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WHEN: Tuesday, March 12, 2013
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Conference Room, Suite 700
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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Federal Register

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1110; Directorate Identifier 2012–NM–013–AD; Amendment 39–17353; AD 2013–03–19]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for certain The Boeing Company Model 707 airplanes, and Model 720 and 720B series airplanes. That AD currently requires replacing wiring for the fuel boost pumps and override pumps with new wiring, installing Teflon sleeving on the wiring, and doing associated actions; and doing repetitive inspections to detect damage of the wiring or evidence of a fuel leak. This new AD reduces the repetitive inspection interval. This AD was prompted by a determination that an inspection interval must be reduced. We are issuing this AD to detect and correct damaged wiring for the fuel boost pumps and override pumps, which could cause electrical arcing that could puncture the conduit containing the wire, and result in a fuel tank explosion or a fire adjacent to the fuel tank.

DATES: This AD is effective March 21, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of October 1, 2001 (66 FR 44954, August 27, 2001).

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. 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 Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Rebel Nichols, Aerospace Engineer, Propulsion Branch, ANM–140S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6509; fax: 425–917–6590; email: *Rebel.Nichols@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001). That AD applies to the specified products. The NPRM published in the **Federal Register** on October 29, 2012 (77 FR 65501). That NPRM proposed to continue to require replacing wiring for the fuel boost pumps and override pumps with new wiring, installing Teflon sleeving on the wiring, and doing associated actions; and doing repetitive inspections to detect damage of the wiring or evidence of a fuel leak with a reduced repetitive inspection interval.

Comment

We gave the public the opportunity to participate in developing this AD. We have considered the comment received. Boeing stated that it has reviewed the NPRM (77 FR 65501, October 29, 2012), and concurs with the proposed rule.

Conclusion

We reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting the AD as proposed—except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 65501, October 29, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 65501, October 29, 2012).

Costs of Compliance

We estimate that this AD affects 5 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacement [retained action from AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001)].	38 work-hours × $85 per hour = $3,230	$9,943	$13,173	$65,865.
Inspection [retained action from AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001)].	3 work-hours × $85 per hour = $255 per inspection cycle.	$0	$255 per inspection cycle.	$1,275 per inspection cycle.

The new requirements of this AD add no additional economic burden. The increase in replacement labor costs of 31 work hours in AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001), to the 38 work hours specified in this AD, is due to the opening and closing hours being included in the cost of this AD. We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this AD.

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 have 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 that this AD:

(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),

(3) Will not affect intrastate aviation in Alaska, and

(4) 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001), and adding the following new AD:

2013–03–19 The Boeing Company: Amendment 39–17353; Docket No. FAA–2012–1110; Directorate Identifier 2012–NM–013–AD.

(a) Effective Date

This AD is effective March 21, 2013.

(b) Affected ADs

This AD supersedes AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001).

(c) Applicability

This AD applies to The Boeing Company Model 707–100 long body, -200, -100B long body, and -100B short body series airplanes; Model 707–300, -300B, -300C, and -400 series airplanes; and Model 720 and 720B series airplanes; certificated in any category; line numbers 1 through 941 inclusive.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 24, Electrical Power.

(e) Unsafe Condition

This AD was prompted by a report that, while investigating a fuel leak around the bolts on the number 1 fuel boost pump on a Boeing Model 707 series airplane, an operator found wire damage where the fuel boost pump wiring exited the boost pump and entered the boost pump access area. We are issuing this AD to detect and correct damaged wiring for the fuel boost pumps and override pumps, which could cause electrical arcing that could puncture the conduit containing the wire, and result in a fuel tank explosion or a fire adjacent to the fuel tank.

(f) Compliance

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

(g) Retained Replacement of Wiring, Installation of Sleeving, and Associated Actions

This paragraph restates the requirements of paragraph (a) of AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001). Within 1 year or 4,000 flight hours after October 1, 2001 (the effective date of AD 2001–17–20), whichever occurs first: Replace the wiring for the fuel boost pumps and override pumps, install Teflon sleeving over the wiring, and do all associated actions, per the Accomplishment Instructions of Boeing Service Bulletin A3500, Revision 1, dated April 26, 2001. The associated actions include performing a general visual inspection of the area around each fuel boost pump and override pump for evidence of a fuel leak; finding the source of any fuel leak and repairing the affected area; replacing the conduit, if required; and performing a detailed visual inspection of the wiring installed in the conduit for evidence of electrical arcing or a fuel leak, or exposed copper wire. If replacement of the conduit is deferred per the Accomplishment Instructions of Boeing Service Bulletin A3500, Revision 1, dated April 26, 2001, repeat the inspection for fuel leaks every 500 flight hours until the conduit is replaced, and replace the conduit within 6,000 flight hours or 18 months, whichever occurs first.

(1) For the purposes of this AD, a general visual inspection is defined as: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or drop-light, and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(2) For the purposes of this AD, a detailed visual inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

(h) Retained Repetitive Inspections

This paragraph restates the requirements of paragraph (b) of AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001), with a new compliance time. After replacement of the wiring per paragraph (g) of this AD, repeat the detailed visual inspection of the wiring for the fuel boost pumps and override pumps for damage, such as evidence of electrical arcing or exposed copper wire, or evidence of a fuel leak. After the effective date of this AD, repeat the inspection one time at the earlier of the times specified in paragraphs (h)(1) and (h)(2) of this AD, per the Accomplishment Instructions of Boeing Service Bulletin A3500, Revision 1, dated April 26, 2001. If any electrical arcing or exposed copper wire or evidence of a fuel leak is detected during any inspection per this paragraph, before further flight, do the applicable corrective actions (including finding the source of any fuel leak and repairing the affected area, replacing the wiring, replacing the conduit, or installing new Teflon sleeving; as applicable) according to the Accomplishment Instructions of Boeing Service Bulletin

A3500, Revision 1, dated April 26, 2001. Repeat the inspection thereafter at intervals not to exceed 15,000 flight hours.

(1) Within 30,000 flight hours after the most recent inspection.

(2) At the later of the compliance times specified in paragraphs (h)(2)(i) and (h)(2)(ii) of this AD.

(i) Within 15,000 flight hours after the most recent inspection.

(ii) Within 3 years after the effective date of this AD.

(i) Credit for Previous Actions

This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before October 1, 2001 (the effective date of AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001)), using Boeing Alert Service Bulletin A3500, dated July 27, 2000, which is not incorporated by reference in this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Certification Office (ACO), 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 manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(3) AMOCs approved previously in accordance with AD 2001–17–20, Amendment 39–12411 (66 FR 44954, August 27, 2001), are approved as AMOCs for the corresponding provisions of this AD, except for AMOCs that change the inspection frequency.

(k) Related Information

(1) For more information about this AD, contact Rebel Nichols, Aerospace Engineer, Propulsion Branch, ANM–140S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6509; fax: 425–917–6590; email: *Rebel.Nichols@faa.gov.*

(2) For Boeing service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(l) Material Incorporated by Reference

(1) The Director of the **Federal Register** approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(3) The following service information was approved for IBR on October 1, 2001 (66 FR 44954, August 27, 2001).

(i) Boeing Service Bulletin A3500, Revision 1, dated April 26, 2001.

(ii) Reserved.

(4) For Boeing service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(5) You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(6) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington on February 6, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–03267 Filed 2–13–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1055; Directorate Identifier 2012–NE–33–AD; Amendment 39–17351; AD 2013–03–17]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Rolls-Royce Deutschland Ltd & Co KG (RRD) BR700–710A1–10 and BR700–710A2–20 turbofan engines, and certain BR700–710C4–11 model engines. This AD was prompted by RRD performing an evaluation that determined that certain high-pressure turbine (HPT) stage 1 and stage 2 discs from a specific supplier may contain steel inclusions that may cause the discs to fail before they reach their current life limits. This AD requires reducing the life limits for certain HPT stage 1 and stage 2 discs. We are issuing this AD to prevent failure of the HPT stage 1 and stage 2 discs, which could result in uncontained failure of the engine and damage to the airplane.

DATES: This AD becomes effective March 21, 2013.

ADDRESSES: The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Robert Morlath, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7154; fax: 781–238–7199; email: *robert.c.morlath@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on November 16, 2012 (77 FR 68714). That NPRM proposed to correct an unsafe condition for the specified products. The Mandatory Continuing Airworthiness Information (MCAI) states:

> The results of a recent quality review of high pressure turbine (HPT) stage 1 and stage 2 discs identified potential for steel inclusions in some production scale parts. Further investigation concluded that all affected parts were manufactured by Udimet 720I and melted by a certain supplier. Subsequent evaluation concluded that the affected parts life limitation values declared in the engine Time Limits Manual cannot be supported for discs with potential steel inclusion.
>
> This condition, if not corrected, could lead to an uncontained HPT disc failure, potentially resulting in damage to, and/or reduced control of the aeroplane.

The FAA has further determined that the risk to the engine is increased by installing an HPT stage 1 disc and an HPT stage 2 disc from the affected population, on the same engine. Therefore the FAA is prohibiting the installation of an HPT stage 1 and HPT stage 2 discs from the affected population in the same engine. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We

received no comments on the NPRM (77 FR 68714, November 16, 2012).

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed (77 FR 68714, November 16, 2012).

Costs of Compliance

We estimate that this AD will affect about 10 engines installed on airplanes of U.S. registry. Prorated parts life will cost about $210,000. Based on these figures, we estimate the cost of this AD on U.S. operators to be $2,100,000. Our cost estimate is exclusive of possible warranty coverage.

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.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–03–17 Rolls-Royce Deutschland Ltd & Co KG (Formerly Rolls-Royce Deutschland GmbH, formerly BMW Rolls-Royce GmbH): Amendment 39–17351; Docket No. FAA–2012–1055; Directorate Identifier 2012–NE–33–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective March 21, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the following Rolls-Royce Deutschland Ltd & Co KG (RRD) turbofan engines that have any of the high-pressure turbine (HPT) stage 1 or stage 2 discs with a serial number (S/N) listed in Table 1 to paragraph (c) of this AD, installed:

(1) RRD BR700–710A1–10 and BR700–710A2–20 turbofan engines; and

(2) BR700–710C4–11 model engines that have hardware configuration standard 710C4–11 or 710C4–11/10 engraved on the engine data plate.

TABLE 1 TO PARAGRAPH (C)—AFFECTED HPT STAGE 1 AND STAGE 2 DISCS

S/Ns of HPT Stage 1 Discs, Part Number (P/N) BRR23952	S/Ns of HPT Stage 2 Discs, P/N BRR22008
LDRQA05719	LDRQA05791
LDRQA05720	LDRQA05944
LDRQA05721	LDRQA05945
LDRQA05722	
LDRQA05723	
LDRQA05724	
LDRQA05726	
LDRQA05727	
LDRQA05841	
LDRQA05842	

(d) Reason

This AD was prompted by RRD performing an evaluation that determined that certain HPT stage 1 and stage 2 discs from a specific supplier may contain steel inclusions that may cause the discs to fail before they reach their current life limits. We are issuing this AD to prevent failure of the HPT stage 1 and stage 2 discs, which could result in uncontained failure of the engine and damage to the airplane.

(e) Actions and Compliance

Unless already done, remove from service the HPT stage 1 and stage 2 discs listed by S/N in Table 1 to paragraph (c) of this AD, at the following:

(1) For BR700–710A1–10, BR700–710A2–20, and BR700–710C4–11 engine models (without RRD Mod 72–101466), remove the HPT stage 1 and stage 2 discs from service before accumulating 3,000 cycles-since-new (CSN).

(2) For the BR700–710C4–11 engine model (with RRD Mod 72–101466), remove the HPT stage 1 and stage 2 discs from service before accumulating 2,300 CSN.

(f) Installation Prohibition

After the effective date of this AD, do not install an HPT stage 1 and an HPT stage 2 disc, identified by S/N in Table 1 to paragraph (c) of this AD, in the same engine.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(h) Related Information

(1) For more information about this AD, contact Robert Morlath, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7154; fax: 781–238–7199; email: *robert.c.morlath@faa.gov*.

(2) Refer to European Aviation Safety Agency Airworthiness Directive 2012–0166, dated August 30, 2012, and Rolls-Royce Deutschland Ltd & Co KG Alert Service Bulletin SB–BR700–72–A900508, dated July 26, 2012, for related information. Contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, Dahlewitz, 15827

Blankenfelde-Mahlow, Germany; phone: 49 0 33–7086–1883; fax: 49 0 33–7086–3276, for a copy of this service information.

(3) You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(i) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on February 5, 2013.

Robert J. Ganley,

Acting Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–03269 Filed 2–13–13; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2012–0040]

16 CFR Part 1199

Children's Toys and Child Care Articles Containing Phthalates; Final Guidance on Inaccessible Component Parts

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: On August 14, 2008, Congress enacted the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110–314. Section 108 of the CPSIA, as amended by Public Law 112–28, provides that the prohibition on specified products containing phthalates does not apply to any component part of children's toys or child care articles that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product. In this document, the Consumer Product Safety Commission (CPSC or Commission) issues guidance on inaccessible component parts in children's toys or child care articles subject to section 108 of the CPSIA.

DATES: This rule is effective February 14, 2013.

FOR FURTHER INFORMATION CONTACT: Kristina M. Hatlelid, Ph.D., M.P.H., Toxicologist, Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone (301) 987–2558; *khatlelid@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

1. Statutory Authority

On August 14, 2008, Congress enacted the CPSIA (Pub. L. 110–314), as amended on August 12, 2011, by Public Law 112–28. Section 108 of the CPSIA, titled, ''Prohibition on Sale of Certain Products Containing Specified Phthalates,'' permanently prohibits the sale of any ''children's toy or child care article'' containing more than 0.1 percent of three specified phthalates (di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP)). Section 108 of the CPSIA also prohibits, on an interim basis, ''toys that can be placed in a child's mouth'' or ''child care article'' containing more than 0.1 percent of three additional phthalates (diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DnOP)). These prohibitions became effective on February 10, 2009. 15 U.S.C. 2057c(a), (b). The terms or phrases ''children's toy,'' ''toy that can be placed in a child's mouth,'' and ''child care article,'' are defined in section 108(g) of the CPSIA. A ''children's toy'' is defined as a ''consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.'' A toy can be placed in a child's mouth ''if any part of the toy can actually be brought to the mouth and kept in the mouth by a child so that it can be sucked and chewed. If the children's product can only be licked, it is not regarded as able to be placed in the mouth. If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in a child's mouth.'' The term ''child care article'' means ''a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 years and younger, or to help such children with sucking or teething.'' 15 U.S.C. 2057c(g).

Section 108(d) of the CPSIA provides that the prohibitions for the specified phthalates shall not apply to any component part of a children's toy or child care article that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product, as determined by the Commission. That section further provides that a component part is not accessible, if such component part is not physically exposed, by reason of a sealed covering or casing, and does not become physically exposed through reasonably foreseeable use and abuse of the product. Reasonably foreseeable use and abuse includes swallowing, mouthing, breaking, or other children's activities, and the aging of the product. 15 U.S.C. 2057c(d)(1).

The CPSIA directs the Commission to: (A) Promulgate a rule providing guidance with respect to what product components, or classes of components, will be considered to be inaccessible; or (B) adopt the same guidance with respect to inaccessibility that was adopted by the Commission with regard to accessibility of lead under section 101(b)(2)(B) (15 U.S.C. 1278a(b)(2)(B)), with additional consideration, as appropriate, of whether such component can be placed in a child's mouth. 15 U.S.C. 2057c(d)(3).

Section 108 of the CPSIA also directed the Commission, not earlier than 180 days after the date of enactment of this Act [enacted Aug. 14, 2008], to appoint a Chronic Hazard Advisory Panel (CHAP), pursuant to the procedures of section 28 of the CPSA (15 U.S.C. 2077), to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles. 15 U.S.C. 2057c(b)(2). The Commission appointed the CHAP on April 14, 2010, to study the effects on children's health of all phthalates and phthalate alternatives, as used in children's toys and child care articles. The CHAP currently is working on a report, including recommendations, to be sent to the Commission.

Under section 108(d)(2) of the CPSIA, the Commission may revoke any or all exclusions granted based on the inaccessible component parts provision of section 108 of the CPSIA, at any time, and require that any or all component parts manufactured after such exclusion is revoked, comply with the prohibitions of phthalates, if the Commission finds, based on scientific evidence, that such compliance is necessary to protect the public health or safety. 15 U.S.C. 2057c(d)(2).

2. Notice of Proposed Guidance

In the **Federal Register** notice of July 31, 2012 (77 FR 45297), the Commission published a proposed guidance on inaccessible phthalate-containing component parts. As stated in the preamble to the proposed guidance (77 FR 45299), the Commission proposed to adopt the lead guidance for determining inaccessible component parts for phthalates, with the exception of polyvinyl chloride (PVC or vinyl) or other plasticized materials covering mattresses and other sleep surfaces designed or intended by the manufacturer to facilitate sleep of children age 3 and younger. Both the lead guidance and proposed phthalate guidance specified that a children's product, toy, or child care article that is completely enclosed or covered by fabric is considered inaccessible to a child, unless the product or part of the product in one dimension is smaller

than 5 centimenters. However, the lead guidance did not exclude vinyl or other plasticized materials covering mattresses and other sleep surfaces. The proposed phthalate guidance found that while lead is unlikely to leach through fabric except in the case of mouthing or swallowing an item, sheets or mattress pads that cover a vinyl sleep or other plasticized sleep surface should not serve as a barrier to the potential exposure of phthalates for young children. A child's skin comes into close contact with mattresses and similar products for large portions of a day, and a mattress cover could be dampened with a spilled beverage, saliva, sweat, urine, or other liquid, which could facilitate phthalate migration through a fabric covering. 74 FR 39539 (August 7, 2009).

In addition, although section 108 did not specifically disqualify paint, coatings, or electroplating as barriers that would render phthalates inaccessible, the Commission proposed to adopt the same guidance with respect to inaccessibility for phthalates that was adopted by the Commission with regard to inaccessibility of lead. The proposed phthalates guidance stated that paint, coatings, and electroplating may not be considered a barrier that would render phthalate-containing component parts of toys and child care articles inaccessible. The proposed phthalates guidance also noted that in some applications, phthalates are added to paint, printing inks, or coatings. 77 FR45299.

In addition, the Commission determined preliminarily that:

- An accessible component part is one that is capable of being touched or mouthed by a child;
- An inaccessible component part is one that is located inside the product and not capable of being touched or mouthed by a child, whether or not such part is visible to a user of the product;
- An inaccessible part is one that may be enclosed in any type of material, *e.g.,* hard or soft plastic, rubber, or metal (with the exception of vinyl or other plasticized materials covering mattresses or other sleep surfaces for children age 3 and younger);
- To assess whether a part is inaccessible, the accessibility probes defined in the Commission's existing regulations for evaluating accessibility of sharp points or sharp metal or glass edges (16 CFR 1500.48 and 1500.49) are appropriate. An ''accessible phthalate-containing component part'' would be considered one that contacts any portion of the specified segment of the accessibility probe. An ''inaccessible phthalate-containing component part'' would be considered as one that cannot be contacted by any portion of the specified segment of the accessibility probe; and
- Use and abuse tests are appropriate for evaluating whether phthalate-containing component parts of a product become accessible to a child during normal and reasonably foreseeable use and abuse of the product by a child (with the exception of the bite test). The purpose of the tests is to simulate use and damage or abuse of a product by children and to expose potential hazards that might result from use and abuse. 16 CFR 1500.50–1500.53.

B. Discussion of Comments to the Proposed Guidance and CPSC's Responses

Five comments were received on the proposed guidance. Two of the comments were from industry and three from consumers or nonprofit consumer and public health organizations. Most comments express general support for the guidance.

1. Fabric Materials as a Barrier to Accessibility of Component Parts

Comment: One commenter states that fabric should not be considered a barrier, regardless of the size of the component, because children could be exposed to phthalates through the fabric.

Response: As provided in CPSC staff's briefing memo ''Guidance for Evaluating Accessibility of Phthalate-Containing Component Parts'' dated July 13, 2012, CPSC staff is not aware of any studies that show the propensity for phthalates to move from a phthalate-containing material through an intact, non-phthalate-containing material, such as an outside covering, where it could eventually reach the outside of a product. Furthermore, CPSC staff's review showed that the non-vapor passive movement of phthalates within a product, if it exists, would be exceedingly slow and would never account for any more than a small, negligible fraction of the original phthalate content of the inaccessible phthalate-containing part. Based on CPSC staff's analysis, the Commission finds that, in most cases, phthalates that are inaccessible would not result in physical exposure to phthalates, unless it is reasonably foreseeable that a component part will become physically exposed through mouthing, swallowing, breaking, or other children's activities, and aging of the product. Accordingly, a children's toy or child care article that is, or contains, a phthalate-containing part that is enclosed, encased, or covered by fabric and passes the appropriate use and abuse tests on such covers, is considered inaccessible to a child, unless the product, or part of the product, in one dimension, is smaller than 5 centimeters; *i.e.,* a fabric-covered component part is not inaccessible if the product, or part of the product, can be placed in a child's mouth.

Moreover, the Commission reiterates that vinyl or other plasticized materials covering mattresses and other sleep surfaces designed or intended by a manufacturer to facilitate sleep for children age 3 and younger should not be considered to be made inaccessible through the use of a fabric covering. As discussed in the preamble of the proposed guidance, the Commission reviewed phthalate-containing vinyl or other plasticized materials covering mattresses and sleep surfaces intended for young children. These mattresses or sleep surfaces are too large to be placed in a child's mouth. Although such mattresses or sleep surfaces may be covered by fabric, such as sheets or mattress pads, additional consideration was given to whether children would become physically exposed to the vinyl or other plasticized materials covering the surface through reasonably foreseeable use and abuse of the products, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product. The Commission determined there may be instances in which a child's skin comes into close contact with a fabric covering over a phthalate-containing item for large portions of a day, such as a vinyl or other plasticized material covering a mattress or other sleep surface. Young children typically spend more than half of each day sleeping or resting, frequently on a mattress or similar item. While a mattress is typically covered with a sheet or mattress pad, such non-permanently affixed coverings that are either supplied with the mattress or provided by the consumer should not be considered to render the underlying material inaccessible. As with the potential transfer of phthalates by saliva during mouthing of an item, a mattress cover dampened with a spilled beverage, saliva, sweat, urine, or other liquid, could facilitate phthalate migration through the fabric. Furthermore, a nonpermanent covering cannot be assumed to be in use at all times; if it is not, the mattress could no longer be considered inaccessible. For these reasons, vinyl (or other plasticized material) covered mattresses/sleep surfaces, which contain phthalates, designed or intended by a manufacturer

to facilitate sleep for children age 3 and younger, should not be considered to be made inaccessible through the use of a fabric covering.

Comment: One commenter states that the proposed guidance ''exempts components covered in fabric provided that the underlying component is not smaller than 5 centimeters in any one dimension.'' According to the commenter, any exposure to phthalates-containing component parts within fabric coverings is very low and all phthalate-containing components parts covered by fabric should be exempt, irrespective of the size of the part. The commenter also suggests that a *de minimis* exception should be considered for accessible small plasticized parts.

Response: The commenter misinterprets the fabric covering restriction in the proposed guidance on inaccessible phthalate-containing component parts. The proposed guidance states that ''a children's product that is or contains a phthalate-containing part which is enclosed, encased, or covered by fabric and passes the appropriate use and abuse tests on such covers, is inaccessible to a child unless the product or part of the product in one dimension is smaller than 5 centimeters.'' However, the 5 centimeter measure is applied to the fabric-covered part or product (i.e., a fabric covered plastic button), not to the size of the underlying phthalate-containing component part. If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in a child's mouth (i.e., a fabric covered plastic ear on a stuffed animal). A phthalate-containing component part which is encased by a fabric covering is considered to be accessible to a child if the part or product is smaller than 5 centimeters in any dimension because such a part or product could be placed in a child's mouth, and the fabric is not expected to perform as a barrier to saliva or other fluids or to prevent direct contact by the child with the saliva or other fluid after a fluid's contact with the phthalate-containing part. Even if a fabric covering passes the applicable use and abuse tests, such a covering is not a barrier to the underlying material if the product can be placed in the mouth because it is smaller than 5 centimeters.

If the phthalate-containing component part that is encased by fabric covering is 5 centimeters or greater in dimension, such a part of product is considered to be inaccessible to a child, because the part or product in not likely to be put in the mouth or swallowed (i.e., plastic electronic box inside a stuffed animal). As discussed above, however, vinyl or other plasticized material covering a mattress or other sleep surface which is designed or intended by a manufacturer to facilitate sleep of children age 3 and younger, even when covered with a sheet or mattress pad, will still be considered accessible given that the foreseeable use and abuse of the product, including spilled beverages, saliva, sweat, urine, or other liquids, may facilitate phthalate migration through the fabric.

The statute does not provide for a *de minimis* exception for accessible component parts, and the Commission is not considering in this guidance such exceptions for accessible phthalate-containing children's toys and child care articles. However, we note that a CHAP has been convened to study the effects on children's health of all phthalates and phthalate alternatives, as used in children's toys and child care articles. Based on the findings and recommendations of the CHAP, any guidance concerning phthalates may be modified and revised, as appropriate.

Comment: The same commenter also states that the exclusion of fabric materials as a barrier to accessibility for phthalate-containing parts or products smaller than 5 centimeters is inconsistent with the Commission's use and abuse testing.

Response: The proposed guidance provides that accessibility of component parts, as a result of normal and reasonably foreseeable use and abuse of the product, should be evaluated using the use and abuse tests under the Commission's regulations at 16 CFR 1500.50 through 1500.53 (excluding the bite test in paragraph (c) of §§ 1500.51–1500.53). We disagree that the exclusion of fabric materials as a barrier to accessibility is inconsistent with the Commission's use and abuse testing. The Commission finds, in general, that fabric coverings can be considered barriers to the underlying materials because such coverings prevent direct physical contact with the phthalate-containing parts. The appropriate use and abuse tests, such as the test for the integrity of seams, should be used to evaluate fabric coverings to ensure that the component parts remain physically inaccessible to a child. Use and abuse testing generally is applied to evaluate whether a component part may become physically accessible as a result of reasonably foreseeable use and abuse of the product, including swallowing, mouthing, breaking, or other children's activities. Historically, this testing has been used to evaluate the presence of physical hazards, such as small parts, which may be choking hazards, or sharp points and edges. In the case of lead-containing or phthalate-containing component parts, these tests are used to evaluate the potential for physical contact with the parts. The material beneath a fabric covering should not be considered to be inaccessible to a child if the part or product is smaller than 5 centimeters in any dimension because such a part or product could be placed in a child's mouth, and fabric is not expected to perform as a barrier to saliva or other fluids or to prevent direct contact by the child with the saliva or other fluid after a fluid's contact with the phthalate-containing part. Even if a fabric covering passes the applicable use and abuse tests, such a covering is not a barrier to the underlying material if the product can be placed in the mouth.

2. Exclusion of the ''Bite Test'' from Use and Abuse Testing

Comment: Two commenters question the exclusion of the ''bite test'' from the use and abuse testing and requested that it be included in the guidance.

Response: Currently, the Commission does not use the bite test specified in 16 CFR 1500.51–1500.53), as a result of a court case (*Clever Idea Co., Inc.* v. *Consumer Product Safety Commission,* 385 F. Supp. 688 (E.D. N.Y. 1974)) that questioned the appropriateness of this test. Because the bite test currently is not applied as part of use and abuse testing for consumer products, it will not be applied for the purposes of evaluating products for accessibility of phthalate-containing component parts. However, this requirement may be modified in a future proceeding if the bite test is reevaluated.

3. Requirements for Labeling of Art Materials

Comment: One commenter requests consistency among the requirements for paints and other surface coatings for lead and phthalates and the requirements under ASTM D 4236 and ASTM F 963 that address art materials. This commenter specifically requests that bottles of paint available in retail stores should comply with all requirements because such paint could be used by children or on products for children.

Response: This comment is outside the scope of this guidance, which addresses the issue of when a phthalate-containing component part of a children's toy or child care article is considered to be inaccessible to a child. The *Standard Consumer Safety Specification for Toy Safety,* ASTM F 963 requires that all art materials comply with the Labeling of Hazardous Art Materials Act (LHAMA). In addition to the LHAMA requirements discussed above, art materials that are designed or

intended primarily for children 12 years of age or younger, are also required, like all children's products, to comply with the requirements of the CPSIA, including third party testing and certification.

C. Effective Date

Although guidance documents do not require a particular effective date under the Administrative Procedure Act, 5 U.S.C. 553(d)(2), the Commission recognizes the need for providing the guidance expeditiously. In addition, material published in the Code of Federal Regulations must have an effective date. Accordingly, the guidance will take effect upon publication in the **Federal Register**.

D. Final Guidance

The Commission is issuing the final guidance without substantive change from the proposed guidance.

List of Subjects in 16 CFR Part 1199

Business and industry, Infants and children, Consumer protection, Imports, Toys.

For the reasons stated above, the Commission adds 16 CFR part 1199 to read as follows:

PART 1199— CHILDREN'S TOYS AND CHILD CARE ARTICLES CONTAINING PHTHALATES: GUIDANCE ON INACCESSIBLE COMPONENT PARTS

Authority: 15 U.S.C. 1251–1289, 86 Stat. 1207, 125 Stat. 273.

§ 1199.1 Children's toys and child care articles: Phthalate-containing inaccessible component parts.

(a) Section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) permanently prohibits the sale of any ''children's toy or child care article'' containing more than 0.1 percent of three specified phthalates (di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP)). Section 108 of the CPSIA also prohibits, on an interim basis, ''toys that can be placed in a child's mouth'' or ''child care article'' containing more than 0.1 percent of three additional phthalates (diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DnOP)). A ''children's toy'' is defined as a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays. A toy can be placed in a child's mouth if any part of the toy can actually be brought to the mouth and kept in the mouth by a child so that it can be sucked and chewed. If the children's product can only be licked, it is not regarded as able to be placed in the mouth. If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth. The term ''child care article'' means a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 years and younger, or to help such children with sucking or teething.

(b) Section 108(d) of the CPSIA provides that the prohibitions in paragraph (a) of this section do not apply to component parts of a children's toy or child care article that are not accessible to children through normal and reasonably foreseeable use and abuse of such product, as determined by the Commission. A component part is not accessible if it is not physically exposed, by reason of a sealed covering or casing, and does not become physically exposed through reasonably foreseeable use and abuse of the product, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product.

(c) Section 108(d)(3) of the CPSIA directs the Commission to promulgate a rule to provide guidance with respect to what product components or classes of components will be considered to be inaccessible for a children's toy or child care article that contains phthalates or adopt the same guidance with respect to inaccessibility that was adopted by the Commission with regard to accessibility of lead under section 101(b)(2)(B) (15 U.S.C. 1278a(b)(2)(B)), with additional consideration, as appropriate, of whether such component can be placed in a child's mouth. 15 U.S.C. 2057c(d)(3). The Commission adopts the same guidance with respect to inaccessibility for the phthalates that was adopted by the Commission with regard to accessibility of lead, however, vinyl (or other plasticized material) covered mattresses/sleep surfaces, that contain phthalates that are designed or intended by the manufacturer to facilitate sleep of children age 3 and younger, are considered accessible and would not be considered inaccessible through the use of fabric coverings, including sheets and mattress pads.

(d) The accessibility probes specified for sharp points or edges under the Commission's regulations at 16 CFR 1500.48–1500.49 should be used to assess the accessibility of phthalate-containing component parts of a children's toy or child care article. A phthalate-containing component part would be considered accessible if it can be contacted by any portion of the specified segment of the accessibility probe. A phthalate-containing component part would be considered inaccessible if it cannot be contacted by any portion of the specified segment of the accessibility probe.

(e) For children's toys or child care articles intended for children that are 18 months of age or younger, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.51 (excluding the bite test of § 1500.51(c)), should be used to evaluate accessibility of phthalate-containing component parts of a children's toy or child care article as a result of normal and reasonably foreseeable use and abuse of the product.

(f) For children's toys or child care articles intended for children that are over 18 months, but not over 36 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.52 (excluding the bite test of § 1500.52(c)), should be used to evaluate accessibility of phthalate-containing component parts of a children's toy or child care article as a result of normal and reasonably foreseeable use and abuse of the product.

(g) For children's toys intended for children that are over 36 months, but not over 96 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.53 (excluding the bite test of § 1500.53(c)), should be used to evaluate accessibility of phthalate-containing component parts of a children's toy as a result of normal and reasonably foreseeable use and abuse of the product.

(h) For children's toys intended for children over 96 months through 12 years of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.53 (excluding the bite test of § 1500.53(c)) intended for children ages 37–96 months should be used to evaluate accessibility of phthalate-containing component parts of a children's toy as a result of normal and reasonably foreseeable use and abuse of the product.

(i) Because the Commission adopts the same guidance with respect to inaccessibility for phthalates that was adopted by the Commission with regard to inaccessibility of lead, paint, coatings, and electroplating may not be considered a barrier that would render phthalate-containing component parts of toys and child care articles inaccessible. A children's toy or child care article that is or contains a phthalate-containing part that is enclosed, encased, or covered by fabric and passes the appropriate use and

abuse tests on such covers, is considered inaccessible to a child, unless the product or part of the product, in one dimension, is smaller than 5 centimeters. However, vinyl (or other plasticized material) covered mattresses/sleep surfaces that contain phthalates that are designed or intended by the manufacturer to facilitate sleep of children age 3 and younger, are considered accessible and would not be considered inaccessible through the use of fabric coverings, including sheets and mattress pads.

(j) The intentional disassembly or destruction of products by children older than age 8 years, by means or knowledge not generally available to younger children, including use of tools, will not be considered in evaluating products for accessibility of phthalate-containing components.

Dated: February 11, 2013.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2013–03400 Filed 2–13–13; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SATS No. MT–032–FOR; Docket ID No. OSM–2011–0011]

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: We are issuing a final decision on an amendment to the Montana regulatory program (the Montana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). We are not approving the amendment. Montana proposes changes to the Montana Strip and Underground Mine Reclamation Act (MSUMRA) that differentiate between coal beneficiation and coal preparation plants. Montana revised its program to clarify ambiguities and improve operational efficiency.

DATES: *Effective Date:* February 14, 2013.

FOR FURTHER INFORMATION CONTACT: Jeffrey Fleischman, Casper Field Office Director, Telephone: (307) 261–6550, Internet address: *jfleischman@OSMRE.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program
II. Submission of the Proposed Amendment
III. Office of Surface Mining Reclamation and Enforcement's (OSMRE's) Findings
IV. Summary and Disposition of Comments
V. OSMRE's Decision
VI. Procedural Determinations

I. Background on the Montana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Montana program on April 1, 1980. You can find background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval in the April 1, 1980, **Federal Register** (45 FR 21560). You can also find later actions concerning Montana's program and program amendments at 30 CFR 926.15, 926.16, and 926.30.

II. Submission of the Proposed Amendment

By letter dated June 7, 2011, Montana sent us a proposed amendment to its program (SATS number: MT–032–FOR, Administrative Record Docket ID No. OSM–2011–0011) under SMCRA (30 U.S.C. 1201 *et seq.*). Montana submitted the amendment to include changes made to the MSUMRA as a result of the Montana Legislature's 2011 passage of a Senate Bill (SB 297) relating to coal beneficiation. Montana sent the amendment to include changes made at its own initiative.

We announced receipt of the proposed amendment in the October 17, 2011, **Federal Register** (76 FR 64045). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record No. MT–29–11; Administrative Record Document ID No. OSM–2011–0011–0001). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on November 16, 2011. We received four public comments and four Federal agency comments (discussed under ''IV. Summary and Disposition of Comments'').

During our review of Montana's submittal and the comments received, we identified concerns with the amendment proposal including its newly proposed statutory definition of ''Coal beneficiation plant'' at Montana Code Annotated (MCA) Section 82–4–203(9), as well as proposed revisions to its currently approved statutory definitions of ''Coal preparation plant'' at MCA Section 82–4–203(11); ''Operation'' at MCA Section 82–4–203(34); ''Operator'' at MCA Section 82–4–203(35); ''Strip mining'' at MCA Section 82–4–203(48) (b); and ''Underground mining'' at MCA Section 82–4–203(52). We notified Montana of these concerns by letter dated February 14, 2012 (Administrative Record No. MT–29–15; Administrative Record Document ID No. OSM–2011–0011–0011).

We delayed final rulemaking to afford Montana the opportunity to submit new material to address the deficiencies. Montana responded in a letter dated March 14, 2012, that all of the proposed changes are legislative amendments to the MSUMRA and because they are changes in statute and not rule, the Montana Department of Environmental Quality (DEQ) has no authority to amend them (Administrative Record No. MT–29–16; Administrative Record Document ID No. OSM–2011–0011–0012). As a result, Montana stated that it will not be submitting revised amendments or draft proposed changes in response to our February 14, 2012, letter. Therefore, we are proceeding with the final rule **Federal Register** document.

III. OSMRE's Findings

30 CFR 732.17(h)(10) requires that State program amendments meet the criteria for approval of State programs set forth in 30 CFR 732.15, including that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of 30 CFR Part 700. In 30 CFR 730.5, OSMRE defines ''consistent with'' and ''in accordance with'' to mean (a) with regard to SMCRA, the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act and (b) with regard to the Federal regulations, the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of SMCRA.

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at

30 CFR 732.15 and 732.17. We are not approving the amendment as described below.

A. Minor Revisions to Montana's Statutes

Montana proposes minor wording and editorial changes to its currently approved statutory definitions of ''Coal conservation plan'' at MCA Section 82–4–203(9); ''Imminent danger to the health and safety of the public'' at MCA Section 82–4–203(25); ''Minable coal'' at MCA Section 82–4–203(32); ''Prospecting'' at MCA Section 82–4–203(41) (b); and ''Residential'' at MCA Section 82–4–203(46).

These minor wording and editorial changes do not impact the effectiveness of the current statutes and do not adversely affect other aspects of the program. OSMRE was prepared to approve them. However, in its March 14, 2012, letter Montana explained that as a matter of state law OSMRE must approve Chapter 408 as a whole before any portion of it can take effect [SB 297 was published as Chapter 408, Laws of 2011 by the Secretary of State].

Specifically, Montana referenced Section 2 of Chapter 408 which provides:

> [This act] is effective on the date that the office of surface mining reclamation and enforcement publishes notice in the **Federal Register** that [this act] is approved pursuant to 30 CFR 732.17.

Therefore, Montana advised that the minor grammatical changes will not become effective if OSMRE disapproves any amendments made by Chapter 408. During our review of Montana's submittal, we found that the proposed amendments to the definitions of ''coal preparation plant,'' ''operation,'' ''operator,'' ''strip mining,'' and ''underground mining'' are less effective than Federal regulations or less stringent than SMCRA.

Based on Montana's explanation above and the ''contingent voidness'' clause in Section 2 of Chapter 408, we are not approving the proposed minor wording and editorial changes.

B. Revisions to Montana's Statutes That Are Not the Same as the Corresponding Provisions of SMCRA and the Federal Regulations

1. Definition of ''Coal Beneficiation Plant'' at Montana Code Annotated (MCA) Section 82–4–203(9)

At its own initiative, Montana proposes a new definition for ''Coal beneficiation plant'' at Montana Code Annotated (MCA) Section 82–4–203(9) to mean ''a commercial facility where coal is subject to coal preparation that is not operated, owned, or controlled by the mine operator of the mine providing the coal.'' While there are no direct Federal counterpart provisions, the definitions of ''Surface coal mining operations'' at SMCRA Section 701(28)(A) and 30 CFR 700.5, and the definitions of ''Coal preparation'' and ''Coal preparation plant'' at 30 CFR 701.5 all speak to the activities of chemical or physical processing, cleaning, concentrating, or other processing or preparation of coal. Similarly, Montana's definitions of ''Coal preparation'' and ''Coal preparation plant'' include coal processing and preparation.

In its submittal, Montana expresses its intent to exclude coal beneficiation plants from permitting and regulation under the MSUMRA. Montana's proposed definition of ''Coal beneficiation plant'' does not sufficiently distinguish between coal preparation and coal beneficiation plants for purposes of regulation under SMCRA and the MSUMRA. Specifically, the proposed definition references ''a commercial facility where coal is subject to coal preparation.'' However, Montana's currently approved definition of ''Coal preparation plant'' at MCA Section 82–4–203(11) also references ''a commercial facility where coal is subject to coal preparation.'' Montana does propose to revise its definition of ''Coal preparation plant'' by specifying that coal preparation is ''in connection with a strip mine or underground coal mine.'' Nevertheless, Montana's definitions for ''Coal beneficiation plant'' and ''Coal preparation plant'' both reference a commercial facility where coal is subject to coal preparation and as such are largely synonymous.

In identifying the relationship necessary for coal preparation to be ''in connection with'' a coal mine, the principle stated by OSMRE in a May 5, 1983, **Federal Register** (48 FR 20393) preamble to the definition of ''surface coal mining operations'' should be referenced. In that preamble, OSMRE stated its belief that the phrase in Section 701(28)(A) of the Act and 30 CFR 700.5 ''in connection with'' should be interpreted broadly. OSMRE also cited examples of facilities that could be considered to be ''in connection with'' a coal mine, including ''facilities which receive a significant portion of their coal from a mine; facilities which receive a significant portion of the output from a mine; facilities which have an economic relationship with a mine; or any other type of integration that exists between a facility and a mine.'' Further, OSMRE stated that a ''facility need not be owned by a mine owner to be in connection with a mine.''

Therefore, ownership, control, or operation by someone other than the mine operator is not the only criterion that determines whether a coal beneficiation facility or coal preparation plant is ''in connection with'' a coal mine. OSMRE amended its regulations, as published in the **Federal Register** (November 22, 1988, 53 FR 47384), to clarify the circumstances under which coal preparation plants located outside the permit area of a mine are subject to the performance standards and permitting requirements of SMCRA. The associated preamble clarified that off-site coal preparation is subject to regulation under SMCRA only when it is conducted in connection with a coal mine. No definition of the term ''in connection with'' is included in the rule. OSMRE stated in the preamble that any attempt to further define this phrase would unduly restrict the discretion that the regulatory authority must have in order to make valid decisions about the applicability of SMCRA in individual cases. In the same preamble, OSMRE stated that the elements of (1) geographic proximity and (2) functional relationship are proper factors to consider in evaluating whether an off-site coal preparation plant is subject to regulation under SMCRA. As a result of a subsequent U.S. District Court decision, OSMRE published a notice in the **Federal Register** (January 8, 1993, 58 FR 3466) to clarify that geographic proximity may not be the decisive factor in deciding whether to regulate an off-site coal preparation plant. To allow proximity to be the decisive factor would render ''in connection with'' equivalent to ''at or near.'' That is not the Secretary's intent. Instead, the Secretary's intent is to provide regulatory authorities appropriate guidance and discretion in deciding which off-site coal processing plants to regulate.

Since the term ''in connection with'' is not defined in the rule, OSMRE clarified in the **Federal Register** (November 22, 1988, 53 FR 47384) several factors that should be considered in order to determine whether a coal preparation plant located outside the permit area of a mine is operated in connection with a coal mine, thus constituting a surface coal mining operation and subject to the performance standards and permitting requirements of SMCRA. Specifically, in addition to geographic proximity and functional relationship, other factors, including economic and operational relationship and point of ultimate use are to be considered by regulatory

authorities when evaluating whether such facilities are subject to regulation under SMCRA.

Accordingly, we find that Montana's proposed definition is too vague to exclude coal beneficiation plants from permitting and regulation under SMCRA and the MSUMRA. In particular, proposed MCA Section 82–4–203(9) references ''coal preparation'' and, in addition to relying solely on ownership and control considerations, fails to ensure that coal beneficiation plants have no functional or economic relationship to the mine(s) providing the coal and are the point of end use of the coal. Consequently, we are not approving Montana's proposed definition of ''Coal beneficiation plant'' as it is less stringent than SMCRA and less effective than the Federal regulations.

Moreover, we are not approving Montana's proposed statutory changes that derive from its disapproved definition of ''Coal beneficiation plant'' or their associated recodification. Specifically, we are not approving Montana's proposed revisions to its currently approved definition of ''Coal preparation plant'' at MCA Section 82–4–203(11); Montana's proposed revisions to its currently approved definition of ''Operation'' at MCA Section 82–4–203(34); Montana's proposed revision to its currently approved definition of ''Operator'' at MCA Section 82–4–203(35); Montana's proposed revisions to its currently approved definition of ''Strip mining'' at MCA Section 82–4–203(48)(b); and Montana's proposed revisions to its currently approved definition of ''Underground mining'' at MCA Section 82–4–203(52).

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the original amendment proposal (76 FR 64045; Administrative Record Docket ID No. OSM–2011–0011–0001). We received four public comments.

Westmoreland Resources, Inc. commented in a July 6, 2011, email message that it supports the changes to MSUMRA resulting from passage and approval of SB 297, and encouraged OSM to approve the program amendment (Administrative Record Document ID No. OSM–2011–0011–0003).

We received a comment letter from a private citizen on November 15, 2011 (Administrative Record Document ID No. OSM–2011–0011–0010). The letter contained both general and narrative comments in opposition to SB 297. The commenter noted that the definition of a coal beneficiation plant relates only to the ownership of the ''commercial facility,'' and opined that apparently the authors of SB 297 and its proposed amendments to the Montana program thought that if a coal beneficiation plant is owned by someone other than the mine operator, it would have no effect on anything for which the mine owner/operator is responsible under MSUMRA and SMCRA.

The commenter also stated that Section 507(a) of SMCRA dealing with application requirements makes it quite plain that anyone having an interest in property being permitted must be listed whether ownership or lease, and Section 508 indicates that there must be a reclamation plan for those lands, and that would include every activity, including measures to be taken during mining and reclamation to assure the protection of surface and ground water systems, rights of present users to water, and several other things. As a result, the commenter expresses a concern that if a company can avoid reclaiming areas where some sort of ''beneficiation'' may have taken place and may now be polluted in the soil or water, it can dodge an expensive cleanup.

Next, the commenter asserted that SB 297 is trying to get coal gasification exempted from control if it is in a mine permit. The commenter stated that SMCRA is quite plain that damaging the hydrologic balance in a mine site is not acceptable. The commenter also referenced 30 CFR Part 828 which concerns special environmental protection performance, reclamation and design standards for in situ processing of coal and noted that water is particularly important in that part.

The commenter went on to claim that SB 297 could be a vehicle to allow most of a mine permit surface to be sold for a ''beneficiation'' plant that would result in the removal of all bonding and reclamation problems because the operator would cease to own most of it. The commenter continued that if one attempted to operate on a mine permit, there would be questions as to where the waste from the beneficiation plant would be stored or disposed of. The commenter then questioned how the effects of processed water on the hydrologic balance in the area would affect the mine operator's compliance with SMCRA, and asked what kind of chemicals would be used in the beneficiation process and where would they be stored or disposed of? The commenter concluded by asserting that SB 297 is an attempt to avoid complying with the reclamation laws, and the modifications to MSUMRA do not comply with SMCRA.

Notwithstanding the ancillary concerns expressed above regarding hydrologic balance and waste storage and disposal, we refer the commenter to Finding No. III.B.1. for a detailed explanation as to why we are not approving Montana's proposed amendment.

We also received a comment letter from the Montana Environmental Information Center (MEIC) on November 16, 2011 (Administrative Record Document ID No. OSM–2011–0011–0008). The MEIC opposed Montana's proposed changes to the MSUMRA and asserted that the myriad of proposed changes would violate Federal law by eliminating important regulation of coal beneficiation plants, strip mines, and underground mines. The MEIC further stated that the Montana proposal attempts to differentiate coal preparation plants by ownership and asserts that the definition of ''surface coal mining operations'' in section 701(28) of SMCRA does not allow for such arbitrary differentiation. The MEIC continued that because the definition does not differentiate operations based on ownership, the proposal is clearly in conflict with the Federal requirements and should be rejected.

Next, the MEIC asserted that Montana's proposed change to the definition of ''operation'' contains a broad exclusion of at least three different types of coal preparation facilities, railroads, roads, and equipment that would leave many communities with no regulation of these potentially dangerous activities. The MEIC then stated that the definition change clearly flies in the face of SMCRA and should be rejected.

Finally, the MEIC contended that Montana's attempt to exclude all beneficiation activities from regulation through proposed changes to the definitions of ''operator,'' ''strip mining,'' and ''underground mining'' is counter to the intent of SMCRA and the definition of ''surface coal mining operations.'' For the reasons stated above, the MEIC urged OSMRE to reject Montana's proposal.

In response to the concerns expressed above, we refer the MEIC to Finding No. III.B.1. for a detailed explanation as to why we are not approving Montana's proposed amendment.

Lastly, we received a comment letter from the Northern Plains Resource Council (NPRC) on November 16, 2011 (Administrative Record Document ID No. OSM–2011–0011–0009). The NPRC also opposed Montana's proposed changes to the MSUMRA and asserted

that they eliminate important oversight responsibilities of OSMRE in relation to coal preparation, strip mining, and underground mining and should be rejected as they clearly violate the intent of the Federal law. The NPRC continued that the proposed amendment's newly-created definition of ''coal beneficiation plant'' exempts these facilities from regulation under the MSUMRA and removes the Montana DEQ's jurisdictional authority to regulate them. The NRPC went on to state that the intent of SB 297 was to create a regulatory distinction between a coal preparation facility that is owned, operated, or controlled by the mine operator supplying the coal and a ''coal beneficiation plant'' that has a potential different owner, operator, or controller which results in an arbitrary exclusion under the law. The NPRC then referenced the definition of ''surface coal mining operations'' in section 701(28) of SMCRA and asserted that because it does not make a distinction between ownership, operation, or control of any such activities being connected to the mine operator, the distinction made in the Montana program would appear to be inconsistent.

Next, the NPRC commented that the proposed amendment attempts to change the definition of ''operation'' so that these facilities would no longer be subject to regulation under the Montana regulatory program, and would create a far reaching exemption under law that would leave significant gaps in oversight for the development and reclamation of such activities. The NRPC then reiterated that such facilities clearly fall under the definition of ''surface coal mining operations'' in SMCRA and asserted that allowing this exemption would be inconsistent with Federal law.

The NRPC then cited the Federal regulations at 30 CFR 785.21 to argue that all coal preparation facilities, whether within the mining permit area or not, are subject to regulation under SMCRA. Additionally, the NRPC maintained that the Federal regulations governing the development of *in situ* processing and gasification clearly indicate that these facilities are to be regulated under the provisions of SMCRA. The NRPC concluded by strongly encouraging OSMRE to reject the proposed amendment as it is in clear violation with SMCRA and the Federal regulations.

In response, we acknowledge the concerns expressed above and refer the NPRC to Finding No. III.B.1. for a detailed explanation as to why we are not approving Montana's proposed amendment.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Montana program (Administrative Record ID No. MT–29–03). We received comments from three Federal Agencies.

The Bureau of Land Management (BLM) commented in a July 8, 2011 letter (Administrative Record Document ID No. OSM–2011–0011–0005), the U.S Geological Survey (USGS) commented in a July 15, 2011 letter (Administrative Record Document ID No. OSM–2011–0011–0006), and the Mine Safety and Health Administration (MSHA) commented in a July 29, 2011 letter (Administrative Record Document ID No. OSM–2011–0011–0007).

The BLM commented that one of the proposed changes to the MSUMRA would differentiate a coal beneficiation plant from a coal preparation plant by way of ownership, control, or operations by someone other than the mine operator. The BLM continued that the effect of the change would be that the DEQ would no longer have regulatory authority through MSUMRA over facilities that meet the definition of ''coal beneficiation plant'' even though it performs the same processes as a coal preparation plant. The BLM then referenced the definition of ''Surface Coal Mining Operations'' at 30 CFR 700.5 and ''the cleaning, concentrating, or other processing or preparation of coal.'' The BLM also quoted § 701.11(a), which requires ''any person who conducts surface coal mining operations on non-Indian and non-Federal lands on or after 8 months from the date of approval of a State program or implementation of a Federal program shall have a permit issued pursuant to the applicable State or Federal program.'' On this basis, the BLM stated it appears that the operation of a coal beneficiation plant or coal preparation plant is to be regulated under SMCRA and the Federal regulations at 30 CFR Part 700. The BLM concluded by stating that the proposed change to the MSUMRA would render it less stringent than SMCRA and should not be allowed.

We agree with the BLM's concerns and refer it to Finding No. III.B.1. above for a detailed explanation as to why we are not approving Montana's proposed amendment.

The USGS commented that, as a non-regulatory agency, it does not have a standing position on the issue and could not provide one.

The MSHA stated its concurrence with the proposed revisions to the MSMURA and has no further comment.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i), OSMRE requested comments on the amendment from EPA (Administrative Record ID No. MT–29–03). EPA did not respond to our request.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On June 29, 2011, we requested comments on Wyoming's amendment (Administrative Record ID No. MT–29–03). The SHPO responded on July 5, 2011, and commented that apparently the DEQ previously exercised regulatory authority over coal beneficiation and coal preparation facilities prior to the proposed changes (Administrative Record Document ID No. OSM–2011–0011–0004). The SHPO also explained that OSMRE's correspondence does not address whether or not it otherwise has regulatory authority under SMCRA or the National Historic Preservation Act for what would be termed coal beneficiation under MSUMRA, and noted that the proposed changes would seem to constrict the actions or undertakings under which SMCRA would/should otherwise apply. The SHPO then stated that 36 CFR Part 800 does not distinguish regulatory authority or responsibility on the basis of ownership, but by permitting, approval, license, funding or indirect jurisdiction by a Federal agency. The SHPO also commented that if, but for the proposed changes, OSMRE has regulatory responsibility under SMCRA, then it would seem the proposed amendment would pertain to cultural resources insofar as a section 106 type review to 36 CFR Part 800 standards would be foregone. The SHPO concluded by stating that it is not in a position to determine that responsibility as § 800.3(a) states the Federal agency official shall determine whether an action is an undertaking using the criteria of § 800.16(y).

In response, we acknowledge the aforementioned concerns and refer the SHPO to Finding No. III.B.1. above for a detailed explanation as to why we are not approving Montana's proposed amendment.

V. OSMRE's Decision

Based on the above findings, we are not approving Montana's June 7, 2011, amendment.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 926, which codify decisions concerning the Montana program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires the State's program to demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

Effect of OSMRE's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change of an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSM. In the oversight of the Montana program, we will recognize only the statutes, regulations and other materials we have approved, together with any consistent implementing policies, directives and other materials. We will require Montana to enforce only approved provisions.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects 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. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 CFR U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) *et seq*).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded Mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 926

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 26, 2012.

Allen D. Klein,

Director, Western Region.

Editorial Note: This document was received at the Office of the Federal Register on February 6, 2013.

For the reasons set out in the preamble, 30 CFR part 926 is amended as set forth below:

PART 926—MONTANA

■ 1. The authority citation for part 926 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

■ 2. Add § 926.12 to read as follows:

§ 926.12 State program provisions and amendments not approved.

(a) The amendment submitted by letter dated June 7, 2011, Docket ID No. OSM–2011–0011, which proposed changes to the Montana approved program as a result of the Montana Legislature's 2011 passage of a Senate Bill (SB 297) relating to coal beneficiation is not approved.

(b) [Reserved]

[FR Doc. 2013–03065 Filed 2–13–13; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

[SATS No. WY–040–FOR; Docket ID OSM–2011–0004]

Wyoming Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment with certain exceptions.

SUMMARY: We are issuing a final decision on an amendment to the Wyoming regulatory program (the ''Wyoming program'') under the Surface Mining Control and Reclamation Act of 1977 (''SMCRA'' or ''the Act''). Our decision approves in part and disapproves in part the amendment. Wyoming proposes revisions and additions to rules concerning noncoal mine waste, valid existing rights, and individual civil penalties. Wyoming revised its program to be consistent with the corresponding Federal regulations and SMCRA, clarify ambiguities, and improve operational efficiency.

DATES: *Effective Date:* February 14, 2013.

FOR FURTHER INFORMATION CONTACT: Jeffrey W. Fleischman, Telephone: 307.261.6550, Email address: *jfleischman@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Wyoming Program
II. Submission of the Proposed Amendment
III. OSMRE's Findings
IV. Summary and Disposition of Comments
V. OSMRE's Decision
VI. Procedural Determinations

I. Background on the Wyoming Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act* * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Wyoming program on November 26, 1980. You can find background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Wyoming program in the November 26, 1980, **Federal Register** (45 FR 78637). You can also find later actions concerning Wyoming's program and program amendments at 30 CFR 950.12, 950.15, 950.16, and 950.20.

II. Submission of the Proposed Amendment

By letter dated April 28, 2011, Wyoming sent us a proposed amendment to its approved regulatory program (SATS number: WY–040–FOR, Administrative Record Docket ID No. OSM–2011–0004) under SMCRA (30 U.S.C. 1201 *et seq.*). Wyoming submitted the amendment partly in response to a February 13, 2008, letter that we sent to Wyoming notifying the State that the Office of Surface Mining Reclamation and Enforcement's (OSMRE) December 17, 1999, Valid Existing Rights (VER) rule changes had been upheld in court and the State should respond to our April 2, 2001, letter sent in accordance with 30 CFR 732.17(c) (''732 letter''). That letter required Wyoming to submit amendments to ensure its program remains consistent with the Federal program. This amendment package is intended to address all required rule changes pertaining to VER. Wyoming also submitted the proposed amendment to address required program amendments at 30 CFR 950.16(r), (s), and (t), respectively, and deficiencies that we identified in a November 7, 1988, 732 letter. These included changes to Wyoming's rules for noncoal mine waste and individual civil penalties.

We announced receipt of the proposed amendment in the June 21, 2011, **Federal Register** (76 FR 36040). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record Document ID No. OSM–2011–0004–0001). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on July 21, 2011. We received comments from three Federal agencies (discussed under ''IV. Summary and Disposition of Comments'').

During our review of the amendment, we identified concerns regarding Wyoming's proposed rule changes in response to the April 2, 2001, 732 letter including revisions to its definition of ''Valid existing rights'' at Chapter 1, Section 2(fl); its newly-proposed ''Needed for and adjacent standard'' definition at Chapter 1, Section 2(fl)(ii)(B)(IV); its newly-proposed VER standards for roads rule at Chapter 1, Section 2(fl)(iii); its procedures for public road waivers at Chapter 12, Section 1(a)(v)(D); its VER submission requirements and procedure rules at Chapter 12, Section 1(a)(vii)(A)(I) and (IV); its requirements for initial review of VER requests at Chapter 12, Section 1(a)(vii)(B)(I) and (IV); its VER public notice and comment requirements at Chapter 12, Section 1(a)(vii)(C)(I)(3.), (C)(II)(2.), and (C)(III); its rules at Chapter 12, Section 1(a)(vii)(D)(I) and (III) concerning how a VER decision will be made; its newly-proposed requirements at Chapter 12, Section 1(a)(vii)(E) providing for administrative

and judicial review of VER determinations; its proposed revisions at Chapter 12, Section 1(a)(vii)(F) regarding availability of records; its newly proposed procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places at Chapter 12, Section 1(a)(vii)(G)(III)(2.); its proposed definition of ''willfully'' at Chapter 16, Section 4(a)(iii) in response to a November 7, 1988, 732 letter; and its newly proposed rules at Chapter 16, Section 4(b)(i) for determining when an individual civil penalty may be assessed in response to the November 7, 1988, 732 letter. We notified Wyoming of these concerns by letter dated August 17, 2011 (Administrative Record Document ID No. OSM–2011–0004–0009).

We delayed final rulemaking to afford Wyoming the opportunity to submit new material to address the deficiencies. Wyoming responded in a letter dated October 5, 2011, that it could not currently submit additional formal revisions to the amendment due to the administrative rulemaking requirements for promulgation of revised substantive rules (Administrative Record Document ID No. OSM–2011–0004–0010). Specifically, Wyoming explained that the required changes would be considered substantive in nature and therefore the Land Quality Division (LQD) is required to present the proposed rules to the LQD Advisory Board and then the Wyoming Environmental Quality Council for vetting. Following approval by the Governor, the rules may be submitted to OSMRE for final review. While it could not submit formal changes, Wyoming did submit informal responses to the noted concerns. Therefore, we are proceeding with the final rule **Federal Register** document. Our concerns and Wyoming's responses thereto are explained in detail below.

III. OSMRE's Findings

30 CFR 732.17(h)(10) requires that State program amendments meet the criteria for approval of State programs set forth in 30 CFR 732.15, including that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of 30 CFR Part 700. In 30 CFR 730.5, OSMRE defines ''consistent with'' and ''in accordance with'' to mean (a) with regard to SMCRA, the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act and (b) with regard to the Federal regulations, the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of SMCRA.

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment with certain exceptions as described below.

A. Minor Revisions to Wyoming's Rules

Wyoming proposed minor editorial and recodification changes to the following previously approved rules. No substantive changes to the text of these regulations were proposed. Because the proposed revisions to these previously approved rules are minor, we are approving the changes and find that they are no less effective than the corresponding Federal regulations.

Chapter 1, Section 2(fl)(iii); deletion of existing ''needed for and adjacent'' rule due to newly-proposed rule language at Section 2(fl)(ii)(B);

Chapter 7, Section 1(a)(i)(A) and (B); recodification of existing Underground Coal Mining Permit Application Content Requirements to reflect changes resulting from WY–038–FOR;

Chapter 12, Section 1(a)(viii), (ix), (x), and (xi); and recodification of existing permitting procedure rules applicable to surface coal mine operation permit applications.

B. Revisions to Wyoming's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations

1. Wyoming proposes additions and revisions to the following rules containing language that are the same as or similar to the corresponding sections of the Federal regulations and/or SMCRA. We are approving the following revisions

Chapter 1, Section 2(fl)(ii)(A) and (B)(I)–(III); VER ''Good faith/all permits'' and ''Needed for and adjacent'' standards; [30 CFR 761.5(b)(1) and (2)(i)–(iii)];

Subsections (A)–(D) of Chapter 1, Section 2(fl)(iii); VER standard for roads; [30 CFR 761.5(c)(1)–(4)];

Chapter 10, Section 2(a); General permit requirements for exploration of more than 250 tons or in an area designated as unsuitable; [30 CFR 772.12(a)];

Chapter 10, Section 2(b)(xiii); Exploration permit application information; [30 CFR 772.12(b)(14)];

Chapter 10, Section 3(c) (iv); Approval of applications for exploration of more than 250 tons or in an area designated as unsuitable for surface coal mining operations; [30 CFR 772.12(d)(2)(iv)];

Subsections (1.)-(9.) of Chapter 12, Section 1(a)(vii)(A)(I); VER submission requirements and procedures; [30 CFR 761.16(b)(1)(i)–(ix)];

Chapter 12, Section 1(a)(vii)(A)(II)(1.)–(3.) and (III); VER submission requirements and procedures; [30 CFR 761.16(b)(2)(i)–(iii) and (3)];

Subsections (1.)-(3.) of Chapter 12, Section 1(a)(vii)(A)(IV); VER submission requirements and procedures; [30 CFR 761.16(b)(4)(i)–(iii)];

Chapter 12, Section 1(a)(vii)(B)(II) and (III); Initial review of VER request; [30 CFR 761.16(c)(2) and (3)];

Chapter 12, Section 1(a)(vii)(C)(I)(1.) and (2.); VER notice and comment requirements and procedures; [30 CFR 761.16(d)(1)(i) and (ii)];

Subsections e.–h. of Chapter 12, Section 1(a)(vii)(C)(I)(3.); VER notice and comment requirements and procedures; [30 CFR 761.16(d)(1)(v)–(viii)];

Chapter 12, Section 1(a)(vii)(C)(II)(1.); VER notice and comment requirements and procedures; [30 CFR 761.16(d)(2)(i)];

Chapter 12, Section 1(a)(vii)(D)(II); How a VER decision will be made; [30 CFR 761.16(e)(2)];

Chapter 12, Section 1(a)(vii)(D)(IV) and (V)(1.) and (2.); How a VER decision will be made; [30 CFR 761.16(e)(4) and (5)(i) and (ii)];

Chapter 12, Section 1(a)(vii)(G)(I)(1.), (2.), and (3.), (II), and (III)(1.); Procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places; [30 CFR 761.17(d)(1)(i), (ii), and (iii), (2), and (3)(i)];

Chapter 16, Section 4(a)(i) and (ii)(A) and (B); definitions of ''Knowingly'' and ''Violation, failure or refusal;'' [30 CFR 701.5];

Chapter 16, Section 4(b)(ii); when an individual penalty may be assessed; [30 CFR 846.12(b)];

Chapter 16, Section 4(c)(i)(B)–(C); Amount of civil penalty; [30 CFR 846.14(a)(2)–(3)];

Chapter 16, Section 4(d)(i), (ii)(B), and (iii); Procedure for assessment of individual civil penalty; [30 CFR 846.17(a), (b)(2), and (c)]; and

Chapter 16, Section 4(e)(i)–(iii); Payment of penalty; [30 CFR 846.18(a)–(c)].

2. Chapter 1, Section 2(fl)(i) and (iv)(B); Definition of ''Valid Existing Rights''

In response to Items B–2 and B–5 of OSMRE's April 2, 2001, 732 letter, Wyoming proposes to delete the takings

standard from its definition of VER at Chapter 1, Section 2(fl)(i) and its concept of continually created VER at Section (iv)(B). Wyoming explains in its Statement of Principle Reasons for Adoption (SOPR) that the Federal VER rules as published in 1999 (64 FR 70766) removed ''the 1983 takings standard for VER'' and reinstated a revised version of the 1980 good faith/all permits standard. The preamble to the 1999 VER rules indicated that the taking standard is less protective for areas under 30 CFR 761.11 than the good faith/all permits standard. The 732 letter notified Wyoming that because its ''definition at (i) and (iv)(B) bases VER (except for roads) on a takings standard'' the rules were less effective than the Federal definition. For these reasons, Wyoming now proposes to delete the aforementioned takings standards and include a good faith/all permits standard in its definition of VER to be consistent with the Federal definition at 30 CFR 761.5. We agree with the rationale for Wyoming's proposed deletions and we approve them.

3. Chapter 1, Section 2(fl)(iv)(A); VER Exception for Existing Operations

In response to Item D of OSMRE's April 2, 2001, 732 letter, Wyoming proposes to revise its rules at Chapter 1, Section 2(fl)(iv) by both identifying which operations qualify for the exception for existing operations and specifying that a person claiming VER must demonstrate the required elements as of the date that the land came under the protection of 522(e) of P.L. 95–87 or 30 CFR 761.11 rather than August 3, 1977 (the date of SMCRA's enactment). The 732 letter stated that Wyoming's definition of VER at former Chapter 1, Sec. 2(df)(iv)(A) incorporates the exception for existing operations as though it is stated as a type of VER rather than an exemption from VER. As a result, Wyoming is deleting former subsection (A) and explains in its SOPR that the VER definition was revised to be consistent with the Federal regulation at 30 CFR 761.12. Wyoming's proposed revision makes its rules substantively identical to and no less effective than the Federal regulations at 30 CFR 761.12(a) and we approve it.

4. Chapter 12, Section 1(a)(v)(B); Procedures for Compatibility Findings

In response to Items E–1 and G–3 of OSMRE's April 2, 2001, 732 letter, Wyoming proposes to revise its rules at Chapter 12, Section 1(a)(v)(B) by adding a cross-reference to the Federal requirements at 30 CFR 761.13 regarding procedures for compatibility findings for surface coal mining operations on Federal lands in national forests. The Federal rule clarifies that an applicant may request these findings in advance of preparing and submitting a permit application. The 732 letter indicated that although Wyoming's program incorporates the compatibility test for national forest lands as required by 30 CFR 761.11(b), it did not include the specific procedures of 30 CFR 761.13. Wyoming explains in its SOPR that subsection (B) was revised to include the necessary reference to the applicable Federal procedures for compatibility findings in order to correct the aforementioned 732 deficiencies. Wyoming's proposed revision and incorporation by reference makes its rules no less effective than the Federal regulations at 30 CFR 761.13 and we approve it.

5. Chapter 12, Section 1(a)(vi); Basic Framework for VER Determinations

In response to OSMRE's April 2, 2001, 732 letter, Wyoming proposes to revise its rules at Chapter 12, Section 1(a)(vi) to be consistent with the table in the Federal regulations at 30 CFR 761.16(a) by adding a basic framework for making valid existing rights determinations. Item A–1 of the 732 letter addressed the Cooperative Agreement at 30 CFR 950.20 and required Wyoming to clarify the responsibilities for making VER determinations on Federal lands within areas protected under 30 CFR 761.11(a) and (b), and the definition to use in making those determinations. Item G stated that the Wyoming program lacked the provisions of new 761.16(a) that defines which agency is responsible for the VER determination and which definition (State or Federal) applies. Proposed subsection (vi) adds those elements by specifying that OSMRE shall be the responsible agency for making VER determinations for Federal lands described in proposed subsections (v)(A) and (B) which are the counterparts to 30 CFR 761.11(a) and (b). Proposed subsection (vi) also identifies that Wyoming (the Division) is the responsible agency for making VER determinations for non-Federal lands described in subsection (v)(A) and shall make evaluations using the Federal VER definition. Wyoming's proposed rule at Chapter 12, Section 1(a)(vi) satisfies the 732 deficiencies and is no less effective than the counterpart Federal requirements at 30 CFR 761.16(a). Accordingly we approve it.

C. Revisions to Wyoming's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations

1. Chapter 1, Section 2(fl); Definition of ''Valid existing rights''

In response to Item B–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its definition of VER at Chapter 1, Section 2(fl) by adding an explanation of the operation of VER and noting that operations on prohibited or limited areas under VER are still subject to the remainder of SMCRA regulations. In its SOPR, Wyoming stated that the revisions are meant to be consistent with the required elements of OSMRE's basic conceptual definition for VER in 30 CFR 761.5.

OSMRE replied in a letter dated August 17, 2011, that Wyoming's definition does not include Federal counterpart language stating that ''Possession of valid existing rights only confers an exception from the prohibitions of § 761.11 and 30 U.S.C. 1272(e).'' We stated that Wyoming's failure to include this language in its VER definition clarifying and further explaining the operation of VER renders its program less effective than the Federal regulations. Consequently, we required Wyoming to add the ''exception'' language to its proposed definition of VER.

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the required ''exception'' language to its VER definition in a future rule package.

Based on the discussion above, we are not approving Wyoming's revised VER definition at Chapter 1, Section 2(fl). We also acknowledge Wyoming's commitment to add the required ''exception'' language to its VER definition in a future rulemaking.

2. Chapter 1, Section 2(fl)(ii)(B)(IV); Definition of ''Needed for and adjacent standard''

In response to Item B–5 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed a new ''Needed for and adjacent standard'' definition at Chapter 1, Section 2(fl)(ii)(B)(IV) and includes a requirement that, when evaluating if a person meets that standard, the agency making the decision may consider ''Whether the land lies within the area identified on the life-of-mine map submitted before the land came under the protection of 30 CFR § 761.11 (2009).''

OSMRE replied in a letter dated August 17, 2011, that the Federal counterpart provision at 30 CFR 761.5(b)(2) includes specific citation cross-references requiring the submission of a life-of-mine map as part

of a permit application. Therefore, in order to provide specificity and maintain clarity in its VER rules, we required Wyoming to revise the proposed rule language to specify the applicable counterpart permit application reference for requiring the submission of life-of-mine maps.

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the required cross-references in a future rule package.

Consequently, we are not approving Wyoming's newly-proposed ''Needed for and adjacent standard'' definition at Chapter 1, Section 2(fl)(ii)(B)(IV). We also acknowledge Wyoming's commitment to add the required citation cross-references in a future rulemaking.

3. Chapter 1, Section 2(fl)(iii); VER Standards for Roads

In response to Item B–5 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed a new rule at Chapter 1, Section 2(fl)(iii) that applies the VER standard to all roads included within a surface mining operation.

OSMRE replied in a letter dated August 17, 2011, that the Federal counterpart provision at 30 CFR 761.5(c), as well as the remainder of Wyoming's rules refer to ''surface *coal* mining operations.'' Thus, in order to maintain consistency with the terminology used in its VER rules, we required Wyoming to revise the proposed rule language to include the term ''coal.''

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the term ''coal'' in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 1, Section 2(fl)(iii) that applies its VER standard to all roads included within a surface mining operation. We also acknowledge Wyoming's commitment to revise the proposed rule language and add the term ''coal'' in a future rulemaking.

4. Chapter 12, Section 1(a)(v)(D); Procedures for Public Road Waivers

In response to Item F–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rule regarding procedures for public road waivers at Chapter 12, Section 1(a)(v)(D) to be consistent with the Federal counterpart regulations at 30 CFR 761.14 by adding requirements for time limits and written findings.

OSMRE replied in a letter dated August 17, 2011, that Wyoming's proposed language warrants additional grammatical revisions for purposes of clarity and consistency within its rules. Specifically, we stated that Wyoming needs to revise the phrase ''shall follow notice and opportunity to for public hearing'' to read ''shall *provide a public comment period* and an opportunity *to request* a public hearing.'' We further noted that Wyoming needs to replace the word ''authority'' with ''Administrator'' to clarify that they are responsible for making written findings following a hearing or end of the public comment period.

Wyoming responded in a letter dated October 5, 2011, and stated that it will make the requested revisions in a future rule package.

As a result, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(v)(D) regarding procedures for public road waivers. We also acknowledge Wyoming's commitment to revise the proposed rule and include the aforementioned grammatical revisions in a future rulemaking.

5. Chapter 12, Section 1(a)(vii)(A)(I); VER Submission Requirements and Procedures

In response to Item G–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add VER submission requirements and procedure rules to be consistent with the Federal counterpart regulations at 30 CFR 761.16(b).

OSMRE replied in a letter dated August 17, 2011, that Wyoming's proposed language at Chapter 12, Section 1(a)(vii)(A) does not include Federal counterpart language explaining that a VER determination request shall be submitted if an individual ''intends to conduct surface coal mining operations on the basis of valid existing rights under § 761.11 or wish to confirm the right to do so.'' Wyoming's failure to include this additional explanatory language in the proposed rule renders its program less effective than the Federal regulations. Similarly, for purposes of clarity and consistency within its rules and to be consistent with the Federal requirements at 30 CFR 761.16(b)(1) we required Wyoming to revise the proposed rule language in subsection (I) by adding citation cross-references to property rights demonstrations under paragraph (i) of its VER definition in Chapter 1 for requests that rely on the good faith/all permits standard or the needed for and adjacent standard in paragraph (ii) of its VER definition in Chapter 1.

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the required cross-references and clarify that a request can be submitted if the individual intends to conduct surface coal mining operations on the basis of valid existing rights or wishes to confirm the right to do so in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(A)(I) concerning VER determination requests. We also acknowledge Wyoming's commitment to revise the proposed rule to include the aforementioned citation cross-references and VER submission requirement language in a future rulemaking.

6. Chapter 12, Section 1(a)(vii)(A)(IV); VER Submission Requirements and Procedures

In response to Item G–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add VER submission requirements and procedure rules at Chapter 12, Section 1(a)(vii)(A)(IV).

OSMRE replied in a letter dated August 17, 2011, that in order to be consistent with its own rules and the Federal counterpart requirements at 30 CFR 761.16(b) (4) Wyoming must revise the proposed rule language in subsection (IV) by adding a citation cross-reference to paragraphs (iii)(A) through (iii)(C) of its VER definition in Chapter 1 regarding the standards for roads.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise subsection (IV) to include the aforementioned required citation cross-references in a future rule package.

Therefore, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(A)(IV) concerning VER submission requirements and requests that rely on one of the standards for roads. We also acknowledge Wyoming's commitment to include the required citation cross-references in a future rulemaking effort.

7. Chapter 12, Section 1(a)(vii)(B)(I); Initial Review of VER Request

In response to Item G–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed a new rule at Chapter 12, Section 1(a)(vii)(B)(I) requiring that responsible agencies conduct an initial review of a VER request and determine whether it includes all applicable submission components as discussed in subsection (A). The proposed rule also states that the review only examines completeness of the request.

OSMRE replied in a letter dated August 17, 2011, that in order to be consistent with the Federal regulations at 30 CFR 761.16(c)(1) Wyoming must include Federal counterpart language in subsection (I) to further explain that the review does not pertain to the ''legal or

technical adequacy of the materials submitted.'' Wyoming's failure to include this qualifying explanatory language in the proposed rule renders its program less effective than the Federal regulations.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise its rules to indicate that the review does not address legal or technical adequacy in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(B)(I) concerning initial review of a VER request. We also acknowledge Wyoming's commitment to revise the proposed rule and include the aforementioned qualifying explanatory language in a future rulemaking.

8. Chapter 12, Section 1(a)(vii)(B)(IV); Initial Review of VER Request

In response to Item G–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add requirements to its rules at Chapter 12, Section 1(a)(vii)(B)(IV) for conducting an initial review of all applicable submission components for making VER determinations.

OSMRE replied in a letter dated August 17, 2011, that for purposes of clarity in its own rules and to be consistent with the Federal requirements at 30 CFR 761.16(c)(4) Wyoming must revise the proposed rule language in subsection (IV) regarding the VER demonstration by adding a citation cross-reference to subsection (D)(IV) that discusses how a VER decision will be made.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise its rules with the appropriate citation cross-reference discussed above in a future rule package.

Accordingly, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(B)(IV) concerning an initial review of all applicable submission components for making VER determinations. We also acknowledge Wyoming's commitment to include the required citation cross-reference in a future rulemaking.

9. Chapter 12, Section 1(a)(vii)(C)(I)(3.); VER Notice and Comment Requirements

In response to Item G–2 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add VER public notice and comment requirements and procedures to its rules at Chapter 12, Section 1(a)(vii)(C)(I)(3.).

OSMRE replied in a letter dated August 17, 2011, that in order to be consistent with its own rules and the Federal requirements at 30 CFR 761.16(d)(1)(iii) Wyoming must revise the proposed rule language in subsection (3.) by adding a citation cross-reference to include ''the applicable standards under Chapter 1, VER definition.'' For the same reasons, Wyoming must revise the language in subsection (a.) to include a cross-reference to paragraph (ii) of its VER definition in Chapter 1 regarding the good faith/all permits standard or the needed for and adjacent standard, and change the citation cross-references in subsections (b.) and (c.) from (IV)(1.) and (IV)(2.) to (A)(IV)(1.) and (A)(IV)(2.), respectively. Wyoming also needs to correct a typographical error for grammatical correctness in subsection (c.) by changing the word ''creation'' to ''creating.'' Lastly, in order to maintain consistency within its own rules and the Federal requirements at 30 CFR 761.16(d)(1)(iv) we required Wyoming to revise the proposed rule language in subsection (d.) by adding a citation cross-reference to the standards in paragraphs (ii), (iii)(A), and (iii)(B) of its VER definition in Chapter 1.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise its proposed rule language to include the citation cross-references discussed above and correct the typographical error in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rules concerning VER public notice and comment requirements and procedures at Chapter 12, Section 1(a)(vii)(C)(I)(3.). We also acknowledge Wyoming's commitment to include the required citation cross-references and correct a typographical error in a future rulemaking.

10. Chapter 12, Section 1(a)(vii)(C)(II)(2.); VER Notice and Comment Requirements

In response to Item G–2 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(C)(II)(2.) by requiring that the Division provide a copy of the notice of an administratively complete VER request to the owner of the feature causing the land to come under VER protection and, where applicable, the agency with primary jurisdiction over the feature.

OSMRE replied in a letter dated August 17, 2011, that Wyoming does not include Federal counterpart language providing specific examples of such required notifications. Wyoming's failure to include this additional explanatory language in its proposed rule renders its program less effective than the Federal regulations at 30 CFR 761.16(d)(2)(ii). In addition, we noted that Wyoming needs to correct a typographical error for grammatical correctness by changing the phrase ''where applicable'' to ''when applicable.''

Wyoming responded in a letter dated October 5, 2011, and stated that it will amend its rules by providing specific examples of administratively complete VER request notifications and correct the aforementioned typographical error in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(C)(II)(2.) concerning VER public notice and comment requirements and procedures. We also acknowledge Wyoming's commitment to revise its proposed rule by adding explanatory language and correcting a typographical error in a future rulemaking effort.

11. Chapter 12, Section 1(a)(vii)(C)(III); VER Notice and Comment Requirements

In response to Item G–2 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(C)(III) by requiring that the letter transmitting notice of an administratively complete VER request also provide a 30-day comment period and specify that another 30 days is available upon request.

OSMRE replied in a letter dated August 17, 2011, that Wyoming does not include Federal counterpart language providing the Division with discretion to grant additional time to comment for good cause upon request, and fails to explain that the Division need not necessarily consider comments received after the closing date of the comment period. We further explained that this provision is not to be interpreted as providing Wyoming with discretion to adopt the counterpart language. Rather, it is intended to afford Wyoming with the option to both extend the comment period for good cause requested and reject comments received after the comment period closes. Thus, Wyoming's failure to include this language in its proposed rule renders its program less effective than the Federal regulations at 30 CFR 761.16(d)(3).

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the Federal counterpart language mentioned above in a future rule package.

Consequently, we do not approve Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(C)(III) concerning VER public notice and comment requirements and procedures. We also acknowledge Wyoming's

commitment to revise its proposed rule by including Federal counterpart language affording Wyoming the option to both extend the comment period for good cause requested and reject comments received after the comment period closes in a future rulemaking.

12. Chapter 12, Section 1(a)(vii)(D)(I); How a VER Decision Will Be Made

In response to Item G–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(D)(I) by requiring that the Division review materials and comments submitted for adequacy before making a VER determination.

OSMRE replied in a letter dated August 17, 2011, that in order to maintain consistency within its own rules and the Federal requirements at 30 CFR 761.16(e)(1) Wyoming must revise the proposed rule language in subsection (I) by adding citation cross-references to include ''materials submitted under subsection (A)'' and ''comments received under subsection (C).''

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the aforementioned required cross-references in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(D)(I) concerning the review of materials and comments submitted for adequacy before making a VER determination. We also acknowledge Wyoming's commitment to include the required citation cross-references in a future rulemaking.

13. Chapter 12, Section 1(a)(vii)(D)(III); How a VER Decision Will Be Made

In response to Item G–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(D)(III) regarding impacts of property rights disagreements on VER determinations.

OSMRE replied in a letter dated August 17, 2011, that in order to maintain consistency within its own rules and the Federal requirements at 30 CFR 761.16(e)(3)(i) Wyoming must revise the proposed rule language in subsection (1.) by adding citation cross-references to include ''the closing date of the comment periods discussed under subsections (C)(I) or (C)(III) above.'' Similarly, to be consistent with 30 CFR 761.16(e)(3)(ii) Wyoming must revise subsection (2.) by adding citation cross-references to the requisite property rights demonstrations under paragraphs ''(i), (iii)(A), or (iii)(B)'' of its VER definition in Chapter 1, as appropriate. We also stated that Wyoming needs to specify that the Division is the ''responsible agency'' and correct a typographical error in the cross-reference from subsection (C)(II) to (D)(II). Lastly, for purposes of clarity and specificity, we required Wyoming to ensure that the ''responsible agency'' reference is similarly revised, if applicable, when it appears elsewhere in the proposed rules.

Wyoming responded in a letter dated October 5, 2011, by stating that it will revise its rule to provide the appropriate citation cross-references and clarify that the Land Quality Division is the ''responsible agency'' in a future rule package.

Accordingly, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(D)(III) concerning the impacts of property rights disagreements on VER determinations. We also acknowledge Wyoming's commitment to revise it rule and incorporate the required changes discussed above in a future rulemaking.

14. Chapter 12, Section 1(a)(vii)(E); Administrative and Judicial Review

In response to Item G–1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add requirements to its rules at Chapter 12, Section 1(a)(vii)(E) providing for administrative and judicial review of VER determinations.

OSMRE replied in a letter dated August 17, 2011, that in order to provide clarity and specificity within its own rules and be consistent with the Federal requirements at 30 CFR 761.16(f) Wyoming must revise the proposed rule language by adding a reference to the Wyoming Administrative Procedures Act. Wyoming's failure to include this reference in the proposed rule renders its program less effective than the Federal regulations.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise it rules to include a reference to the Wyoming Administrative Procedures Act in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(E) providing for administrative and judicial review of VER determinations. We also acknowledge Wyoming's commitment to include a reference to the Wyoming Administrative Procedures Act in a future rulemaking.

15. Chapter 12, Section 1(a)(vii)(F); Availability of Records

In response to Item G–4 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(F) by requiring that the Division or agency responsible for processing a VER request shall make a copy of the request and related materials available to the public.

OSMRE replied in a letter dated August 17, 2011, that in order to maintain consistency within its rules, Wyoming needs to specify in the heading that the rule pertains to ''Availability of Records.'' Moreover, Wyoming must add language explaining that, in addition to the VER request and related materials, records associated with any subsequent determination under subsection (D) shall also be made available to the public. Wyoming's failure to include this corresponding language in its proposed rule renders its program less effective than the Federal regulations at 30 CFR 761.16(g).

Wyoming responded in a letter dated October 5, 2011, by stating that it will revise its rules to include the section header ''Availability of Records'' and additional language regarding other materials which may be made available to the public.

Accordingly, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(F) concerning requirements for making VER requests and related materials available to the public. We also acknowledge Wyoming's commitment to revise the rule to address the required changes discussed above in a future rulemaking effort.

16. Chapter 12, Section 1(a)(vii)(G)(III)(2.); Procedures for Joint Approval of Surface Coal Mining Operations That Will Adversely Affect Publicly Owned Parks or Historic Places

In response to Item H–1 of OSMRE's April 2, 2001, 732 letter and to be no less effective than the Federal requirements at 30 CFR 761.17, Wyoming proposed new rules at Chapter 12, Section 1(a)(vii)(G) regarding procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places. Wyoming also proposed to clarify in subsection (III)(2.) that these procedures do not apply to lands within the scope of the exception for existing operations or to lands for which a person has VER.

OSMRE replied in a letter dated August 17, 2011, that in order to maintain consistency within its rules, Wyoming needs to revise the proposed rule language in subsection (2.) by adding a citation cross-reference to subsection (iv) to specify where the ''exception for existing operations'' is located in its Chapter 1, ''valid existing rights'' definition.

Wyoming responded in a letter dated October 5, 2011, and stated that it will amend its rules to include the required cross-reference in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(G) concerning procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places. We also acknowledge Wyoming's commitment to add the aforementioned required citation cross-references in a future rulemaking effort.

17. Chapter 16, Section 4(a)(iii); Definition of ''Willfully''

In response to a November 7, 1988, 732 letter, Wyoming proposed to add a new definition of ''willfully'' to its rules at Chapter 16, Section 4(a)(iii) to be no less effective than those of the Federal rules.

OSMRE replied in a letter dated August 17, 2011, and notified Wyoming that OSMRE revised this definition and moved it from 30 CFR 846.5 to 701.5 in a December 19, 2000, final rule **Federal Register** (65 FR 79656) notice. Specifically, OSMRE replaced the definition of ''willful'' with a similarly worded definition of ''willful or willfully'' to mean ''that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted: (1) Intentionally, voluntarily, or consciously; and (2) with intentional disregard or plain indifference to legal requirements.'' OSMRE revised the text of the definition for clarity and consistency with the term's broader applicability. In addition, OSMRE replaced the word ''individual'' with ''person'' because the Act and Federal regulations define person in a manner that includes both individuals and business entities, as is appropriate in the context in which the Act and regulations employ this term.

Wyoming's proposed definition of ''willfully'' at Chapter 16, Section 4(a)(iii) means ''that an individual acted: (A) Intentionally, voluntarily, or consciously; and (B) with intentional disregard or plain indifference to legal requirements.'' While subsections (A) and (B) are identical to the Federal counterpart provisions, subsection (iii) does not include the revised Federal language defining ''willful'' to mean ''a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation.'' Similar to Section 701(19) of SMCRA, Wyoming Statute W.S. 35–11–103(a)(vi) also defines the word ''person'' in a manner that includes both individuals and business entities. Lastly, it should be noted that the language in Wyoming's proposed definition of ''knowingly'' at Chapter 16, Section 4(a)(i) is identical to the revised Federal definition language at 30 CFR 701.5. Thus, in order to maintain consistency with the terminology used in its proposed rules and be no less effective than the corresponding Federal regulations at 30 CFR 701.5, we required Wyoming to amend its proposed definition of ''willfully'' to include the revised language discussed above.

Wyoming responded in a letter dated October 5, 2011, by stating that it will revise it rules to include the additional language described above in a future rule package.

Based on the discussion above, we are not approving Wyoming's newly-proposed definition of ''willfully'' to its rules at Chapter 16, Section 4(a)(iii). We also acknowledge Wyoming's commitment to revise the rule and add the required language discussed above in a future rulemaking effort.

18. Chapter 16, Section 4(b)(i); When an Individual Civil Penalty May Be Assessed

Wyoming proposes new rules at Chapter 16, Section 4(b) for determining when an individual civil penalty may be assessed. In subsection (i), Wyoming references its statutes at W.S. 35–11–902(b), ''Surface coal mining operations; violations of provisions; penalties'' in lieu of adopting Federal counterpart language at 30 CFR 846.12(a). In its Statement of Principal Reasons, Wyoming indicates that the statutory reference was in response to concerns expressed by the Wyoming Attorney General who stated in a review letter dated February 20, 2001, that most of the rules proposed by Chapter 16, Section 4, are already covered in W.S. 35–11–902.

In a November 7, 1988, 732 letter, OSMRE required Wyoming to adopt definitions of ''knowingly,'' ''willfully,'' and ''violation, failure or refusal'' to be no less effective than those of the Federal rules. Wyoming's proposed definition of ''violation, failure or refusal'' at Chapter 16, Section 4(a)(ii) is consistent with and no less effective than the Federal definition at 30 CFR 701.5. The referenced statutory language at W.S. 35–11–902(b) states, in pertinent part, that ''Any person who violates, or any director, officer or agent of a corporate permittee who willfully and knowingly authorizes, orders or carries out the violation'' is subject to an individual civil penalty. However, unlike the Federal regulation at 30 CFR 846.12(a) the statute does not specify that such penalties may also be assessed for ''failure or refusal'' to comply. Thus, in order to be consistent with its proposed definition of ''violation, failure or refusal'' and no less effective than the corresponding Federal requirements at 30 CFR 846.12(a) Wyoming must either clarify how its reference to W.S. 35–11–902(b) addresses a ''failure or refusal'' to comply, or revise the language in proposed Chapter 16, Section 4(b)(i) by stating that that the Director may assess an individual civil penalty against any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered or carried out a violation, failure or refusal.

Wyoming responded in a letter dated October 5, 2011, by stating that it will amend its regulations to include the language discussed above provided it is determined that the Department of Environmental Quality has the authority to adopt that language in consideration of W.S. 35–11–902.

Consequently, we do not approve Wyoming's newly-proposed rules at Chapter 16, Section 4(b)(i) for determining when an individual civil penalty may be assessed. We also acknowledge Wyoming's commitment to revise the proposed rule and add the language discussed above in a future rulemaking effort if authorized to do so, or clarify how its reference to W.S. 35–11–902(b) addresses a ''failure or refusal'' to comply.

19. Chapter 16, Section 4(c)(i); Amount of Civil Penalty

In a November 7, 1988, 732 letter, OSMRE notified Wyoming that its rules concerning individual civil penalties were deficient. In response, Wyoming proposes new rules at Chapter 16, Section 4(c)(i) imposing criteria that shall be considered when determining the amount of the individual civil penalty to be assessed. Proposed subsection (A) requires the Director to consider the ''individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface mining operation.''

However, the Federal counterpart provision at 30 CFR 846.14(a)(1), as well as the remainder of Wyoming's rules refer to ''surface *coal* mining operations.'' Thus, in order to maintain consistency with the terminology used in those rules, Wyoming must revise its proposed rule language to include the term ''coal.'' Based on the discussion above, we are not approving Wyoming's

newly proposed rule at Chapter 16, Section 4(c)(i)(A).

20. Chapter 16, Section 4(c)(ii); Amount of Civil Penalty

In a November 7, 1988, 732 letter, OSMRE notified Wyoming that its rules concerning individual civil penalties were deficient. In response, Wyoming proposes a new rule at Chapter 16, Section 4(c)(ii) prescribing individual civil penalty amounts that cannot be exceeded for each day during which a violation, failure or refusal continues, including those for multiple violations. Specifically, Wyoming incorporates a reference to its statute at W.S. 35–11–902(b), ''Surface coal mining operations; violations of provisions; penalties'' which states, in pertinent part, that violators are ''subject to either a penalty not to exceed ten thousand dollars ($10,000.00) for each day during which a violation continues, or, for multiple violations, a penalty not to exceed five thousand dollars ($5,000.00) for each violation for each day during which a violation continues * * *.'' In its SOPR, Wyoming indicates that the statutory reference was made in response to concerns expressed by the Wyoming Attorney General who stated in a review letter dated February 20, 2001, that W.S. 35–11–902(b) provides a more detailed penalty assessment for individual offenses and daily offenses than did Wyoming's originally proposed rule language that mirrored the Federal rule.

The Federal counterpart language provides a maximum penalty amount for each violation and a separate individual penalty may be assessed for each day the violation, failure or refusal continues, but it does not specifically address multiple violations. Thus, Wyoming's reference to its statute at W.S. 35–11–902(b) adds specificity and does not render its proposed rule at Chapter 16, Section 4(c)(ii) less effective than the corresponding Federal requirements at 30 CFR 846.14(b). Accordingly, we approve it.

21. Chapter 16, Section 4(d)(ii)(A); Procedure for Assessment of Individual Civil Penalty

In a November 7, 1988, 732 letter, OSMRE notified Wyoming that its rules concerning individual civil penalties were deficient. In response, Wyoming proposes a new rule at Chapter 16, Section 4(d)(ii)(A) requiring an individual to file within 15 days of service of a notice of proposed individual civil penalty assessment a petition for review with the Environmental Quality Council. In its SOPR, Wyoming indicates that the 15-day petition for review timeframe was included in response to concerns expressed by the Wyoming Attorney General who stated in a review letter dated February 20, 2001, that the 30-day timeframe provided in Wyoming's originally proposed rule language that mirrored the Federal rule was less restrictive than W.S. 35–11–902(d) which specifically provides and allows for 15 days to request a conference.

The Federal counterpart language requires an individual to file within 30 days of service of a notice of proposed individual civil penalty assessment a petition for review with the U.S. Department of the Interior's Office of Hearings and Appeals. Wyoming's 15-day timeframe to petition for review of a notice of proposed individual civil penalty assessment is both consistent with its statutory requirement at W.S. 35–11–902(d) and more stringent than the Federal 30-day timeframe. As such, Wyoming's proposed rule at Chapter 16, Section 4(d)(ii)(A) is no less effective than the corresponding Federal requirements at 30 CFR 846.17(b) and we approve it.

D. Removal of Required Amendments

1. Required Amendment at 30 CFR 950.16(r), Disposal of Noncoal Wastes

In an October 29, 1992 **Federal Register** (57 FR 48984) notice, we required Wyoming to either reinstate the removed cited reference ''disposal of noncoal wastes shall be in accordance with the standards set out in Section 11, paragraph c., Solid Waste Management Rules and Regulations (1980)'' or otherwise amend its rules to be no less effective than the Federal regulations at 30 CFR 816.89 and 817.89. Wyoming had revised its existing rule at Chapter 2, Section 3(a)(v)(A)(II) (now codified at Chapter 2, Section 2(a)(v)(A)(II)) by adding the modified definition of Solid Waste Management Facility contained in W.S. 35–11–103(d)(ii)(D) and by removing the requirement that noncoal wastes shall be disposed of in accordance with the Solid Waste Management Rules and Regulations. Additionally, the proposed rule would require facilities receiving solid waste that is generated outside the proposed permit area by any activity other than a mine-mouth power plant or mine-mouth coal drier to follow the Solid Waste Management Rules of Article 5 of the Environmental Quality Act (EQA).

The proposed rules were disapproved primarily because of the removal of specific performance standards for noncoal mine waste disposal as approved by the OSMRE in Wyoming's original program. Moreover, the proposed Statute change of Article 5 of the EQA did not contain Federal counterpart rules to the Federal requirements at 30 CFR 816.89 and 817.89. Consequently, we determined that Wyoming's proposed rules regarding solid waste permitting and management for mines were less effective than the corresponding Federal regulations.

Wyoming explains in its SOPR that in November of 1990, the Solid Waste Management Program revised its rules by removing Section 11, paragraph c. from the Solid Waste Rules and Regulations in response to the Wyoming Legislature eliminating duplication of jurisdiction for mine site solid waste disposal. The (now repealed) rules contained language which was very similar to the Federal Rules at 30 CFR 816.89, Disposal of noncoal mine wastes. OSMRE requested that the original reference to these rules be reinstated. However, Wyoming states that the rules are no longer a part of the current Solid and Hazardous Waste Management Division Rules and Regulations and cannot be referenced in the LQD Rules and Regulations.

In response to the required program amendment at 30 CFR 950.16(r), Wyoming proposes to revise its rules at Chapter 2, Section 2(a)(v)(A) by referring to the ''Solid and Hazardous Waste Management Division.'' Wyoming also proposes to revise subsection (II) by adding a cross-reference to its newly proposed rules at Chapter 4, Section 2(c)(xiii)(C) that provide standards for noncoal waste disposal and are no less effective than Federal regulation requirements at 30 CFR 816.89 and 817.89. Wyoming explains in its SOPR that the proposed rule language more appropriately explains which DEQ Division has authority over facilities other than those handling mine generated noncoal waste, and that the counterpart Federal rules now proposed for adoption in Chapter 4 also apply to such ''within permit'' disposal of off-site wastes.

Wyoming's proposed revisions makes its rules at Chapter 2, Section 2(a)(v)(A)(II) no less effective than the Federal regulations at 30 CFR 816.89 and 817.89, and we are removing the required program amendment at 30 CFR 950.16(r).

2. Required Amendments at 30 CFR 950.16(s) and (t), Specific Performance Standards for Noncoal Waste Disposal

In an October 29, 1992 **Federal Register** (57 FR 48984) notice, we required Wyoming to submit revisions to its rules at Chapter 2, Section 3(b)(xxi) and (xxii) (now codified at Chapter 2, Section 5(a)(xx) and (xxi),

respectively) to provide and/or include specific performance standards for noncoal waste disposal that are no less effective than the Federal Regulations at 30 CFR 816.89 and 817.89.

In response to required program amendments at 30 CFR 950.16(s) and (t), Wyoming proposes to revise its rules at Chapter 2, Section 5(a)(xx) by requiring that each application for a surface coal mining permit contain a plan for the management and disposal of noncoal mine waste within the proposed permit area in accordance with its newly-proposed rules at Chapter 4, Section 2(c)(xiii)(C) that provide standards for noncoal waste disposal and are no less effective than the Federal requirements at 30 CFR 816.89 and 817.89.

Wyoming also proposes to remove its rule at Chapter 2, Section 5(a)(xxi) regarding plans for the management and disposal within the permit area of any solid wastes generated by a mine mouth power plant or mine mouth coal drier. Wyoming states in its SOPR that the rule is being proposed for deletion because separate rules regarding solid wastes generated by a mine mouth power plant, coal drier or coal processing facility are no longer necessary. Wyoming further explains that these types of facilities are now addressed with the inclusion of language in proposed Chapter 2, Section 5(a) (xx) regarding solid wastes generated by a mine mouth power plant, coal drier or coal processing facility. Wyoming also notes that ''noncoal mine waste'' is interpreted by the LQD to exclude coal mine dust and coal fines which may be generated during the processing of coal. Specifically, coal dust and fines may be recovered and therefore are not considered waste.

Based on the foregoing, Wyoming's proposed revisions to its rules at Chapter 2, Section 5(a)(xx) and (xxi) are no less effective than the Federal regulations at 30 CFR 780.11(b), 816.89 and 817.89, and we are removing the required program amendments at 30 CFR 950.16(s) and (t).

3. Required Amendment at 30 CFR 950.16(s) and (t), Specific Performance Standards for Noncoal Waste Disposal

In an October 29, 1992 **Federal Register** (57 FR 48984) notice, we required Wyoming to submit revisions to its rules at Chapter 4, Section 2(c)(v) and Section 3(c)(iii)(C) and (D) (now codified at Chapter 4, Section 2(c)(xiii)(C) and (D), respectively) to provide and/or include specific performance standards for noncoal waste disposal that are no less effective than the Federal Regulations at 30 CFR 816.89 and 817.89.

In response to the required program amendments at 30 CFR 950.16(s) and (t), Wyoming proposes new rules at Chapter 4, Section 2(c)(xiii)(C)(I)–(III) that provide specific performance standards for temporary storage of noncoal mine wastes, final disposal of noncoal mine wastes, and restrictions as to where noncoal mine waste can be deposited. Wyoming also incorporates the requirements of former Section 2(c)(v) into newly-proposed Chapter 4, Section 2(c)(xiii)(C)(I) and (II) under ''Disposal of noncoal mine wastes.'' Subsections (I) and (III) of Wyoming's proposed rules regarding temporary storage and deposition restrictions for noncoal mine wastes are substantively identical to and no less effective than the Federal counterpart requirements at 30 CFR 816.89 and 817.89(a) and (c), and we are approving them.

Wyoming's proposed rule language in subsection (II) regarding final disposal of noncoal mine wastes requires that when the disposal is completed, a minimum of four feet of suitable cover material shall be placed over the site. The Federal counterpart language requires that a minimum of two feet of soil cover shall be placed over the site when the disposal is completed. In its SOPR, Wyoming explains that a burial depth of four feet above any noncoal mine waste disposal site is required to ensure that the disposed materials are never exposed at the final reclaimed surface. Wyoming acknowledges that this requirement is more stringent than the minimum of two feet of soil cover required by Federal Rules at 30 CFR 816.89(b). However, for the types of wastes that will be buried and the fact that some amount of erosion takes place on reclaimed land in the arid West, Wyoming believes that four feet of cover plus subsoil and topsoil, is necessary to prevent buried materials from making their way to the soil surface.

Wyoming also explains that its proposal requiring that suitable material be used for burial purposes rather than ''soil cover'' as required by the OSMRE rules is intended to clarify that topsoil and subsoil should not be used for burial purposes. Wyoming adds that the four feet can be comprised of suitable spoil or other approved material which is nontoxic, nonacid-forming and noncombustible, and the approved depth of subsoil/topsoil shall be placed above the four feet of suitable cover material.

We agree with Wyoming's rationale justifying the adoption of a four foot burial depth above disposal sites using of suitable cover material in lieu of soil cover. These provisions are reasonable and are more stringent than the Federal counterpart requirements at 30 CFR 816.89 and 817.89(b). Therefore, we approve subsection (II) of newly proposed Chapter 4, Section 2(c)(xiii)(C).

Wyoming also proposes to remove its rule at Chapter 4, Section 2(c)(xiii)(D) regarding management and final burial on the permit area of solid wastes generated by a mine mouth power plant or mine mouth coal drier. Wyoming explains in its SOPR that subsection (D) is no longer necessary because these types of facilities are now addressed with the inclusion of language in proposed Chapter 4, Section 2(c)(xiii)(C)(II) regarding solid wastes generated by a mine mouth power plant, coal drier or coal processing facility. Wyoming notes that ''noncoal mine waste'' is interpreted by the LQD to exclude coal mine dust and coal fines which may be generated during the processing of coal. Specifically, coal dust and fines may be recovered and therefore are not considered waste. We agree with Wyoming's proposed rule change and approve it.

Based on the discussion above, Wyoming's proposed revisions to its rules at Chapter 4, Section 2(c)(xiii)(C) and (D) are no less effective than the Federal regulations at 30 CFR 816.89 and 817.89, and we are removing the required program amendments at 30 CFR 950.16(s) and (t).

Related to the findings above is Wyoming's proposal to add a new rule at Chapter 7, Section 2(b)(ix) regarding Environmental Protection Performance Standards Applicable to Underground Mining Operations. In its SOPR, Wyoming's explains that proposed subsection (ix) provides a specific cross-reference to the noncoal mine waste management and performance standards in Chapter 4 Section 2(c) and is intended to make clear that they are applicable to underground mining operations as required by 30 CFR 817.89. Wyoming also states that the additional subsection will eliminate the need for adoption of a separate set of duplicate rules regarding noncoal mine waste generated by underground coal mines. We find that Wyoming's proposed rule applying noncoal mine waste management and performance standards to underground mining operations is no less effective than the Federal requirements at 30 CFR 817.89 and we approve it.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (Administrative Record

Document ID No. OSM–2011–0004–0001), but did not receive any.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Wyoming program (Administrative Record No. WY–45–03). We received comments from three Federal Agencies.

The United States Geological Survey (USGS) commented in a May 10, 2011, email response (Administrative Record Document ID No. OSM–2011–0004–0008), the Mine Safety and Health Administration (MSHA) commented in a June 1, 2011, letter (Administrative Record Document ID No. OSM–2011–0004–0006), and the Bureau of Land Management (BLM) commented in a June 3, 2011, letter (Administrative Record Document ID No. OSM–2011–0004–0005).

The USGS responded that inasmuch as they aren't a regulatory agency, they do not have a major role for commenting on these rule changes. The USGS further stated that a copy of the amendment materials was forwarded to the Central Energy Resource (coal group), Wyoming Water Science Center (water), and Fort Collins (wildlife and habitat) Science Centers for their review. The USGS concluded by stating they would forward to OSMRE any comments that were received from those groups.

MSHA responded that it reviewed the proposed changes to the Wyoming Reclamation Program and had no comments or concerns.

The BLM responded that the proposed Wyoming Reclamation Program amendment materials were reviewed by BLM staff in the Field, District, and State Offices and it did not have any comments at this time.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

Under 30 CFR 732.17(h)(11)(i), OSMRE requested comments on the amendment from EPA (Administrative Record No. WY–45–03). EPA did not respond to our request.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On July 1, 2011, we requested comments on Wyoming's amendment (Administrative Record No. WY–045–06), but neither responded to our request.

V. OSMRE's Decision

Based on the above findings, we approve, with certain exceptions, Wyoming's April 28, 2011, amendment. We do not approve the following provisions or parts of provisions.

As discussed in Finding No. III.C.1, we are not approving Wyoming's revised VER definition at Chapter 1, Section 2(fl).

As discussed in Finding No. III.C.2, we are not approving Wyoming's newly-proposed ''Needed for and adjacent standard'' definition at Chapter 1, Section 2(fl)(ii)(B)(IV).

As discussed in Finding No. III.C.3, we are not approving Wyoming's proposed rule change at Chapter 1, Section 2(fl)(iii) that applies its VER standard to all roads included within a surface mining operation.

As discussed in Finding No. III.C.4, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(v)(D) regarding procedures for public road waivers.

As discussed in Finding No. III.C.5, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(A)(I) concerning VER determination requests.

As discussed in Finding No. III.C.6, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(A)(IV) concerning VER submission requirements and requests that rely on one of the standards for roads.

As discussed in Finding No. III.C.7, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(B)(I) concerning initial review of a VER request.

As discussed in Finding No. III.C.8, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(B)(IV) concerning an initial review of all applicable submission components for making VER determinations.

As discussed in Finding No. III.C.9, we are not approving Wyoming's proposed rules concerning VER public notice and comment requirements and procedures at Chapter 12, Section 1(a)(vii)(C)(I)(3.).

As discussed in Finding No. III.C.10, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(C)(II)(2.) concerning VER public notice and comment requirements and procedures.

As discussed in Finding No. III.C.11, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(C)(III) concerning VER public notice and comment requirements and procedures.

As discussed in Finding No. III.C.12, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(D)(I) concerning the review of materials and comments submitted for adequacy before making a VER determination.

As discussed in Finding No. III.C.13, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(D)(III) concerning the impacts of property rights disagreements on VER determinations.

As discussed in Finding No. III.C.14, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(E) providing for administrative and judicial review of VER determinations.

As discussed in Finding No. III.C.15, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(F) concerning requirements for making VER requests and related materials available to the public.

As discussed in Finding No. III.C.16, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(G) concerning procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places.

As discussed in Finding No. III.C.17, we are not approving Wyoming's newly-proposed definition of ''willfully'' to its rules at Chapter 16, Section 4(a)(iii).

As discussed in Finding No. III.C.18, we are not approving Wyoming's newly-proposed rules at Chapter 16, Section 4(b)(i) for determining when an individual civil penalty may be assessed.

As discussed in Finding No. III.C.19, we are not approving Wyoming's newly-proposed rule at Chapter 16, Section 4(c)(i)(A) imposing criteria that shall be considered when determining the amount of the individual civil penalty to be assessed.

We are removing existing required amendments and approving, as discussed in: Finding No. III.D.1, Chapter 2, Section 2(a)(v)(A)(II) concerning disposal of noncoal wastes; Finding No. III.D.2, Chapter 2, Section

5(a) (xx) and (xxi) concerning specific performance standards for noncoal waste disposal; and Finding No. III.D.3, Chapter 4, Section 2(c)(xiii)(C) and (D) concerning specific performance standards for noncoal waste disposal. To implement this decision, we are amending the Federal regulations at 30 CFR Part 950, which codify decisions concerning the Wyoming program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

Effect of OSMRE's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change of an approved State program be submitted to OSMRE for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSMRE. In the oversight of the Wyoming program, we will recognize only the statutes, regulations and other materials we have approved, together with any consistent implementing policies, directives and other materials. We will require Wyoming to enforce only approved provisions.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSMRE. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian tribes and have determined that the rule does not have substantial direct effects 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. The rule does not involve or affect Indian tribes in any way.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 CFR U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) *et seq*).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 950

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 26,2012.

Allen D. Klein,

Regional Director, Western Region.

Editorial Note: This document was received at the Office of the Federal Register on February 8, 2013.

For the reasons set out in the preamble, 30 CFR part 950 is amended as set forth below:

PART 950—Wyoming

■ 1. The authority citation for part 950 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 950.15 is amended in the table by adding a new entry in chronological order by ''Date of Final Publication'' to read as follows:

§ 950.15 Approval of Wyoming regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * *
April 28, 2011	2–14–13	Chap. 1, Sec. 2(fl)(i); Chap. 1, Sec. 2(fl)(ii)(A) and (B)(I)–(III); Subsections (A)–(D) of Chap. 1, Sec. 2(fl)(iii); Chap. 1, Sec. 2(fl)(iv)(A) and (B); Chap. 2, Sec. 2(a)(v)(A)(II); Chap. 2, Sec. 5(a)(xx) and (xxi); Chap. 4, Sec. 2(c)(xiii)(C) and (D); Chap. 7, Sec. 1(a)(i)(A) and (B); Chap. 7, Sec. 2(b)(ix); Chap. 10, Sec. 2(a); Chap. 10, Section 2(b)(xiii); Chap. 10, Sec. 3(c)(iv); Subsections (1.)–(9.) of Chap. 12, Sec. 1(a)(vii)(A)(I); Chap. 12, Sec. 1(a)(v)(B); Chap. 12, Sec. 1(a)(vi); Chap. 12, Sec. 1(a)(vii)(A)(II) (1.)–(3.) and (III); Subsections (1.)–(3.) of Chap. 12, Sec. 1(a)(vii)(A)(IV); Chap. 12, Sec. 1(a)(vii)(B)(II) and (III); Chap. 12, Sec. 1(a)(vii)(C)(I)(1.) and (2.); Subsections e.–h. of Chap. 12, Sec. 1(a)(vii)(C)(I)(3.); Chap. 12, Sec. 1(a)(vii)(C)(II)(1.); Chap. 12, Sec. 1(a)(vii)(D)(II); Chap. 12, Sec. 1(a)(vii)(D)(IV) and (V)(1.) and (2.); Chap. 12, Sec. 1(a)(vii)(G)(I)(1.), (2.), and (3.), (II), and (III)(1.); Chap. 16, Sec. 4(a)(i) and (ii)(A) and (B); Chap. 16, Sec. 4(b)(ii); Chap. 16, Sec. 4(c)(i)(B)–(C); Chap. 16, Sec. 4(c)(ii); Chap. 16, Sec. 4(d)(i), (ii)(A) and (B), and (iii); Chap. 16, Sec. 4(e)(i)–(iii); also all minor, editorial, and codification changes.

■ 3. Section 950.16 is amended by removing and reserving paragraphs (r), (s), and (t).

[FR Doc. 2013–03365 Filed 2–13–13; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2012–1034]

Special Local Regulation; Southern California Annual Marine Events for the San Diego Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the 2013 California Ironman Triathlon Special Local Regulation located in Oceanside Harbor in Oceanside, California from 6:40 a.m. through 9:30 a.m. on March 30, 2013. This action is necessary to provide to provide for the safety of the participants, crew, spectators, sponsor vessels of the event, and general users of the waterway. During the enforcement period, no spectators shall anchor, block, loiter in, or impede the transit of participants or official patrol vessels in the regulated area during the effective dates and times, unless cleared for such entry by Coast Guard Patrol Commander or through an official supporting vessel.

DATES: The regulations in 33 CFR 100.1101 will be enforced from 6:40 a.m. to 9:30 a.m. on March 30, 2013.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Petty Officer Bryan Gollogly, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone 619–278–7656, email *D11–PF–MarineEventsSanDiego@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Special Local Regulation for the 2013 California Ironman Triathlon in 33 CFR 100.1101 (Item 2 on Table 1) from 6:40 a.m. through 9:30 a.m. on March 30, 2013.

Under provisions of 33 CFR 100.1101, a vessel may not enter the regulated area, unless it receives permission from the COTP. Spectator vessels may safely transit outside the regulated area but may not anchor, block, loiter, or impede the transit of participants or official patrol vessels. The Coast Guard may be assisted by other Federal, State, or Local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 100.1101 and 5 U.S.C. 552 (a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with extensive advance notification of this enforcement period via the Local Notice to Mariners. If the Captain of the Port or his designated representative determines that the regulated area need not be enforced for the full duration stated on this notice, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

Dated: January 22, 2013.

S.M. Mahoney,

Captain, United States Coast Guard, Captain of the Port San Diego.

[FR Doc. 2013–03353 Filed 2–13–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2013–0061]

Drawbridge Operation Regulation; Bayou Boeuf, Amelia, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Burlington

Northern Santa Fe (BNSF) Railway Company swing span bridge across Bayou Boeuf, mile 10.2, at Amelia, St. Mary Parish, Louisiana. The deviation is necessary to complete scheduled repairs necessitated by a bridge allision. This deviation allows the bridge to remain in the closed-to-navigation position for sixteen consecutive hours.

DATES: This deviation is effective from 6 a.m. through 10 p.m. on Thursday, March 14, 2013.

ADDRESSES: The docket for this notice, USCG–2013–0061, is available online at *www.regulations.gov* by typing the docket number in the ''SEARCH'' box and clicking ''SEARCH.'' Click on Open Docket Folder on the line associated with this notice. 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.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email David Frank, Bridge Administration Branch, Coast Guard; telephone 504–671–2128, email *David.M.Frank@uscg.mil.* If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The BNSF Railway Company has requested a temporary deviation from the operating schedule of the swing span railroad bridge across Bayou Boeuf, mile 10.2, at Amelia, St. Mary Parish, Louisiana. The bridge provides no vertical clearance in the closed-to-navigation position. However, the bridge will be able to open in the event of an emergency.

In accordance with 33 CFR 117.5, the bridge currently opens on signal for the passage of vessels. This deviation allows the swing span of the bridge to remain in the closed-to-navigation position from 6 a.m. through 10 p.m. on Thursday, March 14, 2013.

The closure is necessary in order to change out a shaft and reducer gear damaged during a bridge allision that occurred last year. Notices will be published in the Eighth Coast Guard District Local Notice to Mariners and will be broadcast via the Coast Guard Broadcast Notice to Mariners System.

Navigation at the site of the bridge consists mainly of tows with barges and some recreational pleasure craft. Due to prior experience, as well as coordination with waterway users, it has been determined that this closure will not have a significant effect on these vessels. An alternate route is available by using the GIWW, Morgan City to Port Allen Alternate Route.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: February 4, 2013.

David M. Frank,

Bridge Administrator, Eighth Coast Guard District.

[FR Doc. 2013–03349 Filed 2–13–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2013–0062]

Drawbridge Operation Regulation; Charenton Canal, Baldwin, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Burlington Northern Santa Fe (BNSF) Railway Company swing span bridge across Charenton Canal, mile 0.4, at Baldwin, St. Mary Parish, Louisiana. The deviation is necessary to complete scheduled repairs for the continued safe operation of the bridge. This deviation allows the bridge to remain in the closed-to-navigation position for sixteen consecutive hours.

DATES: This deviation is effective from 6 a.m. through 10 p.m. on Thursday, March 28, 2013.

ADDRESSES: The docket for this notice, USCG–2013–0062, is available online at *www.regulations.gov* by typing in the docket number in the ''SEARCH'' box and clicking ''SEARCH.'' Next, click on Open Docket Folder on the line associated with this notice. 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.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email David Frank, Bridge Administration Branch, Coast Guard; telephone 504–671–2128, email *David.M.Frank@uscg.mil.* If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The BNSF Railway Company has requested a temporary deviation from the operating schedule of the swing span railroad bridge across the Charenton Canal, mile 0.4, at Baldwin, St. Mary Parish, Louisiana. The bridge provides 10 feet of vertical clearance in the closed-to-navigation position. Due to the type of equipment being used and safety concerns, vessels will not be allowed to pass under the bridge while in the closed-to-navigation position. However, the bridge will be able to open in the event of an emergency.

Navigation on the waterway consists of tugs with tows, fishing vessels, and recreational craft including sailboats and powerboats. An alternate route is available for mariners through the Berwick Locks. The alternate waterway route takes about 45 minutes to transit. Due to prior experience, as well as coordination with waterway users, and the alternate route through Berwick Locks, it has been determined that this closure will not have a significant effect on these vessels.

In accordance with 33 CFR 117.5, the bridge currently opens on signal for the passage of vessels. This deviation allows the swing span of the bridge to remain in the closed-to-navigation position from 6 a.m. through 10 p.m. on Thursday, March 28, 2013.

The closure is necessary in order to change out the segment gear on the turn span of the bridge. Notices will be published in the Eighth Coast Guard District Local Notice to Mariners and will be broadcast via the Coast Guard Broadcast Notice to Mariners System.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: February 4, 2013.

David M. Frank,

Bridge Administrator, Eighth Coast Guard District.

[FR Doc. 2013–03351 Filed 2–13–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Part 300

RIN 1820–AB64

[Docket ID ED–2011–OSERS–0012]

Assistance to States for the Education of Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary of Education (Secretary) amends regulations for Part B of the Individuals with Disabilities Education Act (IDEA or Act). These regulations govern the Assistance to States for the Education of Children with Disabilities program, including the Preschool Grants for Children with Disabilities program. These amendments revise the parental consent requirements a public agency must meet before it may access for the first time a child's or parent's public benefits or insurance (e.g., Medicaid) to pay for services required under the Act; ensure that parents of children with disabilities are specifically informed of all of their legal protections when public agencies seek to access public benefits or insurance (e.g., Medicaid) to pay for services required under the Act; and address the concerns expressed by State educational agencies (SEAs) and local educational agencies (LEAs) that requiring parental consent each time access to public benefits or insurance is sought, in addition to the parental consent required by the Family Educational Rights and Privacy Act (FERPA) and section 617(c) of the IDEA, imposes unnecessary costs and administrative burdens.

DATES: These regulations are effective on March 18, 2013.

FOR FURTHER INFORMATION CONTACT: Mary Louise Dirrigl, U.S. Department of Education, 550 12th Street SW., Potomac Center Plaza, Room 5156, Washington, DC 20202–2641. *Telephone:* (202) 245–7324. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), you may call the Federal Relay System (FRS) at 1–800–877–8339.

Individuals with disabilities can obtain a copy of this document in an alternative format (e.g., Braille, large print, audiotape, or compact disk) upon request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:

Background: Section 300.154 of current regulations, which implements section 612(a)(12) and section 612(e) of the Act, addresses methods for ensuring services to children with disabilities, including the responsibility of non-educational public agencies to provide or pay for required special education or related services that are necessary to ensure the provision of a free appropriate public education (FAPE) to children with disabilities in the State. Specifically, § 300.154(h), which implements section 612(e) of the Act, provides that Part B of the Act does not alter requirements imposed on States by Titles XIX and XXI of the Social Security Act or other public benefits or insurance programs. Accordingly, § 300.154(a) reinforces this important principle and emphasizes each State's obligation to develop interagency agreements or other mechanisms for coordination between educational and non-educational public agencies to ensure that all services necessary to provide FAPE are provided to children with disabilities at no cost to the parent, including services such as assistive technology devices or assistive technology services, related services, supplementary aids and services, and transition services. To that end, § 300.154(a), consistent with section 612(a)(12)(A)(i) of the Act, requires States to identify the financial responsibility of non-educational public agencies, including the State Medicaid agency or other public insurers of children with disabilities, for providing services required for FAPE, and specifies that the financial responsibility of Medicaid and other public insurers of children with disabilities must precede the financial responsibility of the LEA responsible for developing the child's IEP. Further, § 300.154(b)(1)(ii), provides that a non-educational public agency may not disqualify a covered service for reimbursement because that service is provided in a school context.

On September 28, 2011, the Department published a notice of proposed rulemaking (NPRM) in the **Federal Register** (76 FR 60310). In the preamble, the Secretary discussed the changes proposed to the regulations that govern the use of a child's or parent's public benefits or insurance to provide or pay for services required under Part B of the IDEA.

Major Changes in the Regulations

The Department has made several significant changes to the regulations proposed in the NPRM. Specifically:

- We have added new § 300.154(d)(2)(iv), which clarifies the parental consent a public agency must obtain prior to accessing a child's or parent's public benefits or insurance for the first time. Paragraph (A) of new § 300.154(d)(2)(iv) describes the specific elements of the written parental consent that a public agency must obtain under FERPA and IDEA before it may release for billing purposes a child's personally identifiable information to a public benefits or insurance program (e.g., Medicaid). Paragraph (B) of new § 300.154(d)(2)(iv) requires that the one-time consent described in new § 300.154(d)(2)(iv)(A) must specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300.
- Because we have added the parental consent provision in new § 300.154(d)(2)(iv), we have moved the provision requiring public agencies to provide written notification to the child's parents in proposed § 300.154(d)(2)(iv) to new § 300.154(d)(2)(v). This new paragraph incorporates, with some minor modifications from the proposed regulations, the specific information that must be included in this written notification. In addition final § 300.154(d)(2)(v) requires that the public agency provide this written notification to the child's parents both prior to accessing a child's or parent's public benefits or insurance for the first time, and annually thereafter. The Department's rationale for these changes is discussed in the *Analysis of Comments and Changes* section of this preamble.

Analysis of Comments and Changes

Introduction

In response to the invitation in the NPRM, more than 500 parties submitted comments. An analysis of the comments and of the changes we made to the regulations as a result follows this introduction. The perspectives of parents, individuals with disabilities, State and local education officials, advocacy organizations, and others were useful in helping us identify and formulate these changes.

We discuss substantive issues under the sections of the regulations to which they pertain. The analysis generally does not address—

(a) Minor changes, including technical changes made to the language published in the NPRM;

(b) Suggested changes the Secretary is not legally authorized to make under applicable statutory authority; and

(c) Comments that express concerns of a general nature about the Department or other matters that are not directly relevant to these regulations, including requests for information about the

provision of special education and related services and other matters that are within the purview of State and local decision-makers.

Methods of Ensuring Services (§ 300.154)

Nature of Public Benefits or Insurance Programs

Comment: One commenter requested clarification on the meaning of the phrase ''seeking to bill or otherwise access the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under Part B of the Act'' in the preamble of the NPRM.

Discussion: We interpret the comment as a request to clarify the phrase ''other public benefits or insurance programs.'' The names of public benefits or insurance programs may vary across States. Generally, these programs are associated with the State agency that is responsible for the administration of a State's Medicaid program, which is a source of funding for medically necessary school-based services that are covered benefits under Medicaid. Another example of a public benefits or insurance program is the Children's Health Insurance Program (CHIP). These final regulations apply to all public benefits and insurance programs regardless of whether they are Medicaid programs.

All of these programs provide sources of funding for public agencies to pay for services required under part 300, provided certain conditions are met. Specifically, provided the conditions described in new § 300.154(d)(2)(iv) and (v) for obtaining parental consent and providing written notification to the child's parents are met, public agencies may access benefits from these programs to bill for services provided by the LEA that are required under Part B of the Act.

We note that in some States, public benefits or insurance programs may also be the provider of services that are required under part 300 and are included in the individualized education programs (IEPs) of children with disabilities. In these situations the public agency would use the public benefits or insurance program to pay for those services. However, the parental consent required under FERPA and § 300.622 that is described in new § 300.154(d)(2)(iv)(A) and the written notification to the child's parents required in new § 300.154(d)(2)(v) would apply only if the public agency seeks to access funds under the public benefits or insurance program for billing purposes to pay for services required under part 300.

Changes: None.

Parental Consent

Comment: Many commenters supported removing the requirement in current § 300.154(d)(2)(iv)(A) that a public agency obtain parental consent each time it seeks access to public benefits or insurance. The commenters stated that eliminating this requirement would reduce paperwork and simplify the process for public agencies to access a child's or parent's public benefits or insurance. Other commenters expressed concern that eliminating the parental consent requirement would diminish parental rights. Another commenter requested that the regulations be revised to require consent to access a child's or parent's public benefits or insurance once every three years.

Discussion: We continue to believe that current § 300.154(d)(2)(iv)(A) should be removed. As we discussed in the NPRM, this change will help alleviate the burden on public agencies to obtain parental consent each time they seek to access public benefits or insurance, and will result in a more streamlined process for accessing a child's or parent's public benefits or insurance to pay for services provided under Part B of the Act. With the changes we are making in these final regulations, we do not believe removing this requirement will result in diminished protections for parents and children. Nor do we believe that requesting periodic consent every three years, as suggested by one commenter, would provide additional protection for parents. A periodic consent would apply only to the services that would be billed to the child's or parent's public benefits or insurance at the time that the parent's consent is sought. Therefore, if a service billed to the child's or parent's public benefits or insurance changes within the three year period, the consent would not apply to the additional services.

Changes: None.

Comment: Some commenters requested clarification about the parental consent requirements in 34 CFR part 99 and § 300.622 and asked how those requirements would apply to the use of public benefits or insurance to pay for special education and related services. Some commenters recommended that the proposed regulations be revised to require a public agency to obtain an initial, one-time, informed consent to access a child's or parent's public benefits or insurance in addition to the consent already required under 34 CFR part 99 and § 300.622 to release personally identifiable information to a public benefits or insurance program. These commenters stated that this one-time, initial consent would offer more protection for families than the consent required under 34 CFR part 99 and § 300.622 alone because the one-time consent would ensure that there is an ongoing dialogue between the school district and the parents on the use of their public insurance.

Discussion: We agree with commenters who suggested that it would be helpful to clarify the parental consent requirements in 34 CFR part 99 and § 300.622 in the final regulations. We referenced these requirements in the proposed regulations in § 300.154(d)(2)(iv)(A) when we discussed the elements of written notification to be provided to parents, but the reference was very brief. Therefore, we are providing in new § 300.154(d)(2)(iv)(A) that the parental consent must meet the requirements in 34 CFR 99.30 and § 300.622 prior to accessing a child's or parent's public benefits or insurance for the first time. And, to clarify what is required under these provisions, and thereby ensure that the public agency provides the parents all relevant information they need to make an informed decision, we are providing in new § 300.154(d)(2)(iv)(A) that such consent must specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular child), the purpose of the disclosure (e.g., billing for services under part 300), and the agency to which the disclosure may be made (e.g., the State's public benefits or insurance program (e.g., Medicaid)). We believe these changes will clarify the parental consent that must be obtained under 34 CFR 99.30 and § 300.622 before a public agency discloses, for billing purposes, the child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) prior to accessing a child's or parent's public benefits or insurance for the first time to pay for services required under part 300.

To ensure that a parent fully understands that the purpose of the consent obtained under 34 CFR part 99 and § 300.622 is to enable the public agency to access the child's or parent's public benefits or insurance for the first time and in the future, we are adding new § 300.154(d)(2)(iv)(B). This section provides that the consent to access public benefits or insurance must state that the parent understands and agrees

that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. We note that to comply with the new parental consent requirement in final § 300.154(d)(2)(iv)(B), a public agency may add the specific statement included in new § 300.154(d)(2)(iv)(B) to the consent required under 34 CFR 99.30 and § 300.622 to release personally identifiable information to a public benefits or insurance program (e.g., Medicaid) for billing purposes, or it may choose to obtain this consent statement separately.

Further, to help ensure that a parent understands his or her rights when a public agency seeks to use or uses their or their child's public benefits or insurance to pay for services under part 300 we are also specifying in § 300.154(d)(2)(iv)(A) that the public agency must provide the written notification described in final § 300.154(d)(2)(v) (proposed § 300.154(d)(2)(iv)) before obtaining parental consent.

Changes: We have revised the regulations to add a new § 300.154(d)(2)(iv). In final § 300.154(d)(2)(iv), we have clarified that parental consent must be obtained before a public agency accesses a child's or parent's public benefits or insurance for the first time.

We have specified that the public agency must provide written notification to the child's parents consistent with § 300.154(d)(2)(v) before parental consent is obtained.

We have added new paragraph (d)(2)(iv)(A) to describe the parental consent required by 34 CFR 99.30 and § 300.622 that a public agency must obtain prior to disclosing for billing purposes a child's personally identifiable information to a State's public benefits or insurance before accessing a child's or parent's public benefits or insurance for the first time.

We have added new § 300.154(d)(2)(iv)(B) to require that the consent must specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300.

Comment: A few commenters asked whether a public agency must obtain a new consent following the publication of the final regulations if the agency already has a parent's consent on file.

Discussion: As described below, under these final regulations, a new consent is not necessary provided there is no change in any of the following: the type (e.g., physical therapy or speech therapy) of services to be provided to the child; the amount of services to be provided to the child (frequency or duration); or the amount that the public agency charges to the public benefits or insurance program.

Under current regulations, a public agency is required to obtain parental consent to access a child's or parent's public benefits or insurance to bill for specific services. Current § 300.154(d)(2)(iv)(A) provides that consistent with the definition of ''consent'' in § 300.9(b), the parent understands and agrees in writing to the carrying out of the activity for which his or her consent was sought. The consent must describe the activity, the records (if any) that were released, and the entity to whom the records were released. Therefore, a public agency that has on file a parental consent that meets the requirements of current § 300.154(d)(2)(iv)(A) and 34 CFR 99.30 and § 300.622 will not be required to obtain a new parental consent following the publication of these final regulations, as long as the type or amount of services that the public agency will bill to public insurance or the amount that the public agency charges to the public benefits or insurance program does not change. By previously consenting, the parent understood and agreed that the public agency was accessing the child's or parent's public benefits or insurance (e.g., Medicaid) to pay for a specified type, amount, and cost of services under part 300.

However, for children for whom the public agency already has consent under current § 300.154(d)(2)(iv)(A), the first time after the effective date of these regulations that there is a change in the type or amount of services to be provided, or the amount charged by the public agency or cost of services billed to the public benefits or insurance program, the public agency must provide the parents the written notification described in new § 300.154(d)(2)(v). The public agency must also obtain consent, consistent with new § 300.154(d)(2)(iv)(B), stating that the parent understands and agrees to the public agency's accessing the child's or parent's public benefits or insurance to pay for services under part 300. Once the public agency obtains this one-time consent, the public agency will not be required to obtain any further parental consent in the future before it accesses the child's or parent's public benefits or insurance, regardless of whether there is any change in the type, amount, or cost of services to be billed to the public benefits or insurance program (e.g., Medicaid). However, the public agency will annually thereafter be required to provide parents with the written notification described in final § 300.154(d)(2)(v), to help ensure that parents understand their rights when a public agency uses their or their child's public benefits or insurance to pay for services under part 300.

Of course, with respect to children with disabilities who receive special education and related services that were not previously billed to the child's or parent's public benefits or insurance program (e.g., Medicaid), a public agency must provide the child's parents the written notification described in new § 300.154(d)(2)(v) and obtain parental consent in accordance with final § 300.154(d)(2)(iv)(A) and (B) prior to accessing the child's or parent's public benefits or insurance (e.g., Medicaid) for the first time to pay for services under part 300. This parental consent must meet the requirements in 34 CFR 99.30 and § 300.622 that apply prior to the release of the child's personally identifiable information to the public benefits or insurance program (e.g., Medicaid) for billing purposes. The consent must also include a statement specifying that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300.

Changes: None.

Comment: Some commenters asked for clarification regarding the Department's position in the March 8, 2007, letter to Mr. John Hill, particularly in situations when parental consent is given directly to another agency, such as the State Medicaid agency.

Discussion: Our position has not changed from what it was in the March 8, 2007, letter to Mr. John Hill. See *http://www2.ed.gov/policy/speced/guid/idea/letters/2007–1/hill030807consent1q2007.pdf*. The public agency is not required to independently obtain separate parental consent, so long as the parental consent provided to the other agency meets the requirements of 34 CFR 99.30 and § 300.622, and current § 300.154(d)(2)(iv)(A) and there is no change in the type, amount, or cost of services to be billed to the public insurance program. However, if the type, amount, or cost of services to be billed to the public benefits or insurance program changes, the public agency must provide to the parent the written notification described in new § 300.154(d)(2)(v) (proposed § 300.154(d)(2)(iv)) and obtain parental consent on a one-time basis in accordance with new § 300.154(d)(2)(iv)(B). This consent must specify that the parent understands and agrees that the public agency may access the child's or

parent's public benefits or insurance to pay for services under part 300.

Changes: None.

Comment: One commenter requested the word ''informed'' be placed in front of the word ''consent'' in the final regulations.

Discussion: We do not believe this change is necessary for the reasons explained in response to the comments regarding the parental consent provisions and the written notification requirement. We believe that the consent required by these final regulations is informed consent. Parents understand that they are consenting to enable the public agency to access their or their child's public benefits or insurance (e.g., Medicaid) to pay for services under part 300.

Changes: None.

Comment: One commenter questioned the value of the proposed regulatory change if school districts will have to obtain parental consent to be able to provide the child's personally identifiable information prior to submitting that information to Medicaid. Other commenters asked the Department to eliminate any requirements to obtain parental consent for Medicaid reimbursable services. These commenters asserted that IDEA contains no requirement to obtain consent before a public agency seeks reimbursement for Medicaid-eligible services to Medicaid-eligible children. The commenters also asserted that other non-school Medicaid providers are permitted to seek reimbursement for Medicaid-eligible services to Medicaid-eligible individuals, including school age children, without seeking parental consent.

Discussion: Under these final regulations, educational agencies covered by 34 CFR part 99 and public agencies under the IDEA must continue to adhere to the consent requirements in 34 CFR 99.30 and § 300.622, which we describe in new § 300.154(d)(2)(iv)(A). Under FERPA and section 617(c) of the Act, a public agency may not release personally identifiable information from a child's education records to a public benefits or insurance program without prior parental consent, except for a few specified exceptions that do not include the release of education records for billing purposes. Therefore, final § 300.154(d)(2)(iv)(A) describes the parental consent that is required under 34 CFR 99.30 and § 300.622 before a public agency may release personally identifiable information from education records for billing purposes to a public benefits or insurance program prior to accessing a child's or parent's public benefits or insurance for the first time. Additionally, new § 300.154(d)(2)(iv)(B) requires a one-time consent specifying that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. We believe that these final regulations continue to protect a parent's rights under FERPA and confidentiality rights under IDEA, and they address concerns from public agencies about costs and the administrative burden associated with obtaining parental consent each time access to public benefits insurance is sought.

Changes: None.

Comment: A few commenters recommended that we retain the current regulations and require parental consent each time a public agency seeks access to Medicaid or other public benefits or insurance programs in order to hold schools accountable for what they bill to the State Medicaid program and to facilitate better communication between the school and parent.

Discussion: We do not believe that it is necessary to retain the current parental consent requirement in order to hold schools accountable for services they bill to public insurance programs (e.g., Medicaid). We believe the parental consent required in 34 CFR 99.30 and § 300.622 (now described in new § 300.154(d)(2)(iv)(A)) and in new § 300.154(d)(2)(iv)(B) will provide sufficient communication with and protection for parents while making it easier for public agencies to access those benefits or insurance to pay for services required under part 300. The former is required before disclosing a child's personally identifiable information to a State's public benefits or insurance program (e.g., Medicaid) for billing purposes. The latter requires that the parent understands and agrees that a public agency may access their or their child's public benefits or insurance to pay for services required under part 300.

In addition to the parental protections provided for in these final regulations, a State's Medicaid agency or other public benefits or insurance program is already responsible for monitoring schools and LEAs to ensure that children are receiving the services for which the public agency bills the public benefits or insurance program. Of course, if a public agency that accesses a child's or parent's public benefits or insurance to pay for required services does not provide those services at no cost to the parents, an SEA must use its general supervisory authority under § 300.149 to achieve compliance. This authority requires each SEA to ensure that all educational programs for children with disabilities administered within the State meet State education standards and the requirements of the Act and part 300. Pursuant to §§ 300.149(b) and 300.600, an SEA must monitor public agencies' implementation of the Act and Part B regulations and ensure timely correction of any identified noncompliance. Also, parents may use IDEA's dispute resolution mechanisms to raise concerns regarding the denial of appropriate services at no cost to the parents. These mechanisms include mediation under § 300.506, due process complaint procedures under §§ 300.507 through 300.516, and State complaint procedures under §§ 300.151 through 300.153. Further, a parent or an organization or individual other than the child's parents, including one from another State, may file a signed, written complaint alleging a violation of Part B of the Act or the Part B regulations. We believe all of these protections help to ensure public agency accountability under the IDEA.

The Secretary also believes that the changes we are making in these final regulations will improve communication between the school and parents. Requiring written notification to the child's parents, consistent with new § 300.154(d)(2)(v), before a public agency obtains consent will provide important information that school districts were not required to provide parents in the past. This includes information about the parental consent requirements in final § 300.154(d)(2)(iv) and a parent's right to withdraw consent at any time.

Changes: None.

Comment: One commenter asked whether the public agency may ask a parent for permission to disclose personally identifiable information to the State public benefits or insurance program if the parent previously declined to provide consent for such disclosure.

Discussion: As in the past, a public agency may make reasonable requests to obtain the parental consent required under new § 300.154(d)(2)(iv) from a parent who previously declined to provide consent to disclose personally identifiable information to the State's public benefits or insurance program (e.g., Medicaid) for billing purposes to pay for services required under part 300. Prior to seeking to obtain this parental consent, the public agency must provide the parents with written notification consistent with new § 300.154(d)(2)(iv).

Changes: None.

Comment: One commenter recommended that the regulations include guidance on whether new

parental consent needs to be obtained prior to disclosing personally identifiable information to access a child's or parent's public benefits or insurance when consent is obtained in one school district, but the child subsequently relocates to another school district within the State or to a location outside of the State.

Discussion: Under § 300.323(e) through (g), States must have policies and procedures in effect to govern IEPs for students who transfer from one public agency to another, and we believe that those policies and procedures could address the parental consent and written notification requirements that apply to accessing public benefits or insurance for billing purposes for services required under part 300 for children who relocate to another public agency or another State. The responsibility for obtaining parental consent prior to the disclosure of personally identifiable information for billing purposes and before accessing a child's or parent's public benefits or insurance for the first time rests with the public agency responsible for providing a free appropriate public education (FAPE) to the child, not with the individual school. Thus, if a child who had an IEP in effect in a previous public agency transfers to a school in a new public agency in the same school year, whether or not within the same State, the new public agency would need to obtain a new parental consent under new § 300.154(d)(2)(iv)(A)–(B) before it can access the child's or parent's public benefits or insurance for the first time to pay for services under part 300. This new parental consent is to enable the new public agency to release the child's personally identifiable information for billing purposes to the public benefits or insurance program (e.g., Medicaid). Consistent with new § 300.154(d)(2)(iv)(B), the consent also must specify that the parent understands and agrees that the new public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. Likewise, in these transfer situations, the new public agency must provide the child's parents with the written notification described in final § 300.154(d)(2)(v) prior to obtaining parental consent for that agency to access the child's or parent's public benefits or insurance for the first time. Further, the new public agency must provide this written notification to the child's parents annually thereafter. However, if a child transfers to a different school but remains within the same public agency, any parental consent that the public agency has previously obtained that meets the requirements in new § 300.154(d)(2)(iv)(A)–(B) would continue to apply.

Changes: None.

Comment: One commenter recommended that electronic signatures for consent be accepted as valid due to the increasing use of virtual meetings.

Discussion: A public agency may accept digital or electronic signatures in obtaining the parental consent required under 34 CFR 99.30 and § 300.622, as described in new § 300.154(d)(2)(iv)(A), before disclosing, for billing purposes, the child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) prior to accessing the child's or parent's public benefits or insurance for the first time. Among other requirements, under 34 CFR 99.30(a), the parental consent that must be obtained before disclosure of personally identifiable information must be signed and dated. Section 99.30(d) provides that this consent may include a record and signature in electronic form that—

(1) Identifies and authenticates a particular person as the source of the electronic consent; and

(2) Indicates such person's approval of the information contained in the electronic consent, i.e., disclosure of the child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) for billing purposes to pay for services under part 300. Additionally, the electronic consent must include a statement that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300.

Changes: None.

Parental Notification

Comment: Many commenters supported the requirement in proposed § 300.154(d)(2)(iv) that prior to accessing a child's or parent's public benefits or insurance, the public agency must provide written notification to parents consistent with current § 300.503(c). Several commenters stated that this type of written notification would help to protect children's and parents' rights under IDEA and FERPA. These commenters agreed with the Department's analysis in the NPRM that the proposed written notification requirement would provide parents with important information they need to understand their rights in the special education process. They also stated that the proposed requirement would ensure that all parents of children with disabilities receive full disclosure of their rights on the use of their public benefits or insurance for services under Part B, particularly their rights under FERPA and the IDEA confidentiality requirements.

A few commenters recommended that the written notification in proposed § 300.154(d)(2)(iv) be provided at the child's initial IEP Team meeting. Another commenter expressed concern that providing the written notification at the initial IEP Team meeting would overwhelm parents. Some commenters suggested that LEAs be given discretion on when to provide the notification. One commenter asked if the proposed parental written notification may be mailed to the parents.

Several commenters expressed concern about only providing parents with a one-time written notification. They instead recommended that a written notification be provided to parents at each subsequent annual IEP Team meeting and when there is an amendment to the IEP during the course of the school year that would result in a change to the type or amount of services billed to a public benefits or insurance program. These commenters stated that requiring more frequent written notifications would provide parents with greater protections and remind parents that they can reconsider their consent in light of changed circumstances a family may experience over time (e.g., change in the child's disability, change in living situation, change in guardianship, etc.).

Discussion: The Department appreciates the commenters' strong support for the written notification provision in proposed § 300.154(d)(2)(iv) and has retained this provision in new § 300.154(d)(2)(v) with a few minor modifications. We agree with commenters generally that more frequent notifications to the child's parents in addition to the initial written notification to the child's parents would be beneficial. Therefore, we are amending new § 300.154(d)(2)(v) (proposed § 300.154(d)(2)(iv)) to require that the public agency provide written notification that meets the requirements of § 300.503(c) to the child's parents prior to accessing a child's or parent's public benefits or insurance for the first time and annually thereafter. The requirement that the notice be written in language understandable to the general public and in the native language of the parent or other mode of communication used by the parent, unless it is clearly

not feasible to do so, will provide additional protections for children and parents. This annual written notification will be especially important for parents in families that experience a change in circumstances over time and for children whose parent, as defined in § 300.30, changes often (e.g., children in the foster care system), children whose guardianship changes, or children who live with an individual acting in place of the biological or adoptive parent. Providing an annual written notification to parents also will serve to remind them of important safeguards previously explained. Further, as discussed earlier, we are specifying in final § 300.154(d)(2)(iv) that this written notification must be provided to the child's parents before the public agency obtains their consent to access their or their child's public benefits or insurance for the first time.

In those instances where a child has been determined eligible for Medicaid prior to the IEP Team meeting, the public agency could provide the child's parents with the written notification described in final § 300.154(d)(2)(v) at the IEP Team meeting or at some other meeting, so long as the child's parents receive the written notification before the public agency obtains the requisite parental consent under final § 300.154(d)(2)(iv) to access the parent or child's public benefits or insurance for the first time.

We do not agree with those commenters who recommended requiring the written notification described in proposed § 300.154(d)(2)(iv) be provided at the child's initial IEP Team meeting or at subsequent IEP Team meetings. We appreciate the importance of parent participation in the IEP process, and we recognize that an IEP Team meeting could provide a public agency with a meaningful opportunity to explain to the parents the components of the written notification and respond to any questions the parents may have.

As a practical matter, however, eligibility for Medicaid may not necessarily coincide with annual IEP Team meetings. Therefore, requiring written notification at an IEP Team meeting could mean that a public agency would have to convene an additional IEP Team meeting for those children found to be eligible for Medicaid only after the annual IEP Team meeting.

We also do not agree with the commenters who suggested that written notification be provided each time the public agency amends a child's IEP in a manner that would result in a change to the type or amount of services billed to the public benefits or insurance program. We believe that providing parents the annual written notification in accordance with final § 300.154(d)(2)(v) is sufficient protection in these situations. Of course, nothing in these regulations would prevent public agencies from providing parents the written notification described in final § 300.154(d)(2)(v) more frequently than annually, if they deem it appropriate to do so. Further, nothing in these regulations would prevent public agencies from providing the notification described in final § 300.154(d)(2)(v) to all parents of children with disabilities, regardless of whether the public agency is seeking to access the child's or parent's public benefits or insurance.

There are a number of ways in which the public agency may provide the written notification to parents. The annual written notification may be mailed to the parents, provided at an IEP Team meeting if it occurs prior to the first time a public agency accesses a child's or parent's public benefits or insurance, or provided through other means determined by the public agency, so long as all of the written notification requirements in these final regulations are met, including the requirement in § 300.154(d)(2)(v) that the public agency provide written notification before obtaining parental consent under new § 300.154(d)(2)(iv).

We decline to specify in the regulations when subsequent annual written notifications must be provided to parents because we believe that once the public agency provides the child's parents the written notification described in final § 300.154(d)(2)(v) prior to accessing the child's or parent's public benefits or insurance for the first time, public agencies need to have the flexibility to determine the timing of subsequent annual written notifications.

Finally, for those children with IEPs for whom services have previously been billed to Medicaid, when the final regulations become effective, the written notification requirement in final § 300.154(d)(2)(v) applies. The written notification, therefore, must be provided before the public agency may access the child's or parent's public benefits or insurance after these final regulations become effective and annually thereafter. As noted previously, no new parental consent would need to be obtained if there is no change in the type, amount, or cost of services to be billed to public benefits or insurance (e.g., Medicaid).

However, in the future, if the type, amount, or cost of services billed to the public benefits or insurance program changes, the public agency must provide to the parent the written notification described in new § 300.154(d)(2)(v) (proposed § 300.154(d)(2)(iv)) before obtaining one-time parental consent in accordance with new § 300.154(d)(2)(iv)(B) specifying that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300 in the future.

Changes: We have revised final § 300.154(d)(2)(v) to specify that the written notification must be provided to the child's parents prior to accessing a child's or parent's public benefits or insurance for the first time and annually thereafter. To conform to the changes in new § 300.154(d)(2)(iv), we have added a reference in new § 300.154(d)(2)(v)(A) to the new regulatory provision regarding parental consent in § 300.154(d)(2)(iv).

We have also revised new § 300.154(d)(2)(v)(C) (proposed § 300.154(d)(2)(iv)(C)) to clarify that parents may withdraw their consent under part 99 *and* part 300 to the disclosure of their child's personally identifiable information to the agency responsible for the administration of the public benefits or insurance program (e.g., Medicaid). The reference to part 300 was inadvertently left out of proposed § 300.154(d)(2)(iv)(C). We also have renumbered paragraphs (B) and (D) of the proposed regulations with no other changes.

Comment: One commenter recommended that the written notification provided to parents clearly and prominently provide information to parents about the process of withdrawing consent for disclosure of personally identifiable information necessary to access public insurance.

Discussion: Proposed § 300.154(d)(2)(v)(C) provided that the written notification to the child's parents had to include a statement that parents have the right under 34 CFR part 99 to withdraw their consent to the disclosure of their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) at any time. This provision has been retained in final § 300.154(d)(2)(v)(C), but as noted in the response to comments about the timing of the written notification, this section has been revised to also include a reference to withdrawal of consent under part 300. The parents must be informed of this right in the written notification that the public agency must provide them prior to accessing their or their child's public benefits or insurance

for the first time and annually thereafter.

FERPA and IDEA do not include specific provisions regarding the process for withdrawal of consent for the disclosure of a child's personally identifiable information; therefore, we are deferring to LEAs on procedures for withdrawal of this parental consent. However, once the parent withdraws consent under 34 CFR part 99 and part 300 to the disclosure of the child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid), the public agency responsible for providing FAPE to the child with a disability may no longer bill the public benefits or insurance program (e.g., Medicaid) to pay for services under part 300. The public agency must nevertheless continue to provide the child with all services required under part 300 at no cost to the parents.

Changes: None.

Comment: A few commenters asked whether the proposed written notification takes the place of written parental consent for a child to participate in Medicaid-funded related services at school, particularly in a State where the public agency provides the child's IEP to the public benefits program so that the public benefits or insurance program may determine whether the related services are medically necessary and covered under the public benefits or insurance program.

Discussion: The final regulations are clear that the written notification requirement in final § 300.154(d)(2)(v) is separate and distinct from, and does not replace, the parental consent requirements in FERPA and IDEA that are now described in new § 300.154(d)(2)(iv)(A). Further, under new § 300.154(d)(2)(iv)(B), this parental consent must specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. The written notification requirements in final § 300.154(d)(2)(v) (proposed § 300.154(d)(2)(iv)) continue to underscore the significance of those requirements and now require that this written notification include an explanation of the parental consent requirements contained in new § 300.154(d)(2)(iv)(A)–(B).

These requirements continue to apply even in States where the public agency provides the IEP to the public benefits program to verify that the related services in the IEP are medically necessary and covered under the public benefits or insurance program. The consent required in this context must be obtained before the public agency accesses the child's or parent's public benefits or insurance for the first time to bill for services required under part 300 and after the public agency provides the written notification described in new § 300.154(d)(2)(v). Further, this consent must specify that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under part 300.

We remind public agencies that they may not reduce or delay providing the services in a child's IEP solely because the State's public benefits or insurance program determined that the services required in the child's IEP are not medically necessary or not covered under the public benefits or insurance program. If the services are not medically necessary under Medicaid, a public agency would not receive reimbursement for them. But the public agency is not relieved of its responsibility under Part B to ensure that all required services in the IEP are provided at no cost to the parents, even if that means using Part B funds or sources of support other than the child's or parent's public benefits or insurance in order to ensure that the child receives all required services at no cost to the parents.

Changes: None.

Comment: A few commenters requested model language for the written notification requirement.

Discussion: Following the publication of these final regulations, the Department intends to issue model language for the written notification requirement described in final § 300.154(d)(2)(v).

Changes: None.

Other Matters

Comment: A few commenters stated that public agencies should not be permitted to bill Medicaid for educational services because this would deplete medical benefits that should be directed to families. Other commenters, concerned about the potential for Medicaid fraud, recommended that parents who consent to the use of Medicaid funds to pay for their child's school-based health services should be provided a quarterly statement of those services. Another commenter asked whether Medicaid may be billed for services the child does not receive.

Discussion: These final regulations continue to permit public agencies to use Medicaid or other public benefits or insurance to provide or pay for services required under part 300, provided that those agencies comply with the consent requirements in 34 CFR 99.30 and § 300.622, now described in final § 300.154(d)(2)(iv)(A), including the requirement that parents provide their consent prior to the release of their child's personally identifiable information to the public benefits or insurance program for billing purposes before the public agency may access the parent's or child's public benefits or insurance for the first time. This consent must also specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. Public benefits and insurance are important sources of financial support for services required under Part B. Section 612(a)(12) of the Act requires the State to identify or have a method of defining the financial responsibility of non-educational public agencies for services required to provide FAPE to children with disabilities and that the financial responsibility of those non-educational public agencies, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of LEAs or the State agency responsible for developing the child's IEP. The statute, therefore, contemplates that public agencies responsible for providing education to children with disabilities under State law, in appropriate circumstances, access funds from public benefits and insurance programs (e.g., Medicaid) as a means of paying for services required under Part B.

We do not believe it is necessary to require public agencies to provide quarterly statements of the dates and times children with disabilities are provided school-based health services. However, under § 300.613 each participating agency must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency to implement Part B of the Act. A parent, therefore, may request to review any education records relating to their child that have been sent to the State public benefits or insurance program.

If parents believe public agencies are billing Medicaid for services that their child does not receive, they should file a complaint with the State agency responsible for the administration of the State's Medicaid program. The Department has no jurisdiction over complaints alleging Medicaid fraud. However, if a parent believes that a public agency has not provided his or

her child all required services at no cost to the parents, this could constitute a denial of FAPE under the Act and these regulations, and the parent could use IDEA's dispute resolution mechanisms to seek redress. These mechanisms include mediation under § 300.506, the due process complaint procedures in §§ 300.507 through 300.516, or the State complaint procedures in §§ 300.151 through 300.153. Note also that under the State complaint procedures in §§ 300.151 through 300.153, any organization or individual other than the child's parent, including one from another State, may file a signed, written complaint alleging that a public agency has violated a requirement of Part B of the Act or the Part B regulations.

Changes: None.

Comment: A few commenters recommended that LEAs be included in the consent language on the Medicaid application form used in most States. The commenters stated that like hospitals and clinics, schools are providers of Medicaid services and do not need a separate consent form. One commenter requested that the written notice include a warning to parents that once in receipt of public benefits or insurance, the subsequent refusal to share such information with the Medicaid program is a violation of the terms of eligibility and is in many States considered a crime.

Discussion: The Department does not administer Medicaid or other State public benefits or insurance programs and, therefore, cannot dictate what States choose to include on applications or how State programs choose to address parties that do not share required information with them. Under new § 300.154(d)(2)(iv), if parents refuse to consent to release personally identifiable information to a public benefits or insurance program for billing purposes under 34 CFR 99.30 and § 300.622, the public agency may not access the child's or parents public benefits or insurance to pay for those services, and the child with a disability must continue to receive all special education and related services necessary for the provision of FAPE at no cost to the parents.

Changes: None.

Comment: A few commenters asked the Department to clarify whether the proposed regulations apply to the use of private insurance to pay for services to children with disabilities. One commenter expressed concern that under the proposed regulations, a family's right to privacy is linked to its economic status. Other commenters expressed concern that the regulations establish a dual standard for consent based on whether the child or parent is enrolled in a private insurance program or a public benefits or insurance program.

Discussion: Final § 300.154(d)(2)(iv)–(v) applies only to public benefits and insurance programs and does not apply to private insurance programs. The requirements for children with disabilities covered by private insurance are found in § 300.154(e). For services required to provide FAPE to an eligible child under Part B of the Act, a public agency may access the parents' private insurance proceeds only if the parents provide consent consistent with § 300.9. Each time the public agency proposes to access the parents' private insurance, the agency must obtain parental consent and inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

We disagree with the comments that the proposed regulations set a dual standard based on economic status and enrollment in private versus public insurance. The Act places no financial obligations on private insurers; however, section 612(a)(12) of the Act places financial obligations on non-educational public agencies by requiring States to identify or have a method of defining the financial responsibility of non-educational public agencies, including the State Medicaid agency and other public insurers of children with disabilities, for services provided by the LEA that are necessary to provide FAPE to children with disabilities. No similar statutory provision exists regarding the use of private insurance. In addition, section 612(a)(12) of the Act requires that the financial responsibility of those non-educational public agencies, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of an LEA or the State agency responsible for developing the child's IEP. This statutory provision also requires non-educational public agencies, such as a State Medicaid agency, to fulfill their obligations or responsibilities under State or Federal law to pay for services provided by LEAs required under Part B, if permitted under the public benefits or insurance program. To the extent that the final regulations treat people who have public and private insurance differently, the regulations merely reflect the operation of the Act.

These final regulations are consistent with the Act and strengthen the privacy and confidentiality protections afforded to parents and children enrolled in public benefits or insurance programs who are eligible to receive special education and related services under Part B of the Act. For example, new § 300.154(d)(2)(iv)(A) requires a public agency to obtain the parental consent required in § 300.622 and 34 CFR 99.30 before the agency accesses a child's or parent's public benefits or insurance for the first time. Additionally, final § 300.154(d)(2)(iv)(B) provides that this consent must specify that the parent understands and agrees that the public agency may access a child's or parent's public benefits or insurance to pay for services under part 300. Further, in accordance with final § 300.154(d)(2)(v), the public agency must provide the child's parents with written notification consistent with § 300.503(c) prior to obtaining parental consent to access a child's or parent's public benefits or insurance for the first time. A public agency must also provide this written notification annually thereafter. This written notification must inform the child's parents in language understandable to the general public and in the parent's native language or other mode of communication used by the parent, unless it is clearly not feasible to do so, of the following:

(a) A statement of the parental consent provisions in § 300.154(d)(2)(iv)(A)–(B).

(b) A statement of the ''no cost'' provisions under § 300.154(d)(2)(i)–(iii).

(c) A statement that parents have the right under 34 CFR part 99 and part 300 to withdraw their consent to disclosure of their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) at any time.

(d) A statement that withdrawal of consent or refusal to provide consent under 34 CFR part 99 and part 300 to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

We believe these parental consent and written notification requirements will strengthen the protections afforded to parents and children enrolled in public benefits or insurance programs by specifically including the parent's right to withdraw their consent under 34 CFR part 99 and part 300 at any time.

If a parent chooses to withdraw this consent, the public agency responsible for providing FAPE to the child with a disability may no longer bill the public benefits or insurance program (e.g.,

Medicaid) to pay for services required under part 300 and must ensure that the child receives all required services necessary to receive FAPE at no cost to the parents.

Changes: None.

Comment: One commenter stated that the proposed regulations would diminish the protections of FERPA and violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The commenter also asserted that the proposed regulations would violate the Equal Protection Clause because individuals without disabilities are not spending down their Medicaid resources and that the notice provision would violate due process.

Discussion: HIPAA is administered by the U.S. Department of Health and Human Services and not by the Department of Education. HIPAA excludes from its definition of ''protected health information'' individually identifiable health information contained in education records covered by FERPA and records described under FERPA's medical treatment records provision (34 CFR 99.3, defining ''education records''). See 45 CFR 160.103. Thus, the term ''protected health information'' in the HIPAA Privacy regulations does not cover records protected by FERPA. The reason for this exception is that Congress, through FERPA, specifically addressed how education records and student treatment records should be protected.

FERPA provides ample protections for these records, which include requiring public agencies to obtain prior consent from parents before a child's personally identifiable information is disclosed to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) for billing purposes. There is no exception under FERPA or under these final regulations that would permit the nonconsensual disclosure of personally identifiable information in education records to a public benefits or insurance program (e.g., Medicaid) for billing purposes. Likewise, the IDEA's confidentiality of information provisions in section 617(c) of the Act and § 300.622 also require parental consent before personally identifiable information can be disclosed to a State's public benefits or insurance program for billing purposes (e.g., Medicaid). Therefore, nothing in these final regulations violates or is in any way inconsistent with either HIPAA or FERPA. In fact, the final regulations support FERPA in that they require written notification to inform parents of certain protections under FERPA.

Further, neither the proposed nor final regulations violate the U.S. Constitution's Equal Protection Clause. On the contrary, they help to ensure that children, regardless of disability status, have equal access to education. The regulations facilitate access to FAPE by removing the requirement in current regulations for a public agency to obtain consent from the parent each time access to public benefits or insurance is sought, while continuing to require that the parental consent required by FERPA and section 617(c) of the IDEA prior to disclosure of personally identifiable information for billing purposes to a State's public benefits or insurance program, now described in final § 300.154(d)(2)(iv)(A), be obtained before a public agency can access a child's or parent's public benefits or insurance for the first time.

These final regulations also require that, in accordance with new § 300.154(d)(2)(iv)(B), the consent must specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. Additionally, an important new protection is provided to parents through the written notification provision in new § 300.154(d)(2)(v), which must be provided to the child's parents prior to accessing the child's or parent's public benefits or insurance for the first time and annually thereafter.

As in the past, these final regulations will continue to require, as specified in § 300.154(d)(2)(i) through (d)(2)(iii), that the children of parents who consent to share their children's personally identifiable information with a State's public benefits or insurance program (e.g., Medicaid) for billing purposes continue to receive all required services under this part at no cost.

Finally, we do not agree with the commenter's assertion that the notice would deny due process. Rather, the written notification required in new § 300.154(d)(2)(v) would enhance due process protections for parents by providing them crucial information about when public agencies seek to access their or their child's public benefits or insurance.

Changes: None.

Comment: One commenter requested clarification on the example provided in the NPRM discussing ''Tommy'' and asked whether a related services provider is required to attend the IEP Team meeting when the team discusses the related service.

Discussion: The IDEA does not expressly require that related services personnel attend IEP Team meetings. However, if a child with a disability has an identified need for a related service, it would be appropriate for the related services provider to attend the meeting. Additionally, if the public agency designates the related services provider as a required IEP Team member, the public agency must ensure that the individual attends the child's IEP Team meeting, unless the excusal provisions in § 300.321(e) are met.

Changes: None.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This regulatory action is a significant regulatory action subject to review by OMB under section 3(f)(4) of Executive Order 12866 because this action is economically significant.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Potential Costs and Benefits

The following is an analysis of the costs and benefits of the significant changes reflected in these final regulations. In conducting this analysis, the Department examined the extent the changes made by these regulations add to or reduce the costs to States, LEAs, and others, as compared to the costs of implementing the current Part B program regulations. Based on the following analysis, the Secretary has concluded that the changes reflected in the final regulations will not impose significant costs on States, LEAs, and others.

Costs and Benefits

Current Section 300.154(d)

Under current regulations, public agencies are required to obtain parental consent, consistent with § 300.9, each time access to a child's or parents' public benefits or insurance is sought to pay for services identified in the child's IEP. This has meant that written parental consent to access public benefits or insurance must be obtained for a specified type of service (e.g., physical therapy, speech therapy), and amount of services (frequency or duration). If the type, amount, or cost of service changes, the public agency must obtain new parental consent covering the change in services to be charged to the child's or parents' public benefits or insurance.

New § 300.154(d)(2)(iv) and (v)

The final regulations eliminate the requirement to obtain consent every time that the type or amount of service changes, or the amount charged for services changes. Instead, the final regulations require public agencies to obtain an initial, one-time consent from parents before the agency seeks to access a child's or parent's public benefits or insurance (e.g., Medicaid). This consent must meet the parental consent requirements under 34 CFR part 99 and § 300.622 and must specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services provided under part 300. This written consent is consistent with the consent currently required under § 300.9(b), which specifies that the parent understands and agrees to the carrying out of the activity for which his or her consent is sought and the records to be released and to whom. However, consent under current § 300.154(d)(2)(iv)(A) would no longer be valid if the public agency seeks to access public benefits or insurance for a different type or amount of services for a specified period of time.

The final regulations also require public agencies to specifically inform parents of their rights and protections under the Act by providing written notification prior to obtaining consent to access public benefits or insurance for the first time. This written notification also must be provided to the child's parents annually thereafter. Thus, a public agency would be able to access a child's or parent's public benefits or insurance program to provide or pay for services required under Part B of the Act without obtaining parental consent each time it seeks access, provided that (1) the agency has complied with the parental consent requirements under FERPA and part 300, as described in final § 300.154(d)(2)(iv)(A), before personally identifiable information is released to a State's Medicaid agency or other public insurance program for billing purposes and (2) before seeking to access a child's or parent's public benefits or insurance program for the first time to provide or pay for services required under Part B.

This written notification also must be provided annually thereafter. These changes allow public agencies to save the costs associated with obtaining written consent from parents each time access to their or their child's public benefits or insurance is sought. We estimate that the changes to final § 300.154(d)(2)(iv) will result in net cost savings and provide an economic benefit to LEAs in many States.

Savings From Reduction in Current Requirements

Although we do not have data on the number of children who participate in both IDEA Part B and public benefits or insurance programs, a Congressional Research Service (CRS) report indicates that at least 25 percent of children receiving services under Part B of IDEA are eligible for Medicaid services (including children who are eligible for but not enrolled in Medicaid).[1] For this analysis, we assume that 20–30 percent of the 6,558,000 students served under the Part B program are also enrolled in public benefits or insurance programs for a total of 1,311,600 to 1,967,400 children. While some LEAs do not currently use public benefits or insurance to pay for services that are eligible for reimbursement, we do not know the number of eligible students who are enrolled in these LEAs. Accordingly, this analysis assumes that all LEAs seek to use public benefits or insurance for all students who are served under Part B and are eligible for public benefits or insurance. As a result, our analysis likely overestimates the number of students for which LEAs currently need parental consent to access public benefits or insurance.

Costs of Current Requirements

Under the current regulations, we assume that LEAs need to obtain consent 1.2 times per year for each eligible student for a total of 1,573,920 to 2,360,880 consent requests per year. If we assume that the consent forms are no more than 4 pages long and that it takes approximately 5–10 minutes to draft and print these forms for each consent request (forms must be tailored to the specific services and duration of services as specified in the child's IEP), we estimate that the cost of complying with the current regulations is

[1] U.S. Congressional Research Service. Individuals with Disabilities Education Act (IDEA) and Medicaid (RL31722; Jan. 31, 2003), by Richard Apling and Elicia Herz.

$4,363,693 to $12,618,904 annually based on the national average hourly compensation of $30.87. This estimate is based on the median hourly wage for an insurance claims and policy processing clerk of $20.19, as reported in the National Compensation Survey, December 2009-January 2011 (*www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), and the average cost to employers for benefits to State and local government employees of 34.6 percent of total hourly compensation (Table A, *www.bls.gov/news.release/ecec.nr0.htm*).

In most cases (50–75 percent), we assume that although not required in the regulations, public agencies seek to obtain parental consent during a child's IEP Team meeting (either at the annual meeting or following a change in the IEP). We assume that IEP Team meetings typically include four participants (the child's special education teacher or, where appropriate, related services provider; the child's regular education teacher; a public agency representative; and one parent). Assuming it takes an average of three minutes to obtain a response regarding parental consent, the additional estimated cost under the current regulations of obtaining a response during an IEP Team meeting would be $7,754,310 to $17,447,198 annually, based on the average hourly compensation of the participating teachers and school or public agency representative of between $59.82 and $69.95 and the opportunity cost to the parent, which was calculated using the Federal minimum wage. The median wages of participants, excluding the parent, were obtained from the National Compensation Survey, December 2009-January 2011 (*www.bls.gov/ncs/ocs/sp/nctb1479.pdf*) and 34.6 percent of total hourly compensation was used as the average cost to employers for benefits to State and local government employees (Table A, *www.bls.gov/news.release/ecec.nr0.htm*)

In the 25 to 50 percent of cases where a response is not obtained during an IEP Team meeting (or the agency and parents agree to make a change in the IEP without convening an IEP Team meeting as permitted under the Act and regulations), we assume that public agencies mail forms directly to parents to be completed and returned and incur additional administrative, postage, and material costs. Of the parents who receive consent forms sent via mail, we estimate that only 30–50 percent of those recipients will respond to any particular letter request, with a maximum of 3 letters sent to any particular parent for a total of 688,590 to 2,585,164 letters sent. We estimate that the cost of mailing consent forms includes $0.45 for postage, $0.10 for an envelope, and $0.20 to duplicate or print each 4-page form. Each consent form returned by parents requires return postage of $0.45 and $0.10 for an envelope. We estimate these combined postage and materials costs are $627,109 to $2,129,337.[2] If, based on the national average hourly compensation for a secretary or administrative assistant of $27.14, it takes approximately 10–15 minutes of administrative time for each letter sent to track the addresses of parents who have not provided a response, mail forms to parents, and process responses, and if, based on the Federal minimum wage, it takes an additional 5 minutes for the opportunity cost to parents to respond to a consent request, we estimate that the additional cost of time spent by public agencies and parents is $3,322,734 to $18,008,896. The estimated cost of administrative time was based on the median hourly wage of a secretary or administrative assistant of $17.75, as reported in the, National Compensation Survey, December 2009-January 2011 (*www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), and 34.6 percent of total hourly compensation was used as the average cost to employers for benefits to State and local government employees (Table A, *www.bls.gov/news.release/ecec.nr0.htm*). Based on these estimates, eliminating the parental consent requirement in current § 300.154(d)(2)(iv)(A) will result in gross savings of $16,067,846 to $50,204,335 annually.

Costs of Additional Requirements

The final regulations in § 300.154(d)(2)(iv) permit public agencies to access a child's or parent's public benefits or insurance if the public agency obtains written, parental consent and provides written notification to the child's parents prior to accessing the child's or parents' public benefits or insurance for the first time and provides written notification to parents annually thereafter to inform them of their rights and protections under the Act. The written consent must (a) meet the requirements of 34 CFR 99.30 and § 300.622; and (b) specify that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under part 300.

We believe that initially there would be no additional cost to comply with the revised consent requirements in the final regulations for students already enrolled in Medicaid and for whom parents have already provided consent under 34 CFR 99.30 and § 300.622 and that consent meets the requirements of current § 300.154(d)(2)(iv)(A). However, at the time this consent is no longer valid because of a change in the type amount or cost of services, the public agency must obtain parental consent to seek further access to the child's or parent's public benefits or insurance to provide or pay for services under part 300. This consent must specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. We estimate that the costs of obtaining written consent will be the same costs incurred under current IDEA requirements for obtaining consent each time the public agency seeks to access a public benefits or public insurance program.

Of the 1,311,600 to 1,967,400 children we estimate to be enrolled in Medicaid, we do not know how many in any one year are children for whom the public agency is seeking to access a public benefits or insurance program for the first time. However, we estimate for purposes of these final regulations that there are roughly 100,237 to 150,355 such children,[3] leaving a total of 1,211,363 to 1,817,045 children for whom the agency would be required to obtain a one-time consent when there is a change in services. We estimate that the cost of obtaining this one-time consent under the final regulations would be $12,366,571 to $38,639,632. This assumes that LEAs would incur costs in obtaining the required consent in IEP Team meetings and in mailing the consent forms to parents from whom they were not able to obtain consent in such meetings.

For the remaining children for whom the public agency is seeking to access public benefits or insurance for the first time, there would be a minimal cost associated with obtaining the consent required under new § 300.154(d)(2)(iv)(B) because LEAs could meet this requirement by presenting parents with a modified FERPA and IDEA consent form (which they should already have in place for the release of the child's personally

[2] Amounts shown are the additional postage and material costs of sending forms via mail; the cost of the first form copy is not included.

[3] Our estimate of the number of children for whom the agency would be seeking to access public benefits or insurance for the first time is based on an estimate of the number of newly identified children under IDEA using IDEA child count data for the period 2004–2010.

identifiable information to the public benefits or insurance program for billing purposes), or by presenting parents with a separate consent form that meets the requirements in new § 300.154(d)(2)(iv)(B) at the same time the agency is seeking the consent required under 34 CFR part 99 and § 300.622.

Although the specific format and content may vary by State, we estimate that it will take no more than 10 hours per State to draft a consent form that complies with these requirements. Although the parental consent requirement generally rests with LEAs, we assume States will choose to create a standard consent form in order to increase efficiency and address any applicable State laws. We estimate that the cost per State of drafting this document will be no more than $590, for a national cost of approximately $35,000 based on the national average hourly compensation for lawyers employed by State or local governments of $38.46, as reported in the National Compensation Survey, December 2009-January 2011 (*http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), and the average cost to employers for benefits to State and local government employees of 34.6 percent of total hourly compensation (Table A, *www.bls.gov/news.release/ecec.nr0.htm*).

We further estimate that it would take approximately 30 minutes for an administrative assistant in each of the 16,330 LEAs to obtain and modify the State's model form for use in that LEA. The total cost of preparing new FERPA and IDEA consent forms would therefore be $222,000, based on the national average hourly compensation of $27.14. The estimated cost of compensation was based on the median hourly wage of a secretary or administrative assistant of $17.75, as reported in the National Compensation Survey, December 2009–January 2011 (*www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), and the average cost to employers for benefits to State and local government employees of 34.6 percent of total hourly compensation (Table A, *www.bls.gov/news.release/ecec.nr0.htm*). The number of LEAs is taken from the National Center for Education Statistics Schools and Staffing Survey, ''Public School District Data File,'' 2007–08.

The total cost of drafting FERPA and IDEA consent forms, including drafting the State model form and customizing it for use in each LEA, will be at most a one-time cost of an estimated $257,000.

Final § 300.154(d)(2)(v) specifies that written notifications to the child's parents consistent with § 300.503(c) include (a) A statement of the parental consent provisions in § 300.154(d)(2)(iv)(A)–(B); (b) a statement of the ''no cost'' provisions in § 300.154(d)(2)(i)–(d)(2)(iii); (c) a statement that the parents have the right under 34 CFR part 99 and part 300 to withdraw at any time their consent to disclosure of their child's personally identifiable information; and (d) a statement that the withdrawal of consent or refusal to provide consent under 34 CFR part 99 and part 300 to disclose personally identifiable information does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

We do not expect the requirement for written notification to result in significant costs. While the written notification must be provided to the child's parents before the public agency may access the child's or parent's public benefits or insurance for the first time to pay for services under Part 300 and annually thereafter, the timing of the written notification is otherwise left to the discretion of public agencies. In many instances, public agencies will have an opportunity to provide this written notification, either by mail or in person, in conjunction with other required documentation or activities and will incur only the additional cost of photocopying the written notification.

Although the specific format and content may vary by State, we estimate that it will take no more than 10 hours per State to draft a written document that complies with these requirements and that the document will not exceed 4 pages in length. Although the written notification requirement generally rests with LEAs, we assume States will choose to create a standard notification in order to increase efficiency and address any applicable State laws. We estimate that the cost per State of drafting this document will be no more than $590, for a national cost of approximately $35,000 based on the national average hourly compensation for lawyers employed by State or local governments of $38.46, as reported in the National Compensation Survey, December 2009–January 2011 (*http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), and the average cost to employers for benefits to State and local government employees of 34.6 percent of total hourly compensation (Table A, *www.bls.gov/news.release/ecec.nr0.htm*).

Assuming all 16,330 LEAs need to prepare written notifications and that it would take approximately 30 minutes for an administrative assistant to obtain and modify the State's standard notification for use in that LEA, the total cost of preparing written notifications will be $222,000, based on the national average hourly compensation of $27.14. The estimated cost of compensation was based on the median hourly wage of a secretary or administrative assistant of $17.75, as reported in the, National Compensation Survey, December 2009–January 2011 (*www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), and the average cost to employers for benefits to State and local government employees of 34.6 percent of total hourly compensation (Table A, *www.bls.gov/news.release/ecec.nr0.htm*). The number of LEAs is taken from the National Center for Education Statistics Schools and Staffing Survey, ''Public School District Data File,'' 2007–08. If the written notification is assumed to be no more than 4 pages long, then the cost of photocopying this document for the estimated 1,311,600 to 1,967,400 children who participate in both Part B and a public benefits or insurance program will be approximately $263,000 to $394,000 annually.

In some instances, public agencies will be unable to provide the written notification in conjunction with other mailings or in person and will need to provide that written notification by mail separately. We assume that sending written notifications by mail separately will be necessary for one-half of the eligible children and that the cost of each written notification would be $0.55.[4] The resulting additional cost of mailing these notifications will be an estimated $361,000 to $541,000. The total cost of the written annual notification requirement, including drafting the State model notification, customizing it for use in each LEA, and either copying it for distribution at the IEP Team meeting or mailing it to parents, will be an estimated $881,000 to $1,192,000 in the first year and $624,000 to $935,000 annually thereafter.

After accounting for additional parental consent and written notification costs resulting from the final regulations, the net savings will be $2,563,275 to $10,115,702 in the first year and $15,443,846 to $49,269,335 annually thereafter, assuming the costs associated with obtaining parental consent for children for whom the agency is already accessing public benefits or insurance occur in year one.

[4] The additional cost of mailing a notification includes $0.45 in postage, and $0.10 for an envelope.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control numbers assigned to the collection of information in these final regulations at the end of the affected section of the regulations.

These final regulations include one information collection requirement associated with the following provisions: § 300.154(d)(2)(iv)–(v).

A description of these provisions is given below with an estimate of the annual recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

Collection of Information: State and Local Educational Agency Record Keeping, Notification, and Reporting Requirements under Part B of the Individuals with Disabilities Education Act (Information Collection 1820–0600). The affected section of the regulations for this information collection is final § 300.154(d)(2)(iv)–(v). The Act requires SEAs and LEAs to gather, maintain, report, and disclose various information and data, but the Act does not require this information and data to be submitted to the Department.

The final regulations in § 300.154(d)(2)(iv)–(v) permit public agencies to access a child's or parent's public benefits or insurance if the public agency provides written notification to the child's parents of their protections under the Act, obtains written consent prior to accessing the child's or parents' public benefits or insurance for the first time, and provides annual written notification to parents thereafter.

Each LEA must obtain written parental consent after providing the written notification to parents. Assuming that each SEA will develop a model consent form that its LEAs can use, and that it will take an average of about 10 hours to draft the consent form for each of the 60 grantees funded under Part B of IDEA, we estimate a total burden of 600 hours for SEAs to develop a model consent form.

We further estimate that as an uppermost bound it will take an additional 8,165 hours for LEA staff to obtain and modify an existing model consent form, based on not more than 30 minutes for each of the 16,330 LEAs. However, we would expect that most LEAs will simply use the model consent form provided by their SEA. Therefore, we estimate the burden for the first year of implementation of this consent requirement to be not more than 8,765 hours.

Additionally, each LEA must provide a written notification to parents prior to accessing a child's or parents' public benefits or insurance for the first time and annually thereafter. Assuming that each SEA will develop a model written notification that its LEAs can use and assuming that it will take an average of about 10 hours to draft the written document for each of the 60 grantees funded under Part B of IDEA, we estimate a total burden of 600 hours for SEAs to develop a model notification.

We further estimate that as an uppermost bound it will take an additional 8,165 hours for LEA staff to obtain and modify an existing model notification, based on not more than 30 minutes for each of the 16,330 LEAs. However, we would expect that most LEAs will simply use the model notification provided by their SEA. Therefore, we estimate the burden for the first year of implementation of this notification requirement to be not more than 8,765 hours.

With the addition of the burden to SEAs and LEAs associated with final § 300.154(d)(2)(iv)–(v), the total annual record keeping and notification burden for this collection of information is estimated to be approximately 490,181 hours for the 104,349 separate responses from SEAs and LEAs.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

You may also view this document in text [or PDF] at the following site: *idea.ed.gov.*

(Catalog of Federal Domestic Assistance Number 84.181)

List of Subjects in 34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

Dated: February 8, 2013.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends 34 CFR chapter III as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

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

Authority: 20 U.S.C. 1221e–3, 1406, 1411–1419, unless otherwise noted.

■ 2. Section 300.154 is amended by:

■ a. Revising paragraph (d)(2)(iv).

■ b. Adding new paragraph (d)(2)(v).

The revision and addition read as follows:

§ 300.154 Methods of ensuring services.

* * * * *

(d) * * *

(2) * * *

(iv) Prior to accessing a child's or parent's public benefits or insurance for the first time, and after providing notification to the child's parents consistent with paragraph (d)(2)(v) of this section, must obtain written, parental consent that—

(A) Meets the requirements of § 99.30 of this title and § 300.622, which consent must specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular child), the purpose of the disclosure (e.g., billing for services under part 300), and the agency to which the disclosure may be made (e.g., the State's public benefits or insurance program (e.g., Medicaid)); and

(B) Specifies that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under part 300.

(v) Prior to accessing a child's or parent's public benefits or insurance for the first time, and annually thereafter, must provide written notification, consistent with § 300.503(c), to the child's parents, that includes—

(A) A statement of the parental consent provisions in paragraphs (d)(2)(iv)(A) and (B) of this section;

(B) A statement of the ''no cost'' provisions in paragraphs (d)(2)(i) through (iii) of this section;

(C) A statement that the parents have the right under 34 CFR part 99 and part 300 to withdraw their consent to disclosure of their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) at any time; and

(D) A statement that the withdrawal of consent or refusal to provide consent under 34 CFR part 99 and part 300 to disclose personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

* * * * *

[FR Doc. 2013–03443 Filed 2–13–13; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 26

[EPA–HQ–OPP–2010–0785; FRL–9353–4]

RIN 2070–AJ76

Protections for Subjects in Human Research Involving Pesticides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing narrowly tailored amendments to the portions of its rules for the protection of human subjects of research applying to third parties who conduct or support research with pesticides involving intentional exposure of human subjects and to persons who submit the results of human research with pesticides to EPA. The amendments broaden the applicability of the rules to cover human testing with pesticides submitted to EPA under any regulatory statute it administers. The amendments also disallow participation in third-party pesticide studies by subjects who cannot consent for themselves. Finally, the amendments identify specific considerations to be addressed in EPA science and ethics reviews of proposed and completed human research with pesticides, drawn from the recommendations of the National Academy of Sciences (NAS). The amendments make no changes to the current Federal Policy for the Protection of Human Subjects (the ''Common Rule''), which governs research with human subjects conducted or supported by EPA and many other Federal departments and agencies.

DATES: This rule is effective April 15, 2013.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2010–0785, is available at *http://www.regulations.gov* or at the OPP Docket in the Environmental Protection Agency Docket Center (EPA/DC), located in the EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets*.

FOR FURTHER INFORMATION CONTACT: Kelly Sherman, Immediate Office of the Director (7501P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–8401; fax number: (703) 308–4776; email address: *sherman.kelly@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you conduct or sponsor research that may be submitted to EPA and which involves intentional exposure of human subjects. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document might apply to them. Although EPA has in the past received such third-party research from pesticide registrants, other entities could submit such information to EPA.

- Pesticide and other Agricultural Chemical Manufacturing (NAICS code 325320) who sponsor or conduct human research with pesticides.
- Other entities (NAICS code 541710) that sponsor or conduct human research with pesticides, and Institutional Review Boards (IRBs) who review human research with pesticides to ensure it meets applicable standards of ethical conduct. Under these new provisions, EPA must consider the ethical aspects and scientific validity and reliability of research in a manner that is consistent with the requirements of the Common Rule as codified in 40 CFR part 26, subpart A. The ''Common Rule'' is the name generally used to refer to the Federal Policy for the Protection of Human Subjects, which governs research with human subjects conducted or supported by EPA and many other Federal departments and agencies. EPA's codification of the Common Rule appears as subpart A in 40 CFR part 26.

B. What action is the agency taking?

The amendments contained in this final rule change the 2006 rule, published in the **Federal Register** issue of February 6, 2006 (71 FR 6138) (FRL–7759–8), subsequently amended in the **Federal Register** issue of June 23, 2006 (71 FR 36171) (FRL–8071–6), and codified at 40 CFR part 26, in the following substantive respects:

- By broadening the applicability of 40 CFR part 26, subparts K, L, M, and Q, so these subparts would apply not only to research submitted to or considered by EPA under the pesticide

laws, but also to research involving a ''pesticide'' (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136(u)) which is submitted to or considered by EPA under any other regulatory statute it administers.

- By incorporating the definition of ''pesticide'' from FIFRA, as a substance or mixture of substances intended for pesticidal effect.
- By deleting from 40 CFR part 26, subpart K, all references to consent on behalf of a subject in research involving intentional exposure to a pesticide by a subject's ''legally authorized representative.''
- By incorporating into 40 CFR part 26, subparts P and Q, factors to be considered by EPA and the Human Studies Review Board (HSRB), in their review of proposed and completed human research, derived from the recommendations by the National Research Council of NAS in its 2004 Report entitled ''Intentional Human Dosing Studies for EPA Regulatory Purposes: Scientific and Ethical Issues'' (hereafter, 2004 NAS Report) to EPA.

C. What is the agency's authority for taking this action?

Sections 3(a) and 25(a) of FIFRA (7 U.S.C. 136a(a) and 136w(a)) and section 408(e)(1)(C) of the Federal Food, Drug, and Cosmetic Act (FFDCA) (21 U.S.C. 364a(e)(1)(C)), provide the legal authority for these amendments to the 2006 rule on human research.

D. What are the incremental costs and benefits of this action?

The incremental costs of these amendments both to industry and to EPA are expected to be negligible. EPA has not, therefore, prepared a new economic analysis for this rule. Because no research has been identified that is outside the scope of the 2006 rule but that would be within the scope of these amendments, EPA has no basis on which to revise the cost estimates that were provided in the economic analysis for the 2006 rule or those most recently provided in the 2008 renewal of the Information Collection Request (ICR) for the existing regulation at 40 CFR part 26. The estimates included in the ICR are summarized in Unit VI.B. and a copy of the ICR is available in the docket.

II. Background

A. EPA's 2006 Rule

As required by section 201 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006 (2006 Appropriations Act), Public Law 109–54, 119 Stat. 531, EPA promulgated a rule in 2006 establishing a set of protections for people participating as subjects in third-party human research with pesticides in 40 CFR part 26. (In this context ''third-party'' research is research neither conducted (''first-party'') nor supported (''second-party'') by EPA or another Common Rule Federal department or agency.) The 2006 rule prohibits EPA from relying on third-party research on pesticides involving intentional exposure of children or of pregnant or nursing women, unless relying on the data is crucial to a decision that would impose a more stringent regulatory restriction that would improve protection of public health than could be justified without relying on the data. It further forbids EPA itself to conduct or support any research involving intentional exposure of pregnant or nursing women or of children to any substance.

B. Petition for Review of the 2006 Rule and Settlement Agreement

In early 2006, the Natural Resources Defense Council, Inc.; Pesticide Action Network North American; Pineros y Campesinos Unido Del Noroeste; Physicians for Social Responsibility-San Francisco; Farm Labor Organizing Committee; ALF-CIO; and Migrant Clinicians Network petitioned for review of the 2006 rule in the United States Court of Appeals for the Second Circuit (Second Circuit Court of Appeals) (*NRDC* v. *EPA,* No. 06–0820–ag (2d Cir.)). The Petitioners argued that the 2006 rule violated the 2006 Appropriations Act because it did not bar all pesticide research with pregnant women and children, was inconsistent with the 2004 NAS Report, and was inconsistent with the Nuremburg Code.

After briefing and argument, but before a decision was rendered by the Second Circuit Court of Appeals, EPA and Petitioners entered a settlement agreement in which EPA agreed to conduct notice-and-comment rulemaking on the issue of whether the 2006 rule should be amended. EPA also agreed to propose, at a minimum, amendments to the 2006 rule that were substantially consistent with language negotiated between the parties and attached to the settlement agreement as Exhibit A. This agreement, including Exhibit A, is available in the docket for this action as described under **ADDRESSES**. The settlement agreement makes clear that EPA retained full discretion concerning what amendments were proposed, and what, if any, amendments are finalized.

C. Proposed Amendments to the 2006 EPA Rule

Consistent with the settlement agreement, on January 18, 2011, EPA Administrator Lisa Jackson signed a notice of proposed rulemaking for proposed amendments to the 2006 rule. The proposed amendments were substantially consistent with the regulatory language negotiated with Petitioners. The notice of proposed rulemaking published in the **Federal Register** issue of February 2, 2011 (76 FR 5735) (FRL–8862–7).

D. Retrospective Review of the Common Rule

On July 26, 2011, after issuance of EPA's proposed rule, the Department of Health and Human Services (HHS), in coordination with the Office of Science and Technology Policy (OSTP), issued an advance notice of proposed rulemaking concerning modernization of the Common Rule which governs research with human subjects conducted or supported by EPA and many other Federal departments and agencies (76 FR 44512, July 26, 2011). HHS and OSTP sought comment on ''how to better protect human subjects who are involved in research, while facilitating valuable research and reducing burden, delay, and ambiguity for investigators.'' Id. HHS and OSTP identified seven areas of concern regarding the Common Rule. Most relevant to EPA's proposed amendments to the 2006 rule, was a concern with ''the multiple, differing regulatory requirements that can apply to a single research study * * *.'' These requirements, according to HHS and OSTP, ''have been criticized as complex, inconsistent, and lacking in clarity,'' and can result in ''unwarranted variability across institutions and their [Institutional Review Boards] in how the requirements are interpreted and implemented'' (76 FR at 45514). HHS and OSTP stressed the importance of clarifying and harmonizing human subject protections across the Federal Government and sought comment on the means by which this could be accomplished (76 FR at 44528).

III. The Final Rule

EPA is finalizing the amendments to the 2006 rule as proposed. This includes changes to the scope and consent provisions, and the incorporation of selected individual recommendations from the 2004 NAS Report as the specific ethical and scientific factors to be considered by EPA and the HSRB in reviewing proposed and completed human research (*i.e.,* proposed

§§ 26.1603 and 26.1703, see 76 FR 5745–5749).

The amendments finalized in this rule are consistent with the recommendations in the 2004 NAS Report and EPA practice under the 2006 rule. That practice has been modeled primarily on EPA's practice under its Common Rule. Sections 26.109, 26.111, 26.116, and 26.117 of EPA's Common Rule explicitly address most of the specific ethical considerations included in the amendments to the 2006 rule, including whether risks to subjects are minimized (compare § 26.1603(c)(2) with existing § 26.111(a)(2)); whether risks are reasonable in comparison to benefits (compare § 26.1603(c)(3) with § 26.111(a)(2)); whether subject selection would be equitable (compare § 26.1603(c)(4) with existing § 26.111(a)(3)); whether consent will be free and voluntary (compare § 26.1603(c)(5) with existing §§ 26.116 and 26.117); whether an appropriately constituted institutional review board (IRB) has reviewed the proposed research (compare § 26.1603(c)(6) with § 26.109); and whether the ''special problems'' of research involving vulnerable populations are taken into account (compare § 26.1603(c)(7) and (8) with existing § 26.111(a)(3)). Other considerations are implicitly addressed.

The Common Rule's requirement to ''minimize risks'' in § 26.111(a)(1) necessitates consideration of whether adequate animal data is available to assess potential risks to subjects (see § 26.1603(c)(1)). It would involve consideration of whether medical care is to be provided for injuries incurred in the proposed research (see § 26.1603(c)(10)). Section 26.111(b)'s requirement that additional safeguards be in place to protect against undue influence of ''economically'' disadvantaged persons ensures that consideration of whether any proposed payments are so high as to constitute undue inducement or so low as to be attractive only to individuals who are socioeconomically disadvantaged (see § 26.1603(c)(9)). Although scientific considerations are not addressed in similar detail in the Common Rule requirements, nonetheless, the requirement to consider scientific validity and reliability and the Common Rule's emphasis on the need for ''sound research design'' in § 26.111(a)(1) and the need to take ''the importance of the knowledge that may reasonably be expected to result'' from the study into account, mandate that EPA focus on considerations addressing scientific validity such as those included in §§ 26.1603 and 26.1703. At a minimum, NAS Recommendations 3–1, 4–1, 5–1, 5–2, 5–3, and 5–5 are critical to proper consideration of the Common Rule's ethical requirements and its requirement for ''sound research design.''

IV. Public Comments on the Proposed Amendments

This unit discusses, in general terms, the public comments on the proposed amendments and EPA's responses to those comments. EPA received a total of 10 public comments on the proposed amendments during the 60-day comment period. Comments were submitted by 4 individual citizens and 6 different entities—the Agricultural Handler Exposure Task Force, the American Chemistry Council (on behalf of the Antimicrobial Exposure Assessment Task Force II), Beyond Pesticides, CropLife America, Natural Resources Defense Council, and SC Johnson & Son, Inc. The docket (under docket ID number EPA–HQ–OPP–2010–0785) includes all of the comments submitted to EPA on the proposed amendments, as well as EPA's Response to Comments document, which provides detailed responses to all comments received.

A. Comments on Proposal To Expand Scope To Include Research Submitted to EPA Under Any Regulatory Statute EPA Administers

Two comments addressed the proposed changes to the scope of the 2006 rule. One commenter stated that the 2006 Appropriations Act did not permit an expansion of scope beyond pesticide studies performed in the FIFRA and FFDCA context, and another argued that the 2006 Appropriations Act required that the scope of the rule be further expanded beyond studies submitted, or intended for submission, to EPA.

After considering these comments, EPA has decided to finalize the rule text relating to scope as it was proposed, *i.e.,* expanding the scope to cover research involving intentional exposure of human subjects to pesticides where that research is submitted, or intended to be submitted, to EPA under any regulatory statute that EPA administers. As noted in EPA's Response to Comments document, EPA no longer regards the 2006 Appropriations Act as authority for this rule. Therefore, EPA believes it is unnecessary to address whether the 2006 Appropriation Act either requires or does not allow EPA to establish a different scope for this rule.

Nevertheless, EPA regards FIFRA as providing adequate legal authority for the scope of research covered by this final rule. Sections 3(a) and 25(a) of FIFRA provide EPA with authority to regulate pesticides, including research involving intentional exposure of a human subject to a substance, when the substance is being tested as a ''pesticide.'' That includes research intended for submission to EPA, whether under FIFRA, FFDCA, or any of EPA's other regulatory authorities. EPA believes it makes sense to apply the same standards to all human studies involving pesticides submitted to EPA. On the other hand, EPA believes that it is not in the public interest to extend the prohibition against research involving intentional exposure of children or pregnant women to pesticides beyond the scope delineated in the proposed rule because such a prohibition, if enforceable, could have the unintended effect of prohibiting valuable research.

B. Comments on Inclusion of NAS-Derived Considerations

Two commenters questioned whether new regulatory text proposed at § 26.1603(b)(2)(ii) and (iii) would change the ways in which EPA has been reviewing proposed studies to measure exposures experienced by people who mix, load, or apply pesticides. As proposed, EPA would have been required to consider whether the proposed research includes representative study populations for the endpoint in question and has adequate statistical power to detect appropriate effects. These commenters expressed the same concern regarding the proposed regulatory text at § 26.1703(a)(2) and (3), which would require EPA to consider these factors in determining whether to rely on the research. As explained in more detail in EPA's Response to Comments document, EPA does not believe that the adoption of the specific ethical and scientific factors will impose any additional burden on sponsors of exposure studies or on the types of exposure studies referenced by the commenters.

As explained previously, EPA has decided to finalize the proposed text detailing specific scientific and ethical aspects of proposed and completed research—including the text proposed at § 26.1603(b)(2)(ii) and (iii) and at § 26.1703(a)(2) and (3)—that EPA and the HSRB must consider when reviewing such research. EPA also notes that, under the 2006 rule as amended through this final rule, EPA does not intend to change the way in which it reviews exposure research with respect to the inclusion of representative populations or the statistical power of the study, although EPA will consider whether further guidance on this issue

is needed. In addition, EPA does not believe the codification of the specific ethical and scientific factors derived from the 2004 NAS Report represents a material change in the way a particular pesticide study would have been reviewed. Thus, EPA believes that particular pesticides studies that have been approved under the 2006 rule, would also meet the standards reflected in this final rule.

C. Other Comments, Including Comments on Narrowing the Scope of the 2006 Rule To Include Only Intentional Dosing Studies

The remainder of the public comments addressed issues beyond the scope of the proposed amendments. These comments included arguments that the burden of the requirements of the 2006 rule (as opposed to any burden connected to this amendment) are unjustified, and assertions that EPA's interpretation in the 2006 rule of the language ''research involving intentional exposure of a human subject'' incorrectly expanded the scope of the rule beyond that required in the 2006 Appropriations Act, which addressed only ''intentional dosing human toxicity studies.'' The commenters are referring to § 26.1101(a) of the 2006 rule, which defines the scope of the rule as applying to ''all research initiated after April 7, 2006 involving intentional exposure of a human subject * * *.'' As EPA explained in the preamble to the proposal for the 2006 rule, this scope was intended to capture ''all intentional dosing human studies intended for submission to EPA under the pesticide laws'', *i.e.,* studies involving intentional dosing to measure a toxic effect and studies involving intentional dosing to measure other scientific endpoints, like exposure (**Federal Register** issue of September 12, 2005 (70 FR at 53845) (FRL–7728–2)). Additional discussion in the preambles to the proposal for the 2006 rule and 2006 rule further explains what studies EPA intended to be included within the scope of the 2006 rule (70 FR at 53845–53847; 71 FR 6138, 6146, 6149–6150).

Because these comments were directed at provisions in the 2006 rule that EPA did not reopen for reconsideration as part of the proposed amendments, these comments are beyond the scope of this final rule, and no response to them is required to finalize this rule. Nonetheless, EPA appreciates the concerns expressed by the commenters with regard to the burdens imposed by the 2006 rule and recognizes that there may be value in considering further amendments to the 2006 rule in a way that reduces the burdens on investigators, *e.g.,* by limiting the types of research that are subject to particular requirements of the rule.

V. Conclusion

EPA received relatively few comments on the proposed rule, and many of the comments received did not address the amendments in the proposal. For the reasons noted previously, the comments that did address the proposal do not merit any change to the amendments as proposed. Accordingly, EPA is finalizing the amendments as proposed for the reasons stated herein and in the preamble to the proposed rule.

VI. Statutory and Executive Order Reviews

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

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action,'' because the Office of Management and Budget (OMB) determined that it would raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to OMB for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket for this rulemaking as required by the Executive Order.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden that would require additional review or approval by OMB. However, OMB has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 26 under the provisions of PRA (44 U.S.C. 3501 *et seq.*), and has assigned OMB Control No. 2070–0169 (EPA ICR No. 2195). The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

In its 2008 analysis supporting the most recent renewal of this ICR, EPA estimated that respondents would submit to the Agency some 34 proposals for or reports of research involving intentional exposure of human subjects each year. EPA estimated that preparation of information required by the 2006 rule would require about 598 hours per study at a cost of $45,927 per study, for a total estimated annual burden for affected entities of 20,332 hours at an estimated cost of $1,561,518. In addition, EPA estimated annual submission of 20 reports of research requiring only documentation of ethical conduct at a cost of 12 hours/$879 per report, or 240 hours/$17,580 per year. The total estimate of the annual respondent burden and cost was the sum of these two estimates, or 2,572 hours/$1,579,098.

These paperwork burden and cost estimates include activities related to initial rule familiarization, as well as activities that researchers would have to perform even without the Agency's rulemaking in this area, such as developing a protocol and maintaining records.

The average annual burden on EPA for reviewing each of the 34 study submissions was estimated to be 178 hours/$16,850 per study, or 6,052 hours/$572,900 per year. The average annual burden on EPA for reviewing each of the 20 additional submissions was estimated to be 44 hours/$3,158 per study, or 880 hours/$63,160 per year. The total estimate of the annual burden on EPA was the sum of these two estimates, or 6,932 hours/$636,000 per year.

In no year since promulgation of the 2006 rule have more than 7 protocols been submitted to EPA by industry; the average annual rate has been just over 5 for the 5-year period of 2006–2010. Somewhat fewer completed reports have been submitted during this period, so the average of new protocols and finished studies has been about 11 per year, less than a third of the projected 34 per year covered by the ICR. There is no evidence to suggest an upward trend, and nothing in these amendments is believed likely to lead to a significant change in the rate of protocol and study submissions.

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 OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

RFA (5 U.S.C. 601 *et seq.*), 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 (5 U.S.C. 551–553) 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, which is based on either the maximum number of employees or on the sales for small businesses in each industry sector, as defined by a 6-digit NAICS code, and for this rule is pesticide and other agricultural chemical manufacturers (NAICS code 325320) who sponsor or conduct human research with pesticides, or other entities (NAICS code 541710) that sponsor or conduct human research with pesticides, and IRBs who review human research with pesticides to ensure it meets applicable standards of ethical conduct;

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; or

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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Because no small entities have been identified that are directly regulated by these amendments, EPA has not attempted to reduce the impact of this final rule on small entities. Public comments were explicitly invited on all aspects of the proposal and its impacts on small entities, but no such comments were received.

D. Unfunded Mandates Reform Act (UMRA)

Title II of UMRA (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule 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. Thus, this rule is not subject to the requirements of UMRA sections 202 or 205. This rule is also not subject to the requirements of UMRA section 203, because it contains no regulatory requirements that might significantly or uniquely affect small governments. These amendments are unlikely to affect State, local, and tribal governments at all, and are likely to affect the private sector only trivially.

E. Executive Order 13132: Federalism

This action does not have federalism implications because 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 (64 FR 43255, August 10, 1999). It makes marginal changes in the scope of an existing rule applying to sponsors and investigators conducting certain kinds of research involving human subjects, and refines the standards for EPA oversight of and reliance on such research. 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). This action will not have substantial direct effects on Indian Tribes, will not significantly or uniquely affect the communities of Indian tribal governments, and does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997), as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045, because it does not establish an environmental standard intended to mitigate health or safety risks, nor is it an ''economically significant regulatory action'' as defined in Executive Order 12866. The 2006 rule applies to the conduct and review of research involving intentional exposure of human subjects, and prohibits the conduct of or EPA reliance on any such research involving subjects who are children, or pregnant or nursing women. These provisions would not be affected by the amendments.

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

This action is not a ''significant regulatory action'' as defined in 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 (NTTAA)

Section 12(d) of NTTAA (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 action does not involve any 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 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.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations, because it does not affect the level of protection provided to human health or the environment. This rule does not entail special considerations of environmental justice related issues. The strengthened protections for human subjects participating in covered research established in the 2006 rule will not be altered by these amendments.

VII. Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 *et seq.*), 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 the Comptroller General of the United States. 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**. 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).

List of Subjects in 40 CFR Part 26

Environmental protection, Administrative practice and procedures, Human research, Pesticides and pests.

Dated: February 8, 2013.

Lisa P. Jackson,

Administrator.

Therefore, 40 CFR chapter I is amended as follows:

PART 26—[AMENDED]

■ 1. The authority citation for part 26 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 136a(a) and 136w(a)(1); 21 U.S.C. 346a(e)(1)(C); sec. 201, Pub. L. 109–54, 119 Stat. 531; and 42 U.S.C. 300v–1(b).

■ 2. In § 26.1101:

■ a. Remove paragraphs (a), (c), and (g).

■ b. Redesignate paragraph (b) as (c), (f) as (g), (e) as (f), and (d) as (e).

■ c. Add new paragraphs (a), (b), and (d).

The amendments read as follows:

§ 26.1101 To what does this subpart apply?

(a) Except as provided in paragraph (c) of this section, this subpart applies to all research initiated on or after April 15, 2013 involving intentional exposure of a human subject to:

(1) Any substance if, at any time prior to initiating such research, any person who conducted or supported such research intended either to submit results of the research to EPA for consideration in connection with any action that may be performed by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136–136y) or section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA) (21 U.S.C. 346a), or to hold the results of the research for later inspection by EPA under FIFRA or section 408 of FFDCA; or

(2) A pesticide if, at any time prior to initiating such research, any person who conducted or supported such research intended either to submit results of the research to EPA for consideration in connection with any action that may be performed by EPA under any regulatory statute administered by EPA other than those statutes designated in paragraph (a)(1) of this section, or to hold the results of the research for later inspection by EPA under any regulatory statute administered by EPA other than those statutes designated in paragraph (a)(1) of this section.

(b) For purposes of determining a person's intent under paragraph (a) of this section, EPA may consider any available and relevant information. EPA must rebuttably presume the existence of intent if:

(1) The person or the person's agent has submitted or made available for inspection the results of such research to EPA; or

(2) The person is a member of a class of people who, or whose products or activities, are regulated by EPA and, at the time the research was initiated, the results of such research would be relevant to EPA's exercise of its regulatory authority with respect to that class of people, products, or activities.

* * * * *

(d) The EPA Administrator retains final judgment as to whether a particular activity is covered by this subpart.

* * * * *

■ 3. In § 26.1102, revise paragraphs (a) and (c) and add new paragraph (k) to read as follows:

§ 26.1102 Definitions.

(a) *Administrator* means the Administrator of the Environmental Protection Agency (EPA) and any other officer or employee of EPA to whom authority has been delegated.

* * * * *

(c) *Pesticide* means any substance or mixture of substances meeting the definition in 7 U.S.C. 136(u) (Federal Insecticide, Fungicide, and Rodenticide Act, section 2(u)).

* * * * *

(k) *Common Rule* refers to the Federal Policy for the Protection of Human Subjects that was established in 1991 by the Office of Science and Technology Policy and codified in 1991 by EPA and 14 other Federal departments and agencies (see the **Federal Register** issue of June 18, 1991 (56 FR 28003)) and subsequently codified by other Federal departments and agencies. The Common Rule contains a widely accepted set of standards for conducting ethical research with human subjects, together with a set of procedures designed to ensure that the standards are met. Once codified by a Federal department or agency, the requirements of the Common Rule apply to research conducted or sponsored by that Federal department or agency. EPA's codification of the Common Rule appears in 40 CFR part 26, subpart A.

§ 26.1111 [Amended]

■ 4. In § 26.1111, remove from paragraph (a)(4) the phrase ''or the subject's legally authorized representative.''

■ 5. In § 26.1116, revise the introductory text of the section to read as follows:

§ 26.1116 General requirements for informed consent.

No investigator may involve a human being as a subject in research covered by this subpart unless the investigator has obtained the legally effective informed consent of the subject. An investigator must seek such consent only under circumstances that provide the prospective subject sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject must be in language understandable to the subject. No informed consent, whether oral or written, may include any exculpatory language through which the subject is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

* * * * *

■ 6. Revise § 26.1117 to read as follows:

§ 26.1117 Documentation of informed consent.

(a) Informed consent must be documented by the use of a written consent form approved by the IRB and signed by the subject. A copy shall be given to the subject.

(b) The consent form may be either of the following:

(1) A written consent document that embodies the elements of informed consent required by § 26.1116. This form may be read to the subject, but in any event, the investigator must give the subject adequate opportunity to read it before it is signed; or

(2) A short form written consent document stating that the elements of informed consent required by § 26.1116 have been presented orally to the subject. When this method is used, there must be a witness to the oral presentation. Also, the IRB shall approve a written summary of what is to be said to the subject. Only the short form itself is to be signed by the subject. However, the witness must sign both the short form and a copy of the summary, and the person actually obtaining consent must sign a copy of the summary. A copy of the summary must

be given to the subject, in addition to a copy of the short form.

■ 7. Revise the heading for subpart L to read as follows:

Subpart L—Prohibition of Third-Party Research Involving Intentional Exposure to a Pesticide of Human Subjects Who Are Children or Pregnant or Nursing Women

■ 8. Revise § 26.1201 to read as follows:

§ 26.1201 To what does this subpart apply?

This subpart applies to any research subject to subpart K of this part.

■ 9. Revise § 26.1301 to read as follows:

§ 26.1301 To what does this subpart apply?

This subpart applies to any person who submits to EPA on or after April 15, 2013 either of the following:

(a) A report containing the results of any human research for consideration in connection with an action that may be performed by EPA under FIFRA (7 U.S.C. 136–136y) or section 408 of FFDCA (21 U.S.C. 346a).

(b) A report containing the results of any human research on or with a pesticide for consideration in connection with any action that may be performed by EPA under any regulatory statute administered by EPA.

§ 26.1302 [Amended]

■ 10. In § 26.1302, remove the word ''shall.''

§ 26.1502 [Amended]

■ 11. In § 26.1502:

■ a. Remove in the first sentence of paragraph (a), the period after the phrase ''during an inspection'' and add in its place a comma.

■ b. Remove in the second sentence of paragraph (a), the phrase ''The agency'' and add in its place ''EPA.''

■ c. Remove in the last sentence of the introductory text of paragraph (b), the phrase ''the Agency'' and add in its place ''EPA.''

§ 26.1505 [Amended]

■ 12. In § 26.1505, remove from the last sentence, the citation ''§ 26.1502(c)'' and add in its place ''§ 26.1502(b)(4).''

§ 26.1507 [Amended]

■ 13. In § 26.1507, remove from the last sentence, the phrase ''The Agency'' and add in its place ''EPA.''

§§ 26.1601 through 26.1603 [Redesignated as §§ 26.1603 through 26.1605]

■ 14. Redesignate §§ 26.1601 through 26.1603 as §§ 26.1603 through 26.1605.

■ 15. Add new §§ 26.1601 and 26.1602 to subpart P to read as follows:

§ 26.1601 To what does this subpart apply?

This subpart applies to both of the following:

(a) Reviews by EPA and by the Human Studies Review Board of proposals to conduct new research subject to § 26.1125.

(b) Reviews by EPA on or after April 15, 2013 and, to the extent required by § 26.1604, by the Human Studies Review Board of reports of completed research subject to § 26.1701.

§ 26.1602 Definitions.

The definitions in § 26.1102 also apply to this subpart.

■ 16. In newly redesignated § 26.1603:

■ a. Remove paragraphs (a) and (e).

■ b. Redesignate paragraphs (b) through (d) as (e) through (g).

■ c. Add new paragraphs (a), (b), (c), (d), and (h).

The amendments read as follows:

§ 26.1603 EPA review of proposed human research.

(a) EPA must review all proposals for new human research submitted under § 26.1125 in a timely manner.

(b) In reviewing proposals for new human research submitted under § 26.1125, the EPA Administrator must consider and make determinations regarding the scientific validity and reliability of the proposed research, including:

(1) Whether the research would be likely to produce data that address an important scientific or policy question that cannot be resolved on the basis of animal data or human observational research.

(2) Whether the proposed research is designed in accordance with current scientific standards and practices to:

(i) Address the research question.

(ii) Include representative study populations for the endpoint in question.

(iii) Have adequate statistical power to detect appropriate effects.

(3) Whether the investigator proposes to conduct the research in accordance with recognized good research practices, including, when appropriate, good clinical practice guidelines and monitoring for the safety of subjects.

(c) In reviewing proposals for new research submitted under § 26.1125, the EPA Administrator must consider and make determinations regarding ethical aspects of the proposed research, including:

(1) Whether adequate information is available from prior animal studies or from other sources to assess the potential risks to subjects in the proposed research.

(2) Whether the research proposal adequately identifies anticipated risks to human subjects and their likelihood of occurrence, minimizes identified risks to human subjects, and identifies likely benefits of the research and their distribution.

(3) Whether the proposed research presents an acceptable balance of risks and benefits. In making this determination for research intended to reduce the interspecies uncertainty factor in a pesticide risk assessment, the EPA Administrator will also consider the process laid out and the attendant discussion for evaluating that type of study as provided in Recommendation 4–1 of the 2004 Report from the National Research Council of the National Academy of Sciences (NAS), entitled ''Intentional Human Dosing Studies for EPA Regulatory Purposes: Scientific and Ethical Issues.''

(4) Whether subject selection will be equitable.

(5) Whether subjects' participation would follow free and fully informed consent.

(6) Whether an appropriately constituted IRB or its foreign equivalent has approved the proposed research.

(7) If any person from a vulnerable population may become a subject in the proposed research, whether there is a convincing justification for selection of such a person, and whether measures taken to protect such human subjects are adequate.

(8) If any person with a condition that would put them at increased risk for adverse effects may become a subject in the proposed research, whether there is a convincing justification for selection of such a person, and whether measures taken to protect such human subjects are adequate.

(9) Whether any proposed payments to subjects are consistent with the principles of justice and respect for persons, and whether they are so high as to constitute undue inducement or so low as to be attractive only to individuals who are socioeconomically disadvantaged.

(10) Whether the sponsor or investigator would provide needed medical care for injuries incurred in the proposed research, without cost to the human subjects.

(d) With respect to any research or any class of research subject to this subpart, the EPA Administrator may recommend additional conditions which, in the judgment of the EPA

Administrator, are necessary for the protection of human subjects.

* * * * *

(h) EPA must provide the submitter of the proposal copies of the EPA and Human Studies Review Board reviews.

■ 17. In newly redesignated § 26.1604, revise paragraph (a) to read as follows:

§ 26.1604 EPA review of completed human research.

(a) When considering, under any regulatory statute it administers, data from completed research involving intentional exposure of humans to a pesticide, EPA must thoroughly review the material submitted under § 26.1303, if any, and other available, relevant information and document its conclusions regarding the scientific and ethical conduct of the research.

* * * * *

■ 18. Add §§ 26.1606 and 26.1607 to subpart P to read as follows:

§ 26.1606 Human Studies Review Board review of proposed human research.

In commenting on proposals for new research submitted to it by EPA, the Human Studies Review Board must consider the scientific merits and ethical aspects of the proposed research, including all elements required in § 26.1603(b) and (c) and any additional conditions recommended pursuant to § 26.1603(d).

§ 26.1607 Human Studies Review Board review of completed human research.

In commenting on reports of completed research submitted to it by EPA, the Human Studies Review Board must consider the scientific merits and ethical aspects of the completed research, and must apply the appropriate standards in subpart Q of this part.

■ 19. Revise the heading for subpart Q to read as follows:

Subpart Q—Standards for Assessing Whether To Rely on the Results of Human Research in EPA Actions

■ 20. Revise §§ 26.1701 through 26.1705 to read as follows:

* * * * *

Sec.

26.1701 To what does this subpart apply?
26.1702 Definitions.
26.1703 Prohibitions applying to all research subject to this subpart.
26.1704 Prohibition of reliance on unethical human research with non-pregnant, non-nursing adults.
26.1705 Prohibition of reliance on unethical human research with non-pregnant, non-nursing adults initiated after April 7, 2006.

* * * * *

§ 26.1701 To what does this subpart apply?

(a) For decisions under FIFRA (7 U.S.C. 136–136y) or section 408 of FFDCA (21 U.S.C. 346a), this subpart applies to research involving intentional exposure of human subjects to any substance.

(b) For decisions under any regulatory statute administered by EPA other than those statutes designated in paragraph (a) of this section, this subpart applies to research involving intentional exposure of human subjects to a pesticide.

§ 26.1702 Definitions.

The definitions in § 26.1102 and § 26.1202 also apply to this subpart.

§ 26.1703 Prohibitions applying to all research subject to this subpart.

(a) Prohibition of reliance on scientifically invalid research. EPA must not rely on data from research subject to this subpart unless EPA determines that the data are relevant to a scientific or policy question important for EPA decisionmaking, that the data were derived in a manner that makes them scientifically valid and reliable, and that it is appropriate to use the data for the purpose proposed by EPA. In making such determinations, EPA must consider:

(1) Whether the research was designed and conducted in accordance with appropriate scientific standards and practices prevailing at the time the research was conducted.

(2) The extent to which the research subjects are representative of the populations for the endpoint or endpoints in question.

(3) The statistical power of the data to support the scientific conclusion EPA intends to draw from the data.

(4) In a study that reports only a No Observed Effect Level (NOEL) or a No Observed Adverse Effect Level (NOAEL), whether a dose level in the study gave rise to a biological effect, thereby demonstrating that the study had adequate sensitivity to detect an effect of interest.

(b) Prohibition of reliance on research subject to this subpart involving intentional exposure of human subjects who are pregnant women (and therefore their fetuses), nursing women, or children. Except as provided in § 26.1706, EPA must not rely on data from any research subject to this subpart involving intentional exposure of any human subject who is a pregnant woman (and therefore her fetus), a nursing woman, or a child.

§ 26.1704 Prohibition of reliance on unethical human research with non-pregnant, non-nursing adults.

(a) This section applies to research subject to this subpart that is not subject to § 26.1705.

(b) Except as provided in § 26.1706, EPA must not rely on data from any research subject to this section if there is clear and convincing evidence that:

(1) The conduct of the research was fundamentally unethical (*e.g.,* the research was intended to seriously harm participants or failed to obtain informed consent); or

(2) The conduct of the research was deficient relative to the ethical standards prevailing at the time the research was conducted in a way that placed participants at increased risk of harm (based on knowledge available at the time the study was conducted) or impaired their informed consent.

(c) The prohibition in this section is in addition to the prohibitions in § 26.1703.

§ 26.1705 Prohibition of reliance on unethical human research with non-pregnant, non-nursing adults initiated after April 7, 2006.

(a) This section applies to research subject to this subpart, that:

(1) Was initiated after April 7, 2006.

(2) Was subject, at the time it was conducted, either to subparts A through L of this part, or to the codification of the Common Rule by another Federal department or agency.

(b) Except as provided in § 26.1706, EPA must not rely on data from any research subject to this section unless EPA determines that the research was conducted in substantial compliance with either:

(1) All applicable provisions of subparts A through L of this part, or the codification of the Common Rule by another Federal department or agency; or

(2) If the research was conducted outside the United States, with procedures at least as protective of subjects as those in subparts A through L of this part, or the codification of the Common Rule by another Federal department or agency.

(c) Except as provided in § 26.1706, EPA must not rely on data from any research subject to this section unless EPA determines that the research was conducted in substantial compliance with either:

(1) A proposal that was found to be acceptable under § 26.1603(c), and no amendments to or deviations from that proposal placed participants at increased risk of harm (based on knowledge available at the time the

study was conducted) or impaired their informed consent. If EPA discovers that the submitter of the proposal materially misrepresented or knowingly omitted information that would have altered the outcome of EPA's evaluation of the proposal under § 26.1603(c), EPA must not rely on that data.

(2) A proposal that would have been found to be acceptable under § 26.1603(c), if it had been subject to review under that section, and no amendments to or deviations from that proposal placed participants at increased risk of harm (based on knowledge available at the time the study was conducted) or impaired their informed consent.

(d) The prohibition in this section is in addition to the prohibitions in § 26.1703.

§ 26.1706 [Amended]

■ 21. In § 26.1706, remove in paragraph (d) the word ''publishes'' and add in its place the phrase ''has published.''

[FR Doc. 2013–03456 Filed 2–13–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2011–0367; FRL–9756–8]

Approval and Promulgation of Implementation Plans; State of Alaska; Regional Haze State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) submittal from the State of Alaska as meeting the requirements of Clean Air Act (CAA) sections169A and 169B and federal regional haze regulations. The SIP implements a regional haze program in the State of Alaska for the first regional haze planning period, through July 31, 2018. This submittal addresses the requirements of the Clean Air Act (CAA) and EPA's rules that require states to prevent any future and remedy any existing manmade impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the ''regional haze program''). In this action, EPA is approving all provisions of Alaska's Regional Haze SIP submission, including the requirements for the calculation of baseline and natural visibility conditions, statewide inventory of visibility-impairing pollutants, best available retrofit technology (BART), Reasonable Progress Goals (RPGs), and Long-Term Strategy (LTS). Additionally, EPA is approving the Alaska Department of Environmental Conservation Best Available Retrofit Technology regulations, and amendments to Alaska's Area Wide Pollution Control Program for Regional Haze.

DATES: This final rule is effective March 18, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2011–0367. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., 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 at the State and Tribal Air Programs Unit, Office of Air Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Keith Rose, EPA Region 10, Suite 900, Office of Air, Waste and Toxics, 1200 Sixth Avenue, Seattle, WA 98101, (206) 553–1949.

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act, CAA,* or *Clean Air Act* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *Alaska* and *State* mean the State of Alaska.

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II. Response to Comments
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I. Background Information

In the CAA Amendments of 1977, Congress established a program to protect and improve visibility in the national parks and wilderness areas. See CAA section 169A. Congress amended the visibility provisions in the CAA in 1990 to focus attention on the problem of regional haze. See CAA section 169B. EPA promulgated regulations in 1999 to implement sections 169A and 169B of the Act. These regulations require states to develop and implement plans to ensure reasonable progress toward improving visibility in mandatory Class I Federal areas [1] (Class I areas). 64 FR 35714 (July 1, 1999); see also 70 FR 39104 (July 6, 2005) and 71 FR 60612 (October 13, 2006).

On February 24, 2012, EPA published a Notice of Proposed Rulemaking (NPR) for the State of Alaska. See 77 FR 11022. In the NPR, EPA proposed approval of the Alaska SIP submittal that addresses regional haze for the planning period 2008 through 2018. The Regional Haze Plan was submitted to EPA on April 4, 2011. Specifically, EPA proposed to approve all provisions of Alaska's April 4, 2011 Regional Haze SIP submission. In this action, EPA is approving all provisions of Alaska's Regional Haze SIP submission, including the requirements for the calculation of baseline and natural visibility conditions, statewide inventory of visibility-impairing pollutants, best available retrofit technology (BART), Reasonable Progress Goals (RPGs), Long-Term Strategy (LTS), ADEC's BART regulations in 18 AAC 50.260, and the amendments to 18 AAC 50.030 which adopts by reference Volume II, Section III. F. Open Burning; Volume II, Section III. K. Area Wide Pollution Control Program for Regional Haze; and Volume II, Appendices to Volume II.

[1] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the Clean Air Act, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the Clean Air Act apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

A detailed explanation of the requirements for regional haze SIPs as well as EPA's analysis of Alaska's SIP submittal was provided in the NPR and will not be repeated in detail here.

Most of the comments received on the NPR addressed the Healy coal-fired power plant (Healy Power Plant) located in Healy, Alaska just five miles from Denali National Park. The Healy Power Plant consists of 2 power generating units. Unit 1 is subject to BART as a nominal 25 megawatt (MW) coal-fired electric generating unit that was initially constructed in 1967. Unit 2, also referred to as the Healy Clean Coal Project (HCCP), is a nominal 50 MW coal-fired electric generating unit, was constructed in 1997, is not subject to BART, and has not operated since 1999. Golden Valley Electric Association, Inc. (GVEA) owns and operates Unit 1. GVEA and the Alaska Industrial Development and Export Authority (AIDEA) currently own Unit 2. GVEA and AIDEA intend to reactivate and/or restart Unit 2.[2]

Subsequent to the publication of the NPR, the United States entered into negotiations with GVEA and the AIDEA regarding their future work plans and intent to operate Unit 2 at the Healy Power Plant. These negotiations resulted in the United States, on behalf of EPA, filing a civil complaint for injunctive relief concurrently with a consent decree in the United States District Court for the District of Alaska.[3] The consent decree recognizes that GVEA and AIDEA intend to reactivate and/or restart Unit 2 and that, as alleged in the complaint accompanying the consent decree, the United States believes that GVEA's and AIDEA's project at Unit 2 at the Healy Power Plant would result in the operation of a new source or, in the alternative, a major modification of an existing source without obtaining the necessary permits under the Act and without the installation and operation of the state-of-the-art controls necessary under the Act to reduce air pollutants, particularly oxides of nitrogen (NOx) emissions from Unit 2. While not admitting liability, GVEA and AIDEA agreed to comply with specified pollution control requirements and emissions limits for Unit 1 and Unit 2 at the Healy Power Plant.

The consent decree requires GVEA to install Selective Non-Catalytic Reduction (SNCR) on Unit 1 on or before September 30, 2015 or 18 months after Unit 2 first fires coal, whichever is later. Additionally, by December 31, 2022, GVEA must elect to either permanently retire Unit 1 by December 23, 2024 or install Selective Catalytic Reduction (SCR). If GVEA elects to operate Unit 1 after December 31, 2024 it must continuously operate the SCR and comply with specified emission limits. The consent decree also requires GVEA and AIDEA to install SCR on Unit 2 on or before September 30, 2015 or 24 months after it first fires coal and to comply with specified emission limits.

The consent decree also acknowledges that EPA is currently reviewing the Regional Haze SIP submittal from Alaska and that EPA may consider the enforceable conditions in the consent decree when it takes final action on that SIP submission. Additionally the consent decree provides that nothing in the consent decree relieves GVEA or AIDEA of their obligation to comply with all applicable state or federal, state and local laws and regulations, specifically including the BART requirements in the Alaska SIP or emission limits or deadlines for the installation of pollution controls set forth in the regulations.

II. Response to Comments

EPA received a number of comments on the proposed action to approve the Alaska Regional Haze SIP submittal. These comments were received from the Alaska Department of Environmental Conservation (ADEC), Sierra Club, the National Park Service, Denali Citizens' Council, National Parks and Conservation Association (NPCA), and Golden Valley Electric Association (GVEA) and a number of individual commenters or members of organizations. The individual comments included many identical or nearly identical comment letters that were part of a public comment campaign sponsored by Sierra Club, NPCA and CREDO. Additionally, on June 29, 2012, Earth Justice submitted a letter to EPA on behalf of the NPCA commenting on a number of Regional Haze SIPs, including Alaska, that were pending review before the agency. Even though the letter was submitted after the close of the comment period for this action, we have taken these comments into account and are responding to those comments relevant to this action in this notice.

The EPA's responses to the comments are grouped into three categories: (1) Comments on BART for Healy Unit 1; (2) Comments on Reasonable Progress and Healy Unit 2; and (3) General Comments.

A. Comments Related to BART for Healy Unit I

As noted above, the majority of the comments received related to the Healy Power Plant. Numerous comments were received regarding the selection of Selective Non-Catalytic Reduction (SNCR) rather than Selective Catalytic Reduction (SCR) as BART for Healy Unit 1. Many of the comments focused on the cost of controls, cost effectiveness calculations, and the lack of an enforceable shut down date for the unit.

After reviewing the public comments, we performed additional analyses of the cost effectiveness associated with the various NO_X control technologies considered by ADEC in determining BART for Unit 1 at the Healy Power Plant. While evaluating the public comments received on the proposed approval of the Alaska Regional Haze SIP submission, we considered the enforceable conditions in the consent decree and the resulting controls, limits and emission reductions. We also considered our additional technical and cost effectiveness analyses. The specific comments and responses are described below.

Comment: A number of commenters asserted that BART should be SCR for Healy Unit I. More specifically, a comment concluded that BART for Healy Unit 1 should require the installation and operation of SCR at a 0.035 lb/mmBtu emission limit and stated that SCR technology is the industry standard for NO_X removal. Other commenters asserted that SCR could achieve a limit between 0.05 and 0.07 lbs/mmBtu. In the commenters' view, the State's analysis overestimated the SCR costs and underestimated its benefits. One comment pointed to EPA's finding in other determinations that BART for NO_X is 0.05 lbs/mmBtu. For the San Juan coal-fired generating station in New Mexico, EPA imposed a 0.05 lbs/mmBtu BART limit, and the final permit for the Desert Rock coal-fired generating plant imposed a limit of 0.035 lbs/mmBtu.

Response: EPA agrees that a more stringent emission rate is achievable with SCR than with SNCR. A BART determination is based on consideration of multiple factors. As explained in the NPR, the State found that SCR is not cost effective at this facility for an 8 year equipment lifetime. Although EPA does

[2] Unit 2 previously went through Prevention of Significant Deterioration (PSD) review and received an Air Quality Control Permit issued in 1993 and amended in 1994. On February 3, 2011, ADEC issued Final Air Quality Control Permit No. AQ0173TVPO2 to GVEA.

[3] *United States* v. *Golden Valley Electric Association, Inc. and Alaska Industrial Development and Export Authority,* Civ. No. 4:12-cv-00025–RRB (D. Alaska). The United States filed an Unopposed Motion to Enter the Consent Decree on November 14, 2012.

not agree with the State's use of an 8 year equipment life, we are approving the BART limit for NO_X of 0.20 lbs/mmBtu based on the installation of SNCR. After considering the comments received, EPA calculated the cost of SCR using a 30 year lifetime for the controls in addition to the 20 year lifetime cost calculation that EPA had undertaken prior to the proposed action. Based on the vendor's quote for SCR and having eliminated costs that were not consistent with EPA's Control Cost Manual, EPA found that the cost effectiveness of SCR at Healy Unit 1 is about $5,900/ton for a 20 year equipment lifetime, and about $5,300/ton for a 30 year lifetime. See ''Revisions to Healy Unit 1 Cost Effectiveness Calculations'', memo from Zach Hedgpeth to Keith Rose, October 15, 2012. Based on modeled results of visibility impacts at different emission rates, the State also found that the incremental visibility improvement at Denali National Park associated with an emission rate of 0.07 lbs/mmBtu (achievable with SCR) versus the improvement expected with an emission rate of 0.19 lb/mmBtu (achievable with SNCR) to be relatively small (about 0.17 dv).

In this case, as explained in more detail in the proposal, ADEC selected the BART NO_X emission limit for Healy Unit 1 based on their consideration of the BART five-step review process, information provided in GVEA's BART analyses, the Enviroplan GVEA Healy BART Report, and a decision by ADEC to grant GVEA's request to allow for some operational variability in the NO_X emission rate for Healy Unit 1. 77 FR 11034, February 24, 2012. The Regional Haze rule grants States the authority to make the initial determination of what constitutes BART. EPA reviews that determination to ensure that the appropriate factors were considered and that the determination by the State is a reasonable one.

BART is a source by source determination based on consideration, among other things, of the cost of controls at the source and the visibility improvement expected to result from the installation of controls at the source. In other words, each BART determination is made based on a site-specific, fact-specific evaluation of the particular BART source. Here, to name but one difference between Healy and the San Juan Generating Station as an example, the BART unit at Healy is only rated at 25 MW, whereas the four units at the San Juan facility are rated at a total of 1,800 MW. The size of the unit can affect both the cost effectiveness of controls as well as the associated air quality or visibility impacts. As a result, the conclusion that SCR is BART for one facility is not determinative in another BART determination. The decision as to appropriate controls for the Desert Rock facility to meet the requirements of another CAA program, the prevention of significant deterioration or PSD program, is of even less relevance to the determination of BART for Healy Unit 2.

EPA also notes that pursuant to the consent decree described above, no later than December 31, 2022, GVEA must decide whether it will continue to operate Unit 1 past December 31, 2024 (the date upon which ADEC based its cost effectiveness calculations) or whether it will permanently retire the Unit by December 31, 2024. If GVEA elects to continue operation after December 31, 2024, it must install SCR control technology (or alternate control technology approved by EPA).

Taking all this into consideration, EPA is approving the State's NO_X BART determination for Healy Unit 1 as meeting the requirements of the CAA.

Comment: A number of comments state that the SIP fails to adequately address the shutdown date required as part of the BART determination for Healy Unit 1. The commenter references the BART guidelines statements that ''if a shutdown date affects the BART determination, this date should be assured by a federally or state enforceable restriction preventing further operation.'' The commenters assert that this requirement is not addressed in the SIP submittal and that the SIP should make clear that a shutdown date of 2024 is a requirement for Unit 1.

Response: As noted in the proposal, the BART Guidelines explain that the source's remaining useful life may be considered as an element of the cost analysis in a BART determination for a particular source and, as the comment points out, where the retirement date affects the BART determination, the date should be enforceable. BART Guidelines IV.D.4.k. 70 FR 39169, July 6, 2005. In our proposed rulemaking, we recognized that the 2024 shutdown date relied on in the State's cost effectiveness calculation is not enforceable. Because of this, EPA conducted additional analyses of the cost effectiveness of the particular control technologies under consideration for Healy Unit 1 based on the estimated useful lifetime for the controls. 77 FR 11034, February 24, 2012. For that analysis we used lifetimes of 20 years for NO_X control technologies, and 15 years for SO_2 and PM control technologies. Based on additional information received during the public comment period, we subsequently evaluated the cost effectiveness of the NO_X control technologies for Healy Unit 1 based on a 8, 15, 20 and 30 year lifetime. This analysis calculated the cost effectiveness of SNCR, SCR, Rotating Over Fire Air (ROFA), ROFA with Rotamix, and optimization of the low NO_X burners with a modified over-fire air system. Thus, EPA's revised cost analysis specifically examined the cost effectiveness of SCR over both 20 and 30 year lifetimes. The revised cost analysis calculates SCR costs of about $5,900/ton of NO_X reduced for a 20 year equipment lifetime, and $5,300/ton of NO_X reduced for a 30 year equipment lifetime. After reviewing new information submitted from the commenters, and adjusting the assumptions in our cost effectiveness calculations, EPA continues to find that it was reasonable for the State to conclude that the additional cost for SCR over SNCR, even when based on 20 year or 30 year lifetimes, is not justified.

Our analysis confirmed that the reduced period for the remaining useful life used by the State in its BART analysis did not change the level of control that would reasonably be required as BART at this facility. As explained above, based on consideration of all the BART factors, including cost effectiveness, the remaining life, and visibility improvement estimated to result with emission limits associated with the different controls, the State's decision to reject SCR is not unreasonable.

Comment: EPA failed to conduct an adequate review of Alaska's cost projections for SCR technology on Healy Unit 1. EPA relied on Alaska's submission of a single vendor's quote (Fuel Tech) for the cost of SCR. The cost of an SCR can vary significantly depending on the vendor and its specifications, and EPA did not even review the details in this vendor's estimate. Both the Fuel Tech report and the GVEA report use cost assumptions that are contrary to the Cost Control Manual. EPA cannot reject SCR on cost effectiveness grounds without more sufficient factual support.

Response: EPA disagrees with the comment regarding Fuel Tech's cost quotes. It is appropriate for our cost analysis to rely, at least in part, on the vendor's quote which is based on site specific information and specifications. In conducting our analysis described above, we reduced the vendor's cost estimates for a number of components, including annual operating and maintenance (O&M) costs, NO_X emission rates for SCR, expected equipment lifetime, and costs for a new

induced draft fan, consistent with the EPA Control Cost Manual methodology.

Comment: One commenter asserted that the NO_X control options evaluated for Healy Unit 1 could be implemented sooner that the five years assumed by Alaska, in which case a 2024 shut down date may affect the cost effectiveness of feasible emission control technologies considered for Healy Unit 1.

Response: EPA recognizes that the time it takes to implement controls and the length of time the controls may operate affect the cost effectiveness calculation and thus the ultimate BART determination. EPA acknowledges that SNCR installations may typically require 8 to 12 months, however, the amount of time necessary for installation at a particular facility may vary significantly depending on the site specific circumstances, such as weather conditions, and the frequency and duration of maintenance periods for a particular power plant. Additionally, as noted above, the shut down date does not affect the BART determination here and thus the State's estimate of the time it may take to install SNCR does not significantly affect the cost effectiveness calculations of that technology.

Comment: A commenter asserts that EPA's proposal does not require meaningful emission reductions from this outdated coal plant. Further the comment states that limits proposed for SO_2 and NO_X at Healy do not represent the ''degree of reduction achievable through the application of the best system of continuous emission reduction'' and that EPA must impose lower BART emission limits for SO_2 and NO_X at Healy Unit 1 that are consistent with modern pollution control technology.

Response: The State's BART determination found that 0.20 lbs/mmBtu is the appropriate NO_X limit based on continued use of the current low NO_X burners (LNB) and over fired air (OFA) systems, and the new installation of SNCR. This limit represents a reduction of 29% from baseline emissions of NO_X from Healy 1. The BART limit for SO_2 is 0.30 lb/mmBtu based on the current Dry Sorbent Injection (DSI) system. As explained above, based on comments received on the proposed rulemaking, EPA reevaluated the cost effectiveness of SCR on Healy Unit 1 based on 20 and 30 year lifetimes, and evaluated the cost effectiveness of SNCR, ROFA, ROFA with Rotamix, and optimization of the low NO_X burners with overfire air system for 30 year lifetimes. Though some of the more stringent control technologies for NO_X (such as ROFA with Rotamix) and for SO_2 (such as DSI optimization), are reasonable in terms of cost effectiveness, the incremental visibility improvement achievable with these technologies, over the BART limits determined by ADEC for Healy Unit 1, are relatively small. For example, ROFA with Rotamix is estimated to result in just 0.166 dv more visibility improvement than that which is expected to result from SNCR, and DSI optimization may possibly improve visibility by just 0.25 dv. The incremental visibility improvement at Denali National Park for SCR over SNCR is only about 0.17 dv. EPA agrees with the State that the additional cost of SCR over SNCR is not justified at this facility by the relatively small incremental improvement in visibility.

Comment: A commenter asserts that even though a NO_X emissions limit of 0.19 lb/mmBtu is far too high to be BART for Healy Unit 1, EPA did not provide adequate justification for using a 0.20 lb/mmBtu emissions limit instead of 0.19 lb/mmBtu. The commenter states that Alaska found that SNCR could achieve a 0.19 lb/mmBtu emission limit at Healy, but then allowed a 5% higher emission rate for ''operating variability'' and that EPA accepted this determination without further analysis. There is no data showing that this need for variability necessarily exists, and furthermore, neither Alaska nor EPA conducted a visibility analysis based on the 0.20 lb/mmBtu emission limit.

Response: In the proposal, EPA explained that the State's basis for setting the NO_X limit at 0.20 lb/mmBtu rather than 0.19 lb/mmBtu was GVEA's analysis of 5 years of 30 day rolling average NO_X and SO_2 emissions from Unit 1. Based on this data, the State determined that the small increase would appropriately allow for operational flexibility. 77 FR 11034, February 24, 2012. EPA found that a 5% increase in NO_X emissions over the 0.19 lb/mmBtu achievable with SNCR, to allow for operational variability of Healy Unit 1, is reasonable and EPA has decided that the State's determination to set the NO_X limit at 0.20 lb/mmBtu is approvable.

Comment: The comment states that ROFA would achieve a 0.66 dv incremental visibility improvement over the improvement associated with SNCR at Healy 1. EPA cannot dismiss a cost-effective improvement greater than the improvement it proposes to accept. Also, EPA improperly rejected ROFA with Rotamix as BART based on an unclear relationship between NO_X and CO, CO_2 and PM emissions.

Response: EPA disagrees with the comment regarding the incremental visibility improvement between SNCR and ROFA. The SIP submittal indicates that the incremental visibility improvement expected to result from ROFA compared to SNCR would only be 0.049 dv, and ROFA with Rotamix compared to SNCR to be just 0.116 dv. See Table 8–1 of Appendix III.K.6 of the SIP submittal. EPA regards the small incremental visibility improvements from ROFA or ROFA with Rotamix as insufficient to justify the increased cost of either technology, regardless of the risk of additional collateral pollutant (CO, CO_2, and PM) emission increases.

Comment: GVEA agrees with Alaska and EPA that the BART process results in an emissions limit for NO_X based on the limit that can be achieved with SNCR, and that SCR would not be cost effective.

Response: As explained above, the State's conclusion regarding the BART limit for Healy Unit 1 is reasonable. In this action EPA is approving Alaska's determination that the NO_X BART emission limit for Healy Unit 1 is 0.20 lb/mmBtu.

Comment: EPA proposed that the current sulfur dioxide emissions limit of 0.30 lb/mmBtu is BART. EPA erroneously rejected optimization of the DSI system, which could achieve a 0.18 lb/mmBtu emission limit. This lower emissions limit would result in significant reduction in sulfur dioxide emissions and greatly improve visibility at Denali. EPA found that DSI optimization is cost-effective; however, it rejected this more stringent limit based on its concerns about a ''brown plume'' effect. The commenter further asserts there is no demonstration that the rapid conversion to NO_2 nearer the source will make any difference to the visibility in Denali. It is improper for EPA to dismiss this control possibility based on anecdotal evidence, which is not even linked to plant-specific characteristics present at Healy. The comment suggests that a short term pilot study be made part of the SIP to test the relationship between mercury emissions and sorbent injection rates.

Response: For the reasons explained in the SIP submittal and summarized in the proposal, after considering all the BART factors, the State's BART analysis for SO_2 at Healy Unit 1 found that the current DSI control technology with a limit of 0.30 lb/mmBtu is BART for SO_2. The State's analysis found that increased sorbent injection, at a cost of \$3578/ton of SO_2 removed would result in a potential visibility improvement of 0.25 dv but could also cause a visibility impairing brown plume which would interfere with rather than improve visibility in the nearby Denali National Park. EPA does not consider this

amount of potential improvement in visibility achievable by optimizing the existing DSI system when coupled with the potential for brown plume to provide sufficient basis to disapprove the State's SO_2 BART determination for Healy Unit 1.

The State retains the ability to consider requiring a pilot study in the future. The results of such a study, along with available information to better evaluate the potential for brown plume, could be used to further evaluate optimizing DSI as potential control technology when the State evaluates reasonable progress in the next planning period for regional haze. The other SO_2 control options analyzed, a spray dryer and wet limestone flue gas desulfurization, were considered not cost effective. See 77 FR 11034, February 24, 2012. Given these considerations, EPA has decided that the State's SO_2 BART determination for Healy Unit 1 is reasonable.

Comment: One commenter suggested that the effectiveness of a Lime Spray Dryer (LSD) was underestimated and recommended that EPA require GVEA to evaluate the LSD SO_2 treatment technology with plume reheat to see if the efficiency of the existing DSI system can be increased.

Response: EPA does not believe this further analysis is required. Plume reheat would require additional fuel combustion. This would increase CO2 emissions and add to the costs of a wet scrubbing control system.

B. Comments Related to the State's Reasonable Progress Demonstration and Healy Unit 2

A number of comments were received regarding the State's analysis of future sources that may impact visibility in Denali National Park. The commenters were particularly concerned with the emissions associated with Healy Unit 2 and contend its emissions should have been included in the State's reasonable progress and long term strategy analysis and determinations.

Comment: Commenters claim that, in general, the SIP does little to address additional emissions that are reasonably foreseeable. A number of industrial developments are currently moving forward in the Denali region, and are not even mentioned in Alaska's SIP. At a minimum, the SIP should address how it will deal with future emissions and construction activities occurring prior to the SIP's next review phase that would affect Denali's Class I Airshed. The commenters state that it is not prudent to delay this planning to the future.

Response: Contrary to the comments, the State in its SIP did account for future growth in emissions from industrial sources through 2018 by considering and evaluating population growth factors. The State used population projections compiled by the Alaska Department of Labor and Workforce Development (DOLWD) at five-year intervals through 2030 by individual borough and census areas to grow 2002 baseline activity to 2018 for most of the source categories. In addition, emission factors specific to calendar year 2018 were also developed for stationary point sources affected by regulatory control programs and technology improvements. The SIP submittal does not consider emissions from specific industrial projects that are planned for the future, or permitted point sources that are not currently operating but which may be in operation in 2018. Emissions from any such point sources will be considered and evaluated in future updates to the Alaska Regional Haze plan as they come into operation. A full description of the emission sources included in the 2018 projected inventory can be found in section III.K.5 of the SIP submittal.

Comment: Multiple commenters claim that the failure to account for emissions from Healy Unit 2 results in an inaccurate conclusion that the State is on the ''glide path'' to achieving its reasonable progress goals. Alaska failed to include Healy Unit 2 in its reasonable progress analysis, a facility which is projected to come on line in the near term, and that because Unit 2 is in the same footprint as Healy Unit 1 its emissions may prevent reasonable progress at Denali. The commenters assert that EPA must issue adequate emission limits for Healy Unit 2 to ensure reasonable progress not be thwarted by anticipated haze causing emissions.

Response: EPA recognizes that the Alaska Regional Haze SIP submittal does not address future emissions from Healy Unit 2 and that if, or when, it begins operating its emissions could influence Alaska's ability to achieve their reasonable progress goals. As explained above, Healy Unit 2, was originally permitted in 1994, operated briefly for testing in the late 1990's and has not operated at all since December 1999. It is a 50 MW non-BART unit. Unit 2 was not operating during the baseline period and its emissions were not included in the State's baseline emissions inventory. Recently, as further explained in the proposal, ADEC issued a renewed Title 5 permit to GVEA allowing future operation at Unit 2. However its future emissions have not been modeled and its potential visibility impact have not been determined at this time. 77 FR 11036, February 24, 2012. The Unit is still not operating. In the proposal, EPA indicated that it would consider additional relevant information it receives during public comment period regarding the emissions or visibility impact of this source as it relates to Alaska's reasonable progress goals. We did not receive additional specific information regarding Healy Unit 2 emissions or its future visibility impacts. The potential emissions for Healy Unit 2 have not been modeled therefore we cannot accurately assess the Unit's potential future visibility impacts.

In its SIP submittal, should Unit 2 be restarted, Alaska has committed to reassess the need for further control on the source during the five-year review to determine whether additional emission reductions would improve visibility in Class I areas in the next planning period. Thus, more specifically, in order to determine the affect of any such emissions from Healy Unit 2 on the glide path, the State will need to assess its emissions in future reasonable progress evaluations conducted pursuant to 40 CFR 51.308(g).

Additionally, EPA notes that the *U.S.* v. *GVEA and AIDEA* consent decree acknowledges that the anticipated operation of Unit 2 could be viewed as the operation of a new source and imposes additional enforceable requirements on Unit 2 that go beyond the Regional Haze SIP requirements. As described more fully above, pursuant to the consent decree, GVEA is subject to SCR installation requirements, strict NO_X emission limits and associated monitoring recordkeeping and reporting requirements. Additionally, the consent decree establishes declining NO_X emission limitations for both Unit 1 and Unit 2. Its emissions will be well controlled. It is unlikely that even if the State were to include the future emissions from Healy Unit 2 in its reasonable progress analysis that controls beyond those required under the consent decree would be necessary under the reasonable progress provisions in the regional haze rule.

In consideration of a number of factors including the current non-operational status of Healy Unit 2, the uncertainty of its future emissions, the State's commitment to assess its emissions during the 5-year review and the enforceable terms and conditions in the *U.S.* v. *GVEA and AIDEA* consent decree, EPA approves Alaska's treatment of Healy Unit 2 in its reasonable progress determination as proposed.

Comment: GVEA agrees with Alaska and EPA that the exact amount of impact from any operation of Healy Unit 2 cannot be determined at this time and that it is not reasonable to require additional controls on Healy Unit 2. However, GVEA does not agree with the State's assumption that it will necessarily have to ''consider'' Healy Unit 2 in its reasonable progress evaluation.

Response: As explained above, Alaska has committed to assess emissions from Healy Unit 2 in the reasonable progress evaluation in its 5-year assessment and in its 2018 Regional Haze SIP submittal. Given the location of Healy Unit 2, EPA believes that Alaska's commitment is not only appropriate but is necessary to ensure reasonable progress. EPA is approving Alaska's treatment of Healy Unit 2 in its reasonable progress determination as proposed.

Comment: Alaska's LTS fails to satisfy obligations under the Regional Haze Rule toward achieving natural visibility conditions at Denali. The Clean Air Act requires states to submit implementation plans that ''contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal'' of achieving natural visibility conditions at all Class I Areas.

Response: In developing a LTS, the Regional Haze Rule requires that states address six topics: (1) Ongoing Air Pollution Control Programs, (2) Measures to Mitigate Impacts of Construction Activities, (3) Emission Limitations and Schedules for Compliance, (4) Source Retirement and Replacement Schedules, (5) Smoke Management Techniques for Agricultural and Forestry Burning, and (6) Enforceability of Emission Limitations and Control Measures. In its proposed rulemaking, EPA found that the Alaska Regional Haze SIP submittal adequately addressed all six topics, and proposed to find that the LTS as a whole provided sufficient measures to ensure that Alaska will meet its emission reduction obligations.

According to ADEC's reasonable progress analysis, there is no statistically significant difference between the visibility improvement predicted by the Weighted Emission Potential (WEP) analysis for 2018 and the 2018 visibility target needed to achieve the uniform rate of progress (URP) to meet natural visibility conditions by 2064 for each Alaska Class I area. ADEC reached this conclusion by showing that the WEP results for 2018 fall within the 95 percent confidence limits of the 2018 visibility goal for each Class I area. See Section 9.E of the SIP submission. EPA believes that the reasonable progress goals established by Alaska for its Class I areas are reasonable. EPA finds that controls identified in the submittal, including the elements identified in the LTS portion of the Alaska Regional Haze SIP, along with additional controls on Healy Unit 2 required as a result of the consent decree, will provide reasonable progress towards attaining the goal of achieving natural visibility conditions in Alaska's Class I areas by 2064.

C. General Comments Regarding Visibility and Air Quality in Alaska

EPA also received a number of general comments on a range of topics including the purpose of the Clean Air Act, the need to protect the visibility in Denali National Park, the impact of pollution on public health, the importance of visibility to tourism in Alaska, motoring techniques and coal combustion and other generalized concerns or comments.

Comment: EPA received numerous comments asking EPA to ensure clean air in Denali National Park, Fairbanks, Anchorage, and throughout the region, and asking EPA to strengthen Alaska's regional haze plan.

Response: EPA's final action in this rulemaking to approve Alaska's Regional Haze SIP will result in cleaner air in Denali National Park and throughout the region by placing stricter emission limits on sources that contribute to regional haze. The objective of the regional haze program is to improve and protect visibility in national parks and wilderness areas through successive 10-year regional haze plans developed by the states. The Alaska Regional Haze plan, as approved in this action, establishes emission limits, through BART. For instance, Healy Unit 1 will have new NOx emission limits that are expected to result in a significant improvement in visibility in Denali National Park. The combined effect of all of the elements in the State's long term strategy that were described in the NPR, including the emission limits established for Healy, will result in improved visibility in Denali National Park, and cleaner air throughout the region.

Comment: EPA received numerous comments on the health effects, primarily asthma, that are associated with air pollution, and urged EPA to place tighter controls on sources of air pollution in Alaska.

Response: We appreciate the commenters' concerns regarding the potential adverse health effects of air pollution. We agree that the same emissions that cause visibility impairment can also cause respiratory problems, such as decreased lung function, aggravated asthma, and bronchitis. Although our action addresses visibility impairment, we note that there is the potential for improvements in human health through reductions in regional concentrations of visibility impairing pollutants.

Comment: We received a few comments saying that the purpose of the Clean Air Act is to protect our nation's air quality, especially at special places like Denali, the only national park in Alaska classified as a Class 1 area. These comments urged EPA not to allow air quality to degrade in the Denali National Park Class I area. We also received comments urging EPA to preserve the views at Denali National Park, and to ensure that tourism to pristine areas in Alaska is not adversely impacted by regional haze. Additional comments were submitted stating that Healy Units 1 and 2 are less than five miles from Denali, and are not being required to reduce emission enough to significantly decrease their visibility impacts on the park. These comments stated that modern and effective controls should be required to stem the haze pollution from Healy Unit 1 and Unit 2.

Response: EPA agrees that it is important to reduce the visibility and health impacts from man-made pollution at the Federal Class I Areas, such as Denali National Park. EPA's approval of Alaska's Regional Haze SIP will result in significant reductions in emissions and improvement in visibility in the State. This represents only the first step towards meeting the national goal of natural conditions in federal Class I Areas. The State's actions being approved in this rulemaking are the first in a series of actions that will be taken over the next several decades to improve visibility in Alaska Class I areas.

EPA also recognizes the role that protecting visibility in national parks and wilderness areas in Alaska has to tourism throughout the state. Reducing regional haze will help ensure that views in these parks and wilderness areas are preserved, and will continue to support tourism. We also appreciate the concern regarding Healy's proximity to Denali National Park. With approval of the State's BART determination for Healy, and as a result of the enforceable terms and conditions in the *U.S.* v. *GVEA and AIDEA* consent decree, the facility will be subject to modern and effective pollution control requirements and its emissions will be reduced. Additionally, the State will continue to

assess its control strategies and visibility goals in future regional haze reviews. Additional more detailed responses to comments regarding controls on the Healy Power Plant are addressed above.

Comment: We received a comment regarding the Denali IMPROVE monitoring site. The commenter stated that while it appears that the Alaska Regional Haze SIP submittal equally considers data from both the Denali Headquarters and Trapper Creek monitoring sites, it does not explicitly state that this is the case. The SIP submittal describes the Denali Headquarters IMPROVE site as now a ''protocol site'' but does not define the difference between a protocol and primary site, or whether data from a primary site would be given preference over a protocol site. Monitoring pollutants affecting visibility in Denali should not only consider pollutant information south of the Alaska Range, but pollutants from nearby major sources such as the Healy Power Plant, and sources in the Fairbanks area and both sites should be given equal consideration in the future.

Response: According to the information on the national IMPROVE Web site (*http://vista.cira.colostate.edu/improve/Overview/IMPROVENetwork Exp.htm*), the Denali Headquarters site was designated as the ''IMPROVE'' site, and the Trapper Creek site was designated as a ''protocol'' site when the IMPROVE network was expanded in 2002. EPA agrees with these designations, and also agrees that data from both the Denali Headquarters site and the Trapper Creek site should be used by Alaska to determine future progress toward visibility improvement goals in Denali National Park.

Comment: One commenter recommended that a more refined, receptor-by-receptor modeling analysis be conducted throughout Denali National Park to determine if visibility improvements greater than those predicted by GVEA for the Healy Unit 1 would be found.

Response: GVEA used the CALPUFF model to estimate the visibility impacts of Healy Unit 1 on Denali National Park. Alaska found that the CALPUFF modeling methods and related model input options used by GVEA were consistent with the WRAP CALPUFF modeling protocol and related BART guidance. The receptors used in the CALPUFF modeling were placed at uniform receptor spacing along the boundary and in the interior of Denali National Park, and were based on the National Park Service database for Class I area modeling receptors, found at: (*http://www2.nature.nps.gov/air/maps/Receptors/index.cfm*).

EPA believes that the modeling approach taken to determine visibility impacts from Healy Unit 1 is consistent with the BART modeling guidance and does not believe that including additional receptors in the CALPUFF modeling runs would have identified any greater visibility improvements for any given emission limits than those identified in the GVEA modeling results.

Comment: GVEA commented regarding the contributions from wildfires and out of State sources and supported the finding that natural wildfires inside Alaska are the primary contributors to regional haze at Denali National Park. GVEA also submits that the sources outside and upwind of Alaska are significant contributors to visibility impairment, and if visibility is not improving as planned, the monitoring data should be evaluated to quantify not only the impacts from natural wildfires, but from the out-of-state, upwind air pollution as well.

Response: The Alaska Regional Haze SIP submittal identifies organic carbon emissions from natural wildfires as the primary contributor to visibility impairment on the 20% worst days in Denali National Park. More specifically, the WEP analysis used by Alaska found that approximately 97% of the fine particulates causing visibility impairment on the 20% worst days in Denali National Park were composed of organic carbon from natural fires. Alaska will also review monitoring data prior to the five-year SIP update to determine progress towards the 2018 visibility goals in each Class I area. Alaska may decide at that time if additional source controls are necessary to achieve the 2018 goals. In addition, Alaska will undertake a comprehensive review of control strategies and visibility goals every 10 years. These subsequent reviews will evaluate whether this assessment of the dominance of fire continues to be the case.

Comment: EPA received numerous comments that emissions from coal combustion have impacts on visibility, human health, salmon, and climate change through emissions of carbon dioxide. The comments urged EPA to hold Alaska coal combustion sources, particularly utilities, to the highest emission standards with the most modern pollution control technology.

Response: The primary emission control action pertaining to coal-fired power plants taken in this final action is to establish BART emission limits on Healy Unit 1. The emission reductions achieved through BART for Healy Unit 1 will result in a decrease of nitrogen oxides emissions from 0.28 lb/mmBtu to 0.20 lb/mmBtu. Additionally it is noteworthy that, additional reductions in NOx, SO_2 and PM emissions will be achieved through the emission limits on Healy Unit 1 and Unit 2 set forth in the *US* v. *GVEA and AIDEA* consent decree discussed above.

Comment: A comment contends that it is unclear whether this SIP fully reviews and addresses all options for control of anthropogenic pollutants that impair visibility in Denali's Class I airshed. For example, while the SIP references coal combustion as a source of Organic Matter Carbon (OMC) and Elemental Carbon (EC), it attributes all OMC and EC in the Denali region to wildfires. Considering that OMC and EC are present year-round, it's unclear why the state has avoided mention of OMC and EC's relationship to the Healy Power Plant and combustion related to power generation and home heating in and near the Denali Borough. This SIP should acknowledge the presence of OMC and EC from anthropogenic sources in and near the Denali Borough (and within the state), and should consider methods to control OMC and EC pollutants related to anthropogenic sources.

Response: As explained in the SIP submittal Chapter III.K.4 of the SIP, the major sources of OMC in Alaska are wildland fires (forest, wetland, and tundra) and biogenic aerosols produced by natural vegetation, and that wildfires in Alaska occur mostly during the May-August fire season. The SIP submittal also states that in Alaska, severe wildfires create a significant amount of EC, and that there is significant amount of elemental carbon aerosols reaching the state from Asia and Europe. Chapter III.K.4 of the SIP submittal also explains that wildfire-related OMC is the largest contributor of fine particulates on the 20% worst days at the Denali IMPROVE sites, particularly during the spring and summer months. Table III.K.7–1 of the SIP summarizes the Weighted Emission Potential (WEP) analysis results from the top three boroughs for each pollutant on the 20% worst days in Denali. This table shows that approximately 97% of the fine particulates (which includes particulates composed of OMC and EC) on the 20% worst visibility days at Denali National Park are due to natural fires in the Yukon Koyukuk, Southeast Fairbanks, and the Fairbanks North Star boroughs. The WEP analysis used by Alaska was developed by the WRAP as a screening tool for states to decide which source regions have the potential

to contribute to haze formation at specific Class I areas. This method does not account for chemistry and removal processes in the atmosphere. Instead, the WEP analysis relies on an integration of gridded emissions data, meteorological back trajectory residence time data, a one-over-distance factor to approximate deposition and dispersion, and a normalization of the final results. The gridded emission data used by Alaska was consolidated into the following sources categories: Commercial marine vessels, natural fires, non-road mobile, on-road mobile, point, and stationary area sources. Therefore, the WEP analysis identified the OMC and EC contribution from the above man-made source categories, but was not able to determine the contribution of any single point source, such as the Healy Power Plant, or a subcategory of an area source, such as home heating sources. So while the SIP submission does not specifically identify the contribution of coal-combustion sources to visibility impairment in Denali National Park, it does demonstrate that wildfires are the major source of $PM_{2.5}$ in the State, that wildfires have the greatest potential to impact visibility in Denali, and that wildfires are the major source of OMC on the worst visibility days in Denali National Park. Alaska may choose to use a more sophisticated chemical-speciation tracer analysis, such as the PM Source Apportionment Technology (PSAT) analysis developed by the WRAP (see the WRAP TSD, Chapter 6A), in the future to determine the contributions from specific point sources or subcategories of sources.

Comment: There were a few comments on topics not related to the proposal. These included comments regarding the regulation of mining activities in Alaska and mercury monitoring in Alaska.

Response: These comments may be important topics for discussion but they are not related to the proposed action.

Comment: We also received a comment urging the use of alternative forms of energy, such as reducing emissions from motor vehicles by shifting to alcohol fuels.

Response: The State has the option of pursuing cleaner forms of alternative energy to reduce emissions that cause regional haze in its Class I areas. Alaska decided not to implement the use of renewable energy in this Regional Haze SIP but may chose to do so in future SIPs.

Comment: ADEC commented that it appreciates EPA's thorough review of the Regional Haze SIP submittal and supports EPA's action to approve the plan and encouraged EPA to finalize its approval of the Alaska Regional Haze SIP as meeting the requirements of the Clean Air Act, Sections 169A and 169B, and the federal Regulations at 40 CFR 51.308.

Response: EPA appreciates this comment supporting our proposed action.

III. Final Action

EPA is approving the Alaska Regional Haze plan, submitted on April 4, 2011, as meeting the requirements set forth in sections 169A and 169B of the Act and in 40 CFR 51.308 regarding Regional Haze. In this action, EPA is approving all provisions of Alaska's Regional Haze SIP submission, including the requirements for the calculation of baseline and natural visibility conditions, statewide inventory of visibility-impairing pollutants, best available retrofit technology (BART), Reasonable Progress Goals (RPGs), and Long-Term Strategy (LTS). Additionally, EPA is approving the Alaska Department of Environmental Conservation Best Available Retrofit Technology regulations at 18 AAC 50.260, and amendments to 18 AAC 50.030 which adopts by reference Volume II, Section III.F. Open Burning; and Volume II, Section III.K. Area Wide Pollution Control Program for Regional Haze.

IV. Statutory and Executive Orders Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is 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). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it 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).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the rule neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law. Therefore, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this rule. Consistent with EPA policy, EPA nonetheless provided a consultation opportunity to Tribes in Alaska located near the affected Class I areas in letters dated December 30, 2011. EPA received no requests for consultation in response to these letters.

This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. 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. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 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 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**. 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. section 804(2).

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 April 15, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2))

List of Subjects in 40 CFR Part 52

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

Dated: November 15, 2012.

Dennis J. McLerran,

Regional Administrator, Region 10.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart C—Alaska

■ 2. Section 52.70 is amended by adding paragraph (c)(41) to read as follows:

§ 52.70 Identification of plan.

* * * * *

(c) * * *

(41) On April 4, 2011, the Alaska Department of Environmental Conservation submitted a SIP revision to meet the regional haze requirements of Clean Air Act sections 169A and 169B, and Federal Regulations 40 CFR 51.308, to implement a regional haze program in the State of Alaska for the first planning period through July 31, 2018.

(i) Incorporation by reference.

(A) The following revised section of the Alaska Administrative Rules: Alaska Department of Environmental Conservation, 18 AAC 50.260, ''Guidelines for Best Available Retrofit Technology under the Regional Haze Rule'', state effective date December 30, 2007.

(ii) Additional material.

(A) The following section of ADEC's air quality control regulations: 18 AAC 50.030 State Air Quality Control Plan; state effective date February 11, 2011; Volume II, Section III. F. Open Burning; and Volume II, Section III. K. Area Wide Pollution Control Program for Regional Haze.

■ 3. Section 52.73 is amended by adding paragraph (g) to read as follows:

§ 52.73 Approval of plans.

* * * * *

(g) *Visibility protection.* (1) EPA approves the Regional Haze SIP revision submitted by the Alaska Department of Environmental Conservation on April 4, 2011, as meeting the requirements of Clean Air Act sections 169A and 169B, and Federal Regulations 40 CFR 51.308 to implement a regional haze program in the State of Alaska for the first planning period through July 31, 2018.

(2) [Reserved]

[FR Doc. 2013–03329 Filed 2–13–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2013–0064; FRL–9777–8]

Interim Final Determination To Stay and Defer Sanctions, Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: EPA is making an interim final determination to stay the imposition of offset sanctions and to defer the imposition of highway sanctions based on a proposed approval of a revision to the Sacramento Metropolitan Air Quality Management District (SMAQMD or District) portion of the California State Implementation Plan (SIP) published elsewhere in this **Federal Register**. The SIP revision concerns two permitting rules submitted by the SMAQMD: Rule 214, *Federal New Source Review,* and Rule 217, *Public Notice Requirements for Permits.*

DATES: This interim final determination is effective on February 14, 2013. However, comments will be accepted until March 18, 2013.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2013–0064, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. Email: *R9airpermits@epa.gov.*

3. *Mail or deliver:* Gerardo Rios (Air-3), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or email. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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.

Docket: Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

I. Background

On July 20, 2011 (76 FR 43183), we published a limited approval and limited disapproval of SMAQMD Rule 214 as adopted locally on October 28,

2010 and submitted by the State on December 7, 2010. We based our limited disapproval action on certain deficiencies in the submitted rule. This disapproval action started a sanctions clock for imposition of offset sanctions 18 months after August 19, 2011 and highway sanctions 6 months later, pursuant to section 179 of the Clean Air Act (CAA) and our regulations at 40 CFR 52.31. Under 40 CFR 52.31(d)(1), offset sanctions apply eighteen months after the effective date of a disapproval and highway sanctions apply six months after the offset sanctions, unless we determine that the deficiencies forming the basis of the disapproval have been corrected.

On August 23, 2012, SMAQMD adopted an amended version of Rule 214, which was intended to correct the deficiencies identified in our July 20, 2011 limited approval and limited disapproval action. On September 26, 2012, the State submitted this amended rule to EPA. In the Proposed Rules section of today's **Federal Register**, we are proposing to fully approve this rule because we believe it corrects the deficiencies identified in our July 20, 2011 disapproval action. Based on today's proposed approval, we are taking this final rulemaking action, effective on publication, to stay the imposition of the offset sanctions and to defer the imposition of the highway sanctions that were triggered by our July 20, 2011 limited disapproval.

EPA is providing the public with an opportunity to comment on this stay/deferral of sanctions. If comments are submitted that change our assessment described in this final determination and our proposed full approval of amended SMAQMD Rule 214, we intend to take subsequent final action to reimpose sanctions pursuant to 40 CFR 52.31(d). If no comments are submitted that change our assessment, then all sanctions and sanction clocks will be permanently terminated on the effective date of a final rule approval.

II. EPA Action

We are making an interim final determination to stay the imposition of the offset sanctions and to defer the imposition of the highway sanctions associated with SMAQMD Rule 214 (as adopted 2010) based on our concurrent proposal to approve the State's SIP revision as correcting the deficiencies that initiated sanctions.

Because EPA has preliminarily determined that the State has corrected the deficiencies identified in EPA's limited disapproval action, relief from sanctions should be provided as quickly as possible. Therefore, EPA is invoking the good cause exception under the Administrative Procedure Act (APA) in not providing an opportunity for comment before this action takes effect (5 U.S.C. 553(b)(3)). However, by this action EPA is providing the public with a chance to comment on EPA's determination after the effective date, and EPA will consider any comments received in determining whether to reverse such action.

EPA believes that notice-and-comment rulemaking before the effective date of this action is impracticable and contrary to the public interest. EPA has reviewed the State's submittal and, through its proposed action, is indicating that it is more likely than not that the State has corrected the deficiencies that started the sanctions clocks. Therefore, it is not in the public interest to initially impose sanctions or to keep applied sanctions in place when the State has most likely done all it can to correct the deficiencies that triggered the sanctions clocks. Moreover, it would be impracticable to go through notice-and-comment rulemaking on a finding that the State has corrected the deficiencies prior to the rulemaking approving the State's submittal. Therefore, EPA believes that it is necessary to use the interim final rulemaking process to stay and defer sanctions while EPA completes its rulemaking process on the approvability of the State's submittal. Moreover, with respect to the effective date of this action, EPA is invoking the good cause exception to the 30-day notice requirement of the APA because the purpose of this notice is to relieve a restriction (5 U.S.C. 553(d)(1)).

III. Statutory and Executive Order Reviews

This action stays and defers Federal sanctions and imposes no additional requirements.

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget.

This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action.

The administrator certifies that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*).

This rule 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).

This rule does not have tribal implications because it will 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).

This action does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999).

This rule is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply to this rule because it imposes no standards.

This rule does not impose an information collection burden under the provisions of 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 to Congress and the Comptroller General. However, section 808 provides that any rule for which the issuing agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). EPA has made such a good cause finding, including the reasons therefore, and established an effective date of February 14, 2013. 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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 April 15, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purpose of judicial review nor does it extend the time within which petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental regulations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: January 29, 2013.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2013–03250 Filed 2–13–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120109034–2171–01]

RIN 0648–XC456

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Trip Limit Adjustments for the Common Pool Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason adjustment of landing limits.

SUMMARY: This temporary rule increases the possession limits for Georges Bank cod, Gulf of Maine cod, and Southern New England/Mid-Atlantic yellowtail flounder for Northeast multispecies common pool vessels for the remainder of the 2012 fishing year. This rule also decreases the trip limits for white hake and pollock. This is intended to facilitate the harvest of Georges Bank cod, Gulf of Maine cod, and Southern New England/Mid-Atlantic yellowtail flounder to allow the total catch of these stocks to approach their pertinent common pool sub-annual catch limits sub-annual catch limits and prevent the overharvest of the white hake and pollock sub-annual catch limits.

DATES: Effective February 11, 2013, through April 30, 2013.

FOR FURTHER INFORMATION CONTACT: Brett Alger, Fisheries Management Specialist, 978–675–2153, Fax 978–281–9135.

SUPPLEMENTARY INFORMATION: Regulations governing the Northeast (NE) multispecies fishery are found at 50 CFR part 648, subpart F. The regulations at § 648.86(o) authorize the NE Regional Administrator (RA) to adjust the possession limits for common pool vessels in order to optimize the harvest of NE regulated multispecies by preventing the overharvest or underharvest of the pertinent common pool sub-annual catch limits (ACLs). As of January 30, 2013, Gulf of Maine (GOM) cod, Georges Bank (GB) cod, and Southern New England (SNE)/Mid-Atlatnic (MA) yellowtail flounder catch is well below their respective quotas, and conversely, catch of white hake and pollock is relatively high with approximately 3 months remaining in fishing year (FY) 2012. Table 1 includes the common pool sub-ACL for each stock affected by this action and the amount that has been caught as of February 7, 2013.

TABLE 1—SUB-ACLS AND CURRENT CATCH OF FIVE NE MULTISPECIES STOCKS IN THE COMMON POOL

	Sub-ACL (lb)	Sub-ACL (mt)	Percent harvested
GOM Cod	176,414	80	35.5
GB Cod	179,489	81	20.3
SNE/MA Yellowtail Flounder	338,099	153	6.1
White Hake	57,896	26	88.7
Pollock	180,323	82	77.8

Framework Adjustment 47 (FW 47) to the NE Multispecies Fishery Management Plan (FMP) established the current trip limits for the common pool vessels fishing under a Category A day-at-sea (DAS) (77 FR 26104). Since then, there have been no adjustments to any trip limits for any common pool vessels. Table 2 contains the current landing limit and the new landing limit being implemented by this action.

TABLE 2—THE CURRENT AND NEW TRIP LIMITS FOR FIVE NE MULTISPECIES STOCKS IN THE COMMON POOL

	Current DAS limit	New DAS limit
GOM Cod	650 lb (294.8 kg) per DAS up to 2,000 lb (907.2 kg) per trip.	2,000 lb (907.2 kg) per DAS up to 6,000 lb (2,721 kg) per trip.
GB Cod	2,000 lb (907.2 kg) per DAS up to 20,000 lb (9,072 kg) per trip.	3,000 lb (1,361 kg) per DAS up to 30,000 lb (13,608 kg) per trip.
SNE/MA Yellowtail Flounder	1,500 lb (680.4 kg) per DAS up to 4,500 lb (2,041 kg) per trip.	5,000 lb (2,268 kg) per DAS up to 15,000 lb (6,804 kg) per trip.
White Hake	1,500 lb (680.4 kg) per trip	500 lb (226.8 kg) per trip.
Pollock	Unlimited	10,000 lb (4,536 kg) per trip.

The regulations require that the Handgear B (HB) trip limit for GOM and GB cod be adjusted proportionally (rounded up to the nearest 25 lb (11.3 kg)) if either the GOM or GB cod trip limit applicable to a vessel fishing

under a NE multispecies DAS permit is adjusted. Under the NE Multispecies FMP, the initial GOM cod trip limits for NE multispecies common pool vessels fishing under a Category A DAS is set at 800 lb (362.9 kg) per DAS. However, FY 2012 began with a GOM cod trip limit of 650 lb (294.8 kg) per DAS, as implemented through FW 47, due to a reduced GOM cod sub-ACL for the common pool. Ultimately, the HB trip limit for GOM cod is adjusted according to trip limit in the FMP (i.e., 800 lb (362.9 kg) per DAS), not what was set under FW 47. For GB cod, the FMP establishes a limit of 2,000 lb (907.2 kg) per DAS and FW 47 did not implement anything different from that.

The new landing limit for GOM cod is 2,000 lb (907.2 kg) per DAS, an increase of 150 percent from 800 lb (362.9 kg) per DAS. Based on this new trip limit for GOM cod for Category A DAS vessels, the new GOM cod trip limit for HB vessels is 200 lb (90.7 kg) per trip (75 lb (34.0 kg) per trip increased by 150 percent = 187.5 lb (85.0 kg) per trip, rounded up to 200 lb (90.7 kg) per trip). The new landing limit for GB cod is 3,000 lb (1,361 kg) per DAS, an increase of 50 percent from the original landing limit of 2,000 lb (907.2 kg) per DAS. Based on the new trip limit for GB cod for Category A DAS vessels, the new GB cod trip limit for HB vessels is 125 lb (56.7 kg) per trip (75 lb (34.0 kg) per trip increased by 50 percent = 112.5 lb (51.0 kg) per trip, rounded up to 125 lb (56.7 kg) per trip). Increasing these trip limits does not jeopardize current conservation objectives.

The trip limit adjustments for Category A DAS and HB vessels are effective February 11, 2013, through April 30, 2013. This action does not change the current cod trip limit for vessels with a limited access Handgear A permit (300 lb (136.1. kg) per trip) or Small Vessel Category permit (300 lb (136.1 kg) of cod, haddock, and yellowtail flounder combined). Catch will continue to be monitored through dealer-reported landings, vessel monitoring system catch reports, and other available information, and if necessary, additional adjustments to common pool management measures may be made.

Classification

This action is required by 50 CFR part 648, and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be impracticable and contrary to the public interest. The regulations at § 648.86(o) grant the RA authority to adjust the NE multispecies trip limits for common pool vessels in order to prevent the overharvest or underharvest of the pertinent common pool sub-ACLs. The information informing this action only very recently became available. Given this fact, this action increases the trip limits for GOM cod, GB cod, and SNE/MA yellowtail flounder to reduce the probability of underharvesting the common pool sub-ACLs. A resulting delay in the trip limit increases of these three stocks could result in less revenue for the fishing industry and be counter to the objective of achieving optimum yield. A resulting delay in the trip limit decreases for white hake and pollock reduces the probability of exceeding the applicable common pool sub-ACLs. If the sub-ACLs are exceeded, this would undermine conservation objectives and trigger the implementation of accountability measures that will have negative economic impacts on the participants in the common pool. Given this fact, the time necessary to provide for prior notice and comment would prevent NMFS from implementing the necessary trip limit adjustments in a timely manner.

The AA further finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reasons stated above.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 11, 2013.

James P. Burgess,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–03476 Filed 2–11–13; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 120813333–3107–02]

RIN 0648–BC28

Fisheries Off West Coast States; West Coast Salmon Fisheries; Amendment 17 to the Salmon Fishery Management Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule under authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to implement Amendment 17 to the Pacific Coast Salmon Fishery Management Plan for Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California (Salmon FMP). NMFS approved Amendment 17 on February 5, 2013. Among other things, Amendment 17 revises the maximum fishing mortality threshold (MFMT) for Quillayute fall coho, revises the FMP to correct typographical errors, updates reporting measures to reflect new technology, and updates or removes other obsolete or unnecessary language. This rule implements certain portions of Amendment 17; specifically, it discontinues the public comment period for final management measures that are published in the **Federal Register** and updates mechanisms for obtaining information on management of the fishery. NMFS also makes minor updates to regulations unrelated to Amendment 17.

DATES: This final rule is effective March 18, 2013.

ADDRESSES: This final rule is also accessible on the Web site of NMFS' Northwest Region (*http://www.nwr.noaa.gov*). The current Salmon FMP, through Amendment 17 will be made available on the Pacific Fishery Management Council's Web site (*http://www.pcouncil.org/*).

FOR FURTHER INFORMATION CONTACT: Peggy Mundy at 206–526–4323, or Heidi Taylor at 562–980–4039.

SUPPLEMENTARY INFORMATION: The Pacific Fishery Management Council (Council) developed Amendment 17 to revise the MFMT for Quillayute fall coho and make several minor revisions to update language and technology used in FMP, including discontinuing a public comment period after the annual salmon management measures have been published in the **Federal Register** as a final rule. NMFS determined that the actions of Amendment 17 have all either been previously analyzed in a NEPA document or qualify for categorical exclusion (CE) from further NEPA analysis under NAO 216–6. The Council took final action on Amendment 17 in September 2012 and transmitted the amendment to NMFS on November 5, 2012. NMFS published a Notice of Availability of Amendment 17 in the **Federal Register** (77 FR 67327, November 9, 2012) to notify the public of the amendment and invite comments. NMFS published a proposed rule in the **Federal Register** (77 FR 75101, December 19, 2012) to notify the public and invite comments on the proposals. NMFS received two comment

submissions. The comments are summarized and responded to in the ''Response to Comments'' section of this rule.

As described in the proposed rule, Amendment 17 removes mention of a public comment period after final management measures are published in the **Federal Register.** Annual management measures for the salmon fishery are published in the **Federal Register** as final rules; public comment periods are not applied to final rules. The public has an opportunity to comment on these measures throughout the Council's annual process of setting them; that process includes two Council meetings and public hearings held in Washington, Oregon, and California. The Council publishes a notice in the **Federal Register** each December that details the process for setting the next year's annual management measures and solicits comments. The Council's notice provides the schedule for Council meetings and public hearings, as well as the schedule of availability of planning documents, including Preseason Report II which contains the salmon management alternatives the Council adopts in March for further consideration at its April meeting where it adopts a final recommendation for the fishing season. The Council's notice informs the public of how to request copies of the preseason planning documents, how to view the documents online, and how to submit comments to the Council by mail, fax, email, or the Federal Rulemaking Portal: *www.regulations.gov.* All comments received are reviewed by both the Council and NMFS.

The other details of Amendment 17 were described in the proposed rule (77 FR 75101, December 19, 2012) and are not repeated here. This final rule identifies changes to the regulations under 50 CFR part 660 subpart H to implement Amendment 17 and additional updates as described in the proposed rule.

Response to Comments

NMFS invited comments on Amendment 17 and the proposed rule. Two comments were received, including a letter of ''no comment'' submitted by the U.S. Department of the Interior. The one public comment received was opposed to approval of ''Frankenfish.'' While NMFS appreciates receiving public comment, the issue of ''Frankenfish'' is not relevant to Amendment 17.

Changes From Proposed Rule

This final rule includes changes to the existing regulations at 50 CFR 660.401 *et seq.* to implement Amendment 17 and additional updates. These are unchanged from the proposed rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with Amendment 17, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Northwest Regional Administrator has determined that the actions of Amendment 17 have all either been previously analyzed in a NEPA document or qualify for categorical exclusion from further NEPA analysis under NAO 216–6.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact the proposed rule, if adopted, would have on small entities. NMFS received no comments to the RIR/IRFA, and a final regulatory flexibility analysis (FRFA) was prepared. The commercial entities directly regulated by the Pacific Council's Fishery Management Plan are non-tribal commercial trollers, tribal commercial trollers, and charter boats. According to the Small Business Administration (SBA), a small commercial fish harvesting business is one that has annual receipts under $4.0 million, a small charter boat business is one that has annual receipts under $7.0 million, and a small processor is one that employs 500 employees or fewer. During 2011, the affected fleets consisted of estimated 802 non-tribal trollers, 40 to 50 tribal trollers, and 438–495 charter boats. Based on Pacific Coast Fisheries Information Network (PacFIN) data, a total of 802 non-tribal vessels participated in the West Coast commercial salmon fishery in 2011. This number is 25 percent more than participated in 2010 (642), two-and-a-half times the number that participated in 2009 (313), and three-and-a-half times the number participating in 2008 (221). Based on the SBA definitions and available information, the IRFA determined that all these entities are small entities. The RIR/IRFA also determined that these regulations are administrative in nature. Consequently, these regulations are not expected to meet any of the tests of having a ''significant'' economic impact on a ''substantial number'' of small entities. There are no additional projected reporting, recordkeeping, and other compliance requirements of this rule. No Federal rules have been identified that duplicate, overlap, or conflict with this action. The FRFA concurs with the findings of the RIR/IRFA.

The final rule is administrative in nature and does not affect ESA listed species. However, NMFS has issued a number of ESA biological opinions that address the impacts of the Council managed salmon fisheries on listed salmonids as follows: March 8, 1996 (Snake River spring/summer and fall Chinook and sockeye), April 28, 1999 (Oregon Coast natural coho, Southern Oregon/Northern California coastal coho, Central California coastal coho), April 28, 2000 (Central Valley spring Chinook), April 27, 2001 (Hood Canal summer chum 4(d) limit), April 30, 2004 (Upper Willamette Chinook, Upper Columbia spring Chinook, Lake Ozette sockeye, Columbia River chum, Puget Sound Chinook), June 13, 2005 (California coastal Chinook), April 28, 2008 (Lower Columbia River natural coho), and April 30, 2010 (Sacramento River winter Chinook, and listed Puget Sound yelloweye rockfish, canary rockfish, and bocaccio), and April 26, 2012 (Lower Columbia River Chinook). NMFS reiterates its consultation standards for all ESA-listed salmon and steelhead species in an annual Guidance letter to the Council. In 2009, NMFS consulted on the effects of fishing under the Salmon FMP on the endangered Southern Resident Killer Whale Distinct Population Segment (SRKW) and concluded the salmon fisheries were not likely to jeopardize SRKW (biological opinion dated May 5, 2009).

Pursuant to Executive Order 13175, this final rule was developed after meaningful consultation and collaboration with Tribal officials from the area covered by the FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian Tribe with Federally recognized fishing rights from the area of the Council's jurisdiction. This tribal representative on the Council has agreed with the provisions that apply to tribal vessels.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: February 11, 2013.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, Performing the Functions and Duties of the Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 773 *et seq.*

■ 2. In § 660.402, revise the definition for ''Dressed, head-off length of salmon'' to read as follows:

§ 660.402 Definitions.

* * * * *

Dressed, head-off length of salmon means the shortest distance between the midpoint of the clavicle arch and the fork of the tail, measured along the lateral line while the fish is lying on its side, without resort to any force or mutilation of the fish other than removal of the head, gills, and entrails.

* * * * *

■ 3. In § 660.406, revise paragraph (c) to read as follows:

§ 660.406 Exempted fishing.

* * * * *

(c) Each vessel participating in any exempted fishery recommended by the Council and allowed by NMFS is subject to all provisions of this subpart, except those portions which relate to the purpose and nature of the exempted fishery. These exceptions will be specified in a permit issued by the Regional Administrator to each vessel participating in the exempted fishery and that permit must be carried aboard each participating vessel.

■ 4. In § 660.408, revise paragraphs (d)(1)(vii) and (d)(2)(v) to read as follows:

§ 660.408 Annual actions.

* * * * *

(d) * * *

(1) * * *

(vii) *Other inseason provisions.* Any increase or decrease in the recreational or commercial allowable ocean harvest resulting from an inseason restructuring of a fishery or other inseason management action does not require reallocation of the overall non-treaty allowable ocean harvest north of Cape Falcon between the recreational and commercial fisheries. Inseason redistribution of subarea quotas within the recreational fishery or the distribution of allowable coho catch transfers from the commercial fishery among subareas may deviate from the preseason distribution. Inseason management actions may be taken by the Regional Administrator to assure meeting the primary objective of achieving all-species fisheries without imposing Chinook restrictions in each of the recreational subareas north of Cape Falcon. Such actions might include, but are not limited to: Closure from 0 to 3, 0 to 6, 3 to 200, or 5 to 200 nm from shore; closure from a point extending due west from Tatoosh Island for 5 nm, then south to a point due west of Umatilla Reef Buoy, then due east to shore; closure from North Head at the Columbia River mouth north to Leadbetter Point; change in species that may be landed; or other actions as prescribed in the annual management measures.

* * * * *

(2) * * *

(v) *Inseason reallocation.* No later than August 15 each year, the Salmon Technical Team will estimate the number of coho salmon needed to complete the recreational seasons. Any coho salmon allocated to the recreational fishery that are not needed to complete the recreational seasons will be reallocated to the commercial fishery. Once reallocation has taken place, the remaining recreational quota will change to a harvest guideline. If the harvest guideline for the recreational fishery is projected to be reached on or before Labor Day, the Regional Administrator may allow the recreational fishery to continue through the Labor Day weekend only if there is no significant danger of impacting the allocation of another fishery or of failing to meet an escapement goal.

* * * * *

■ 5. In § 660.411, revise paragraphs (b) and (c) to read as follows:

§ 660.411 Notification and publication procedures.

* * * * *

(b) *Public comment.* If time allows, NMFS will invite public comment prior to the effective date of any action published in the **Federal Register.**

(c) *Availability of data.* The Regional Administrator will compile in aggregate form all data and other information relevant to the action being taken and will make them available for public review upon request, contact information will be published annually in the **Federal Register** and announced on the telephone hotline. For actions affecting fisheries occurring primarily or exclusively in the fishery management area seaward of California, information relevant to the action also will be made available upon request by the Southwest Region, NMFS.

[FR Doc. 2013–03477 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 31
Thursday, February 14, 2013

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0016; Airspace Docket No. 12–ASO–33]

RIN 2120–AA66

Proposed Modification and Revocation of Air Traffic Service Routes; Jackson, MS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify two jet routes and seven VOR Federal airways; and remove two VOR Federal airways in the vicinity of Jackson, MS. The FAA is proposing this action due to the scheduled decommissioning of the Jackson, MS, VORTAC, and the commissioning of the Magnolia, MS, VORTAC navigation aids.

DATES: Comments must be received on or before April 1, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2013–0016 and Airspace Docket No. 12–ASO–33 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

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–2013–0016 and Airspace Docket No. 12–ASO–33) and be submitted in triplicate to the Docket Management Facility (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–2013–0016 and Airspace Docket No. 12–ASO–33.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date 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 comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except 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 210, 1701 Columbia Ave., College Park, GA 30337.

Persons interested in being placed on a mailing list for future NPRM's 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.

Background

The Jackson, MS, VORTAC will be permanently decommissioned in 2013. The new Magnolia, MS, VORTAC is being constructed on the property of Bruce Campbell Field Airport in Madison, MS, to replace the Jackson VORTAC. The Magnolia VORTAC site is approximately 5.5 NM southeast of the Jackson VORTAC location. The Magnolia VORTAC is scheduled for commissioning concurrent with the shutdown of the Jackson VORTAC. This proposal amends the affected route descriptions due to the VORTAC changes.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify two jet routes and seven VOR Federal airways; and cancel two VOR Federal airways in the vicinity of Jackson, MS. Specifically, the following changes are proposed:

Jet Route J–4 would be amended by removing ''Jackson, MS'' from the description and inserting ''Magnolia, MS'' in its place.

Jet Route J–20 would be amended by removing ''Jackson, MS'' from the description and inserting ''Magnolia, MS'' in its place. Also, the J–20 description in FAA Order 7400.9 contains an editorial error whereby ''Montgomery, AL'' is listed before ''Meridian, MS'' instead of following it. This action would correct the description by moving ''Montgomery, AL'' to follow ''Meridian, MS'' to match its proper geographic position along the route. It should be noted that this editorial error appears only in the route description in Order 7400.9. J–20 is correct in the NAS database and on IFR Enroute High Altitude chart H–6.

VOR Federal Airways V–9 and V–11 would be amended by removing ''Jackson, MS'' and inserting ''Magnolia, MS'' and by inserting radial intersections using the new Magnolia VORTAC.

VOR Federal Airway V–18 would be modified by removing ''Jackson, MS'' and inserting ''Magnolia, MS'' in its

place and by correcting the spelling of ''Talladega'' in the route description listed in FAA Order 7400.9.

VOR Federal Airway V–74 would be modified so that the last route segment proceeds from the Greenville, MS, VOR/DME direct to the new Magnolia VORTAC instead of the Jackson VORTAC.

VOR Federal Airway V–245 would amended by removing ''Jackson, MS'' and substituting ''Magnolia, MS,'' in the description.

Currently, V–417 extends from Monroe, LA, to Charleston, SC. This action would cancel the portion of V–417 that lies between Monroe, LA, and Meridian, MS. Between those two points, V–417 serves as an alternate airway to V–18. However, V–18 provides direct, more efficient routing between Monroe and Meridian, while V–417 includes two doglegs to the south of V–18, resulting in additional flying miles between Monroe and Meridian. The V–417 segments between Monroe and Meridian have been deemed obsolete and of little value to the National Airspace System (NAS), therefore, V–417 would be amended to begin at Meridian and proceed along the current route to Charleston.

V–427 would be removed. V–427 currently extends between Monroe, LA and Jackson, MS. Similar to V–417 (above) V–427 also serves as an alternate airway to V–18, but to the north side of V–18. Since V–18 provides a direct and more efficient route between Monroe, LA, and the Jackson, MS/Magnolia, MS, area, the FAA has determined that V–427 is obsolete and of little value to the NAS.

V–555 currently extends between Picayune, MS, and Sidon, MS, and serves as an alternate route to the east of V–9, between McComb, MS, and Sidon. Since V–9 provides direct, more efficient routing between McComb and Sidon, the FAA is proposing to modify V–555 by removing the segment between McComb and Sidon, which has been determined to be of minimal value to the NAS. As a result, the modified V–555 would only extend between Picayune and McComb.

V–557 currently extends between McComb, MS and Sidon, MS and is an alternate route to the west of V–9. However, V–9 provides direct, more efficient routing between those points; therefore, the FAA has determined that V–557 is of minimal value to the NAS, and would be removed.

The full descriptions of the proposed amended routes are listed in ''The Proposed Amendment'' section, below. Where new navigation aid radials are established in a description, both True and Magnetic degrees are shown. Otherwise, only True degrees are stated.

Jet routes are published in paragraph 2004, and VOR Federal airways are published in paragraph 6010, respectively, of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The jet routes and VOR Federal airways listed in this document would be subsequently published 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. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the route structure as required to preserve the safe and efficient flow of air traffic in the vicinity of Jackson, MS.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 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 FAA Order 7400.9W, Airspace Designations and Reporting Points, Dated August 8, 2012 and effective September 15, 2012, is amended as follows:

Paragraph 2004 Jet routes.

* * * * *

J–4 [Amended]

From Los Angeles, CA, via INT Los Angeles 083° and Twentynine Palms, CA, 269° radials; Twentynine Palms; Parker, CA; Buckeye, AZ; San Simon, AZ; Newman, TX; Wink, TX; Abilene, TX; Ranger, TX; Belcher, LA; Magnolia, MS; Meridian, MS; Montgomery, AL; INT Montgomery 051° and Colliers, SC, 268° radials; Colliers; Columbia, SC; Florence, SC; to Wilmington, NC.

J–20 [Amended]

From Seattle, WA, via Yakima, WA; Pendleton, OR; Donnelly, ID; Pocatello, ID; Rock Springs, WY; Falcon, CO; Hugo, CO; Lamar, CO; Liberal, KS; INT Liberal 137° and Will Rogers, OK, 284° radials; Will Rogers; Belcher, LA; Magnolia, MS; Meridian, MS; Montgomery, AL; Seminole, FL; INT Seminole 129° and Orlando, FL, 306° radials; to Orlando.

* * * * *

Paragraph 6010 Domestic VOR Federal airways.

V–9 [Amended]

From Leeville, LA; McComb, MS; INT McComb 004°T/001°M and Magnolia, MS 194°T/195°M radials; Magnolia; Sidon, MS; Marvell, AR; Gilmore, AR; Malden, MO; Farmington, MO; St. Louis, MO; Spinner, IL; Pontiac, IL; INT Pontiac, IL 343° and Rockford, IL, 169° radials; Rockford; Janesville, WI; Madison, WI; Oshkosh, WI; Green Bay, WI; Iron Mountain, MI; to Houghton, MI.

V–11 [Amended]

From Brookley, AL; Greene County, MS; INT Greene County 315°T/310°M and Magnolia, MS 133°T/134°M radials; Magnolia; Sidon, MS; Holly Springs, MS; Dyersburg, TN; Cunningham, KY; Pocket City, IN; Brickyard, IN; Marion, IN; Fort Wayne, IN; to INT Fort Wayne 038° and Carleton, MI, 262° radials.

V–18 [Amended]

From Guthrie, TX, via INT Guthrie 156° and Millsap, TX, 274° radials; Millsap; Glen Rose, TX; Cedar Creek, TX; Quitman, TX; Belcher, LA; Monroe, LA; Magnolia, MS; Meridian, MS; Crimson, AL; Vulcan, AL; Talladega, AL; Atlanta, GA; Colliers, SC; Charleston, SC.

V–74 [Amended]

From Garden City, KS; Dodge City, KS; Anthony, KS; Pioneer, OK; Tulsa, OK; Fort Smith, AR; 6 miles, 7 miles wide (4 miles north and 3 miles south of centerline) Little Rock, AR; Pine Bluff, AR; Greenville, MS; Magnolia, MS.

V–245 [Amended]

From Alexandria, LA, via Natchez, MS; Magnolia, MS; Bigbee, MS; INT Bigbee 082° and Crimson, AL, 304° radials; to Crimson.

V–417 [Amended]

From Meridian, MS, via Crimson, AL; Vulcan, AL; Rome, GA; INT Rome 060° and Electric City, SC, 274° radials; INT Electric City 274° and Athens, GA, 340° radials; Athens; Colliers, SC; Allendale, SC; to Charleston, SC.

V–427 [Removed]

V–555 [Amended]

From Picayune, MS; to McComb, MS.

V–557 [Removed]

Issued in Washington, DC, on February 6, 2013.

Gary A. Norek,

Manager, Airspace Policy & ATC Procedures Group.

[FR Doc. 2013–03464 Filed 2–13–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0081; Airspace Docket No. 12–AEA–5]

RIN 2120–AA66

Proposed Establishment of Area Navigation (RNAV) Routes; Washington, DC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish five new RNAV routes in support of the Washington, DC, Optimization of Airspace and Procedures in a Metroplex (OAPM) project. The proposed routes would increase efficiency and allow easier transition into the high altitude structure for departures from the Washington, DC Metropolitan area airports.

DATES: Comments must be received on or before April 1, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2013–0081 and Airspace Docket No. 12–AEA–5 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

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–2013–0081 and Airspace Docket No. 12–AEA–5) and be submitted in triplicate to the Docket Management Facility (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–2013–0081 and Airspace Docket No. 12–AEA–5.'' 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 NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except 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 210, 1701 Columbia Ave., College Park, GA 30337.

Persons interested in being placed on a mailing list for future NPRM's 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 to establish three high altitude RNAV routes, designated Q–68, Q–72 and Q–80; and two low altitude RNAV routes, designated T–291 and T–295, in the Washington, DC area. The proposed Q-routes would facilitate the divergence of aircraft departures from the Washington, DC, Metropolitan area airports, produce shorter routings and allow easier transition into the high altitude route structure. The Q-routes are intended to be one-way routes going westward and would serve primarily as feeders and alternate dispersion routes for aircraft departing the DC Metro area to the west. The proposed T-routes are expected to reduce ATC complexity and provide shorter routes of flight in some cases.

The following routes are proposed. Q–68 would extend between the Charleston, WV, VHF omnidirectional range tactical air navigation (VORTAC) aid and the OTTTO, VA, waypoint (WP). Q–72 would extend between the HACKS, WV, intersection and the RAMAY, VA, WP. It would provide an alternate route for jet route J–149 via a direct routing to the HACKS intersection, thus reducing miles flown for RNAV-equipped aircraft. Q–80 would extend between the FAREV, KY, WP and the OTTTO, VA, WP to serve aircraft headed to the southwest.

T–291 would extend between the LOUIE, MD, navigation fix and the Harrisburg, PA, VORTAC. T–295 would extend between the LOUIE fix and the Lancaster, PA, VORTAC. T–291 and T–295 would have a maximum assigned altitude (MAA) of 11,000 feet MSL. The T-routes would provide more efficient and predictable routing for aircraft utilizing airports near Harrisburg, PA, and the airports south of Patuxent River, MD, that normally fly VOR Federal airways V–31, V–33, V–93 and V–499 near the area. The T-routes would also enhance segregation of those aircraft utilizing those airways from the DC Metro arrivals coming from the northeast and from the DC Metro departures headed eastbound.

The proposed routes would increase National Airspace System (NAS) efficiency and advance the use of NextGen technology.

High altitude RNAV routes are published in paragraph 2006, and low altitude RNAV routes are published in paragraph 6011, respectively, of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The RNAV routes listed in this document would be subsequently published 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. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes RNAV routes as required to preserve the safe and efficient flow of air traffic.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 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 FAA Order 7400.9W, Airspace Designations and Reporting Points, Dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 2006 United States Area Navigation Routes

* * * * *

Q68 Charleston, WV (HVQ) to OTTTO, VA [New]

Charleston, WV (HVQ)	VORTAC	(Lat. 38°20′59″ N., long. 081°46′12″ W.)
TOMCA,WV	WP	(Lat. 38°34′42″ N., long. 080°36′41″ W.)
RONZZ, WV	WP	(Lat. 38°33′16″ N., long. 080°07′57″ W.)
HHOLZ, WV	WP	(Lat. 38°38′02″ N., long. 079°41′33″ W.)
HAMME, WV	WP	(Lat. 38°42′30″ N., long. 079°14′39″ W.)
CAPOE, VA	WP	(Lat. 38°51′13″ N., long. 078°22′27″ W.)
OTTTO, VA	WP	(Lat. 38°51′16″ N., long. 078°12′20″ W.)

Q72 HACKS, WV to RAMAY, VA [New]

HACKS, WV	FIX	(Lat. 39°07′46″ N., long. 081°05′35″ W.)
GEQUE, WV	WP	(Lat. 39°05′19″ N., long. 080°17′58″ W.)
BENSH, WV	WP	(Lat. 39°01′10″ N., long. 079°10′29″ W.)
RAMAY, VA	WP	(Lat. 38°57′39″ N., long. 078°12′59″ W.)

Q80 FAREV, KY to OTTTO, VA [New]

FAREV, KY	WP	(Lat. 37°12′28″ N., long. 085°07′21″ W.)
JEDER, KY	WP	(Lat. 37°19′31″ N., long. 084°45′14″ W.)
ENGRA, KY	WP	(Lat. 37°29′02″ N., long. 084°15′02″ W.)
DEWAK, KY	WP	(Lat. 37°46′38″ N., long. 083°14′58″ W.)
CEGMA, KY	WP	(Lat. 37°54′00″ N., long. 082°50′32″ W.)
JONEN, KY	WP	(Lat. 37°59′09″ N., long. 082°32′46″ W.)
BULVE, WV	WP	(Lat. 38°13′20″ N., long. 081°42′43″ W.)
WISTA, WV	WP	(Lat. 38°17′01″ N., long. 081°27′47″ W.)
LEVII, WV	WP	(Lat. 38°22′20″ N., long. 081°05′52″ W.)
RONZZ, WV	WP	(Lat. 38°33′16″ N., long. 080°07′57″ W.)
HHOLZ, WV	WP	(Lat. 38°38′02″ N., long. 079°41′33″ W.)
HAMME, WV	WP	(Lat. 38°42′30″ N., long. 079°14′39″ W.)
CAPOE, VA	WP	(Lat. 38°51′13″ N., long. 078°22′27″ W.)
OTTTO, VA	WP	(Lat. 38°51′16″ N., long. 078°12′20″ W.)

Paragraph 6011 United States Area Navigation Routes

* * * * *

T–291 LOUIE, MD to Harrisburg (HAR), PA [New]

LOUIE, MD	Fix	(Lat. 38°36′44″ N., long. 076°18′04″ W.)
MORTY, MD	WP	(Lat. 39°19′51″ N., long. 076°24′41″ W.)
Harrisburg, PA (HAR)	VORTAC	(Lat. 40°18′08″ N., long. 077°04′10″ W.)

T–295 LOUIE, MD to Lancaster (LRP), PA [New]

LOUIE, MD	Fix	(Lat. 38°36′44″ N., long. 076°18′04″ W.)
MORTY, MD	WP	(Lat. 39°19′51″ N., long. 076°24′41″ W.)
Lancaster, PA (LRP)	VORTAC	(Lat. 40°07′12″ N., long. 076°17′29″ W.)

Issued in Washington, DC, on February 8, 2013.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–03462 Filed 2–13–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–1296; Airspace Docket No. 09–AWA–1]

RIN 2120–AA66

Proposed Modification of Class B Airspace; Minneapolis, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Minneapolis, MN, Class B airspace area to contain large turbine-powered aircraft conducting published instrument procedures at the Minneapolis-St. Paul International Airport (MSP), MN, within Class B airspace. The FAA is proposing this action to ensure containment of aircraft being vectored to and conducting Simultaneous Instrument Landing System (SILS) approaches to parallel Runways 12L/R and 30L/R, aircraft being vectored to and conducting approaches to Runway 35, and aircraft being re-sequenced from approaches to Runway 35 to approaches to Runway 30L. This action would further support the FAA's national airspace redesign goal of optimizing terminal and en route airspace areas to enhance safety, improving the flow of air traffic, and reducing the potential for near midair collision in the terminal area.

DATES: Comments must be received on or before April 15, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2012–1296 and Airspace Docket No. 09–AWA–1 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy and ATC Procedures, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

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–2012–1296 and Airspace Docket No. 09–AWA–1) and be submitted in triplicate to the Docket Management Facility (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 Docket Nos. FAA–2012–1296 and Airspace Docket No. 09–AWA–1.'' 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*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, Operations Support Group, Federal Aviation Administration, 2601 Meacham Blvd. Fort Worth, TX 76137.

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.

Background

In 1974, the FAA issued a final rule which established the Minneapolis, MN, Terminal Control Area (TCA) (38 FR 34991). As a result of the Airspace Reclassification final rule (56 FR 65638), which became effective in 1993, the terms ''terminal control area'' and ''airport radar service area'' were replaced by ''Class B airspace area,'' and ''Class C airspace area,'' respectively. The primary purpose of a Class B airspace area is to reduce the potential for midair collisions in the airspace surrounding airports with high density

air traffic operations by providing an area in which all aircraft are subject to certain operating rules and equipment requirements. FAA directives require Class B airspace areas be designed to contain all instrument procedures, and that air traffic controllers vector aircraft as appropriate to remain within Class B airspace after entry.

The Minneapolis Class B airspace area has only been amended once, in 2006, since being established to address the significant growth in aircraft operations and the construction of Runway 17/35 to accommodate the increased operations at that time. That amendment action modified the Class B airspace to (1) accommodate aircraft conducting SILS approaches to parallel Runways 12L/R and 30L/R, and (2) provide protection for aircraft conducting instrument approaches to MSP's new Runway 35.

Since the 2006 Minneapolis Class B airspace amendment action, changes to MSP vector patterns (traffic flows) and aircraft descent profiles, and the realization of a miscalculated Class B airspace boundary configuration have resulted in unanticipated and unintended Class B airspace exits. There are two areas in the existing Minneapolis Class B airspace extensions located northwest and southeast of MSP where aircraft on south downwind flight paths to MSP Runways 12R and 30L operate on, or in close proximity to, the existing Class B airspace boundaries. These downwind ''legs'' must be far enough away from the associated final approach course (FAC) to ensure that aircraft have enough airspace to execute a standard rate turn from the downwind leg to a point at which they are established on a 30° FAC intercept heading. This 30° intercept heading must be achieved at least three miles from the FAC. On the north side of the final approach areas (for Runways 12L and 30R), the downwind legs are more than 1.5 nautical miles (NM) from the Class B airspace boundary; however, on the south side of the final approach areas (for Runways 12R and 30L), the downwind legs are less than 0.65 NM from the Class B airspace boundary. The southern boundaries of the existing Class B airspace extensions located northwest and southeast of MSP require a one NM expansion further south, at a minimum, to ensure large turbine-powered aircraft flying the downwind legs of the southern traffic patterns supporting Runways 12R and 30L instrument procedures are safely contained within Class B airspace.

Also, there are three areas of the Minneapolis Class B airspace where arriving aircraft ''drop'' beneath the floor of Class B airspace while descending for sequencing to closely-spaced, adjacent approaches at MSP. Since 2006, the fleet mix of aircraft operating at MSP has shifted from mostly rapidly descending DC–9s and B727s, to A320s, B757s, and other turbojet aircraft with more ''efficient wings'' that require a longer time to descend. As a result, the distance at which these slower descending aircraft must start a descent is located farther from MSP because the points at which air traffic control (ATC) must ensure the arriving aircraft reach 4,000 feet or 5,000 feet mean sea level (MSL), in order to commence the various instrument approach procedures, has not changed. This requirement to descend arriving large turbine-powered aircraft earlier often results in aircraft exiting the floor of existing Class B airspace.

Finally, a portion of the Runway 35 FAC, extended, is not contained entirely within the existing Class B airspace. Between 20 NM and 25 NM from the Minneapolis-St. Paul International (Wold-Chamberlain) Airport DME Antenna (I–MSP DME), the Runway 35 FAC is outside the boundary of existing Class B airspace; whereas, between 25 NM and 30 NM from the I–MSP DME, the Runway 35 FAC is inside the boundary of existing Class B airspace. As a result, aircraft turned on to the Runway 35 FAC, extended, at 6,000 feet MSL will be within Class B airspace between 25 NM and 30 NM from the I–MSP DME, but will be outside Class B airspace, beneath the existing 7,000-foot Class B airspace floor in that area between 20 NM and 25 NM from the I–MSP DME. Similarly, aircraft that are initially positioned for an approach to Runway 35, but then re-sequenced to Runway 30L, are also at risk of exiting the Class B airspace area. In this case, the typical flight path for aircraft being re-sequenced from Runway 35 to Runway 30L passes under the existing Class B airspace where, currently, the floor of the existing Class B airspace subarea is 7,000 feet MSL.

The proposed Minneapolis Class B airspace modifications described in this NPRM are intended to address these issues. For calendar year 2011, MSP ranked number 12 in the list of the ''50 Busiest FAA Airport Traffic Control Towers,'' with over 435,000 total airport operations. Additionally, the calendar year 2011 passenger enplanement data ranked MSP as number 16 among Commercial Service Airports, with 15,895,653 passenger enplanements (an increase of 2.47% from the previous year).

Pre-NPRM Public Input

An Ad Hoc Committee, formed in 2010, reviewed the Minneapolis Class B airspace and provided recommendations to the FAA about the proposed design. The Ad Hoc Committee was chaired by the Minnesota Soaring Club representative with participants representing aviation interests in the greater Twin Cities area including representatives of air carrier, seaplane, ultralight, parachute, aerobatic, sailplane, experimental aircraft, and general aviation interests. The Ad Hoc Committee met three times; May 15, 2010; June 15, 2010; and July 13, 2010.

In addition, as announced in the **Federal Register** of January 5, 2011 (76 FR 489), four fact-finding informal airspace meetings were held; the first on March 18, 2011, at the Metropolitan Airports Commission in Minneapolis, MN; the second on March 19, 2011, at the In Flight Pilot Training, LLC., in Eden Prairie, MN; the third on March 21, 2011, at the Minnesota Army National Guard, Aviation Facility, in St. Paul, MN; and the fourth on March 22, 2011, at the Metropolitan Airports Commission in Minneapolis, MN. These meetings provided interested airspace users with an opportunity to present their views and offer suggestions regarding the planned modifications to the Minneapolis Class B airspace area.

The navigation aid radial information contained in the Ad Hoc Committee recommendations, the informal airspace meeting comments, and the proposal discussions that follow is presented relative to Magnetic North for ease of understanding. However, the navigation aid radial information contained in the regulatory text legal description is presented relative to both True North and Magnetic North.

All substantive airspace recommendations made by the Ad Hoc Committee and public comments received as a result of the informal airspace meetings were considered in developing this proposal.

Discussion of Ad Hoc Committee Recommendations

The FAA prepared a preliminary design of the proposed Minneapolis Class B airspace modifications to illustrate the need for change and to serve as a basis for the Ad Hoc Committee's review. In general, the preliminary design featured a proposal to expand the southern boundaries of the existing Class B airspace extensions located northwest and southeast of MSP by approximately one NM to the south; lower the floor of portions of existing

Class B airspace abeam both sides of the existing Class B airspace extensions by 1,000 feet MSL; combine the existing Class B airspace subareas located south and southeast of MSP into one subarea, and; expand the boundary of existing Class B airspace south of MSP from the Gopher VHF omnidirectional range (VOR)/tactical air navigation (VORTAC) antenna (GEP) 160° radial to the GEP 157° radial.

The Ad Hoc Committee reported that most of the proposed Minneapolis Class B airspace area changes had little or no impact on the aviation community represented by the Ad Hoc Committee; however, they felt that the proposed modifications near the Stanton Airfield (SYN) would impact the Minnesota Soaring Club and Stanton Sport Aviation operations. The Ad Hoc Committee's report provided to the FAA contained six recommendations for consideration regarding the FAA's proposed modification of the Minneapolis Class B airspace area.

The Ad Hoc Committee recommended limiting the expansion of the existing Class B airspace located south of MSP, between 25 NM and 30 NM from the I–MSP DME, by defining the boundary using the GEP 158° radial instead of the initially proposed GEP 157° radial. They believed this change would better align the Class B airspace boundary with easily identifiable road junctions on the visual flight rules (VFR) charts and allow pilots of glider and powered aircraft, which are not Global Positioning System (GPS) equipped, to identify the Class B airspace boundary visually.

The FAA incorporated the Ad Hoc Committee's recommendation and defined the portion of the proposed Class B airspace boundary addressed above (proposed Area H) using the GEP 158° radial. Defining this portion of the proposed boundary from the GEP 157° radial to the GEP 158° radial would reduce the Class B airspace subarea by 0.8 NM laterally, but still provide containment of large turbine-powered aircraft within Class B airspace between 20 NM and 30 NM from the I–MSP DME.

The Ad Hoc Committee further recommended the FAA consider using a north-south aligned boundary to define the proposed GEP 158° radial boundary of the Class B airspace located south of MSP, between 25 NM and 30 NM from the I–MSP DME, in lieu of the discussion above. They thought this would more effectively shape the Class B airspace subarea boundary and minimize the Class B airspace expansion towards Stanton Airfield (SYN), as compared to the boundary being aligned using GEP radials. They noted this change would naturally shape the proposed Class B airspace wider towards MSP and minimize the movement of the southern portion of the boundary towards SYN.

The FAA notes that there are no navigation aids available in the MSP terminal area whose position would provide a significantly improved north-south alignment of the proposed boundary under discussion. Absent prominent landmarks being available where needed, to define a north-south aligned boundary, the FAA also considered using geographic references (latitude/longitude) to define the boundary. This alternative was also discounted because pilots of glider and powered aircraft, which are not GPS equipped, operating at SYN would not be able to easily identify the Class B airspace boundary and would risk further airspace incursions. Therefore, this proposal would define the boundary being discussed for the proposed Class B airspace Area H using the GEP 158° radial.

The Ad Hoc Committee also recommended the FAA consider moving the western boundary of the existing Class B airspace, located south of MSP, two degrees east by using the GEP 168° radial to define the boundary. The committee stated the two degree boundary movement would reduce the amount of Class B airspace with a 6,000-foot MSL floor that gliders operating out of SYN would have to stay below to clear.

This recommendation to change the existing GEP 170° radial to the GEP 168° radial to define the existing boundary of Class B airspace located south of MSP would affect two air traffic flows for Runway 35 arrivals and result in large turbine-powered aircraft not being contained within Class B airspace as they are today. If the committee's change was incorporated, the large turbine-powered aircraft inbound to MSP flying the TWOLF Standard Terminal Arrival (STAR) procedure from the south/southwest would fly, on average, an additional three miles in the very same airspace that nonparticipating VFR aircraft are flying in before they entered the protection of the Class B airspace area. Additionally, the large turbine-powered aircraft already contained in Class B airspace, flying a left downwind (southbound) traffic pattern to intercept Runway 35 approach procedures, would exit Class B airspace when the downwind leg of the traffic pattern extended beyond 20 NM from the I–MSP DME. The downwind leg of the traffic pattern to Runway 35 is typically five to seven miles west of the FAC, but the GEP 168° radial is only 4 miles west of the FAC. When an aircraft flying at 6,000 feet MSL on a left downwind to Runway 35 extends beyond 20 NM from the I–MSP DME, it would exit Class B airspace beneath the existing Class B airspace subarea with a 7,000-foot MSL floor, and again be flying in the same airspace used by nonparticipating VFR aircraft before re-entering Class B airspace after being turned-on to the base leg of the traffic pattern in preparation of intercepting the Runway 35 FAC, extended. Both scenarios highlight the unintended consequences that would result from moving the western boundary of the existing Class B airspace subarea located south of MSP two degrees to the east and the counterproductive result to this proposed action.

The Ad Hoc Committee was concerned about the availability of airspace north of SYN. They recommended the FAA establish only the portion of the proposed Class B airspace located south of MSP, west of the GEP 158° radial, with a 6,000-foot MSL floor and retain the existing 7,000-foot MSL floor in the remainder of the existing Class B airspace north of SYN. They further recommended that if more Class B airspace was required north of SYN, the FAA lower the portion of existing Class B airspace from 7,000 feet MSL to 6,000 feet MSL in the area necessary in the Class B airspace cutout north of SYN. The committee wanted to retain the majority of airspace available north of SYN with a 7,000-foot MSL ceiling.

The FAA evaluated this recommendation and determined the proposed Class B airspace located south of MSP and north of SYN (proposed Area H) is necessary with a 6,000-foot MSL floor. Aircraft that are inbound to Runway 35, but then re-sequenced to Runway 30L, are often vectored northeastward through the proposed Class B airspace Area H subarea at 6,000 feet MSL or higher, depending on traffic volume. Typically, aircraft arrivals inbound from the south are re-sequenced to Runway 30L when the traffic flows from the north and southwest saturate the Runway 35 FAC. As the number of aircraft sequenced to Runway 35 increases, the point at which aircraft from the south must be re-sequenced and turned to Runway 30L extends farther to the south; requiring the availability of Class B airspace with a 6,000-foot MSL floor. The proposed modification to establish the new Class B airspace Area H with a 6,000-foot MSL floor would ensure inbound aircraft that are at or descending to

6,000 feet MSL do not exit Class B airspace when transitioning from a Runway 35 arrival to a Runway 30L arrival.

However, in response to the second part of the Ad Hoc Committee's recommendation to minimize the amount of Class B airspace north of SYN being lowered, the initially proposed 25 NM boundary of Class B airspace being lowered to 6,000 feet MSL could be reduced to the 24 NM arc from the I–MSP DME with the floor of the remaining portion of existing Class B airspace between the 24 NM and 25 NM arcs from the I–MSP DME retained at 7,000 feet MSL. The net effect would be to limit the amount of proposed Class B airspace north of SYN being lowered to 6,000 feet MSL by moving the proposed boundary of that subarea one NM further north of SYN. This change to the proposal would still provide the Class B airspace necessary to contain large turbine-powered aircraft within Class B airspace when being re-sequenced from Runway 35 to Runway 30L, but leaves the Class B airspace overhead SYN unchanged.

The Ad Hoc Committee's final recommendation to the FAA was to consider moving the existing Class B airspace boundary over SYN north or eliminating the current 7,000-foot MSL Class B airspace floor altogether. It felt that flight track data shown to it indicated that the floor at the 25 NM line over SYN could be either moved northward or perhaps eliminated.

In this proposal, the FAA moved the 25 NM boundary of proposed Class B airspace to be lowered to 6,000 feet MSL one NM north to the 24 NM arc from the I–MSP DME in accordance with the Ad Hoc Committee's previous recommendation. The existing Class B airspace north of SYN that falls outside 24 NM from the I–MSP DME would remain unchanged. The FAA believes the minimal number of flight tracks documented below the existing Class B airspace between 24 NM and 25 NM from the I–MSP DME below 7,000 feet MSL can be managed with ATC-assigned course changes.

Discussion of Informal Airspace Meeting Comments

The FAA received written comments from thirteen individuals and organizations as a result of the informal airspace meetings. Seven commenters found the FAA's presentation helpful in understanding the requirement and issues, and clearly demonstrated an understanding of all stakeholders' views. The remaining commenters provided comments opposing various aspects of the proposed Minneapolis Class B airspace area modification. The following discussion addresses the substantive comments received.

One commenter questioned the reason for the proposed Class B airspace modification and submitted that the proposed modifications would further restrict General Aviation (GA) freedom of flight around the Twin Cities area, especially near Airlake Airport (LVN). He stated that the new airspace design might cause confusion and more airspace incursion violations, suggesting that the FAA ''keep things the same'' and have fewer regulations.

The FAA is proposing this action to ensure aircraft being vectored and conducting SILS approaches to MSP parallel Runways 12L/R and 30L/R, aircraft being vectored to and conducting approaches to Runway 35, and aircraft being re-sequenced from approach procedures for Runway 35 to approach procedures for Runway 30L are contained within Class B airspace. The FAA does not agree with the commenter that the proposed modification will further restrict GA freedom of flight, especially near LVN. The closest proposed Class B airspace modification to LVN by this action is approximately six miles southeast of the airport; the proposed lowering of Class B airspace (proposed Area H) from 7,000 feet MSL to 6,000 feet MSL. LVN is located approximately 14 NM south of the I–MSP DME, between the 12 NM and 20 NM I–MSP DME arcs where the Class B airspace floor would remain unchanged at 4,000 feet MSL. Additionally, the navigation aids that currently define the various Class B airspace boundaries would continue to define the modified boundaries. The FAA believes the proposed Class B airspace modifications have been clearly developed to prevent confusion, and would not contribute to unintentional airspace incursion violations.

One commenter expressed concern with the regulations that allow aircraft without transponders (sailplanes and gliders) to operate within the 30 NM Mode C veil around MSP, outside the Minneapolis Class B airspace area, because ATC may not be able to see the sailplanes and gliders on radar or advise other aircraft operating in the same area of their presence. The commenter stated that in the interest of safety, the FAA should look very seriously at the no-transponder exception allowing aircraft without a transponder to operate near congested Class B airspace areas.

The commenter is seeking a change to Title 14 Code of Federal Regulations (14 CFR) section 91.215, ATC transponder and altitude reporting equipment and use. This regulation, in part, provides an ''exception'' to the transponder requirement for aircraft not originally certified with an engine-driven electrical system to conduct operations within the 30 NM Mode C veil around Class B airspace primary airports, outside Class B airspace without a transponder. This suggestion is beyond the scope of this action. The MSP Terminal Radar Approach Control (TRACON) controllers are aware that gliders and sailplanes are operating near SYN without transponders and will continue to provide traffic advisories, to the extent possible, to VFR aircraft under their control that are operating near SYN.

One commenter stated that the Class B airspace modifications presented in the March 22, 2011, meeting offered some relief for SYN glider flights compared to previous versions, but that there was increased and unnecessary complexity created with the 24 NM to 25 NM Class B airspace subarea retained with a 7,000-foot MSL floor. A second commenter argued the same point, stating that the proposed modification creates an alleyway of airspace that will confuse pilots and may result in inadvertent airspace incursions. The commenters suggested that the Minneapolis Class B airspace should either end at 24 NM between the GEP 158° radial and the Flying Cloud VOR/DME navigation aid (FCM) 123° radial to simplify navigation for most gliders, or utilize a more consistent Class B airspace floor in this area preserving the 7,000-foot MSL floor directly over SYN. The first commenter also mentioned that the flight path summaries briefed at the informal airspace meetings did not show or take into account the non-transponder equipped gliders operating in the vicinity of SYN adjacent to the current MSP Class B airspace.

The FAA reviewed the Class B airspace subarea with a 7,000-foot MSL floor located between 24 NM and 25 NM from the I–MSP DME, from the GEP 158° radial to the FCM 123° radial, addressed by the commenters and incorporated their suggestion to remove it from the proposal to reduce the perceived airspace complexity and confusion for users in the area north of SYN. As a result, inbound aircraft transitioning from Runway 35 to Runway 30L will be issued ATC-assigned headings to keep them within the proposed Class B airspace Area H between 20 NM and 24 NM from the I–MSP DME.

Additionally, the FAA acknowledges that the flight path summaries presented at the informal airspace meetings did not include non-transponder equipped aircraft (gliders) since track recording

are only possible on transponder-equipped aircraft. This limitation underscores the need and importance for Minneapolis Class B airspace to be designed in such a way that it not only contains large turbine-powered aircraft arriving and departing MSP or nonparticipating VFR aircraft cleared into the Class B airspace by the MSP TRACON, but also segregates aircraft operating within the Class B airspace and those operating outside the Class B airspace, especially those not visible to ATC radar.

One commenter suggested that lowering the Class B airspace located north of SYN, from 7,000 feet MSL to 6,000 feet MSL, should be limited to the airspace west of the GEP 158° radial and the remainder of the Class B airspace subarea left unchanged with a 7,000-foot MSL floor. The commenter argued that this would allow continued upwind operations of glider training flights north of SYN.

As mentioned previously, the proposed Class B airspace located north of SYN between 20 NM and 24 NM from the I–MSP DME is necessary with a 6,000-foot MSL floor to ensure aircraft inbound to Runway 35, but then re-sequenced to Runway 30L are contained within Class B airspace. The proposed Class B airspace Area H would ensure aircraft that are at or descending to 6,000 feet MSL do not exit Class B airspace when transitioning from a Runway 35 arrival to a Runway 30L arrival. However, this action also proposes to return the Class B airspace located north of SYN outside 24 NM from the I–MSP DME between the GEP 158° and FCM 123° radials to the NAS. This airspace return is expected to continue supporting upwind operations of glider training flights north of SYN, as well as other nonparticipating VFR aircraft flying in the vicinity of SYN.

One commenter suggested that the FAA change nine of the Minneapolis Class B airspace boundary segments to align them with prominent geographic landmarks such as rivers and freeways, rather than the existing DME distance and VOR radials. A list of specific boundary changes were recommended and provided for the airspace boundaries located within a short distance (less than one mile) of available landmarks, and where the realignments would keep MSP traffic contained within Class B airspace. The commenter argued that the recommended changes would enhance safety by improving situational awareness for VFR traffic operating below Class B airspace subareas; stating that eliminating the need [for pilots] to keep eyes inside the cockpit would improve traffic scans and would reduce the risk of mid-air collisions.

Using prominent geographic features (landmarks), when they are easily identifiable and coincide with proposed airspace configuration modifications, help identify Class B airspace boundaries and enhances the situational awareness for VFR pilots flying in the vicinity of Class B airspace areas. The scope of this proposed modification is to modify the Minneapolis Class B airspace areas where aircraft containment has been compromised so as to minimize airspace impacts on nonparticipating VFR aircraft operating in the vicinity of the Class B airspace. There are not any easily identifiable landmarks available that coincide with the proposed Class B airspace boundaries needed to contain the large turbine-powered aircraft arriving/departing MSP, without expanding the proposed Class B airspace subareas beyond what is required to match existing landmarks. Since there have not been any containment problems in the areas where the commenter suggested boundary changes, the FAA has opted to retain the existing boundaries and limit the scope of this action as mentioned previously.

The Proposal

The FAA is proposing an amendment to Title 14 of the Code of Federal Regulations

(14 CFR) part 71 to modify the Minneapolis Class B airspace area. This action (depicted on the attached chart) proposes to expand the southern boundary of the existing Area D extensions by approximately 1 NM to the south, lower the floor of portions of existing Class B airspace Area E abeam both sides of the existing Area D extensions by 1,000 feet MSL, reduce the southern boundary of existing Area E located southeast of MSP by 1 NM and combine the remaining airspace of that portion of Area E with existing Area F, and move the eastern boundary of existing Area F from the GEP 160° radial to the GEP 158° radial between 24 NM and 30 NM from the I–MSP DME navigation aid. These proposed modifications would provide the minimum additional airspace needed to contain large turbine-powered aircraft conducting instrument procedures within the confines of Class B airspace.

Except for Areas A, B, and C, the proposed descriptions of all other Minneapolis Class B airspace subareas would be reconfigured, re-described, and realigned by geographic position in relation to the I–MSP DME antenna rather than the previous practice of combining geographically separate areas that share common Class B airspace altitude floors into one large, complex subarea description. The current MSP Class B airspace area consists of six subareas (A through F) whereas the proposed configuration would consist of ten subareas (A through J). The proposed revisions to the Minneapolis Class B airspace area, by subarea, are outlined below.

Area A. Area A is the surface area that extends upward from the surface to 10,000 feet MSL in the Class B airspace contained in the current Area A. The FAA is not proposing any changes to Area A.

Area B. Area B extends upward from 2,300 feet MSL to 10,000 feet MSL in the Class B airspace contained in the current Area B. The FAA is not proposing any changes to Area B.

Area C. Area C extends upward from 3,000 feet MSL to 10,000 feet MSL in the Class B airspace contained in the current Area C. The FAA is not proposing any changes to Area C.

Area D. Area D would be revised to include the airspace extending upward from 4,000 feet MSL to 10,000 feet MSL in the Class B airspace contained in the current Area D with the southern boundary of the Class B airspace extensions moved approximately 1 NM to the south. The expanded southern boundary of the new Area D extensions would ensure containment of aircraft flying the southern traffic pattern downwind legs for Runway 12R and 30L instrument procedures within Class B airspace.

Area E. Area E would be revised to include the airspace extending upward from 6,000 feet MSL to 10,000 feet MSL between the GEP 295° radial clockwise to the GEP 352° radial and the 20 NM to 30 NM arcs from the I–MSP DME. This new subarea would lower a portion of existing Class B airspace contained in the current Area E by 1,000 feet MSL to ensure containment of aircraft that require a longer time/distance to descend for sequence to closely spaced, adjacent instrument approaches to Runways 12L and 12R within Class B airspace.

Area F. Area F would include the airspace extending upward from 7,000 feet MSL to 10,000 feet MSL between the GEP 085° radial clockwise to the GEP 105° radial and the 20 NM to 30 NM arcs from the I–MSP DME. This new subarea would be established in existing Class B airspace contained in the current Area E.

Area G. Area G would include the airspace extending upward from 6,000 feet MSL to 10,000 feet MSL between the GEP 105° radial clockwise to the GEP 115° radial and the 20 NM to 30

NM arcs from the I–MSP DME. This new subarea would lower a portion of existing Class B airspace contained in the current Area E by 1,000 feet MSL to ensure containment of aircraft that require a longer time/distance to descend for sequence to closely spaced, adjacent instrument approaches to Runways 30L and 30R within Class B airspace.

Area H. Area H would include the airspace extending upward from 6,000 feet MSL to 10,000 feet MSL in the existing Class B airspace contained in current Area F and a portion of current Area E located southeast of MSP. This new subarea would expand the eastern boundary of the current Area F to the GEP 158° radial, reduce the southern boundary of the portion of current Area E to the 24 NM arc from the I–MSP DME, and lower the Class B airspace floor in the remaining portion of the current Area E to match the Class B airspace floor in the current Area F. The new subarea would ensure containment of aircraft flying the Runway 35 procedures and associated traffic patterns, as well as the aircraft being re-sequenced from Runway 35 to Runway 30L approaches, within Class B airspace.

Area I. Area I would include the airspace extending upward from 7,000 feet MSL to 10,000 feet MSL between the GEP 170° radial clockwise to the FCM 270° radial and the 20 NM to 30 NM arcs from the I–MSP DME. This new subarea would be established in existing Class B airspace contained in the current Area E.

Area J. Area J would include the airspace extending upward from 6,000 feet MSL to 10,000 feet MSL between the FCM 270° radial clockwise to the FCM 294° radial and the 20 NM to 30 NM arcs from the I–MSP DME. This new subarea would lower a portion of existing Class B airspace contained in the current Area E by 1,000 feet MSL to ensure containment of aircraft that require a longer time/distance to descend for sequence to closely spaced, adjacent instrument approaches to Runways 12L and 12R within Class B airspace.

Finally, this proposed action would update the Minneapolis-St. Paul International (Wold-Chamberlain) Airport reference point, the Gopher VORTAC, the Flying Cloud VOR/DME, and the Minneapolis-St. Paul International (Wold-Chamberlain) Airport DME geographic coordinates (latitude/longitude) to reflect current NAS data is reflected in the Minneapolis Class B airspace area legal description header. The geographic coordinates in this proposal are stated in degrees, minutes, and seconds based on North American Datum 83.

Implementation of these proposed modifications to the Minneapolis Class B airspace area would ensure containment of large turbine-powered aircraft within Class B airspace as required by FAA directive to enhance safety and the efficient management of aircraft operations in the Minneapolis, MN, terminal area.

Class B airspace areas are published in paragraph 3000 of FAA Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR section 71.1. The Class B airspace area listed in this document would be published subsequently in the Order.

Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this proposed rule. The reasoning for this determination follows:

This action proposes to modify the Minneapolis, MN, Class B airspace area to contain large turbine-powered aircraft conducting published instrument procedures within Class B airspace, and reduce the potential for midair collisions. Given the current boundaries and changes in MSP traffic flows and aircraft descent profiles since the last restructuring, instrument flight rules (IFR) flights are not contained within Class B airspace. This amendment would restructure the airspace to ensure containment of these aircraft within Class B airspace which would reduce the potential for midair collisions in the terminal area. The amendment would also reduce controller workload by reducing the number of Class B airspace excursions.

The proposed restructuring accommodates aircraft approaches on flight paths that are currently close to the Class B airspace boundaries, by proposing these boundaries be moved slightly. Also, since the last restructuring of the airspace, the fleet mix has changed from more rapidly descending aircraft to turbojets with more ''efficient wings'' which require a longer time to descend. To better contain these new turbojets, the amendment proposes lowering the floor of the Class B airspace in the areas where arriving aircraft currently drop beneath the floor of Class B airspace so they would be contained. Also, the original Class B airspace design does not contain a portion of one of the FACs within the existing Class B airspace and consequently aircraft traveling along this FAC exit Class B airspace for part of the descent. The rule proposes moving the Class B boundary and lowering the floor in this portion of the airspace so that aircraft using this FAC would be contained within Class B airspace.

The FAA expects these changes would have little impact on VFR traffic as VFR aircraft would have the alternatives of flying under or over the redesigned Class B or through it with clearance from air traffic control. Although there was a comment expressing concern that the proposed modifications would restrict general aviation flight around the Twin Cities area, in particular near Airlake Airport (LVN), the FAA notes that LVN is a significant distance from the proposed modifications and there should be no impact to general aviation traffic in that area. Furthermore, the Ad Hoc Committee which was formed to review the Class B airspace proposal and provide feedback to the FAA reported

most of the proposed changes would have little or no impact on the aviation community they represented, including non-participating VFR aircraft, with the exception of the cutout near Stanton Airfield. The committee did however indicate the proposed modifications would impact the Minnesota Soaring Club and Stanton Sport Aviation operations and provided six recommendations to alleviate the potential impact. Additionally, the FAA held several fact finding informal airspace meetings. As a result of the Ad Hoc Committee and informal airspace meeting inputs, the FAA incorporated those recommendations and comments that supported containment of IFR traffic within Class B airspace with an expected minimal impact on non-participatory VFR operations. The FAA anticipates the proposed modifications would continue to allow sufficient airspace for VFR operations in the vicinity of the Minneapolis Class B airspace area.

The expected outcome would be a minimal impact with positive net benefits, and a regulatory evaluation was not prepared. The FAA requests comments with supporting justification about the FAA determination of minimal impact.

The FAA has, therefore, determined that this proposed rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The proposed rule is expected to improve safety by redefining Class B airspace boundaries and would impose only minimal costs. It is expected to cause little impact on VFR traffic. VFR traffic that might be currently flying in airspace that would be re-designated as Class B airspace would continue to have the option of flying above or below the proposed Class B airspace or obtaining clearance to fly through. The proposed amendment would not require updating of materials outside the normal update cycle. Therefore, the expected outcome would be a minimal economic impact on small entities affected by this rulemaking action.

Therefore, the FAA certifies this proposed rule, if promulgated, would not have a significant impact on a substantial number of small entities. The FAA solicits comments regarding this determination. Specifically, the FAA requests comments on whether the proposed rule creates any specific compliance costs unique to small entities. Please provide detailed economic analysis to support any cost claims. The FAA also invites comments regarding other small entity concerns with respect to the proposed rule.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule and determined that it would have only a domestic impact and therefore no effect on international trade.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This proposed rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 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 the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 3000—Subpart B—Class B Airspace

* * * * *

AGL MN B Minneapolis, MN [Amended]

Minneapolis-St. Paul International (Wold-Chamberlain) Airport (Primary Airport)
(Lat. 44°52′55″ N., long. 93°13′18″ W.)
Gopher VORTAC
(Lat. 45°08′44″ N., long. 93°22′23″ W.)

Flying Cloud VOR/DME
(Lat. 44°49′31″ N., long. 93°26′34″ W.)
Minneapolis-St. Paul International (Wold-Chamberlain) Airport DME Antenna (I–MSP DME)
(Lat. 44°52′27″ N., long. 93°12′21″ W.)

Boundaries

Area A. That airspace extending upward from the surface to and including 10,000 feet MSL within a 6 NM radius of I–MSP DME.

Area B. That airspace extending upward from 2,300 feet MSL to and including 10,000 feet MSL within an 8.5 NM radius of I–MSP DME, excluding Area A previously described.

Area C. That airspace extending upward from 3,000 feet MSL to and including 10,000 feet MSL within a 12 NM radius of I–MSP DME, excluding Area A and Area B previously described.

Area D. That airspace extending upward from 4,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 20 NM arc of the I–MSP DME and the Gopher VORTAC 301°T/295°M radial; thence clockwise along the 20 NM arc of the I–MSP DME to the Gopher VORTAC 121°T/115°M radial; thence southeast along the Gopher VORTAC 121°T/115°M radial to the 30 NM arc of the I–MSP DME; thence clockwise along the 30 NM arc of the I–MSP DME to the Flying Cloud VOR/DME 124°T/123°M radial; thence northwest along the Flying Cloud VOR/DME 124°T/123°M radial to the 20 NM arc of the I–MSP DME; thence clockwise along the 20 NM are of the I–MSP DME to the Flying Cloud VOR/DME 295°T/294°M radial; thence northwest along the Flying Cloud VOR/DME 295°T/294°M radial to the 30 NM arc of the I–MSP DME; thence clockwise along the 30 NM arc of the I–MSP DME to the Gopher VORTAC 301°T/295°M radial; thence southeast along the Gopher VORTAC 301°T/295°M radial to the point of beginning, excluding Area A, Area B, and Area C previously described.

Area E. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 20 NM arc of the I–MSP DME and the Gopher VORTAC 301°T/295°M radial; thence clockwise along the 20 NM arc of the I–MSP DME to the Gopher VORTAC 358°T/352°M radial; thence north along the Gopher VORTAC 358°T/352°M radial to the 30 NM arc of the I–MSP DME; thence counterclockwise along the 30 NM arc of the I–MSP DME to the Gopher VORTAC 301°T/295°M radial; thence southeast along the Gopher VORTAC 301°T/295°M radial to the point of beginning.

Area F. That airspace extending upward from 7,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 20 NM arc of the I–MSP DME and the Gopher VORTAC 091°T/085°M radial; thence clockwise along the 20 NM arc of the I–MSP DME to the Gopher VORTAC 111°T/105°M radial; thence southeast along the Gopher VORTAC 111°T/105°M radial to the 30 NM arc of the I–MSP DME; thence counterclockwise along the 30 NM arc of the I–MSP DME to the Gopher VORTAC 091°T/085°M radial; thence west along the Gopher VORTAC 091°T/085°M radial to the point of beginning.

Area G. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 20 NM arc of the I–MSP DME and the Gopher VORTAC 111°T/105°M radial; thence clockwise along the 20 NM arc of the I–MSP DME to the Gopher VORTAC 121°T/115°M radial; thence southeast along the Gopher VORTAC 121°T/115°M radial to the 30 NM arc of the I–MSP DME; thence counterclockwise along the 30 NM arc of the I–MSP DME to the Gopher VORTAC 111°T/105°M radial; thence northwest along the Gopher VORTAC 111°T/105°M radial to the point of beginning.

Area H. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 20 NM arc of the I–MSP DME and the Flying Cloud VOR/DME 124°T/123°M radial; thence clockwise along the 20 NM arc of the I–MSP DME to the Gopher VORTAC 176°T/170°M radial; thence south along the Gopher VORTAC 176°T/170°M radial to the 30 NM arc of the I–MSP DME; thence counterclockwise along the 30 NM arc of the I–MSP DME to the Gopher VORTAC 164°T/158°M radial; thence north along the Gopher VORTAC 164°T/158°M radial to the 24 NM arc of the I–MSP DME; thence counterclockwise along the 24 NM arc of the I–MSP DME to the Flying Cloud VOR/DME 124°T/123°M radial; thence northwest along the Flying Cloud VOR/DME 124°T/123°M radial to the point of beginning.

Area I. That airspace extending upward from 7,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 20 NM arc of the I–MSP DME and the Gopher VORTAC 176°T/170°M radial; thence clockwise along the 20 NM arc of the I–MSP DME to the Flying Cloud VOR/DME 271°T/270°M radial; thence west along the Flying Cloud VOR/DME 271°T/270°M radial to the 30 NM arc of the I–MSP DME; thence counterclockwise along the 30 NM arc of the I–MSP DME to the Gopher VORTAC 176°T/170°M radial; thence north along the Gopher VORTAC 176°T/170°M radial to the point of beginning.

Area J. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 20 NM arc of the I–MSP DME and the Flying Cloud VOR/DME 271°T/270°M radial; thence clockwise along the 20 NM arc of the I–MSP DME to the Flying Cloud VOR/DME 295°T/294°M radial; thence northwest along the Flying Cloud VOR/DME 295°T/294°M radial to the 30 NM arc of the I–MSP DME; thence counterclockwise along the 30 NM arc of the I–MSP DME to the Flying Cloud 271°T/270°M radial; thence east along the Flying Cloud 271°T/270°M radial to the point of beginning.

Issued in Washington, DC, on February 6, 2013.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

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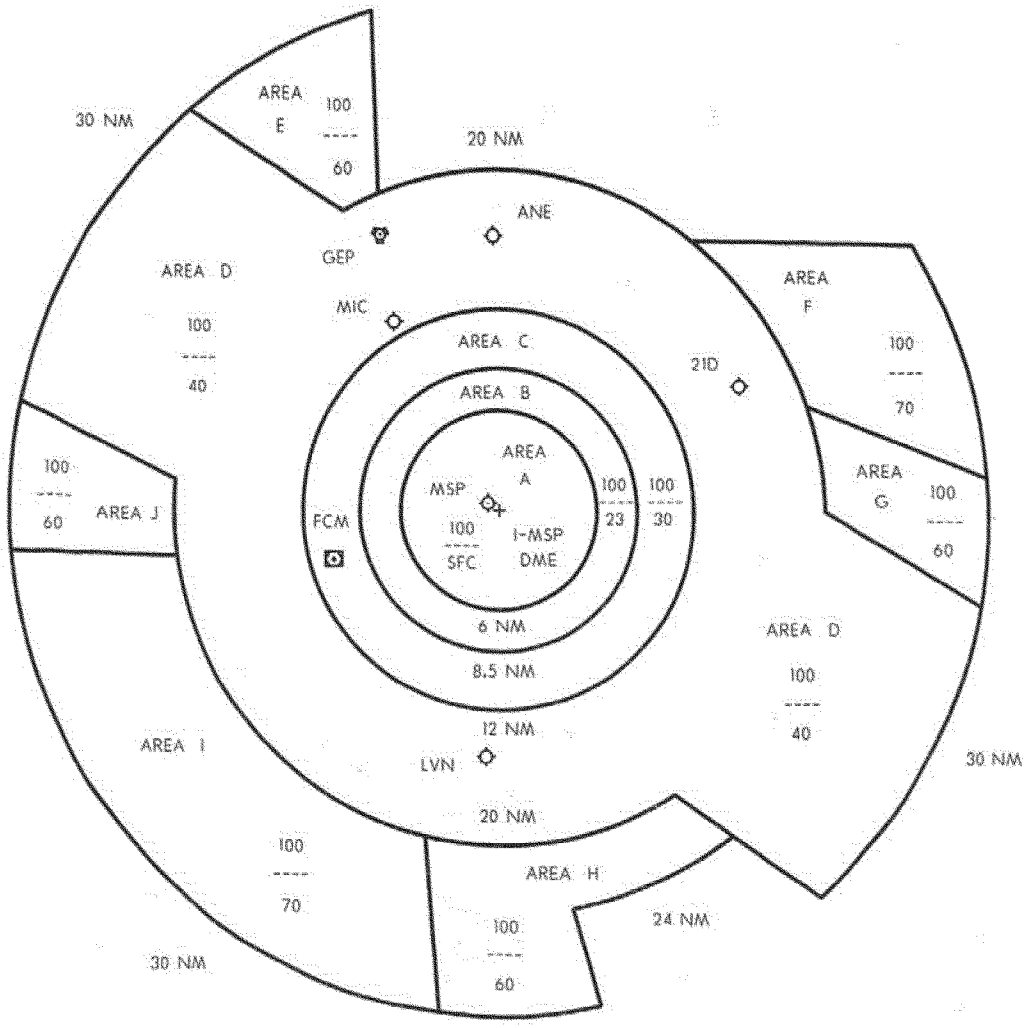
Proposed
Minneapolis, MN, Class B Airspace Area
(Docket No. 09-AWA-1)



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[FR Doc. 2013–03465 Filed 2–13–13; 8:45 am]
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FEDERAL TRADE COMMISSION

16 CFR Part 455

Used Motor Vehicle Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Extension of time period within which to submit comments.

SUMMARY: On December 17, 2012, the Federal Trade Commission (''FTC'' or ''Commission'') published a **Federal Register** notice soliciting public comments in connection with its issuance of a Notice of Proposed Rulemaking (''NPR'') concerning proposed changes to the Used Motor Vehicle Trade Regulation Rule (''Used Car Rule'' or ''Rule''). The notice stated that comments must be received on or before February 11, 2013. In response to several requests to extend the comment period, the Commission has decided to extend the comment period until March 13, 2013.

DATES: Comments addressing the Used Car Rule must be received on or before March 13, 2013.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. For important information concerning the comments you file, please review the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be filed at the following electronic address: *https://ftcpublic.commentworks.com/ftc/usedcarrulenprm* by following the instructions on the web-based form. Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex T), 600 Pennsylvania Avenue NW., Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: John C. Hallerud, (312) 960–5634, Attorney, Midwest Region, Federal Trade Commission, 55 West Monroe Street, Suite 1825, Chicago, IL 60603.

SUPPLEMENTARY INFORMATION: The Commission's December 17, 2012, **Federal Register** notice seeks comments on proposed changes to the Rule described in the NPR.[1] The NPR addresses the comments received during its review and invites public comment on the following four proposed changes to the Buyers Guide: Adding boxes to the back of the Buyers Guide where dealers would have the option to indicate manufacturers' and other third-party warranties; adding a statement to the Buyers Guide encouraging consumers to seek vehicle history information and directing consumers to an FTC Web site for more information about vehicle histories; adding catalytic converters and airbags to the List of Systems on the back of the Buyers Guide; and adding a statement in Spanish to the English Buyers Guide directing consumers who cannot read the Buyers Guide in English to ask for a copy of it in Spanish.

The Commission has received letters from the Chair of the Automobiles Working Group of the National Association of Attorneys General, Consumers for Auto Reliability and Safety, the National Association of Consumer Advocates, the Katharine & George Alexander Community Law Center, Santa Clara University School of Law, and National Vehicle Service requesting that the comment period be extended.[2] Among other reasons supporting the request, these organizations cite their need to coordinate their efforts in researching and developing comments to address issues raised by the NPR.

Based on the arguments raised in these requests, the Commission believes that an extension of the initial sixty-day comment period until March 13, 2013, is reasonable. Accordingly, the Commission has decided to extend the comment period set forth in the December 17, 2012, **Federal Register** notice until March 13, 2013.

Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Used Car Rule Regulatory Review, Project No. P087604'' to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC Web site, at *http://www.ftc.gov/os/publiccomments.shtm*.

Because comments will be made public, they should not include any sensitive personal information, such as any individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential'' as provided in § 6(f) of the Federal Trade Commission Act (''FTC Act''), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing matter for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c).[3]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: *https://ftcpublic.commentworks.com/ftc/usedcarrulenprm* and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink *https://ftcpublic.commentworks.com/ftc/usedcarrulenprm*. If this Notice appears at *http://www.regulations.gov/#!home;tab=search*, you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Web site at *http://www.ftc.gov* to read the Notice and the news release describing it.

A comment filed in paper form should include the ''Used Car Rule Regulatory Review, Project No. P087604'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex T), 600 Pennsylvania Avenue NW., Washington, DC 20580. The FTC requests that any comment filed in paper form be sent by courier or overnight service, if possible, to avoid security related delays.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web

[1] 77 FR 7476 (Dec. 17, 2012).

[2] The letters are available on the Commission's Web site at: *http://ftc.gov/os/comments/usedcarrulenprm/index.shtm.*

[3] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

site, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

Comments on the proposed disclosure amendments, which are subject to review under the Paperwork Reduction Act, 44 U.S.C. 3501–3521, additionally should be submitted to the Office of Management and Budget (''OMB''). If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to: (202) 395–5167.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2013–03341 Filed 2–13–13; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

16 CFR Part 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing amendments to the premerger notification rules (''the Rules'') to provide a framework for the withdrawal of a premerger notification filing under the Hart Scott Rodino Act (''the Act'' or ''HSR''). The Act and Rules require the parties to certain mergers and acquisitions to file reports with the Federal Trade Commission (''the Commission'') and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''the Assistant Attorney General'') (collectively, ''the Agencies'') and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. This proposed rulemaking sets forth the procedure for voluntarily withdrawing an HSR filing, establishes when an HSR filing will be automatically withdrawn after an electronically submitted filing publicly announcing the termination of a transaction is made with the U. S. Securities and Exchange Commission (''SEC'') under the Securities Exchange Act of 1934 and rules promulgated under that act, and sets forth the procedure for resubmitting a filing after a withdrawal with no additional filing fee.

DATES: Comments must be received on or before April 15, 2013.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''HSR Filing Withdrawals Rulemaking, Project No. P859910,'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/hsrruleamendnprm,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex H), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robert L. Jones, Deputy Assistant Director, Premerger Notification Office, Bureau of Competition, Room 302, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 15, 2013. Write ''HSR Filing Withdrawals Rulemaking, Project No. P859910,'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personally identifiable information, like any Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you would like the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/hsrruleamendnprm,* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home;tab=search,* you also may file a comment through that Web site.

If you file your comment on paper, write ''HSR Filing Withdrawals Rulemaking, Project No. P859910,'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex H), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible,

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before April 15, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

Statement of Basis and Purpose

Section 7A(d)(1) of the Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. In addition, Section 7A(d)(2) of the Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to define the terms used in the Act and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

In this proposed rulemaking, the Commission proposes adding § 803.12 to set forth the procedure for voluntarily withdrawing an HSR filing, establish when an HSR filing will be automatically withdrawn after a filing publicly announcing the termination of a transaction is made on EDGAR, the Electronic Data Gathering, Analysis, and Retrieval system where companies who file reports with the SEC must make such submissions, and set forth the procedure for resubmitting a filing with no additional filing fee after a withdrawal. Additionally, the Commission proposes adding § 803.9(f) to establish that no additional filing fee is required when § 803.12(c) is utilized.

Part 803—Transmittal Rules

Section 803.12 Withdraw and Refile Notification.

Since the beginning of the HSR program, the Agencies have allowed HSR filers to withdraw their notification filing at any time. To set forth the procedure, and to require automatic withdrawal of a notification filing in certain circumstances in which an SEC filing is made publicly announcing the termination of a transaction, this rulemaking proposes adding rule § 803.12.

A. Voluntary Withdrawal

Under proposed rule § 803.12(a), at any time, an acquiring person, or in transactions to which § 801.30 does not apply (a ''non-§ 801.30 transaction''), an acquiring or an acquired person, may withdraw its notification by notifying the FTC and the Antitrust Division in writing. Doing so will nullify the filing and terminate the pendency of any formal Request for Additional Information (''Second Request'') if substantial compliance has not been certified. If the transaction has been granted early termination or the initial or extended waiting period has expired, the one year period that parties have under § 803.7(a) to consummate the transaction will terminate. If the parties wish to pursue the acquisition at a future date, new notifications and a new filing fee will be required (unless the withdraw-refile procedure in paragraph (c) of § 803.12 is utilized), and a new waiting period must be observed prior to consummation of the acquisition.

B. Automatic Withdrawal

The Agencies have a strong interest in ensuring that they do not expend scarce resources on hypothetical transactions. The affidavit requirements of § 803.5 provide assurance that at the time of filing, a transaction is not hypothetical. When parties to a transaction make an HSR filing, the filing must include an affidavit attesting, in the case of a tender offer under § 801.30, that the intention to make the tender offer has been publicly announced, and in the case of a non-§ 801.30 transaction, that a contract, agreement in principle or letter of intent has been executed. The affidavit must also attest to a good faith intention to proceed with the transaction. As the Commission stated when it issued § 803.5:

> Two considerations motivate the inclusion of subparagraph (a)(2) and paragraph (b), which require a good faith intention to make the acquisition, public announcement of tender offers, and execution of a contract, agreement in principle or letter of intent. First, those provisions ensure that the parties intend to consummate the acquisition, and are not using notification as a means of testing the agencies' enforcement intentions. Because of the time and resource constraints upon the agency staffs, the agencies could not tolerate review of hypothetical transactions. Second, the requirement assures that the forms will contain sufficiently definitive information about the transaction to permit accurate analysis.

43 FR 33450 (July 31, 1978).

After the HSR filings are made, circumstances may change so that the transaction becomes hypothetical in that the factual basis for the § 803.5 affidavit no longer exists: the tender offer may have expired, been terminated, or been withdrawn, or the agreement between the parties may have been terminated. The Agencies have encountered some such instances where the parties do not withdraw their filing and continue to move forward with the HSR process, for example, by moving ahead with second request compliance. This can happen where, in the § 801.30 context, despite the tender offer having expired, been terminated, or been withdrawn, the offeror indicates that it may launch another offer in the future; it can also happen in non-§ 801.30 transactions where a merger agreement has been terminated, yet the parties state that they hope to negotiate another. In these instances, the investigating Agency is forced to expend scarce resources on what has become a hypothetical transaction.

Proposed rule § 803.12(b) addresses this problem by linking the HSR filing with disclosures required by the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and rules promulgated under that act. Under those SEC disclosure requirements, when the terms or conditions of a tender offer have not been met and subsequently the tender offer has expired, is terminated or has otherwise been withdrawn, the offeror must file an amendment to its Schedule TO filing with the SEC. This amended filing brings the current tender offer to a definitive end and if the offeror wishes to launch another tender offer, it must start the process from the beginning by filing a new Schedule TO. Similar disclosure requirements exist for acquisitions outside of the § 801.30 tender offer context, those that are instead the subject of an agreement between the parties. In the case of non-§ 801.30 transactions, if the parties terminate a definitive material agreement, they must file a Form 8–K with the SEC disclosing the termination of the agreement. If the parties subsequently become interested in moving forward with the transaction once again and sign another definitive material agreement, they must file a new Form 8–K with the SEC.[2]

[2] Parties also may file a Form 8–K voluntarily to announce the entry into, or termination of, agreements, including letters of intent. Under this proposed rulemaking, such voluntary disclosures of

Continued

The SEC disclosure requirements in both the § 801.30 tender offer and the non-§ 801.30, non-tender offer context are clear. Once these termination disclosures are made with the SEC, the parties' transaction as filed with the Agencies has become hypothetical because the factual basis for a § 803.5 affidavit no longer exists. At this point, the parties would not be able to execute the affidavit required by § 803.5 without taking additional steps. In the case of a tender offer under § 801.30, the acquiring person would have to make a public announcement concerning its intent to commence a tender offer in order to execute the affidavit. In the case of a non-§ 801.30 transaction, the parties would have to execute a letter of intent or some other agreement in order to execute the affidavit.

The Commission proposes using the SEC's disclosure requirements to establish a bright line trigger for the automatic withdrawal of an HSR filing. In the case of tender offers under § 801.30, any time a tender offer has expired, is terminated or has otherwise been withdrawn that results in the filing of an amended Schedule TO with the SEC, the Commission proposes that the associated HSR filing will be automatically withdrawn. The Commission also proposes that the same concept would apply to non-§ 801.30 transactions, such that any time an agreement between the parties is terminated that results in the filing of a Form 8–K with the SEC, the associated HSR filing will be automatically withdrawn. In both cases, the Commission proposes that the associated HSR filing would be automatically withdrawn on the date of the filing with the SEC and that the parties must notify the Agencies by letter when the SEC filing is made. Any subsequent transaction between the parties, if otherwise reportable, would be subject to a new HSR filing and a new filing fee (unless the special circumstances of § 803.12(c) apply).

At the same time, the Commission recognizes that there will be instances where transactions that trigger SEC disclosure requirements should not result in the automatic withdrawal of an HSR filing. If the Agencies have already completed an investigation of a transaction, the expiration or withdrawal of a tender offer or the termination of an acquisition agreement does not affect the Agencies' ability to allocate resources. Thus, the Commission proposes three exceptions for transactions that have not been or are no longer being investigated.

The Commission proposes that the associated HSR filing will not be automatically withdrawn:

(1) If the initial waiting period has expired without issuance of a request for additional information or documentary material and without an agreement in place with the Agencies to delay closing of the transaction (''a timing agreement''); or

(2) If early termination of that waiting period has been granted, without a timing agreement in place; or

(3) If a second request has been issued, and the Agencies have either granted early termination or allowed the extended waiting period to expire following certification of compliance without a timing agreement in place.

The Commission understands that withdrawal procedures in this proposed rulemaking will not result in an automatic withdrawal in all instances in which a transaction becomes hypothetical. For instance, parties can make an HSR filing for a non-§ 801.30 transaction on the basis of a letter of intent without having to make a mandatory filing of a Form 8–K with the SEC upon termination and may choose not to do so voluntarily. In addition, tender offers for non-public companies that are not large enough or widely enough held to be covered by the SEC disclosure requirements would not trigger the need to file an amended Schedule TO upon termination. Finally, tender offers for foreign companies that do not have sufficient U.S. ownership and may therefore be exempt from the SEC disclosure requirements would not trigger the need to file an amended Schedule TO upon termination.

The Commission believes the benefit of the approach outlined in this proposed rulemaking will outweigh any additional burden on the parties. The proposal provides a bright line test that will better allow the Agencies to allocate their scarce resources so as to avoid expending resources on transactions where SEC filings demonstrate that the transaction has become hypothetical.

C. Resubmission

For years, the Premerger Notification Office (''PNO'') has informally permitted an acquiring person voluntarily to withdraw a pending HSR filing and resubmit it within two business days without paying an additional fee in order to restart the waiting period. This informal procedure benefits the filing parties by providing an additional 15- or 30-day waiting period for the Agencies to review the competitive impact of a transaction without issuing a Second Request. When an acquiring person chooses to withdraw and refile, it must update certain items in its HSR filing, but it retains the same transaction number and does not pay an additional filing fee. Although experienced practitioners are familiar with this procedure, this withdraw and refile procedure has never been formalized. The Commission proposes to do so now through a new rule, § 803.12(c).

When a filing is voluntarily withdrawn by the acquiring person pursuant to proposed § 803.12(a) or the acquiring person's filing is automatically withdrawn pursuant to proposed § 803.12(b) as discussed above, the acquiring person may resubmit the HSR filing without paying an additional fee if the acquiring person complies with certain requirements. The proposed resubmission process may only be used by an acquiring person in the following circumstances:

(1) The proposed acquisition must not have changed in any material way. For instance, if it is an asset transaction, the resubmitted HSR filing cannot involve additional assets. If it is a voting securities transaction, the resubmitted HSR filing cannot involve a higher notification threshold;

(2) The resubmitted HSR filing must be recertified, and Items 4(a), 4(b), 4(c), and 4(d) must be updated;

(3) The resubmitted HSR filing must include a new executed affidavit as required by § 803.5; and

(4) The resubmitted HSR filing must be refiled with both Agencies prior to the close of the second business day after withdrawal.

The procedure above is straightforward and based on the existing informal process. The refiling must involve the same transaction, include an updated Item 4, and be made within two business days after withdrawal. The requirement that the acquiring person must submit a new certification assures the accuracy of the HSR filing. In submitting a new affidavit, the acquiring person must attest, in the case of a tender offer under § 801.30, that the intention to make the tender offer has been publicly announced, and in the case of a non-§ 801.30 transaction, that a contract, agreement in principle or letter of intent has been executed, as well as attest to its good faith intention to proceed with the transaction.

If the requirements of proposed § 803.12(c) are met, no new filing fee will be assessed and the PNO will assign the same HSR transaction number to the resubmitted HSR filing.

termination would be treated the same way as a mandatory Form 8–K filing disclosing the termination of a definitive material agreement.

The new waiting period will commence on the same day the resubmitted notification filing is received. Withdrawal, whether voluntary or automatic, and resubmission without the payment of an additional fee, will only be permitted once.

It has been the longstanding position of the Agencies that only the acquiring person may avail itself of refiling. If the acquired person, in the case of an acquisition to which § 801.30 does not apply, withdraws its notification under paragraph (a) or its filing is automatically withdrawn under paragraph (b) of this section, no resubmission under paragraph (c) of this section is available.

Section 803.9 Filing Fee

In previous rulemakings, the Commission has addressed other instances in which a filing fee is technically required but is not necessary, given the parameters of the specific situation. For example, the Commission has stated:

> In transactions in which there are two acquiring persons that would have the same responses to Items 5–8 of the Notification and Report Form, those two acquiring persons would have no significant business activities outside of the jointly controlled acquisition vehicle. Accordingly, the agencies are again essentially reviewing one transaction and a single filing fee seems appropriate. Eliminating the double fee for these transactions is non-controversial and benefits potential filing parties.

66 FR 8680 (February 1, 2001). In the instance above, although there are two acquiring persons and two fees are technically required, a single fee is appropriate because it is one transaction.

The same basis for eliminating the filing fee applies to a withdrawn filing that is refiled within two business days and meets the other requirements of § 803.12(c). If the acquiring person voluntarily withdraws its filing under § 803.12(a) or faces the automatic withdrawal provision of proposed § 803.12(b), and the Agencies are reviewing a transaction that is the same in all material respects, they face no disadvantage if the acquiring person resubmits within two business days under § 803.12(c). Accordingly, in such a case, no new fee would be required.

Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. 16 CFR 1.26(b)(5).

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small businesses, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Because of the size of the transactions necessary to invoke an HSR filing, the premerger notification rules rarely, if ever, affect small businesses. The 2000 amendments to the Act exempted all transactions valued at $50 million or less, with subsequent automatic adjustments to take account of changes in GNP resulting in a current threshold of $68.2 million. Further, none of the proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these proposed rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501–3521, requires agencies to submit ''collections of information'' to the Office of Management and Budget (''OMB'') and obtain clearance before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The existing information collection requirements in the Rules and Form have been reviewed and approved by OMB under Control No. 3084–0005. The current OMB clearance expires on August 31, 2014. The proposed rule amendments in this NPR would have at most, a minor effect on the FTC's current burden estimates. Should these proposed amendments become final, the FTC will submit an adjustment request to OMB to modify the currently cleared burden estimate.[3]

When calculating burden for the proposed amendments, there are two potential scenarios. Under proposed § 803.12(a) and (b), a voluntary or automatic withdrawal of a notification that utilizes the two-day resubmission process under § 803.12(c) does not generate an additional transaction as the acquiring person simply restarts the waiting period on the same transaction. Thus, there is no net increase in the number of transactions. In a § 803.12(b) scenario involving an auto-withdrawn notification that does not utilize the two-day resubmission process under § 803.12(c), a new filing would be required if the parties pursue the transaction at a later date, but the likelihood of this occurring is rare. Based on past experience, this situation occurs approximately once every fifteen years. Effectively, then, this averages out to a small fraction of a single transaction per year that would require non-index HSR filings due to the proposed rule change. The currently cleared estimate for a single non-index filing is 37 hours.[4] *See* 76 FR 42471, 42479 (July 19, 2011). PNO staff believes that this new filing will require the same work and diligence as any new non-index filing. Assuming, then, an average of 37 hours for one transaction, when applied to a traditional frequency of .067 (one every fifteen years), this amounts to an annual average of 3 hours, rounded up. Applied to an assumed hourly wage or rate of $460/hour for an executive or attorney's handling, associated labor cost would approximate $1,380.

PNO staff believes that any incremental capital/non-labor costs presented by the proposed amendments would be marginal. Businesses subject to the Rules generally have or would obtain necessary equipment for other business purposes. Staff believes that the existing requirements (and proposed extension to certain additional

[3] The currently cleared burden hours total is 53,756, calculated as follows: [(1,428 non-index filings × 37 hours) + (22 transactions requiring more precise valuation × 40 hours) + (20 index filings × 2 hours)]. *See* 76 FR 42471, 42479 (July 19, 2011). The instant proposed amendments, as detailed below, would incrementally add no more than 3 hours to this total. Separately, the FTC has estimated incremental PRA burden of 2,664 hours for the Commission's proposed amendments to sections 801.1 and 801.2 of the Rules that would reflect the longstanding staff position that a transaction involving the transfer of exclusive rights to a patent in the pharmaceutical industry is potentially reportable under the Act. *See* 77 FR 50057 (August 20, 2012).

[4] ''Index'' filings pertain to banking transactions, and thus would not be affected by the proposed amendments. Index filings are incorporated, however, into the FTC's currently cleared burden estimates (the FTC has jurisdiction over the administration of index filings). They are mentioned here to distinguish them from and to further explain what a ''non-index'' filing is. Clayton Act Sections 7A(c)(6) and (c)(8) exempt from the requirements of the premerger notification program certain transactions that are subject to the approval of other agencies, but only if copies of the information submitted to these other agencies are also submitted to the Agencies. Thus, parties must submit copies of these ''index'' filings, but completing the task requires significantly less time than non-exempt transactions (which require ''non-index'' filings), as illustrated by the calculations in footnote 2 above.

transactions) necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates. This should constitute a small portion of and be subsumed within the ordinary training that employees receive apart from that associated with the information collected under the Rules and the corresponding HSR Form.

List of Subjects in 16 CFR Part 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission proposes to amend 16 CFR part 803 as set forth below:

PART 803—TRANSMITTAL RULES

■ 1. The authority citation for part 803 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 2. Amend § 803.9 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 803.9 Filing fee.

(a) Each acquiring person shall pay the filing fee required by the act to the Federal Trade Commission, except as provided in paragraphs (b), (c) and (f) of this section. No additional fee is to be submitted to the Antitrust Division of the Department of Justice.

* * * * *

(f) For a transaction described by paragraph (c) of § 803.12, the parties shall pay no additional filing fee.

■ 3. Add § 803.12 to read as follows:

§ 803.12 Withdraw and refile notification.

(a) *Voluntary.* An acquiring person, and in the case of an acquisition to which § 801.30 does not apply, an acquired person, may withdraw its notification by notifying the Federal Trade Commission and the Antitrust Division in writing of such withdrawal.

(b) *Upon public announcement of termination.* An acquiring person's notification or, in the case of an acquisition to which § 801.30 does not apply, an acquiring or an acquired person's notification, will be deemed to have been withdrawn if any filing that publicly announces the expiration, termination or withdrawal of a tender offer or the termination of an agreement or letter of intent is made by the acquiring person or the acquired person with the U.S. Securities and Exchange Commission (''SEC'') under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and rules promulgated under that act. The acquiring person or acquired person must notify the Federal Trade Commission and the Antitrust Division by letter that such filing has been made with the SEC and the withdrawal shall be deemed effective on the date of the SEC filing. Withdrawal of the HSR notification(s) shall occur even if statements are made in the SEC filing indicating a desire to recommence the tender offer or enter into a new or amended agreement or letter of intent. This paragraph is inapplicable if the initial 15-day or 30-day waiting period has expired without issuance of a request for additional information or documentary material and without an agreement in place with the Agencies to delay closing of the transaction (''a timing agreement''); or early termination of that waiting period has been granted, without a timing agreement in place; or if a request for additional information or documentary material has been issued and the Agencies have either granted early termination or allowed the extended waiting period to expire following certification of compliance without a timing agreement in place.

(c) *Resubmission without a new filing fee.* (1) An acquiring person whose notification has been voluntarily withdrawn pursuant to paragraph (a) of this section, or an acquiring person whose notification is deemed to have been automatically withdrawn under paragraph (b) of this section, may resubmit its notification, thereby initiating a new waiting period for the same transaction without an additional filing fee pursuant to § 803.9(f). This procedure may be used only one time, and only under the following circumstances:

(i) The proposed acquisition does not change in any material way;

(ii) The resubmitted notification is recertified, and the submission, as it relates to Items 4(a), 4(b), 4(c), and 4(d), is updated to the date of the resubmission;

(iii) A new executed affidavit is provided with the resubmitted HSR filing; and

(iv) The resubmitted notification is refiled prior to the close of the second business day after withdrawal.

(2) If the acquired person, in the case of an acquisition to which § 801.30 does not apply, withdraws its notification under paragraph (a) of this section or is automatically withdrawn under paragraph (b) of this section, no resubmission is available under this paragraph.

Examples: 1. A commences a tender offer to acquire 100% of B's voting securities and files a Schedule TO with the SEC and a premerger notification filing with the Federal Trade Commission and the Antitrust Division (''the Agencies''). Subsequently, A decides to withdraw the tender offer and files an amended Schedule TO announcing the withdrawal. A states in its amended filing, designated as a Schedule TO–T/A on EDGAR, the SEC's Electronic Data Gathering, Analysis, and Retrieval system, which announces the tender offer withdrawal that it reserves the right to recommence the tender offer, should circumstances change. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO–T/A with the SEC.

2. A commences a tender offer for at least 75% of B's voting securities and files a Schedule TO with the SEC stating that the tender offer will expire after 30 days. A also files a premerger notification filing with the Agencies and a request for additional information or documentary material (''Second Request'') is issued. At the end of the 30 day effective period of the tender offer sufficient shares have not been tendered and the tender offer expires. A files a closing Schedule TO–T/A with the SEC announcing the expiration of the tender offer. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO–T/A with the SEC.

3. A commences a tender offer for 100% of B's voting securities and files a Schedule TO with the SEC stating that shareholders tendering their shares will receive $2.00 per share. During the effective period of the tender offer, A increases the amount it will pay per share to $2.25 and files a Schedule TO–T/A with the SEC announcing the increased share price. A's premerger notification filing is not deemed to have been withdrawn on the date of the filing of the Schedule TO–T/A with the SEC because it is not notifying the SEC that the tender offer has expired or is being withdrawn.

4. A commences a tender offer for 100% of B's voting securities and files a Schedule TO with the SEC. During the effective period of the tender offer, A and B enter into a merger agreement and A files a Schedule TO–T/A with the SEC announcing the withdrawal of the tender offer. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO–T/A with the SEC. A can, however, refile within two business days on the merger agreement, commencing a new waiting period, without paying an additional filing fee, if it meets the requirements of § 803.12(c).

5. A and B enter into a merger agreement conditioned on successful completion of due diligence. A and B file premerger notification filings with

the Agencies and also Form 8–Ks with the SEC announcing they have entered into an agreement to merge. Subsequent findings in the course of due diligence cause A and B to terminate the merger agreement and A files an additional Form 8–K announcing the termination of an agreement. A states that it may seek to enter into a new or amended merger agreement with B. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Form 8–K announcing the termination of the merger agreement. A can, however, refile within two business days on a new merger agreement, commencing a new waiting period, without paying an additional filing fee, if it meets the requirements of § 803.12(c).

6. A and B enter into a merger agreement and file premerger notification filings with the Agencies and Form 8–Ks with the SEC. Second requests are issued. A and B subsequently certify compliance with the second request, starting the extended waiting period. Prior to the expiration of the extended waiting period, the parties enter into an agreement with the agency conducting the investigation to delay closing of the transaction, allowing the consummation of the acquisition only after 30-days' notice (a ''timing agreement''), and the extended waiting period expires. During the pendency of the timing agreement, A and B terminate the merger agreement and A files a Form 8–K with the SEC announcing the termination of an agreement. A's premerger notification filing is deemed withdrawn on the date of the SEC filing as a result of that filing, even though the extended waiting period has expired and the parties are still within the one year period following that expiration under § 803.7(a). Note that had the extended waiting period expired and no timing agreement had been entered into, a filing with the SEC announcing the termination of the agreement would not result in the withdrawal of A's premerger notification filing.

7. A and B enter into a merger agreement and file premerger notification filings with the Agencies and Form 8–Ks with the SEC. The agencies complete their review and early termination of the initial 30-day waiting period is granted. Prior to the expiration of the one year period following the grant of early termination, A and B terminate the merger agreement and A files a Form 8–K with the SEC announcing the termination of an agreement. A's premerger notification filing is not deemed withdrawn as a result of the SEC filing because the initial 30-day premerger notification waiting period had been granted early termination. Therefore, the parties still have the full one year period prior to the expiration of the notification under § 803.7(a) to consummate the transaction should it be recommenced.

By direction of the Commission.

Donald S. Clark,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Concurring Statement of Commissioner Joshua D. Wright Regarding Proposed Amendments to Hart-Scott-Rodino Rules

FTC Matter No. P859910

February 1, 2013.

The Commission has voted today to publish a notice of proposed rulemaking seeking comment on amendments to the Hart-Scott-Rodino (HSR) rules. Under the proposed amendments, HSR filings would be automatically withdrawn upon the submission of an SEC filing that the notified transaction had been terminated.[1] I wish to thank staff in the Premerger Notification Office for their efforts in crafting this proposed rule and their diligent administration of the premerger notification program.

I concur in the Commission's decision because I believe the Commission would benefit from the public's input into this proposed rulemaking. Nevertheless, I am concerned that the proposed rules may impose costs in excess of any potential benefits.

The proposed rulemaking appears to be a solution in search of a problem. The **Federal Register** notice states that the proposed rules are necessary to prevent the FTC and DOJ from ''expend[ing] scarce resources on hypothetical transactions.'' Yet, I have not to date been presented with evidence that any of the over 68,000 transactions notified under the HSR rules have required Commission resources to be allocated to a truly hypothetical transaction. Indeed, it would be surprising to see firms incurring the costs and devoting the time and effort associated with antitrust review in the absence of a good faith intent to proceed with their transaction.

The proposed rules, if adopted, could increase the costs of corporate takeovers and thus distort the market for corporate control. Some companies that had complied with or were attempting to comply with a Second Request, for example, could be forced to restart their antitrust review, leading to significant delays and added expenses. The proposed rules could also create incentives for firms to structure their transactions less efficiently and discourage the use of tender offers. Finally, the proposed new rules will disproportionately burden U.S. public companies; the **Federal Register** notice acknowledges that the new rules will not apply to tender offers for many non-public and foreign companies.

Given these concerns, I hope that interested parties will avail themselves of the opportunity to submit public comments so that the Commission can make an informed decision at the conclusion of this process.

[1] The proposed rulemaking would also codify, with one modification, the existing procedure for pulling and refiling an HSR notification without payment of an additional filing fee. I have no objections to this proposal.

[FR Doc. 2013–02821 Filed 2–13–13; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[Docket ID DOD–2012–HA–0105]

RIN 0720–AB58

TRICARE Revision to CHAMPUS DRG-Based Payment System, Pricing of Hospital Claims

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Proposed rule.

SUMMARY: This rule proposes to change TRICARE's current regulatory provision for hospital claims priced under the DRG-based payment system. Claims are currently priced by using the rates and weights that are in effect on a beneficiary's date of admission. This rule proposes to change that provision to price such claims by using the rates and weights that are in effect on a beneficiary's date of discharge.

DATES: Written comments received at the address indicated below by April 15, 2013 will be accepted.

ADDRESSES: You may submit comments, identified by docket number and or Regulatory Information Number (RIN) number and title, by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and

docket number or RIN 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. Amber Butterfield, TRICARE Management Activity, Medical Benefits and Reimbursement Systems, telephone (303) 676–3565.

SUPPLEMENTARY INFORMATION:

Executive Summary and Overview

I. Purpose of the Regulatory Action

This rule proposes to amend the TRICARE/CHAMPUS regulatory provision of pricing hospital claims that are reimbursed under the DRG-based payment system from the beneficiary's date of admission, to pricing such claims based on the beneficiary's date of discharge.

The TRICARE/CHAMPUS DRG-based payment system applies to hospitals, unless such hospital is exempt by regulation from the payment system. Under the TRICARE DRG-based payment system, payment for the operating costs of inpatient hospital services subject to the payment system are made on the basis of prospectively determined rates.

The TRICARE DRG-based payment system is modeled on the Medicare Inpatient Prospective Payment System (IPPS). Although many of the procedures in the TRICARE DRG-based payment system are similar or identical to the procedures in the Medicare IPPS, the actual payment amounts, DRG weights, and certain procedures are different. This is necessary because of the differences in the two programs, especially in the beneficiary population.

Since the inception of the DRG-based payment system in 1987, claims have been priced following the beneficiary's discharge by the hospital, but using the rules, weights, and rates that were in effect on the beneficiary's date of admission. That is, claims submitted for the beneficiary's inpatient stay are grouped to a specific DRG, and the pricing (*i.e.,* payment rate) is determined by using the rules, weights and rates that were in effect on the date of the beneficiary's admission to the hospital. The August 31, 1988, Final Rule (53 FR 33461) published in the **Federal Register** explains TRICARE's decision to utilize the date of admission to price claims. Using the date of admission to price claims allowed hospitals to be reimbursed for inpatient services under the same payment methodology they expected to be used when the patient was admitted. Prior to implementation of the DRG-based payment system, the hospital could expect to be reimbursed at the billed charge rate since that was the method TRICARE used to reimburse hospitals at that time. For patients admitted after implementation of the DRG-based payment system, the hospital could expect to be reimbursed using the DRG-based payment system. The Final Rule continues by stating that since certain services were previously excluded from the DRG-based system, but may have already involved an interim bill prior to the effective date of the Final Rule, it would be administratively difficult and fiscally unfair to hospitals, to attempt to reconcile the total payments with the DRG-based allowed amounts. As a result of the analysis at the time, the provision stated, ''except for interim claims submitted for qualifying outlier cases, all claims reimbursed under the CHAMPUS DRG-based payment system are to be priced as of the date of admission, regardless of when the claim is submitted.''

II. Summary of the Major Provisions of the Regulatory Action

The major provision of this proposed rule is to revise TRICARE's regulation on the pricing of claims paid under the DRG-based payment system. Claims are currently priced by using the rates and weights that are in effect on a beneficiary's date of admission. This rule proposes to change that provision to price such claims by using the rates and weights that are in effect on a beneficiary's date of discharge.

In the early stages of the DRG-based payment system, the approach of pricing claims based on the date of the beneficiary's admission to the hospital was an effective operational policy for TRICARE. It is now time, however, to revise this policy to be consistent with industry standards. Medicare and other payers have an operational policy of pricing all claims, to include interim claims, based on the date of discharge. While pricing using the date of discharge applies to all claims, it becomes an issue only for those relatively few claims that span Fiscal Years (FY). That is, if an admission occurs on September 29, 2013, (FY 2013) and the discharge occurs on October 2, 2013, (FY2014) the payment rate is currently based upon the DRG rates and weights in effect on September 29, 2013, (FY2013) rather than on October 2, 2013, (FY2014). Using this same example, if the provisions of this proposed rule are made final and the date of discharge is used to price the claim, the claim will be priced using the rates and weights in place on October 2, 2013, (FY2014). The rates and weights for the DRG-based payment system are updated every FY, and are based on the previous year's TRICARE claims data.

III. Costs and Benefits

The benefits of this change include, aligning TRICARE pricing of hospital claims practices with industry standards and enhancing provider satisfaction because we are following Medicare and industry standards.

There are known cost impacts associated with this change:

1. One-time information technology costs associated with changes to Managed Care Support Contractors' claims processing systems and one time administrative costs associated with the review change order and the assessment of the impact on Claims Operations, Customer Service, Provider Administration and Contracts Maintenance. The total one time information technology and administrative costs is estimated at $88,208.

2. An annual cost of reprocessing interim claims of $2,500.

3. An increase in health care costs to account for using the weights and rates in place on the date of discharge. Using 2009 claims data, it is estimated about 1,200 inpatient claims will span FYs. Consequently, reimbursing using the updated weights and rates in place for the new FYs date of discharge is expected to increase the payment for approximately 1,200 claims with estimated additional cost of $500,000 annually.

4. Total costs for this change equal approximately $600,000.

IV. Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

Section 801 of title 5, United States Code, and Executive Orders 12866 and 13563 require certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts. It has been certified that this rule is not economically significant, and has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866.

Public Law 104–4, Section 202, ''Unfunded Mandates Reform Act''

Section 202 of Public Law 104–4, ''Unfunded Mandates Reform Act,'' requires that an analysis be performed to determine whether any federal mandate may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector of $100 million in any one year. It has been certified that this proposed rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year, and thus this proposed rule is not subject to this requirement.

Public Law 96–354, ''Regulatory Flexibility Act'' (RFA) (5 U.S.C. 601)

Public Law 96–354, ''Regulatory Flexibility Act'' (RFA) (5 U.S.C. 601), requires that each Federal agency prepare a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This proposed rule is not an economically significant regulatory action, and it has been certified that it will not have a significant impact on a substantial number of small entities. Therefore, this proposed rule is not subject to the requirements of the RFA.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This rule does not contain a ''collection of information'' requirement, and will not impose additional information collection requirements on the public under Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35).

Executive Order 13132, ''Federalism''

E.O. 13132, ''Federalism,'' requires that an impact analysis be performed to determine whether the rule has federalism implications that would 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. It has been certified that this proposed rule does not have federalism implications, as set forth in E.O. 13132.

List of Subjects in 32 CFR part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR Part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for Part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Section 199.14 is amended by revising paragraph (a)(1)(i)(C)(*3*) to read as follows:

§ 199.14 Provider Reimbursement Methods

(a) * * *

(1) * * *

(i) * * *

(C) * * *

(*3*) *Pricing of claims.* All claims reimbursed under the CHAMPUS DRG-based payment system are to be priced as of the date of discharge, regardless of when the claim is submitted.

* * * * *

Dated: February 1, 2013.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–03419 Filed 2–13–13; 8:45 am]

BILLING CODE 5001–06–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1192

RIN 3014–AA42

Rail Vehicles Access Advisory Committee

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of intent to establish advisory committee.

SUMMARY: We, the Architectural and Transportation Barriers Compliance Board (Access Board), plan to revise and update our accessibility guidelines issued pursuant to the Americans with Disabilities Act for transportation vehicles that operate on fixed guideway systems (e.g., rapid rail, light rail, commuter rail, and intercity rail). We are establishing a Rail Vehicles Access Advisory Committee (Committee) to make recommendations for revisions and updates to the accessibility guidelines. We request applications from interested organizations for representatives to serve on the Committee.

DATES: Submit applications by April 1, 2013.

ADDRESSES: Submit applications by any of the following methods:

- *Mail or Hand Delivery/Courier:* Paul Beatty, Access Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111.
- *Fax:* 202–272–0081.
- *Email: rvaac@access-board.gov.*

FOR FURTHER INFORMATION CONTACT: Paul Beatty, Access Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111. Telephone: (202) 272–0012 (Voice) or (202) 272–0072 (TTY). Email address: *rvaac@access-board.gov.*

SUPPLEMENTARY INFORMATION: In this notice, ''we,'' ''us'' and ''our'' refer to the Architectural and Transportation Barriers Compliance Board (Access Board).

The Americans with Disabilities Act requires us to issue guidelines to ensure that transportation vehicles covered by the statute are accessible to individuals with disabilities. 42 U.S.C. 12204. Our accessibility guidelines for transportation vehicles form the basis for legally enforceable accessibility standards issued by the U.S. Department of Transportation (DOT). Our accessibility guidelines for transportation vehicles are codified at 36 CFR part 1192; the DOT accessibility standards for transportation vehicles are codified at 49 CFR part 38.

We issued a notice of proposed rulemaking (NPRM) in 2010 to revise and update our accessibility guidelines for buses, over-the-road buses, and vans. 75 FR 43748 (July 26, 2010). The NPRM noted that we would revise and update our accessibility guidelines for transportation vehicles that operate on fixed guideway systems (e.g., rapid rail, light rail, commuter rail, and intercity rail) at a future date. To begin the process of revising and updating our accessibility guidelines for transportation vehicles that operate on fixed guideway systems, we are establishing a Rail Vehicles Access Advisory Committee (Committee) to make recommendations for revisions and updates to the guidelines. We request applications from representatives of the following interests for membership on the Committee:

- Manufacturers of transportation vehicles that operate on fixed guideway systems;
- Transportation providers that operate fixed guideway systems;
- Organizations representing individuals with disabilities; and
- Other entities whose interests may be affected by the accessibility guidelines.

Federal agencies may serve as ex-officio members on the advisory committee.

The number of Committee members will be limited so that the Committee's

work can be accomplished effectively. The Committee will be balanced in terms of interests represented. We encourage organizations with similar interests to submit a single application to represent their interests. Although the Committee will be limited in size, there will be opportunities for the public to present information to the Committee and to comment at each Committee meeting. Federally registered lobbyists may not be appointed to the Committee pursuant to Presidential Memorandum dated June 18, 2010, entitled ''Lobbyists on Agency Boards and Commissions'' (*http://www.whitehouse.gov/the-press-office/presidential-memorandum-lobbyists-agency-boards-and-commissions*).

Applications should be sent to our office at the address listed at the beginning of this notice. There is no specific application form. The application should include the following information:

- Name of the organization;
- Interests represented by the organization;
- Person who will represent the organization and an alternate, and the title, address, telephone number, and email address for the representative and alternate;
- Description of the representative's qualifications, including engineering, technical, and design expertise and knowledge of making fixed guideway systems accessible to individuals with disabilities; and
- Certification that the representative and alternate are not federally registered lobbyists.

Committee members will not be compensated for their service. We may pay travel expenses for a limited number of persons who would otherwise be unable to participate on the Committee. Committee members will serve as representatives of their organizations, not as individuals. Committee members will not be considered special government employees and will not be required to file confidential financial disclosure reports.

After the applications have been reviewed, we will publish a notice in the **Federal Register** announcing the appointment of Committee members and the first meeting of the Committee. The Committee will operate in accordance with the Federal Advisory Committee Act, 5 U.S.C. app 2. All Committee meetings are expected to be held at our office in Washington, DC. Committee meetings will be open to the public. A notice of each Committee meeting will be published in the **Federal Register** at least 15 days in advance of the meeting. Records will be kept of each Committee meeting and made available for public inspection.

David M. Capozzi,

Executive Director.

[FR Doc. 2013–03380 Filed 2–13–13; 8:45 am]

BILLING CODE 8150–01–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1195

[Docket No. ATBCB–2012–0003]

RIN 3014–AA40

Medical Diagnostic Equipment Accessibility Standards Advisory Committee

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of advisory committee meeting.

SUMMARY: The Medical Diagnostic Equipment Accessibility Standards Advisory Committee will hold its fourth meeting. On July 5, 2012, the Architectural and Transportation Barriers Compliance Board (Access Board) established the advisory committee to make recommendations to the Board on matters associated with comments received and responses to questions included in a previously published Notice of Proposed Rulemaking (NPRM) on Medical Diagnostic Equipment Accessibility Standards.

DATES: The Committee will meet on February 26, 2013, from 10:00 a.m. to 5:00 p.m. and on February 27, 2013, from 9:00 a.m. to 2:30 p.m.

ADDRESSES: The meeting will be held at the Access Board's Conference Room, 1331 F Street NW., Suite 800, Washington, DC 20004–1111.

FOR FURTHER INFORMATION CONTACT: Rex Pace, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111. Telephone number (202) 272–0023 (Voice); (202) 272–0052 (TTY). Electronic mail address: *pace@access-board.gov*.

SUPPLEMENTARY INFORMATION: On July 5, 2012, the Architectural and Transportation Barriers Compliance Board (Access Board) established an advisory committee to make recommendations to the Board on matters associated with comments received and responses to questions included in a previously published NPRM on Medical Diagnostic Equipment Accessibility Standards. See 77 FR 6916 (February 9, 2012). The NPRM and information related to the proposed standards are available on the Access Board's Web site at: *http://www.access-board.gov/medical-equipment.htm*.

The advisory committee will hold its forth meeting on February 26 and 27, 2013. The agenda includes the following:

- Review of previous committee work;
- Presentations by manufacturers on exam tables and chairs;
- Review and discussion of subcommittee work;
- Continued discussion on transfer surface height and size;
- Continued discussion on transfer support location and configuration;
- Review and discussion on the depth of wheelchair spaces;
- Consideration of issues proposed by committee members; and
- Discussion of administrative issues.

The preliminary meeting agenda, along with information about the committee, is available at the Access Board's Web site (*http://www.access-board.gov/medical-equipment.htm*).

Committee meetings are open to the public and interested persons can attend the meetings and communicate their views. Members of the public will have opportunities to address the committee on issues of interest to them during public comment periods scheduled on each day of the meeting.

The meetings will be accessible to persons with disabilities. An assistive listening system, computer assisted real-time transcription (CART), and sign language interpreters will be provided. Persons attending the meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (see *www.access-board.gov/about/policies/fragrance.htm* for more information). Also, persons wishing to provide handouts or other written information to the committee are requested to provide electronic formats to Rex Pace via email prior to the meetings so that alternate formats can be distributed to committee members.

David M. Capozzi,

Executive Director.

[FR Doc. 2013–03381 Filed 2–13–13; 8:45 am]

BILLING CODE 8150–01–P

LIBRARY OF CONGRESS

United States Copyright Office

37 CFR Part 201

[Docket No. 2012–1]

Copyright Office Fees

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

ACTION: Notice of proposed rulemaking: Extension of reply comment periods.

SUMMARY: The United States Copyright Office is extending the deadline for filing reply comments regarding its notice of proposed rulemaking concerning the establishment of a fee schedule for filing cable and satellite statements of account for use of the statutory licenses that provide for the secondary transmission of broadcast programming by cable and satellite companies.

DATES: Reply comments on the proposed regulation must be received in the Office of the General Counsel of the Copyright Office no later than 5 p.m. Eastern Standard Time (EST) on February 22, 2013.

ADDRESSES: The Copyright Office strongly prefers that reply comments be submitted electronically. A comment submission page is posted on the Copyright Office Web site at *http://www.copyright.gov/docs/newfees/comments/.* The Web site interface requires submitters to complete a form specifying name and other required information, and to upload comments as an attachment. To meet accessibility standards, all comments must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted publicly on the Copyright Office Web site exactly as they are received, along with names and organizations if provided. If electronic submission of comments is not feasible, please contact the U.S. Copyright Office at (202) 707–8380 for special instructions.

FOR FURTHER INFORMATION CONTACT: Megan Rivet, Budget Analyst, or Melissa Dadant, Senior Advisor for Operations and Special Projects, at (202) 707–8350.

SUPPLEMENTARY INFORMATION: On December 6, 2012, the U.S. Copyright Office published a notice of proposed rulemaking (''NPRM'') announcing a revised schedule of fees for filing semi-annual statements of account pursuant to 17 U.S.C. 111, 119, and 122 based upon a new cost study. 77 FR 72,788 (December 6, 2012). Comments to the proposed fees were due on January 7, 2013 and the Office received three comments at that time, including a comment from the National Cable & Telecommunications Association (''NCTA''). The Office previously granted an extension of time to file reply comments to February 15, 2013 in response to NCTA's motion requesting additional time to consider the Office's response to a Freedom of Information Act (''FOIA'') request for the cost studies referenced in the Office's December 6 notice announcing new proposed fees. It appears that more time is necessary to consider this information and the Office is thus extending the time for all stakeholders to file reply comments to 5:00 p.m. EST February 22, 2013.

Dated: February 11, 2013.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2013–03449 Filed 2–13–13; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2013–0028; A–1–FRL–9779–9]

Approval and Promulgation of Air Quality Implementation Plans; Massachusetts; Reasonably Available Control Technology for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing approval of State Implementation Plan (SIP) revisions submitted by the State of Massachusetts. These SIP revisions consist of a demonstration that Massachusetts meets the requirements of reasonably available control technology for oxides of nitrogen (NO_X) and volatile organic compounds (VOC) set forth by the Clean Air Act with respect to the 1997 8-hour ozone standard. Additionally, we are proposing approval of updates to two existing regulations limiting emissions of volatile organic compounds. This action is being taken in accordance with the Clean Air Act.

DATES: Written comments must be received on or before March 18, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R01–OAR–2013–0028 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: arnold.anne@epa.gov.*
3. *Fax:* (617) 918–0047.
4. *Mail:* ''Docket Identification Number EPA–R01–OAR–2013–0028,'' Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, (Mail Code OEP05–2), Boston, MA 02109—3912.
5. *Hand Delivery or Courier.* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, (mail Code OEP05–2), Boston, MA 02109—3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R01–OAR–2013–0028. 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 through *www.regulations.gov,* or email, information that you consider to be CBI or otherwise protected. 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.

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In addition, copies of the State submittals are also available for public inspection during normal business hours, by appointment at the Division of Air Quality Control, Massachusetts Department of Environmental Protection, One Winter Street, 8th Floor, Boston, MA 02108.

FOR FURTHER INFORMATION CONTACT: Bob McConnell, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100 (Mail Code: OEP05–2), Boston, MA 02109–3912, telephone number (617) 918–1046, fax number (617) 918–0046, email *mcconnell.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. Additionally, the phrase ''the Commonwealth'' refers to the state of Massachusetts. The following outline is provided to aid in locating information in this preamble.

I. Background and Purpose
II. Summary of Massachusetts' SIP Revisions
III. EPA's Evaluation of Massachusetts' SIP Revisions
a. Evaluation of VOC Requirements
b. Evaluation of NO_X Requirements
IV. Proposed Action
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I. Background and Purpose

On January 31, 2008, the State of Massachusetts submitted a formal revision to its SIP. The SIP revision consists of information documenting how Massachusetts complied with the reasonably available control technology (RACT) requirements for the 1997 8-hour ozone standard.[1] Additionally, on June 1, 2010, Massachusetts submitted updates to two regulations that limit volatile organic compound (VOC) emissions, one of which further restricted emissions from pressure-vacuum (PV) valves used by gasoline service stations, and another that updates an existing regulation limiting VOC emissions from solvent cleaning operations. The Commonwealth's submittals requested that they be incorporated into the Massachusetts SIP.

Sections 172(c)(1) and 182(b)(2) of the Clean Air Act (CAA) require states to implement RACT in areas classified as moderate (and higher) non-attainment for ozone, while section 184(b)(1)(B) of the Act requires RACT in states located in the ozone transport region (OTR). Specifically, these areas are required to implement RACT for all major VOC and NO_X emissions sources and for all sources covered by a Control Techniques Guideline (CTG). A CTG is a document issued by EPA which establishes a ''presumptive norm'' for RACT for a specific VOC source category. A related set of documents, Alternative Control Techniques (ACT) documents, exists primarily for NO_X control requirements. States must submit rules or negative declarations for CTG source categories, but not for sources in ACT categories. However, RACT must be imposed on major sources of NO_X, and some of those major sources may be within a sector covered by an ACT document.

In 1997, EPA revised the health-based National Ambient Air Quality Standards (NAAQS) for ozone, setting it at 0.08 parts per million (ppm) averaged over an 8-hour time frame. EPA set the 8-hour ozone standard based on scientific evidence demonstrating that ozone causes adverse health effects at lower ozone concentrations and over longer periods of time than was understood when the pre-existing 1-hour ozone standard was set. EPA determined that the 8-hour standard would be more protective of human health, especially with regard to children and adults who are active outdoors and individuals with a pre-existing respiratory disease such as asthma. On April 30, 2004 (69 FR 23858), EPA designated areas attainment or nonattainment with respect to the 1997 8-hour ozone standard. The entire state of Massachusetts was designated nonattainment and classified as moderate, as two nonattainment areas. See 40 CFR 81.322.

On November 29, 2005, EPA published a final rule in the **Federal Register** that outlined the obligations that areas found to be in nonattainment of the 1997 8-hour ozone standard needed to address (see 70 FR 71612). This rule, referred to as the ''Phase 2 Implementation rule,'' contained, among other things, a description of EPA's expectations for states with RACT obligations. The Phase 2 Implementation rule indicated that states could meet RACT through the establishment of new or more stringent requirements that meet RACT control levels, through a certification that previously adopted RACT controls in their SIP approved by EPA under the 1-hour ozone NAAQS represent adequate RACT control levels for 8-hour attainment purposes, or with a combination of these two approaches. In addition, a State must submit a negative declaration in instances where there are no CTG sources.

II. Summary of Massachusetts' SIP Revisions

On January 31, 2008, Massachusetts submitted a demonstration that its regulatory framework for stationary sources meets the criteria for RACT as defined in EPA's Phase 2 Implementation rule. The Commonwealth held a public hearing on the RACT program on January 18, 2008. Massachusetts' RACT submittal notes that its prior statewide designation as nonattainment for the 1-hour ozone standard resulted in the adoption of stringent controls for major sources of VOC and NO_X, including RACT level controls. Therefore, as allowed for within EPA's Phase 2 Implementation rule, much of the Commonwealth's submittal consists of a review of RACT controls adopted under the 1-hour ozone standard and an indication of whether those previously adopted controls still represent RACT under the 1997 ozone standard. Additionally, Massachusetts notes that as a member state of the Ozone Transport Commission (OTC) it works with that organization to identify and adopt, as deemed appropriate, regulations on additional VOC and NO_X categories beyond those for which EPA has issued CTGs or ACT documents.

[1] The Commonwealth's submittal was made to address RACT for the 1997 8-hour ozone standard and does not address the 2008 8-hour ozone standard of 0.075 parts per million.

With regard to VOC controls, the Commonwealth's submittal identifies the specific control measures that have been previously adopted to control emissions from VOC sources, reaffirms negative declarations for some CTG categories, and describes updates being considered to strengthen three VOC control regulations to ensure that they will continue to represent RACT under the 1997 ozone standard. A table named ''Table RACT–1'' within Massachusetts' submittal contains a summary of the state's response to each of the CTG categories that EPA issued through 2006.[2] The table identifies the specific state rule, where relevant, that is in place, and the date that EPA approved the rule into the Massachusetts SIP. A table labeled ''Table RACT–2'' within the Commonwealth's submittal identifies the major VOC sources in the state that are not covered by an ACT or CTG document. The state has issued source-specific orders containing control requirements for the facilities listed in Table RACT–2 of the state's submittal, and all of these have been previously approved into the Massachusetts SIP.

The Commonwealth's submittal notes that no sources exist in the state for some CTG categories. Specifically, Table RACT–1 of Massachusetts' submittal makes negative declarations for the following CTG sectors:

1. Refinery Vacuum Producing Systems, Wastewater Separators, and Process Unit Turnarounds;
2. Leaks from Petroleum Refinery Equipment;
3. Manufacture of Synthetic Pharmaceutical Products;
4. Manufacture of Pneumatic Rubber Tires;
5. Large Petroleum Dry Cleaners;
6. Manufacture of High-Density Polyethylene, Polypropylene and Polystyrene Resins;
7. Natural Gas/Gasoline Process Leaks;
8. Synthetic Organic Chemical Manufacturing Air Oxidation Processes; and
9. Ship Building and Repair.

Massachusetts' review of its control program for sources of VOC concludes that, with the adoption of revised rules for solvent cleaning, Stage II vehicle refueling, and cutback asphalt, all required VOC sources in the state are subject to RACT.

As required, the Commonwealth's submittal addresses NO_X emissions as well as VOC emissions. In their submittal, the Commonwealth explains that in order to address the 1990 CAA NO_X RACT requirement, Massachusetts adopted 310 CMR 7.19, ''Reasonably Available Control Technology (RACT) for Sources of Oxides of Nitrogen (NO_X).'' This rule established NO_X RACT for large, medium and small boilers; stationary combustion turbines; stationary reciprocating internal combustion engines; and glass melting furnaces. In addition, they describe that 310 CMR 7.19(12) provided for single source NO_X RACT determinations for major ''miscellaneous'' NO_X sources with a potential to emit 50 tons or more per year of NO_X. Massachusetts explains that they have reviewed 310 CMR 7.19 and, in general, have determined that the NO_X controls required by 310 CMR 7.19 continue to constitute NO_X RACT under the 1997 8-hour ozone standard for each of the source categories covered by that rule, as well as for major sources of NO_X for which single-source RACT determinations were made pursuant to 310 CMR 7.19(12). Additionally, the Commonwealth certifies in Tables RACT–1 and RACT–2 that current Massachusetts NO_X RACT constitutes 8-hour NO_X RACT under the 1997 ozone standard for the NO_X categories listed and for the facilities for which single-source RACT determinations were made.

Within their submittal, the Commonwealth notes that certain NO_X emitting sectors are controlled by additional sections of Massachusetts' air pollution control regulations. First, Massachusetts notes that electric generation units (EGUs) and large industrial boilers, in addition to requirements contained within 310 CMR 7.19, are also covered by 310 CMR 7.28, ''NO_X Allowance Trading Program,'' and 310 CMR 7.32, ''Massachusetts Clean Air Interstate Rule (Mass CAIR).'' In addition, Massachusetts notes that a subset of the largest fossil fuel-fired EGUs in Massachusetts are also subject to NO_X emission limitations under 310 CMR 7.29, ''Emissions Standards for Power Plants,'' adopted in 2001. Lastly, the Commonwealth notes that municipal waste combustors, in addition to requirements contained within 310 CMR 7.19, are also covered by 310 CMR 7.08, ''Incinerators.''

Massachusetts' review of its control program for major sources of VOC and NO_X thus concludes that, with the adoption of revised rules for solvent cleaning, Stage II vehicle refueling, and cutback asphalt, all major sources in the state are subject to RACT under the 1997 ozone standard.

III. EPA's Evaluation of Massachusetts' SIP Revisions

EPA has reviewed Massachusetts' determination that it has adopted VOC and NO_X control regulations for stationary sources that constitute RACT, and determined that the set of regulations cited by the Commonwealth constitute RACT for purposes of the 1997 8-hour ozone standard. Additionally, we are proposing to approve updates to two VOC RACT regulations submitted by Massachusetts on June 1, 2010.

a. Evaluation of VOC Requirements

Massachusetts' submittal documents the set of VOC control regulations that have been adopted to ensure that RACT level controls are required in the state. These requirements include: 310 CMR 7.18, ''Volatile and Halogenated Organic Compounds;'' and 310 CMR 7.24, ''Organic Material Storage and Distribution.'' Table RACT–1 of the Commonwealth's submittal indicates that Massachusetts has either adopted a regulation that has been incorporated into the SIP to address EPA's pre-2006 CTGs, or submitted a negative declaration in instances where no facilities exist in the state for certain CTGs identified in the submittal. Massachusetts' review of these VOC RACT regulations revealed that several could be strengthened in order to continue to meet RACT, and we address the disposition of those updates further below.

Additionally, Massachusetts has adopted numerous single source RACT orders for major sources of VOC that are not covered by one of EPA's CTGs, and these orders have been submitted to EPA and incorporated into the SIP. They are identified within the Commonwealth's submittal in Table RACT–2. Also, as noted above, Massachusetts adopted, and we are proposing to approve into the Massachusetts SIP, updates to two existing VOC RACT rules, namely the state's existing solvent metal cleaning and Stage II motor vehicle refueling regulations.

The Commonwealth's submittal documents a substantial downward trend in VOC emissions from stationary sources, a portion of which is attributable to RACT controls implemented by Massachusetts. Data collected by Massachusetts from its annual survey of industrial point source emitters reveals that between 1996 and 2002, VOC emissions from industrial point sources declined by 63%. This decline in emissions was brought about,

[2] This rulemaking does not address Massachusetts' response to the CTGs that EPA issued in 2006, 2007, and 2008.

in part, by the RACT program implemented by Massachusetts.

We are proposing approval of updates to the following two VOC RACT regulations described below, which Massachusetts has strengthened such that they continue to represent RACT under the 1997 ozone standard. Although Massachusetts's RACT certification submittal indicates that three existing VOC rules were to be updated in such fashion, only two were updated. Massachusetts updated its existing rules limiting emissions from solvent cleaning (metal degreasing) and emissions from storage tanks at gasoline service stations, but did not update its existing cutback asphalt regulation. These three regulations are discussed individually, as follows.

Solvent Degreasing Rule

Massachusetts updated its previously SIP-approved (58 FR 34911) solvent cleaning rule primarily to include a new requirement limiting the vapor pressure for cold cleaning solvents, as recommended within the Ozone Transport Commission's (OTC's) 2001 model rule for this activity. The requirement applies to cold cleaning degreasers that hold more than one liter of solvent. The Commonwealth's proposed revision includes exemptions for cold cleaning degreasers used in special and extreme metal cleaning, for devices located in a permanent total enclosure with an overall VOC control efficiency of at least 90 percent, and for facilities that receive an approval from the Department of Environmental Protection (DEP) to use a non-compliant solvent due to unsafe operating conditions. We note that with the new vapor pressure limit, the revised rule is more stringent than the previously SIP-approved version of the rule. In particular, Massachusetts estimated that the revised rule would reduce VOC emissions by 7 tons per summer day in 2009 compared to the previously regulated levels.[3] Therefore, the revised rule meets the requirements of section 193 of the CAA, which provides that ''[n]o control requirement in effect * * * before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.'' For similar reasons, the revisions meets the requirements of section 110(l) of the CAA, which prohibits EPA from approving a SIP revision ''if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * * or any other applicable requirement of [the Clean Air Act].'' Additionally, we note that the limited number of exemptions from the new vapor pressure requirement is acceptable given that this requirement is above and beyond the RACT recommendation within the EPA's CTG[4] for this source category.

Stage II Rule

The Commonwealth updated its previously adopted, SIP-approved (65 FR 78974) Stage II Vapor Recovery regulation, 310 CMR 7.24(6), primarily to require the use of PV vent caps on vapor balance systems installed on underground gasoline storage tanks to further reduce evaporative emissions from vehicle refueling. A number of additional updates were also made to the rule, including the following items.

The Commonwealth revised definitions for the terms ''isolate,'' ''minor modification,'' ''routine maintenance,'' and ''substantial modification,'' and also proposed new language clarifying requirements that ensure timely repair of Stage II systems. Massachusetts incorporated requirements that compel compliance testing companies to notify the DEP of any facilities that fail a compliance test, and also revised existing requirements for compliance testing companies.

Experience gained from operation of the Stage II program revealed that the compliance benefit attributed to the 120 day in-use compliance testing and certification requirement for vacuum assist systems could be achieved by the weekly visual and annual compliance testing requirement, and so the Commonwealth eliminated the 120 day in-use compliance testing requirement. Additionally, Massachusetts' revisions include an allowance for a facility to commence operation immediately upon passing applicable testing requirements.

When Massachusetts initially adopted its Stage II rule in 1989, it adopted a more stringent applicability level than subsequently required by the CAA amendments of 1990[5] that resulted in essentially all dispensing of gasoline to be subject to the regulation. Because of this, very small levels of gasoline dispensing activity such as that which occurs at salvage yards was covered by the regulation. Therefore, the Commonwealth's revised rule exempts motor vehicle salvage yards that dispense recovered fuel on-site to employee vehicles. By including this exemption, Massachusetts believes that the air quality protections afforded by the rule will not be adversely affected. Given the minimal amount of gasoline that will receive this exemption in comparison to the statewide use of motor vehicle fuel, we agree with the Commonwealth's conclusion.

The Commonwealth's revisions to the Stage II regulation include several provisions relating to requirements put in place by the California Air Resources Board (CARB). These include an allowance for the installation of CARB approved above ground storage tanks, references to CARB Stage II approval letters, and an update to the list of CARB approved Stage II systems to incorporate recently adopted CARB Executive Orders.

Massachusetts also made a number of minor revisions to existing recordkeeping and testing requirements applicable to Stage II system operators. We note that, with the addition of the new PV vent valve requirements, the revised rule is more stringent than the previously SIP-approved rule, even after accounting for the new exemption for motor vehicle salvage yards that dispense recovered fuel on-site to employee vehicles. Therefore, the revision meets the requirements of section 110(l) of the CAA.

The Commonwealth submitted its updated Stage II vapor recovery and solvent cleaning rules to EPA on June 1, 2010, and we are proposing approval of them within this action.

Cutback Asphalt Rule

The Commonwealth's January 31, 2008 submittal indicated that updates were also intended for 310 CMR 7.18(9), the existing cutback asphalt paving rule. However, on January 18, 2013, Massachusetts submitted a letter withdrawing portions of the January 31, 2008 submittal, including the commitment to revise the cutback asphalt rule. The Commonwealth noted in its January 18, 2013 withdrawal letter that on May 29, 2012 (77 FR 31496), EPA issued a final determination that Eastern Massachusetts had attained the 1997 8-hour ozone standard, and on June 19, 2012 (77 FR 36404) issued a similar determination for the Western Massachusetts nonattainment area. Therefore, the Commonwealth indicated

[3] See ''Background Information and Technical Support Document for Proposed Amendments To 310 CMR 7.00 et seq., 310 CMR 7.18, Volatile and Halogenated Organic Compounds, Solvent Metal Degreasing,'' Massachusetts Department of Environmental Protection, October 17, 2008, available in the docket for this rulemaking.

[4] See ''Control of Volatile Organic Emissions from Solvent Metal Cleaning,'' EPA–450/2–77–022; 1977/11.

[5] Section 182(b)(3) of the CAA requires Stage II controls at gasoline dispensing facilities which dispense 10,000 gallons or more per month or 50,000 gallons per month in the case of independent small business marketers.

that it now believes that its existing SIP-approved (58 FR 3495) cutback asphalt regulation continues to represent RACT. Given the circumstances cited above, we concur with this conclusion.

b. Evaluation of NO_X Requirements

Massachusetts' submittal documents the set of NO_X control regulations that have been adopted to ensure that RACT level controls are required in the state. These requirements include the following sections of title 310 of the Code of Massachusetts Regulations:

7.08, ''Incinerators;''

7.19, ''Reasonably Available Control Technology (RACT) for Sources of Oxides of Nitrogen (NO_X);''

7.28, ''NO_X Allowance Trading Program;''

7.29, ''Emission Standards for Power Plants;'' and,

7.32, ''Massachusetts Clean Air Interstate Rule (Mass CAIR).''

Table RACT–1 of the Commonwealth's submittal indicates the regulation that the Commonwealth has adopted, where appropriate, to address EPA's ACTs for NO_X source categories. We note that we have not updated any of the ACT documents noted within Table RACT–1. Massachusetts' submittal addresses NO_X RACT for all major sources in the Commonwealth. For the following sectors for which EPA has published ACT guidelines, Massachusetts's submittal indicates that there are no major sources of NO_X within the Commonwealth: nitric and adipic acid plants; cement plants; and iron and steel manufacturing facilities. Major NO_X sources do exist in Massachusetts for the ACT categories noted within Table RACT–1, and this Table identifies the NO_X RACT regulations the Commonwealth has adopted to address them. These ACT categories include combustion turbines, process heaters, internal combustion engines, industrial-commercial-institutional boilers, and glass manufacturing facilities. Massachusetts' RACT submittal certifies that these regulations represent RACT for purposes of EPA's 1997 8-hour ozone standard. Additionally, Massachusetts has adopted three single source RACT orders for major sources of NO_X that are not covered by one of EPA's ACTs, and these orders, identified in Table RACT–2, have been submitted to EPA and incorporated into the SIP. See 40 CFR 52.1167. Table RACT–1 also lists regulations adopted by the Commonwealth to further control NO_X emissions from electric utility boilers and municipal waste combustors (MWCs), and we discuss these two sectors separately below.

Municipal Waste Combustors

MWCs represent one of the largest NO_X emitting sectors in the Commonwealth, and EPA previously approved RACT requirements for these units within 310 CMR 7.19(9), which became effective in 1995. See 64 FR 48095. More recently, in 2000, the Commonwealth tightened emission limits for eleven of the seventeen MWC units in the Commonwealth via a strengthening of 310 CMR 7.08(2), Incinerators. Massachusetts submitted the updated rule to us, and we approved it as part of the Commonwealth's plan for controlling MWC emissions from existing large MWC plants under Section 111(d) of the CAA on October 9, 2002 (67 FR 62894). Massachusetts noted that the update to section 7.08(2) established emission limits that were equivalent to those within 40 CFR 60 Subpart Cb, which refers to EPA's emission guideline entitled, ''Emissions Guidelines and Compliance Times for Large Municipal Waste Combustors that are Constructed on or Before September 20, 1994.'' The Commonwealth's RACT certification further noted that one unit in Massachusetts is subject to the New Source Performance Standard located at 40 CFR 60 Subpart Eb. In light of the above, we find that the controls on 12 of the 17 units as specified above, in addition to the initial baseline adoption of RACT for MWCs in 1995 pursuant to CMR 7.19(9), demonstrates that the Commonwealth has required an overall RACT level of control for these units.

Electric Utility Boilers

EPA's Phase 2 Ozone Implementation Rule mentioned above addressed various statutory requirements, including the requirement for RACT level controls for sources located within nonattainment areas generally, and controls for NO_X emissions from EGUs in particular. EPA indicated its determination that the regional NO_X emissions reductions that result from either the NO_X SIP Call or the CAIR would meet the NO_X RACT requirement for EGUs located in states included within the respective NO_X SIP Call or the CAIR geographic regions. Thus, EPA concluded that: ''[t]he State need not perform a NO_X RACT analysis for sources subject to the State's emission cap-and-trade program where the cap-and-trade program has been adopted by the State and approved by EPA as meeting the NO_X SIP Call requirements or, in States achieving the CAIR reductions solely from electric generating units (EGUs), the CAIR NO_X requirements.'' [6] Based in part on this existing EPA rule at that time, the Commonwealth certified that the NO_X sources regulated by its NO_X SIP Call and CAIR rules meet the 8-hour ozone RACT requirements for purposes of the 1997 ozone standard.

However, in November 2008, several parties challenged EPA's Phase 2 Ozone Implementation Rule. In particular, they challenged EPA's determination that compliance with the NO_X SIP Call and/or the CAIR could satisfy NO_X RACT requirements for EGUs in nonattainment areas and EPA's determination that compliance with the CAIR could satisfy NO_X RACT for EGUs in ozone nonattainment areas. As a result of this litigation, the Court decided that the provisions in the Phase 2 Ozone Implementation Rule indicating that a state need not perform (or submit) a NO_X RACT analysis for EGU sources subject to a cap-and-trade program that meets the requirements of the NO_X SIP Call are inconsistent with the statutory requirements of section 172(c)(1).[7] The Court specifically held that the Phase 2 Ozone Implementation Rule allowing use of the NO_X SIP call to constitute RACT without any locally applicable analysis regarding the equivalence of NO_X SIP Call and RACT reductions: ''is inconsistent with the Clean Air Act * * * in allowing participation in a regional cap-and-trade program to satisfy an area-specific statutory mandate.'' The Court emphasized that: ''the RACT requirement calls for reductions in emissions from sources in the area; reductions from sources outside the nonattainment area do not satisfy the requirement * * * Accordingly, participation in the NO_X SIP call would constitute RACT only if participation entailed at least RACT-level reductions in emissions from sources within the nonattainment area.'' In view of its decision in *North Carolina* v. *EPA,* in which the Court had previously remanded the CAIR, the court deferred consideration of the litigant's challenge to the Phase 2 Ozone Implementation Rule insofar as they related to the CAIR program. In light of the above, as well as a 2007 petition for reconsideration that EPA granted on this issue as it pertains to CAIR,[8] we do not consider the NO_X SIP call or CAIR to equal NO_X RACT. Rather, consistent

[6] See Phase 2 Ozone Implementation Rule, 70 FR 71617.

[7] See *NRDC* v. *EPA,* 571 F.3d 1245 (D.C. Cir. 2009).

[8] See Earthjustice Petition for Reconsideration of the Clean Air Fine Particle Rule, June 25, 2007. See also April 25, 2011 letter from Lisa P. Jackson to Paul Cort, Earthjustice, responding to the June 25, 2007 petition for reconsideration.

with the above ruling, we have prepared a locally applicable analysis of whether electric utility boilers in the Commonwealth are subject to a RACT level of controls.

Electric utility boilers are subject to the Commonwealth's initial NO_X RACT regulation, 310 CMR 7.19, which was adopted in the mid-1990s. We previously determined that the emission limits within 310 CMR 7.19 required a RACT level of control on these units for purposes of our 1-hour ozone standard. See 64 FR 48095. Massachusetts subsequently acted to further reduce NO_X emissions from these units by participation in several NO_X budget trading programs, and also by enactment of 310 CMR 7.29, ''Emission Standards for Power Plants.''

Regarding NO_X budget trading programs, between 1999 and 2002, Massachusetts participated in the OTC's NO_X Budget Program. Massachusetts implemented this program by adopting 310 CMR 7.27, ''NO_X Allowance Program,'' and submitted this regulation to EPA which we incorporated into the Massachusetts SIP on December 27, 2000 (65 FR 81743). In 2003, the sources covered by the NO_X Allowance Program were transitioned to the Federal NO_X budget program (also referred to as the ''NO_X SIP call'') which Massachusetts implemented by adopting 310 CMR 7.28, ''NO_X Allowance Trading Program.'' Massachusetts submitted this regulation to EPA, and we approved it into the Massachusetts SIP on December 3, 2007 (72 FR 67854). The Federal NO_X budget program achieved significant additional NO_X reductions within Massachusetts from the sources subject to its requirements. In particular, emissions from units within Massachusetts subject to the Federal NO_X budget program reduced ozone season NO_X emissions from 9,265 tons in 2003 to 3,232 tons by 2008, representing a 65% reduction in emissions. Massachusetts then acted to further reduce NO_X emissions from these units by adopting 310 CMR 7.32, ''Massachusetts Clean Air Interstate Rule (Mass CAIR).'' Massachusetts submitted this program to EPA, and we approved it into the SIP on December 3, 2007 (72 FR 67854). By 2011, ozone season NO_X emissions from units within the Commonwealth subject to the CAIR rule decreased by an additional 46%, falling from 3,232 tons in 2008 to 1,760 tons in 2011. The substantial decrease in NO_X emissions from sources in the Commonwealth subject to the Federal NO_X budget and CAIR programs was brought about, in part, by the installation of various types of NO_X emission control equipment of the variety listed in Table 1, below. Although the CAIR program was subject to a number of court challenges, a recent decision by the U.S. Court of Appeals for the District of Columbia issued on August 21, 2012 which vacated the Cross State Air Pollution Rule (CSAPR) provided that until the CSAPR litigation is resolved, the CAIR program remains in effect. (*EME Homer City Generation, L.P.,* v. *EPA,* No. 11–1302. (D.C. Cir. 2012)).

Regarding 310 CMR 7.29, ''Emission Standards for Power Plants,'' the Commonwealth adopted this regulation in 2001, and submitted it to EPA for incorporation into the SIP within a submittal made on December 30, 2011, to address regional haze requirements. We approved the state's submittal, including 310 CMR 7.29, within a final rulemaking signed by the Regional Administrator on September 12, 2012 and forwarded for publication in the **Federal Register**. A copy of the signed approval of the Commonwealth's regional haze SIP is available in the docket for this action. This rule covers the largest fossil fuel-fired EGUs in Massachusetts and required individual emissions units to install additional add-on controls to comply with output-based NO_X emission limits between 2000 and 2008. As of 2009, six operating facilities were subject to this regulation containing 13 EGUs. Annual NO_X emissions for these six facilities dropped from 30,352 tons in 2000 to 7,009 tons in 2009, a drop of 77%. The NO_X controls installed on each unit at these facilities, as listed in their Title V Operating Permit, is contained in Table 1, below. Within Table 1, the following abbreviations are used: LNB for low NO burners; OFA for over-fire air; FGR for flue gas recirculation; SCR for selective catalytic reduction; and SNCR for selective non-catalytic reduction.

TABLE 1—NO_X CONTROLS AT FACILITIES GOVERNED BY 310 CMR 7.29

Facility	Unit	NO_X controls installed	Operating status
Brayton Point	1	LNB, OFA, SCR	Operating.
Brayton Point	2	LNB, OFA	Operating.
Brayton Point	3	LNB, OFA, SCR	Operating.
Brayton Point	4	LNB	Operating.
Canal Station	1	LNB, OFA, FGR, SCR	Operating.
Canal Station	2	LNB, OFA, FGR, combustion tuning, SNCR	Operating.
Mount Tom	1	LNB, OFA, SCR	Operating.
Mystic	7	None [9]	Operating.
Salem Harbor	1	LNB, SNCR	Retired 1/15/12.
Salem Harbor	2	SNCR	Retired 1/15/12.
Salem Harbor	3	LNB, OFA, SNCR	Operating.
Salem Harbor	4	LNB	Operating.
Somerset	8	OFA, Natural Gas Reburn System, SNCR	Retired 1/2/10.

As previously mentioned, Massachusetts adopted a set of regulations to address NO_X RACT for the 1-hour ozone standard, and we approved those requirements into the Commonwealth's SIP. Since then, Massachusetts has acted to further reduce NO_X emissions from the two largest NO_X emitting sectors in the state, namely municipal waste combustors and electric utility boilers. In light of the above regulatory actions and NO_X control equipment installations and the resulting decrease in NO_X emissions within Massachusetts, in addition to the initial baseline adoption of RACT in CMR 7.19, EPA is proposing approval of Massachusetts' January 31, 2008 SIP certification that the state has adopted air pollution control strategies that represent NO_X RACT for purposes of

[9] RACT requirements for Unit 7 are located at 310 CMR 7.19(4)(a)(3)(a)(i), which requires a NO_X emission limit of 0.25 lbs/mmBtu when burning oil, and pursuant to 310 CMR 7.19(4)(a)(3)(a)(ii) which requires a NO_X emission limit of 0.20 lbs/mmBtu when burning gas. Between 2010 and 2012, the unit was well within these limits, emitting NO_X within a range of 0.06 to 0.08 lbs/mmBtu.

compliance with our 1997 8-hour ozone standard. Our decision is also based, in part, on the fact that both nonattainment areas within the Commonwealth have attained our 1997 8-hour ozone standard by their attainment date of June 15, 2010 as noted in Section IV, Proposed Action.

IV. Proposed Action

EPA is proposing approval of Massachusetts' January 31, 2008 SIP submittal that demonstrates that the state has adopted air pollution control strategies that represent RACT for purposes of compliance with the 1997 8-hour ozone standard. Additionally, we are proposing approval of two revised regulations submitted by Massachusetts on June 1, 2010: 310 CMR 7.18(8), ''Solvent Metal Degreasing;'' and 310 CMR 7.24(6), ''Dispensing of Motor Vehicle Fuel.''

EPA has evaluated the VOC and NO_X stationary source control regulations which Massachusetts contends meets RACT for the 1997 8-hour ozone standard, and determined that a level of control consistent with RACT has been implemented in the state for purposes of the 1997 ozone standard. We do not anticipate any difficulties with enforcing the state's standards, as EPA has previously approved the rules Massachusetts cites as the means by which RACT is implemented. We have determined that these regulatory elements and the resulting reduction in VOC and NO_X emissions from major sources demonstrate that a RACT level of control for both pollutants has been implemented in the state. EPA has previously determined that Massachusetts' two 8-hour ozone nonattainment areas attained the 1997 ozone standard by their attainment date, based on quality-assured air monitoring data. This determination was published on May 29, 2012 (77 FR 31496) for the Eastern Massachusetts nonattainment area, and on June 19, 2012 (77 FR 36404) for the Western Massachusetts nonattainment area. The improvements in air quality represented by these clean data determinations were brought about, in part, by the RACT program implemented by Massachusetts.

EPA is soliciting public comments on the issues discussed in this notice or on other relevant matters. These comments will be considered before taking final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA New England Regional Office listed in the **ADDRESSES** section of this **Federal Register**.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed 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 proposed 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 Clean Air Act; 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.

List of Subjects in 40 CFR Part 52

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

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

Dated: February 5, 2013.

Ira W. Leighton,

Acting Regional Administrator, EPA Region 1.

[FR Doc. 2013–03472 Filed 2–13–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2013–0064; FRL–9777–7]

Revision of Air Quality Implementation Plan; California; Sacramento Metropolitan Air Quality Management District; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to fully approve two permitting rules submitted by California as a revision to the Sacramento Metropolitan Air Quality Management District (SMAQMD or District) portion of the California State Implementation Plan (SIP). These rules were adopted by the SMAQMD to regulate the construction and modification of stationary sources of air pollution within Sacramento County. EPA is proposing to approve this SIP revision based on the Agency's conclusion that the rules are consistent with applicable Clean Air Act (CAA) requirements, policies and guidance. Final approval of these rules would make the rules federally enforceable and correct program deficiencies identified in a previous EPA rulemaking on July 20, 2011.

DATES: Any comments must arrive by March 18, 2013.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2013–0064, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.
2. *Email: R9airpermits@epa.gov.*

3. *Mail or deliver:* Gerardo Rios (Air-3), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or email. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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.

Docket: EPA has established a docket for this action under EPA–R09–OAR–2013–0064. Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules addressed by this proposal, including the dates they were adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Amended/Adopted	Submitted
SMAQMD	214	Federal New Source Review	Amended 8/23/12	9/26/12
SMAQMD	217	Public Notice Requirements for Permits	Adopted 8/23/12	9/26/12

CARB's SIP submittal includes evidence of public notice and adoption of these regulations. We find that the submittals for SMAQMD Rules 214 and 217 meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

B. Are there other versions of these rules?

EPA approved a previous version of Rule 214 into the SIP on July 20, 2011 (76 FR 43183). There are no previous versions of Rule 217 in the SIP.

C. What is the purpose of the submitted rules?

Section 110(a)(2) of the CAA requires that each SIP include, among other things, a preconstruction permit program to provide for regulation of the construction and modification of stationary sources within the areas covered by the plan as necessary to assure that the National Ambient Air Quality Standards (NAAQS) are achieved, including a permit program as required in parts C and D of title I of the CAA. For areas designated as nonattainment for one or more NAAQS, the SIP must include preconstruction permit requirements for new or modified major stationary sources of such nonattainment pollutant(s), commonly referred to as ''Nonattainment New Source Review'' or ''NSR.'' CAA 172(c)(5).

Sacramento County is currently designated and classified as severe nonattainment for the 1997 and 2008 8-hour ozone NAAQS and moderate nonattainment for the 24-hour PM_{10} NAAQS. The area is also designated nonattainment for the 2006 24-hour $PM_{2.5}$ NAAQS. *See* 40 CFR 81.305. Therefore, California is required under part D of title I of the Act to adopt and implement a SIP-approved NSR program for the Sacramento area that applies, at minimum, to new or modified major stationary sources of the following pollutants: volatile organic compounds (VOCs), nitrogen oxides (NO_X), particulate matter of 10 microns of less (PM_{10}), particular matter of 2.5 microns or less ($PM_{2.5}$) and sulfur oxides (SO_X).[1]

Rule 214 (Federal New Source Review) implements the NSR requirements under part D of title I of the CAA for new or modified major stationary sources of these nonattainment pollutants within Sacramento County. Rule 217 (Public Notice Requirements for Permits) contains the public notice and other procedural requirements for issuance of permits to all minor sources and to new or modified major sources of nonattainment pollutants in the County.[2] The SMAQMD amended Rule 214 and adopted Rule 217 to correct program deficiencies identified by EPA on July 20, 2011 (76 FR 43183).

II. EPA's Evaluation and Proposed Action

A. How is EPA evaluating the rules?

EPA has reviewed the submitted permitting rules for compliance with the CAA's general requirements for SIPs in CAA section 110(a)(2), EPA's regulations for stationary source permit programs in 40 CFR part 51, subpart I (''Review of New Sources and Modifications''), and the CAA

[1] VOCs and NO_X are subject to NSR as precursors to ozone, and NO_X and SO_X are subject to NSR as precursors to $PM_{2.5}$ in Sacramento County. *See* 40 CFR 51.165(a)(1)(xxxvii)(C).

[2] New or modified major stationary sources of air pollutants for which Sacramento County is designated attainment or unclassifiable are subject to separate permitting procedures and requirements under Rule 203 (Prevention of Significant Deterioration), which EPA fully approved into the California SIP on July 20, 2011. See 76 FR 43183.

requirements for SIP revisions in CAA section 110(l).[3] As explained below, EPA is proposing to fully approve the submitted rules.

B. Do the rules meet the evaluation criteria?

With respect to procedures, CAA sections 110(a) and 110(l) require that revisions to a SIP be adopted by the State after reasonable notice and public hearing. EPA has promulgated specific procedural requirements for SIP revisions in 40 CFR part 51, subpart F. These requirements include publication of notices, by prominent advertisement in the relevant geographic area, of a public hearing on the proposed revisions, a public comment period of at least 30 days, and an opportunity for a public hearing.

Based on our review of the public process documentation included in the SMAQMD's September 26, 2012 rule submittals, we find that the State has provided sufficient evidence of public notice and opportunity for comment and public hearings prior to adoption and submittal of these rules to EPA.

With respect to substantive requirements, EPA has reviewed the submitted rules in accordance with the CAA and regulatory requirements that apply to NSR permit programs under part D of title I of the Act and the general public notice requirements for stationary source permits in 40 CFR section 51.161. Based on our evaluation of these rules, we are proposing to fully approve Rule 214 as satisfying the CAA and regulatory requirements for NSR permit programs in part D of title I of the Act and EPA's NSR implementing regulations in 40 CFR section 51.165 for new or modified major stationary sources proposing to locate in Sacramento County. Additionally, we are proposing to fully approve Rule 217 as satisfying the general public notice requirements in 40 CFR 51.161 for both minor source permits and major source NSR permits issued in Sacramento County. Final approval of Rule 214 and Rule 217 would correct all deficiencies in SMAQMD's permit programs identified in our July 20, 2011 final rule. See 76 FR 43183. The Technical Support Document (TSD) for this action contains a more detailed discussion of our evaluation.

C. Proposed action and request for public comment

For the reasons given above and described more fully in the TSD for this rulemaking, EPA is proposing to fully approve Rule 214 and Rule 217 into the California SIP pursuant to CAA section 110(k)(3). We will accept comments from the public on this proposal for the next 30 days.

III. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive 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 Clean Air Act; and
- Does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed 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 in 40 CFR Part 52

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

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

Dated: January 29, 2013.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2013–03249 Filed 2–13–13; 8:45 am]

BILLING CODE 6560–50–P

[3] Section 110(l) of the CAA requires SIP revisions to be subject to reasonable notice and public hearing prior to adoption and submittal by states to EPA and prohibits EPA from approving any SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Act.

Notices

Federal Register

Vol. 78, No. 31

Thursday, February 14, 2013

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

Office of the Secretary

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: National Appeals Division, U.S. Department of Agriculture.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Action of 1995 (44 U.S.C. Chapter 35), this notice announces the U.S. Department of Agriculture, National Appeals Division's request for an extension to a currently approved information collection for Customer Service Survey.

DATES: Comments on this notice must be received by April 15, 2013 to be assured of consideration.

Additional information or comments: Contact Dr. Angela Parham, U.S. Department of Agriculture, National Appeals Division, 3101 Park Center Drive, Suite 1100, Alexandria, Virginia, 22302–1500, 703.305.2588.

SUPPLEMENTARY INFORMATION:

Title: National Appeals Division Customer Service Survey.

OMB Number: 0503–0007.

Expiration Date of Approval: September 30, 2013.

Type of Request: Extension and Revision of a currently approved information collection.

Abstract: Executive Order 12862, requires Federal Agencies to identify the customers who are, or should be served by the Agency and survey those customers to determine the kind and quality of services they want and level of satisfaction with existing services. Therefore, NAD proposes to extend its currently approved information collection survey.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .17 hours per response.

Respondents: Appellants, producers, and other USDA agencies.

Estimated Number of Respondents: 1600.

Estimated Number of Responses per Respondent: One (1).

Estimated Total Annual Burden on Respondents: 272.

Comments are invited on: (1) 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) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) 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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Dr. Angela Parham, U.S. Department of Agriculture, National Appeals Division, 3101 Park Center Drive, Suite 1100, Alexandria, Virginia 22302–1500.

All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Roger Klurfeld,

Director, National Appeals Division.

[FR Doc. 2013–03421 Filed 2–13–13; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Supplemental Nutrition Assistance Program: State Issuance and Participation Estimates—Forms FNS–388 and FNS–388A

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Food and Nutrition Service (FNS) is publishing for public comment a summary of a proposed information collection. The proposed collection is a revision of a currently approved collection for the Supplemental Nutrition Assistance Program (SNAP) for the form FNS–388, State Issuance and Participation Estimates, and FNS–388A, Project Area Data Format.

DATES: Written comments must be received on or before April 15, 2013.

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 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 Jane Duffield, Chief, State Administration Branch, Supplemental Nutrition Assistance Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 818, Alexandria, VA 22302. Comments may also be submitted via email to *SNAPSAB@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 responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Kelly Stewart at 703–305–2425.

SUPPLEMENTARY INFORMATION:

Title: State Issuance and Participation Estimates.

Form Number: FNS–388 and FNS–388A.

OMB Number: 0584–0081.

Expiration Date: 5/31/2013.

Type of Request: Revision of a currently approved collection.

Abstract: Section 18(b) of the Food and Nutrition Act, (the Act) 7 U.S.C. 2027(b), limits the value of allotments paid to SNAP households to an amount not in excess of the appropriation for the fiscal year. If allotments in any fiscal year would exceed the appropriation, the Secretary of Agriculture is required to direct State agencies to reduce the value of SNAP allotments to the extent necessary to stay within appropriated funding limits. Timely State monthly issuance estimates are necessary for FNS to ensure that it remains within the appropriation. The estimates will also have a direct effect upon the manner in which allotments would be reduced if necessary. While benefit reductions have never been ordered in the past under Section 18(b) nor are they anticipated based on current data, the Department must continue to monitor actual program costs against the appropriation.

Section 11(e)(12) of the Food and Nutrition Act, 7 U.S.C. 2020(e)(12), requires that the State Plan of Operations provide for the submission of reports required by the Secretary of Agriculture. State agencies are required to report on a monthly basis on the FNS–388, State Issuance and Participation Estimates, estimated or actual issuance and participation data for the current month and previous month, and actual participation data for the second preceding month. The FNS–388 report provides the necessary data for an early warning system to enable the Department to monitor actual and estimated costs for all benefit types against the appropriation.

State agencies in general only submit one Statewide FNS–388 per month, which covers benefits from their electronic benefit transfer (EBT) system. The exception is that State agencies which choose to operate an approved alternative issuance demonstration project such as a cash-out system submit a separate report for each additional type of issuance system.

In addition, State agencies are required to submit a project area breakdown on the FNS–388 of issuance and participation data twice a year. The project area breakdown attached to the FNS–388 twice a year is known as the FNS–388A. This data is useful in identifying project areas that operate fraud detection units in accordance with the Act.

As of December, 2012, 100 percent of respondents submitted the FNS–388 and FNS–388A data electronically.

Affected Public: State agencies that administer SNAP.

Estimated Number of Respondents: 53.

Estimated Number of Responses per Respondent: 27.17.

Estimated Hours per Response: 3.581.

Estimated Total Annual Responses: 1440.

Estimated Total Annual Burden on Respondents: The annual reporting and recordkeeping burden for OMB No. 0584–0081, is estimated to be 5,157 hours. For the FNS–388, the frequency of response has decreased slightly from an estimated 11.509 times per year to 11.32. This results in a burden reduction of 86 hours annually. See the table below for estimated total annual burden for each type of respondent.

Affected public	Forms	Number of respondents	Frequency of response	Total annual responses	Time per response (hrs)	Annual burden hours
State Agencies	FNS–388 FNS–388A.	53 53	11.32 2.26	600 120	5.6 14.83	3360 1779.6
Reporting Burden		53		720		5139.6

Affected public	Forms	Number of recordkeepers	Frequency of response	Total annual records	Time per response (hrs)	Annual record–keeping hours
State Agencies	FNS–388 FNS–388A.	53 53	11.32 2.26	600 120	.024 .024	14.4 2.88
Recordkeeping Burden		53		720		17.28
Grand Total		53	27.170	1440	3.581	5156.88

Dated: January 31, 2013.

Jeffrey J. Tribiano,

Acting Administrator, Food Nutrition Service.

[FR Doc. 2013–03340 Filed 2–13–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Evaluation of the Demonstrations of National School Lunch and School Breakfast Program (NSLP/SBP) Direct Certification of Children Receiving Medicaid Benefits

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 is a new collection for Evaluation of the Demonstrations of NSLP/SBP (National School Lunch Program/School Breakfast Program) Direct Certification of Children Receiving Medicaid Benefits.

DATES: Written comments must be received on or before April 15, 2013.

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: Steve Carlson, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1040, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Steve 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 1040, 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 Steve Carlson at 703–305–2017.

SUPPLEMENTARY INFORMATION:

Title: Evaluation of the Demonstrations of NSLP/SBP Direct Certification of Children Receiving Medicaid Benefits.

Form Number: N/A.

OMB Number: Not Yet Assigned.

Expiration Date: Not Yet Determined.

Type of Request: New collection.

Abstract: The Healthy, Hunger-Free Kids Act of 2010 (the Act), Section 103, directs USDA to demonstrate direct certification for free lunches and breakfasts to children who are receiving Medicaid and whose households have a gross income as measured by Medicaid that does not exceed 133 percent Federal Poverty Level (FPL). The Direct Certification-Medicaid (DC–M) demonstration may expand the number of students certified for free meals and affect the costs that States and local education agencies (LEAs) incur when certifying students. While the process of matching students to Medicaid data will increase certification costs for States and some LEAs, DC–M can generate cost savings if it leads fewer families to submit applications for school meals. DC–M may also have an impact on federal costs if it leads to an increase in certifications for free and reduced price meals.

To determine the impact and effectiveness of direct certification using Medicaid data, FNS will conduct a comprehensive evaluation of DC–M through three investigative areas:

(1) Identify the potential impact that DC–M may have on children's access to the NSLP and SBP;

(2) Measure the actual impact of DC–M on participation and costs observed over two years of demonstrations. This component of the study will examine whether DC–M leads to changes in the number and distribution of certified students and higher or lower certification costs in LEAs. The results of this analysis will be used to project the impact of DC–M on number of meals served and on the dollar amount of federal meal reimbursements distributed to districts. The study will also identify the challenges that States and LEAs face when implementing DC–M; and

(3) Examine the conditions that would make SES certification procedures a cost-effective alternative to current certification procedures.

The study will gather data from State and LEAs to include: (1) Certification and participation records; (2) cost surveys and interviews that include certification costs, start-up costs, local meal costs, and federal benefit costs; as well as (3) challenges in conducting DC–M matching. Data will be collected through web surveys and telephone interviews for school year 2012–13 (SY1) and school year 2013–2014 (SY2).

Affected Public: State and Local Government—Respondent groups identified include: (1) State level administrators that administer the National School Lunch and Breakfast Programs from nine State agencies (six States in SY1 and an additional three States in SY2); and (2) District/School level administrators from 698 LEAs in SY1, increasing to 1,200 LEAs in SY2.

Estimated Number of Respondents: 3,776.

Estimated Number of Responses per Respondent: The average estimated annual number of responses per respondent in the first school year is 1.03, and the average in the second school year is 4.24, for an aggregate average over the two years of 3.09 responses.

Estimated Time per Response: The estimated time per response is .767 hours (or approximately 46 minutes). The estimated time of response varies from 10 minutes to 5 hours depending upon respondent action, as shown in the table below.

Estimated Total Annual Burden on Respondents: The total estimated annual burden is 1,265.34 hours in year 1 and 7,684.52 hours in year 2, as shown in the table below.

Action	Respondent type	Estimated # respondents	Responses annually per respondent	Total annual responses	Estimated avg. # of hours per response	Estimated total hours
State Challenge Interviews	*State Agencies* (includes 6 State nutrition directors and 3 Medicaid directors).	9	2	18	1.00	18.00
State Cost Interview	*State Agencies* (includes 6 State nutrition directors and 6 Medicaid directors).	12	3	36	3.50	126.00
LEA Cost Survey	*Local Education Agencies (LEA)* (includes 534 child nutrition program directors, 534 business managers, and 9 pretest respondents).	1,077	1	1,077	1.00	1,077.00
	Local Education Agency (LEA) Cost Survey Non-Responders.	266	1	266	0.1667	44.34

Action	Respondent type	Estimated # respondents	Responses annually per respondent	Total annual responses	Estimated avg. # of hours per response	Estimated total hours
SY1 TOTAL	*State & Local Government*	*[a] 1,355*	*1.03*	*1,397*	*0.91*	*1,265.34*
State Challenge Interviews	*State Agencies* (includes 9 State nutrition directors and 9 Medicaid directors).	18	2	36	1.00	36.00
State Cost Survey	*State Agencies* (includes 9 State nutrition directors and 9 Medicaid directors).	18	3	54	3.50	189.00
LEA Cost Survey	*LEA* (includes 960 child nutrition program directors and 960 business managers).	1,920	5	9,600	0.75	7,200.00
	LEA Cost Survey Non-Responders.	480	1	480	0.1667	80.02
LEA Challenge Interviews	*LEA* (includes 27 child nutrition program directors).	27	2	54	1.00	54.00
	LEA Challenge Interview Non-Responders.	3	1	3	0.1667	0.50
Match Validation Substudy	*State Agencies* (includes 1 child nutrition director).	1	2	2	5.00	10.00
	State Agencies (includes 3 Medicaid directors).	3	1	3	5.00	15.00
	LEA (includes 10 district child nutrition administrators and 10 business managers).	20	2	40	2.50	100.00
SY2 TOTAL	*State & Local Government*	*[b c] 2,421*	*4.24*	*10,272*	*0.75*	*7,684.52*
Grand Total	State & Local Government	3,776	3.09	11,669	0.767	8,949.86

[a] In SY1, the 9 State challenge interview respondents in SY1 are also completing cost interviews.
[b] The 24 Match Validation substudy respondents are also included in the SY2 cost survey respondents.
[c] In SY2, the 18 State challenge interview respondents are also completing the cost interviews, and the 27 district challenge interview respondents are also completing the district cost survey.

Dated: January 29, 2013.

Audrey Rowe,

Administrator.

[FR Doc. 2013–03470 Filed 2–13–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Olympic Peninsula Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Outreach for new RAC Replacement members.

SUMMARY: Interested citizens are invited to serve on the Olympic Peninsula Resource Advisory Committee (RAC). The RAC will be responsible for reviewing and recommending land management projects to be funded under the Secure Rural Schools and Community Self-Determination Act, should the act be reauthorized this year.

RAC members represent a wide range of interests. The committee consists of 15 members and each member is assigned to one of three categories. A replacement member is also assigned to each category. The replacement member becomes a full time member when and if an assigned member can not complete his or her four-year term. The Olympic Peninsula RAC has vacancies for replacement members in Categories A, B, and C.

- Category A represents organized labor, developed outdoor recreation, off-highway vehicle use, commercial recreation activities, energy development interests, the commercial timber industry, and Federal grazing or other land use permits.
- Category B represents nationally recognized environmental organizations, regionally or locally recognized environmental organizations, dispersed recreational activities, archaeological and historical interests.
- Category C represents state, county, or local elected offices, American Indian tribes, school officials or teachers, and the affected public-at-large.

A four-year term would begin upon appointment by the Secretary of Agriculture. Committee members serve without compensation, but may be reimbursed for travel expenses. Members must be Washington residents, preferably living in one of the Olympic Peninsula counties. Meetings are held at least once and up to four times per year within Thurston, Mason, Jefferson, Clallam, or Grays Harbor Counties.

Interested participants should submit the required AD 755 application, available on the forest's Web site at *http://www.fs.usda.gov/main/olympic/workingtogether/advisorycommittees.*

DATES: All applications must be received at the Olympic National Forest Supervisor's Office by March 29, 2013.

ADDRESSES: Please mail all AD 755 forms to: Olympic National Forest, 1835 Black Lake Blvd. SW., Olympia, WA 98512, Attention: Grace Haight.

FOR FURTHER INFORMATION CONTACT: For additional information, please contact Donna Nemeth at 360–956–2274 or Bill Shelmerdine at 360–956–2282.

Dated: February 7, 2013.

Reta Laford,

Forest Supervisor, Olympic National Forest.

[FR Doc. 2013–03290 Filed 2–13–13; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request Revision and Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Fruits, Nuts, and Specialty Crops Surveys. Revision to burden hours will be needed due to changes in the size of the target population, sample design, minor changes in questionnaire design and an anticipated increase in response rates.

DATES: Comments on this notice must be received by April 15, 2013 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0039, by any of the following methods:

- *Email: omboffcer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Fax:* (202) 720–6396.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

SUPPLEMENTARY INFORMATION:

Title: Fruits, Nuts, and Specialty Crops Surveys.

OMB Control Number: 0535–0039.

Expiration Date of Approval: June 30, 2013.

Type of Request: To revise and extend a currently approved information collection for a period of three years.

Abstract: The primary objective of the National Agricultural Statistics Service (NASS) is to collect, prepare and issue State and national estimates of crop and livestock production, prices, and disposition; as well as economic statistics, environmental statistics related to agriculture and also to conduct the Census of Agriculture. The Fruits, Nuts, and Specialty Crops survey program collects information on acreage, yield, production, price, and value of citrus and non-citrus fruits and nuts and other specialty crops in States with significant commercial production. The program provides data needed by the U.S. Department of Agriculture and other government agencies to administer programs and to set trade quotas and tariffs. Producers, processors, other industry representatives, State Departments of Agriculture, and universities also use forecasts and estimates provided by these surveys.

Authority: These data will be collected under authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985 as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–113) and Office of Management and Budget regulations at 5 CFR part 1320. NASS also complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),'' **Federal Register**, Vol. 72, No. 115, June 15, 2007, p. 33376.

Estimate of Burden: Public reporting burden for this information collection is based on approximately 70 individual surveys with expected response times of 4–30 minutes and frequency of 1–12 times per year. Estimated number of responses per respondent is 1.6. Publicity materials and instruction sheet will account for 5 minutes of additional burden per respondent. Respondents who refuse to complete a survey will be allotted 2 minutes of burden per attempt to collect the data.

Respondents: Producers, processors, and handlers.

Estimated Number of Respondents: 63,000.

Estimated Total Annual Burden on Respondents: 16,000 hours.

Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388.

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 will 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 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, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, January 31, 2013.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2013–03220 Filed 2–13–13; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request Revision and Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Honey Survey. Revision to burden hours may be needed due to any changes in the size of the target population, sample design, and slight improvements to the questionnaire to accommodate changes within the industry.

DATES: Comments on this notice must be received by April 15, 2013 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0153, by any of the following methods:

- *Email: omboffcer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Fax:* (202) 720–6396.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

• *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

SUPPLEMENTARY INFORMATION:

Title: Honey Survey.

OMB Control Number: 0535–0153.

Expiration Date of Approval: May 31, 2013.

Type of Request: Intent to revise and extend a currently approved information collection for a period of three years.

Abstract: The primary objective of the National Agricultural Statistics Service (NASS) is to prepare and issue state and national estimates of crop and livestock production, prices, and disposition; as well as economic statistics, environmental statistics related to agriculture and also to conduct the Census of Agriculture.

The Honey Survey collects information on the number of colonies, honey production, stocks, and prices. The survey provides data needed by the U.S. Department of Agriculture and other government agencies to administer programs and to set trade quotas and tariffs. State universities and agriculture departments also use data from this survey.

Authority: These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985 as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–113) and the Office of Management and Budget regulations at 5 CFR part 1320. NASS also complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),'' **Federal Register**, Vol. 72, No. 115, June 15, 2007, p. 33376.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10 minutes per response. Publicity materials and instruction sheet will account for 5 minutes of additional burden per respondent. Respondents who refuse to complete a survey will be allotted 2 minutes of burden per attempt to collect the data.

Respondents: Farmers.

Estimated Number of Respondents: 10,000.

Estimated Total Annual Burden on Respondents: With an estimated response rate of approximately 80%, we estimate the burden to be 2,400 hours. Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388.

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 will 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 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, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, January 31, 2013.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2013–03221 Filed 2–13–13; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent to Request Revision and Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Nursery and Floriculture Chemical Use Survey. Revision to burden hours will be needed due to changes in the size of the target population, sampling design, and/or questionnaire length.

DATES: Comments on this notice must be received by April 15, 2013 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0244, by any of the following methods:

• *Email: omb officer@nass.usda.gov.* Include docket number above in the subject line of the message.

• *Fax:* (202) 720–6396.

• *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

• *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

SUPPLEMENTARY INFORMATION: *Title:* Nursery and Christmas Tree Production Survey and Nursery and Floriculture Chemical Use Survey.

OMB Control Number: 0535–0244.

Expiration Date of Approval: June 30, 2013.

Type of Request: Intent to revise and extend a currently approved information collection for a period of three years.

Abstract: The primary objective of the National Agricultural Statistics Service (NASS) is to prepare and issue State and national estimates of crop and livestock production, prices, and disposition, as well as economic statistics, environmental statistics related to agriculture and also to conduct the Census of Agriculture. This includes estimates of production and value of key nursery products and chemical use by nursery and floriculture production operations.

• As nursery production continues to be one of the fastest growing segments of American agriculture, the Nursery Production and Christmas Tree Survey will update the production and economic contribution of the nursery industry to U.S. agriculture every 3 years by conducting a census of nursery and greenhouse operations with sales over $10,000 in the 17 major producing States. These operations will receive the production questionnaire by mail with telephone and personal interview follow-up for non-response.

• The Nursery and Floriculture Chemical Use Survey, is conducted every 3 years in conjunction with the production survey mentioned above. It measures chemical usage, related to the production of nursery and floriculture crops in six major producing States. The resulting publication is part of the NASS series on Agricultural Chemical Usage, and it summarizes rates of application, total amount of active ingredients applied, and use of pest management practices. NASS collects on-farm chemical use data to enhance the quality of information used in the evaluation of issues related to agricultural chemicals, including pesticide registrations. Pest management data are used to measure integrated pest management adoption levels and evaluate the impact of alternative pesticide regulations, policies, and practices. A sample of nursery and floriculture operations with sales over $10,000 in the major States will be personally interviewed, since chemical use data are not accurately collected by telephone or mail.

• A nursery production survey and a Christmas tree production survey are conducted every year in Oregon.

Authority: These data will be collected under authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985 as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995, (Pub. L. 104–113) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995).

NASS also complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),'' **Federal Register**, Vol. 72, No. 115, June 15, 2007, p. 33376.

Estimate of Burden: Based on previous data collected, the average amount of respondent burden for the Nursery and Floriculture Chemical Use Survey (6 States) is estimated to average 60 minutes per respondent (conducted once every three years). The Nursery and Christmas Tree Production Survey (17 States) is estimated to average 35 minutes per respondent (conducted once every three years). The annual nursery production survey conducted in Oregon is estimated to average 30 minutes per respondent. The annual Christmas tree production survey in Oregon is estimated to average 20 minutes per respondent. Publicity materials and instruction sheet will account for 10 minutes of additional burden per respondent. Respondents who refuse to complete a survey will be allotted 2 minutes of burden per attempt to collect the data.

Respondents: Producers of nursery, greenhouse, and floriculture products.

Estimated Annual Number of Respondents: (Nursery Production and Christmas Tree Survey at 15,000 × frequency of ⅓) + (Chemical Use Survey at 4,200 × frequency of ⅓) + (Oregon Nursery Production Survey at 800 × frequency of 1.0) + (Oregon Christmas Tree Production at 1,000 × frequency of 1.0) = approximately 8,200.

Estimated Total Annual Burden on Respondents: approximately 7,500 hours. Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388.

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 will 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 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, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, January 31, 2013.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2013–03219 Filed 2–13–13; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the Rural Utilities Service (RUS) invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

DATES: Comments on this notice must be received by April 15, 2013.

FOR FURTHER INFORMATION CONTACT: Michele L. Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, 1400 Independence Ave. SW., STOP 1522, Room 5162—South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. FAX: (202) 720–8435. Email: *michele.brooks@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for extension.

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 will 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 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 through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Michele L. Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, STOP 1522, 1400 Independence Ave. SW., Washington, DC 20250–1522. FAX: (202) 720–8435. Email: *michele.brooks@wdc.usda.gov*.

Title: 7 CFR 1779, Water and Waste Disposal Programs Guaranteed Loans.

OMB Number: 0572–0122.

Type of Request: Extension of a currently approved information collection.

Abstract: The Rural Utilities Service is authorized by Section 306 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926) to make loans to public agencies, nonprofit corporations, and Indian tribes for the development of water and waste

disposal facilities primarily servicing rural residents. The guaranteed loan program encourages lender participation and provides specific guidance in the processing and servicing of guaranteed loans. The regulations governing the Water and Waste Disposal Guaranteed Loan program are codified at 7 CFR part 1779. The required information, in the form of written documentation and Agency approved forms, is collected from applicants/borrowers, their lenders, and consultants. The collected information will be used to determine applicant/borrower eligibility, project feasibility, and to ensure borrowers operate on a sound basis and use loan funds for authorized purposes. Failure to collect proper information could result in improper determinations of eligibility, improper use of funds, and/or unsound loans.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 7.8 hours per response.

Respondents: Business or other for profit; Not-for-profit institutions; State, Local or Tribal Government.

Estimated Number of Respondents: 15.

Estimated Number of Responses per Respondent: 7.3.

Estimated Total Annual Burden on Respondents: 858 hours.

Copies of this information collection can be obtained from Rebecca Hunt, Program Development and Regulatory Analysis, at (202) 205–3660, FAX: (202) 720–8435. Email: *rebecca.hunt@wdc.usda.gov*.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: February 8, 2013.

John Charles Padalino,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2013–03347 Filed 2–13–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: National Estuarine Research Reserve System Science Collaboration Evaluation Survey.

OMB Control Number: None.

Form Number(s): NA.

Type of Request: Regular submission (request for a new information collection).

Number of Respondents: 140.

Average Hours per Response: 20 minutes.

Burden Hours: 47.

Needs and Uses: This request is for a new information collection.

The National Estuarine Research Reserve System (NERRS) Science Collaborative was created in 2009 to put Reserve-based science to work for coastal communities coping with the impacts of land use change, pollution, and habitat degradation in the context of a changing climate. The program operates on the belief that for science to be applied to solve coastal management problems, the people who need to use the science must be involved in its generation.

The projects funded by the NERRS Science Collaborative are designed to bring the intended users of the science into the research process so that their perspectives can inform problem definition, research design and implementation, and ultimately, application of the project results. This is what is meant by ''collaboration,'' and it is the program's goal to use this process to ensure that the good science happening in and around the Reserves gets put to good use.

To help evaluate the efficacy of the NERRS Science Collaborative, NOAA is conducting a survey of the NERRS staff located in the 28 Reserves around the country to solicit their perspective about the program and how it has been implemented.

Affected Public: State, local or tribal government, not-for-profit institutions.

Frequency: Once.

Respondent's Obligation: Voluntary.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: February 8, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–03384 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

Economics and Statistics Administration

Bureau of Economic Analysis Advisory Committee

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463 as amended by Pub. L. 94–409, Pub. L. 96–523, Pub. L. 97–375 and Pub. L. 105–153), we are announcing a meeting of the Bureau of Economic Analysis Advisory Committee. The meeting will address ways in which the national economic accounts can be presented more effectively for current economic analysis and recent statistical developments in national accounting.

DATES: Friday, May 10, 2013 the meeting will begin at 9:00 a.m. and adjourn at 3:30 p.m.

ADDRESSES: The meeting will take place at the Bureau of Economic Analysis at 1441 L St. NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Gianna Marrone, Program Analyst, Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; telephone number: (202) 606–9633.

Public Participation: This meeting is open to the public. Because of security procedures, anyone planning to attend the meeting must contact Gianna Marrone of BEA at (202) 606–9633 in advance. The meeting is physically accessible to people with disabilities. Requests for foreign language interpretation or other auxiliary aids should be directed to Gianna Marrone at (202) 606–9633.

SUPPLEMENTARY INFORMATION: The Committee was established September 2, 1999. The Committee advises the Director of BEA on matters related to the development and improvement of BEA's national, regional, industry, and international economic accounts, especially in areas of new and rapidly growing economic activities arising from innovative and advancing technologies, and provides recommendations from the perspectives of the economics profession, business,

and government. This will be the Committee's twenty-fifth meeting.

Dated: February 5, 2013.

Brian C. Moyer,

Deputy Director, Bureau of Economic Analysis.

[FR Doc. 2013–03478 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement (NAFTA), Article 1904 Binational Panel Reviews

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of Completion of Panel Review of the Department of Commerce's final determination of Stainless Steel Sheet and Strip in Coils from Mexico (Secretariat File No. USA–MEX–2008–1904–01).

SUMMARY: Pursuant to the Order of the Binational Panel dated January 8, 2013, the panel review was completed on February 8, 2013.

FOR FURTHER INFORMATION CONTACT: Ellen Bohon, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: On January 8, 2013, the Binational Panel issued an Order granting a joint motion filed by the Investigating Authority (U.S. Department of Commerce) and the Complainant (ThyssenKrupp Mexinox S.A. de C.V. and Mexinox USA, Inc.) to dismiss the panel review concerning the Department of Commerce's final determination concerning Stainless Steel Sheet and Strip in Coils from Mexico. The Secretariat was instructed to issue a Notice of Completion of Panel Review on the 31st day following the issuance of the Notice of Final Panel Action, if no request for an Extraordinary Challenge Committee was filed. No such request was filed. Therefore, on the basis of the Panel Order and Rule 80 of the *Article 1904 Panel Rules,* the Panel Review was completed and the panelists were discharged from their duties effective February 8, 2013.

Dated: February 8, 2013.

Ellen M. Bohon,

United States Secretary, NAFTA Secretariat.

[FR Doc. 2013–03348 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Southeast Region Logbook Family of Forms

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

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.

DATES: Written comments must be submitted on or before April 15, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Steve Turner, (305) 361–4482 or *Steve.Turner@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a current information collection.

Participants in most Federally-managed fisheries in the Southeast Region are currently required to keep and submit catch and effort logbooks from their fishing trips. A subset of these vessels also provide information on the species and quantities of fish, shellfish, marine turtles, and marine mammals that are caught and discarded or have interacted with the vessel's fishing gear. A subset of these vessels also provide information about dockside prices, trip operating costs, and annual fixed costs.

The data are used for scientific analyses that support critical conservation and management decisions made by national and international fishery management organizations. Interaction reports are needed for fishery management planning and to help protect endangered species and marine mammals. Price and cost data will be used in analyses of the economic effects of proposed regulations.

II. Method of Collection

The information is submitted on paper forms. Logbooks are completed daily and submitted on either a by trip or monthly basis, depending on the fishery. Fixed costs are submitted on an annual basis. Other information is submitted on a trip basis.

III. Data

OMB Control Number: 0648–0016.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 4,177.

Estimated Time per Response: Annual fixed-cost reports, 30 minutes; Colombian fishery logbooks, 18 minutes; discard logbooks, 15 minutes; headboat, golden crab, reef fish-mackerel, economic cost/trip,, wreckfish, and shrimp logbooks, 10 minutes; no-fishing responses for golden crab, reef fish-mackerel, charterboat, wreckfish and Colombian fisheries, 2 minutes.

Estimated Total Annual Burden Hours: 16,007.

Estimated Total Annual Cost to Public: $0.

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) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

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: February 8, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–03383 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 130208645–3645–01]

RIN 0648–XC209

Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List 44 Species of Corals as Threatened or Endangered Under the Endangered Species Act

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of 90-day petition finding.

SUMMARY: We (NMFS) announce a 90-day finding on a petition to list 44 species of corals off Alaska as threatened or endangered under the Endangered Species Act (ESA). We find that the petition does not present substantial scientific or commercial information indicating that the petitioned actions may be warranted.

ADDRESSES: Copies of the petitions and related materials are available online at *http://www.alaskafisheries.noaa.gov/protectedresources/coral/default.htm* or upon request from the Assistant Regional Administrator for Protected Resources, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668.

FOR FURTHER INFORMATION CONTACT: John Olson, NMFS Alaska Region, (907) 271–1508; Jon Kurland, NMFS Alaska Region, (907) 586–7638; or Maggie Miller, NMFS Office of Protected Resources, (301) 427–8403.

SUPPLEMENTARY INFORMATION:

Background

On August 20, 2012, we received a petition from the Center for Biological Diversity to list 44 taxa of coral (42 species, one subspecies and one variant) as threatened or endangered under the ESA. The petition is entitled ''Petition to List 43 Coral Species under the Endangered Species Act'' but it provides information regarding 44 taxa. We are therefore treating the petitioned action as the listing of 44 taxa. The petitioner also requested that critical habitat be designated for these corals concurrent with listing under the ESA. The petition asserts that synergistic threats of ocean warming, ocean acidification, commercial fisheries, oil spills, and other impacts affect these species. The petition briefly summarizes the description, taxonomy, distribution, and status for each petitioned species. It also describes current and future threats that the petitioner asserts are affecting or will affect these species.

The 44 taxa included in the petition are: *Arthrogorgia otsukai, Arthrogorgia utinomii, Fanellia compressa, Fanellia fraseri, Narella abyssalis, Narella alaskensis, Narella arbuscula, Narella bayeri, Narella cristata, Plumarella aleutiana, Plumarella echinata, Plumarella hapala, Plumarella nuttingi, Plumarella profunda, Plumarella robusta, Plumarella spicata, Plumarella superba, Primnoa pacifica* var. *willeyi, Primnoa wingi, Thouarella cristata, Thouarella trilineata, Alaskagorgia aleutiana, Cryogorgia koolsae, Cavernularia vansyoci, Swiftia beringi* (a junior synonym for *Calcigorgia beringi*), *Crypthelia trophostega, Cyclohelia lamellata, Errinopora dichotoma, Errinopora disticha, Errinopora fisheri, Errinopora nanneca, Errinopora undulate, Errinopora zarhyncha, Stylaster trachystomus, Stylaster ellasotomus, Stylaster brochi, Stylaster alaskanus, Stylaster leptostylus, Stylaster campylecus, Stylaster crassiseptum, Stylaster parageus parageus, Stylaster repandus, Stylaster stejnegeri,* and *Distochopora borealis. Stylaster cancellatus* is also mentioned in the petition but this is a junior synonym for *Stylaster alaskanus.* All 44 taxa are found in waters off Alaska in the Aleutian Islands, Gulf of Alaska, and/or Bering Sea.

ESA Statutory and Regulatory Provisions and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (U.S.C. 1531 *et seq.*), requires that, to the maximum extent practicable, within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding as to whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When we find that substantial scientific or commercial information indicates the petitioned action may be warranted (a ''positive 90-day finding''), we are required to commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we are to conclude the review with a finding as to whether the petitioned action is warranted within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the available information, a ''may be warranted'' 90-day finding does not prejudge the outcome of the status review.

Under the ESA, a listing determination may address a species, subspecies, or, for any vertebrate species, a distinct population segment (DPS) which interbreeds when mature (16 U.S.C. 1532(16)). Because corals are invertebrate species, we are limited to assessing the status of species or subspecies of corals. A species or subspecies is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). The ESA requires us to determine whether species are threatened or endangered based upon any of the following section 4(a)(1) factors: the present or threatened destruction, modification, or curtailment of habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; and any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1)).

Implementing regulations issued jointly by NMFS and the US Fish and Wildlife Service (50 CFR 424.14(b)) define ''substantial information'' in the context of reviewing a petition to list, delist, or reclassify a species as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. When evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition: (1) Clearly indicates the administrative action recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Court decisions clarify the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage in making a determination whether a petitioned

action may be warranted. As a general matter, these decisions hold that a petition need not establish a strong likelihood or a high probability that a species is either threatened or endangered to support a positive 90-day finding.

Decisions under the ESA must be based on the best scientific and commercial data available. We evaluate the petitioner's request based upon the information in the petition including its references, and the information readily available in our files. If the petitioner's sources are based on accepted scientific principles, we will accept them and characterizations of the information presented unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioner's assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone negates a positive 90-day finding, if a reasonable person would conclude that the unknown information itself suggests an extinction risk of concern for the species at issue.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a ''species'' eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species at issue faces extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species at issue, and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act, will act, or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information that listing may be warranted. We look for information indicating that not only is the particular species exposed, or reasonably likely to be exposed, to a factor, but that the species may respond or may presently be responding in a negative fashion; then we assess the potential significance of that negative response.

Biology of Coral Species

Corals are defined as ''animals in the cnidarian class Anthozoa and Hydrozoa that produce either calcium carbonate (argonite or calcite) secretions resulting in a continuous skeleton or as numerous, usually microscopic, individual sclerites, or that have a black, horn-like proteinaceous axis'' (Cairns, 2007). All of the petitioned corals belong to the phylum Cnidaria and to the classes Anthozoa or Hydrozoa. The anthozoans are exclusively polypoid (i.e., generally sessile) with no medusoid (i.e., generally free-swimming) stage and include the orders Gorgonacea (gorgonians) and Pennatulacea (sea whips and sea pens). The hydrozoans generally retain both the polypoid and medusoid stages in their life cycle and include the order Anthoathecatae (hydrocorals). To date, 134 unique coral taxa have been found in Alaskan waters (Stone and Rooper, in review) and all are ahermatypic (i.e., non-reef forming) and azooxanthellate (i.e., do not contain symbiotic algae in their tissues). They have a broad distribution in Alaskan waters and are found at depths between 3 and 6,328 meters (m) (Stone and Rooper, in review).

Gorgonians are the most diverse coral group in Alaskan waters with 61 unique taxa from 7 families (Stone and Rooper, in review). They are the most important structure-forming corals in Alaskan waters and generally require exposed, hard substratum for attachment (Stone and Shotwell, 2007). Gorgonians are locally abundant, contagiously distributed, and form both single- and multi-species assemblages (Stone and Shotwell, 2007). They range in depth from 6 to 4,784 m (Stone and Shotwell, 2007). Their skeletal components are composed of aragonite, calcite, high-magnesium calcite, amorphous carbonate hydroxylapatite and there is some evidence that some taxa may have polymorphic skeletons (Cairns and MacIntyre, 1992). Of the 23 gorgonians listed in the petition, 11 taxa are known exclusively from the Aleutian Islands, 5 appear to be endemic to seamounts, 4 are known from the Aleutian Islands and Bering Sea Slope, 1 is known from the western Gulf of Alaska and Aleutian Islands, *Primnoa pacifica* var. *willeyi* ranges throughout Alaskan waters south of the Bering Sea, and *Swiftia beringi* (actually *Calcigorgia beringi*) appears to be broadly distributed from the eastern Gulf of Alaska through the Aleutian Island Archipelago (Stone *et al.,* in preparation).

Sea whips and sea pens have a widespread distribution in Alaskan waters and are represented by 10 taxa in 3 families (Stone and Shotwell, 2007). Several are important structure forming corals and at least three species form extensive groves in soft sediment areas (Stone and Shotwell, 2007). They range in depth from 3 to 2,947 m (Stone and Shotwell, 2007) and their skeletons appear to be composed exclusively of high-magnesium calcite (Stone *et al.,* in preparation). The single pennatulacean listed in the petition is known from one specimen collected in the Aleutian Islands (Williams, 2005).

Hydrocorals have a widespread distribution in Alaska but have not been reported from seamounts and are extremely rare north of the Aleutian Archipelago slope (Stone *et al.,* in preparation). They are represented by 24 taxa in Alaskan waters (R. Stone, unpublished data) and several species are important structure forming corals (Stone and Shotwell, 2007). They form erect or encrusting calcareous colonies and require exposed, hard substratum for attachment. They range in depth from 10 to 2,124 m (Stone and Rooper, in review) and their skeletons may be composed of aragonite, calcite, high-magnesium calcite, amorphous carbonate hydroxylapatite, and there is some evidence that some taxa may have polymorphic skeletons (Cairns and MacIntyre, 1992). Of the 19 hydrocorals listed in the petition, 14 are known only from the Aleutian Islands, 3 are known from the Aleutians Islands region and the eastern Gulf of Alaska, and 2 are known from the Aleutian Islands and the southern Bering Sea (Stone *et al.,* in preparation).

Analysis of Petition

The petition describes factors which it asserts have led to the current status of

these corals, as well as threats which it asserts the taxa currently face, categorizing them under the ESA section 4(a)(1) factors. The petition focuses on habitat threats, asserting that the habitat of the petitioned coral taxa is under threat from several processes linked to anthropogenic greenhouse gas emissions, including ocean acidification, ocean warming, and changes in currents and salinity. The petition also asserts that these global habitat threats are exacerbated by local habitat threats posed by commercial fishing activities, oil and gas exploration and production, and oil spills. Finally, the petition contends that the existing regulatory mechanisms in place are inadequate to address the identified threats to corals.

For each of the petitioned taxa, we evaluated whether the information provided or cited in the petition met the regulatory standard for ''substantial information.'' We also reviewed other readily available information (i.e., currently within NMFS files) related to the distribution, abundance, and threats to the petitioned taxa.

Information submitted by the petitioner for each of the 44 coral taxa was limited to a brief taxonomic/physical description, geographic and depth distribution information based on the cited literature, a map describing the possible spatial distribution, and a relatively generic status statement. Some distribution descriptions also contained temperature or substrate data. Relatively little species-specific information was presented in the petition or is presently available on the biology, population characteristics, distribution, or status of the 44 individual taxa. The petitioner provided no species-specific information on abundance or trends. The petition states on page 27 that ''[t]here are several factors that play an important role in the distribution of Alaska coral species, including nutrient flows and productivity, water temperature, availability of hard substrate, currents and sediment load, and seawater chemistry make-up including salinity and calcium carbonate saturation state.'' These statements are not referenced and we are unaware of any research that has been conducted in Alaska to date to support them. The petition continues: ''[t]hese factors were not included in the mapping process as they are not readily available, and the specific interactions of these factors to each species' distribution are unknown.'' The petition acknowledges limited available data regarding the distribution, range, abundance, and population trends for the petitioned taxa and relies instead on relatively generic status statements for each of the petitioned taxa that suggest limited range (endemism) as well as a limited ability of corals to repair damage, adapt to new conditions, or colonize disturbed areas.

Of the 44 petitioned coral taxa, 22 species have been described in just the past decade (14 of those in 2011). These include five species of *Narella* (*N. abyssalis, N. alaskensis, N. arbuscula, N. bayeri,* and *N. cristata*) collected during submersible surveys in 2002 and 2004 and formally described in 2007 (Cairns and Baco, 2007). These are all deep bathyal species and appear to be endemic to Gulf of Alaska seamounts. New species also include two gorgonians (*Alaskagorgia aleutiana* and *Cryogorgia koolsae*) and the small, cryptic pennatulacean *Cavernularia vansyoci* from the Aleutian Islands (Sanchez and Cairns, 2004; Williams, 2005). The latter species is known from only a single specimen. Cairns (2011) published a major revision of the Primnoidae that yielded eight new species that are included in the petition, principally from the Aleutian Islands (*Plumarella aleutiana, P. echinata, P. hapala, P. nuttingi, P. profunda, P. robusta, Thouarella cristata, T. trilineata*). All of these species are extremely difficult to differentiate from each other, particularly in the field, and consequently our knowledge of their distribution is largely limited to expertly identified museum specimens. Cairns and Lindner (2011) also performed a major revision of the hydrocorals (Stylasteridae) from Alaskan waters yielding six new species that are included in the petition (*Errinopora dichotoma, E. disticha, E. fisheri, E. undulata, Stylaster repandus,* and *S. crassiseptum*). The genera *Errinopora* and *Stylaster* require advanced taxonomic expertise to identify to species in the field or laboratory and consequently our knowledge of their distribution is largely limited to expertly identified museum specimens.

The remaining gorgonians in the petition are somewhat easier to identify in the field, and of those, six (*Arthrogorgia otsukai, A. utinomii, Fanellia compressa, F. fraseri, Primnoa pacifica* var. *willeyi,* and *P. wingi*) have been fairly well documented and most have been caught incidentally and repeatedly in bottom trawl surveys that NMFS conducts in the Gulf of Alaska and Bering Sea to assess groundfish stocks. *Plumarella spicata* and *P. superba* are not documented in the NMFS bottom trawl survey. *Swiftia beringi* (actually *Calcigorgia beringi*) is relatively easy to identify in the field but is relatively uncommon and seldom encountered in the NMFS bottom trawl survey. Of the remaining hydrocorals, *Crypthelia trophostega, Cyclohelia lamellata, Errinopora nanneca, E. zarhyncha, Stylaster brochi,* and *S. campylecus* are relatively easy to differentiate to species level in the field and consequently some information on their distribution is available from the NMFS bottom trawl survey. *Distichopora borealis* has not been documented in the NMFS bottom trawl survey. *Stylaster alaskanus, S. ellasotomus, S. leptostylus, S. parageus parageus, S. stejnegeri,* and *S. trachystomus* are very difficult to identify to species and consequently few records are available from any source for these taxa.

The petition presents little information on the past or present numbers, relative abundance, or distribution of the petitioned taxa, which is understandable because for many of the species only scant information exists. As noted above, 22 of the petitioned taxa are new to science in the last decade. For the other 22 petitioned taxa, sampling has been largely opportunistic as bycatch in surveys to assess groundfish stocks using trawl gear that is not designed to sample corals. To supplement information presented in the petition, we reviewed the 38,752 bottom trawl survey data points in our files (available at *http://www.afsc.noaa.gov/RACE/groundfish/survey_data/data.htm*) for the Aleutian Islands, Bering Sea, and Gulf of Alaska, and found 1,151 tows in which corals were caught incidentally since 1982, including 17 of the petitioned taxa. These data demonstrate a substantially wider distribution for some of these taxa than reported in the petition, both geographically and with regard to depth. We also have information that one of the species listed in the petition as ''endemic to the Aleutian Islands, Gulf of Alaska, and Bering Sea,'' *Swiftia beringi,* has confirmed occurrences off Washington State. Nevertheless, systematic surveys have not been conducted in Alaska to assess the distribution, abundance, or population trends of these (or other) corals, providing no reliable basis to assess their status. Trawl surveys off Alaska are limited to areas that are relatively flat and not too rough, yet many Alaskan coral species, particularly in the Aleutian Islands, prefer hard substrate with high currents and steep slopes (Woodby *et al.,* 2009) that are not conducive to sampling with a bottom trawl. NMFS and others have conducted coral research in Alaska with other tools

(e.g., submersibles) that has confirmed a much broader depth and geographical distribution and more varied habitat for many Alaskan coral species than previously documented (Stone, 2006; Stone and Alcorn, 2007; Miller *et al.,* 2012). Even these efforts provide an incomplete picture of the population-level status and abundance of these species. Based on our review of the petition and other information available to us, too little survey information exists to conclude that the small number of documented occurrences of the petitioned taxa may equate to a risk of extinction due to low population size. We expect, based on surveys conducted to date, that additional survey effort would result in additional observations of the petitioned taxa in other locations.

We examined each of the threats listed in the petition. Ocean acidification due to anthropogenic carbon dioxide emissions and oceanographic changes resulting from climate change are described in the petition as major threats. NMFS scientists are aware that others have hypothesized that both may produce conditions that directly and indirectly affect cold water corals, yet no empirical studies to date have demonstrated deleterious effects to the petitioned taxa or to similar coral taxa. The petition draws entirely on the results of ocean acidification research conducted on tropical corals and a single cold water coral species (*Lophelia pertusa*). Tropical scleractinian corals and cold water corals are very different animals both physiologically and ecologically. Tropical scleractinian corals are typically hermatypic (reef-building), contain intracellular zooxanthellae (symbiotic photosynthetic dinoflagellates), and inhabit shallow warm waters. *L. pertusa* is a reef building scleractinian predominantly found in the North Atlantic Ocean and is not found in the northern North Pacific Ocean. It is the only cold water coral for which there is species-specific information on the physiological effects of lowered pH (Maier, 2009). The results of that study were contradictory; *L. pertusa* exhibited reduced growth when exposed to lower pH but colonies still showed positive net calcification. Ocean acidification literature generally would lead scientists to expect both reduced growth and negative net calcification, so we find the Maier (2009) study unhelpful for assessing whether the petitioned corals may react negatively to ocean acidification.

The petitioned corals and scleractinian corals (such as the tropical corals and *L. pertusa*) are not closely related and we find no basis to expect that they would have similar physiological responses to stress. Scleractinians and hydrocorals are related at the Phylum level whereas scleractinians and octocorals (gorgonians and pennatulaceans) are related at the Class level. Most importantly, the biomineralization processes for scleractinians and the petitioned coral groups are entirely different, so it is not appropriate to use the responses of the first group of corals as a surrogate for the latter group. Scleractinians accrete aragonite whereas all gorgonians and many hydrocorals accrete calcite and/or high-magnesium calcite. The biomineralization mechanisms that produce these compounds are very different (Lowenstam and Weiner, 1989). Aragonite is the kinetically favored polymorph of calcium carbonate to precipitate from seawater and scleractinian aragonite crystals are morphologically and chemically similar to aragonites precipitated inorganically (Holcomb *et al.,* 2009). Two factors indicate that scleractinian calcification is more of an inorganic process compared to gorgonians and hydrocorals (including the petitioned taxa) where the organic matrix plays a much more prominent role in calcification. First, scleractinian mineralization is entirely extracellular whereas gorgonian spicules are formed intracellularly. Second, the percent organic matrix in scleractinian coral skeletons is very small (< 1 percent) compared to a very high percentage for gorgonians and hydrocorals (Cohen and Holcomb, 2009).

The literature cited in the petition does not support the petitioned action. For example, the petition states that undersaturation of calcite will affect the growth and repair of both the corals and the plankton that provide the corals' food and nutrient sources and then cites the work by Comeau *et al.* (2010) on pteropods. Drawing inferences based upon effects on pteropods is inappropriate because pteropods are not corals (they are mollusks), belong to an entirely different phylum of animals, and unlike corals are generally free-swimming and pelagic. Similarly, the petition states that shifting currents as the result of climate change may limit nutrients available to the petitioned species. The petition presents no evidence that currents in the areas of the petitioned corals may shift, and no scientific information is available regarding the role water currents play in delivering nutrients to the petitioned taxa. Rather, the petition provides citations from the tropical coral literature (Coma *et al.,* 2009; Donner, 2009) that are not applicable to cold water corals. The petition states that global climate change and ocean acidification will impair biological and ecological functions of cold water corals, degrade habitat, and actively erode existing coral colonies, yet cites the work by Orr *et al.* (2005) on pteropods and the review by Hoffman *et al.* (2010) which does not provide any direct evidence to support the statement. The Hoffman paper reviews ocean acidification literature for ''the responses of key marine calcifiers at the organismal level and extend[s] these observations, where possible, to potential outcomes at the ecosystem level.'' The review does not provide new information on the petitioned corals, but does state that ''some deep-living corals may resist dissolution because tissues protect their carbonate skeletons.''

The petition also states that ''the petitioned coral species are under severe, pervasive and growing threats from * * * ocean acidification and climate change'' and again cites Hofmann *et al.* (2010). Hofmann *et al.* (2010), however, does not mention any of the petitioned corals but rather only specifically discusses the colonial scleractinian, *L. pertusa,* from the North Atlantic Ocean. As noted above, *L. pertusa* is a very different species from the petitioned taxa and we find no basis to infer that the petitioned corals would respond similarly to ocean acidification or climate change. To the contrary, extensive observations made in situ during the last decade indicate that corals in Alaska (including many of the petitioned species) are thriving at depths well below the saturation horizons in the Aleutian Islands (Stone, 2006; Heifetz *et al.,* 2007). Additionally, all stylasterids and octocorals (including all of the petitioned taxa) have external tissue that would insulate the skeleton from acidic water, so they may not be as susceptible to the effects of corrosive seawater as other organisms that lack this tissue coverage (Rudolfo-Metalpa, 2011). In summary, while corals in other parts of the world have come under pressure, including from the effects of climate change and ocean acidification, the little information that exists regarding the petitioned cold water corals is too insubstantial to indicate that they may be threatened by the effects of climate change and ocean acidification.

The information presented in the petition on threats from commercial fishing describes how fishing gear could affect corals, but it understates the degree of conservation provided by the

suite of management measures taken since 2005 to protect corals and other sensitive sea floor habitats in Alaska, which greatly alleviate these threats. On June 28, 2006, NMFS finalized regulations to minimize the effects of fishing on Essential Fish Habitat, including substantial new measures to address concerns about the impacts of bottom trawling on benthic habitat (particularly on coral communities) in the Aleutian Islands and Gulf of Alaska (71 FR 36694). The regulations established the Aleutian Islands Habitat Conservation Area (AIHCA) to prohibit all bottom trawling in the Aleutians outside the historical footprint of the fishery. Over 95 percent of the management area (277,100 square nautical miles (nm^2)) and 60 percent of ''fishable depths'' are closed to bottom trawling. Additionally, the regulations established six Aleutian Islands Coral Habitat Protection Areas totaling 110 nm^2 with especially high density coral and sponge habitat that were closed to all bottom-contact fishing gear (nonpelagic trawl, dredge, dinglebar, pot, and hook-and-line). The regulations also identified 16 seamounts (mostly in the Gulf of Alaska) as Habitat Protection Areas and similarly closed them to all bottom contact fishing to protect corals and other habitat features. The same regulations closed 10 Gulf of Alaska Slope Habitat Conservation Areas totaling 2,086 nm^2 to bottom trawling and closed 5 Gulf of Alaska Coral Habitat Protection Areas totaling 13.5 nm^2 to all bottom contact fishing. Other substantial closures in the Aleutian Islands, such as the Steller Sea Lion protection measures, further limit the areas open to bottom trawling and therefore protect coral habitat. Preliminary GIS analysis of the NMFS trawl survey data show that in the Aleutian Islands, 30 percent of coral records are located in the AICHA alone, which is closed to bottom trawling. NMFS has also conducted cooperative research with the fishing industry, resulting in gear modifications to trawl sweeps that have been shown to reduce the effects of non-pelagic trawls on benthic invertebrates in the Bering Sea and Gulf of Alaska.

The petition suggests that corals in the Bering Sea canyons remain unprotected from the effects of fishing and asserts that such corals are therefore vulnerable. In 2006 and 2007, the North Pacific Fishery Management Council considered protection measures for submarine canyons but ultimately postponed taking action because scientific information was not available to establish the dependence of managed fish species on habitat features of the canyons. A 2007 expedition to Zhemchug and Pribilof Canyons led to publication of a paper with new information (Miller *et al.,* 2012). In April 2012 the Council requested that NMFS review and summarize existing and new information on the canyons, their habitat, and fish associations in those areas to assist the Council in determining whether any potential future management actions are warranted. The analysis will include the coral species in the canyons, but there is no indication at this time that corals, including the few petitioned species that are found there, face risks from commercial fishing that may warrant listing the species as threatened or endangered.

With regard to increased shipping and tourism traffic and oil spills that may accompany such increases, the petition asserts that the risk of spills will intensify over time. According to the petition, most traffic to the Bering Sea and Arctic transits Unimak Pass, thereby placing corals in the Aleutian Islands, Bering Sea, and Gulf of Alaska at risk. NOAA has developed the General NOAA Oil Model Environment (GNOME) model to predict the trajectory and weathering of oil spills. Winds, currents, tides, and climatology can all be used as inputs. However, this is a surface trajectory model and a vertical mixing component is not available. Data on currents in the Aleutian Islands are general at best, and the petition's assertion that the ''currents would therefore be likely to transport oily water to cold water coral sites'' is unsupported, as there is no research to suggest a mechanism for ''likely'' transport of oil. Deep water flowing north in the Pacific Ocean encounters the Aleutian Trench where it is forced up onto the Aleutian Trench and into the Bering Sea through the many island passes (Johnson, 2003). Woodby *et al.* (2009) attempted to include currents in modeling coral distribution in the Aleutian Islands, but stated ''reliable and high resolution current data were not available for model development due to the general lack of current observations in the central Aleutian Islands.'' This statement is true throughout the Aleutians Islands and Alaska. Suchanek (1993) analyzed spill responses in tidal and subtidal environments and included hermatypic corals; however, mechanisms for transport of oil components to depths typical of the petitioned species in Alaska are not discussed. Information presented in the petition related to the Deepwater Horizon oil spill in the Gulf of Mexico and the effects of oil on Gulf of Mexico deep water corals is not directly relevant in Alaska as the Deepwater Horizon spill occurred at a depth of 1,259 m in an environment vastly different than the Aleutian Islands or other Alaskan waters. Fewer than a dozen exploratory wells have been drilled (and subsequently abandoned) in deep (≤ 100 m) central Bering Sea waters, and there has been no exploratory activity in the Aleutian Islands. No wells have been developed for production and no platforms exist. There is a moratorium on exploration in Bristol Bay until at least 2017. In the Arctic, several wells exist; however, most are developed through human-made drilling islands in shallow water (< 15 m). Exploration in the Chukchi Sea in 2012 was conducted in 50 m of water.

The petition cites recent discoveries of corals in the Chukchi Sea as examples of corals at risk from oil exploration and development. However, the species encountered in that instance was a soft coral, *Gersemia rubiformis,* which is not included in the petition. The petition states that ''the density and coverage of cold water corals at the drill site were similar to those observed in tropical coral reefs,'' citing a Washington Post newspaper article (Eilperin, 2012), yet the cited article presents no such conclusion. Based on information in our files, the petitioned coral species do not occur north of approximately the Pribilof Islands in the Bering Sea, approximately 600 miles (966 km) south of the site of proposed oil exploration drilling in the Chukchi Sea. The petition does not present substantial information on possible threats from oil exploration or development to the petitioned species in Alaska.

Beginning in 2012, NMFS implemented a 3 year field research program in Alaska as part of NOAA's Deep Sea Coral Research and Technology Program, which may help to answer some of the unknown questions with regard to corals in Alaska. The goals of the program are to better understand the location, distribution, ecosystem role, and status of deep-sea coral and sponge habitats. Research priorities include determining the distribution, abundance and diversity of deep-sea corals and sponges (and their distribution relative to fishing activity); compiling and interpreting habitat and substrate maps; determining associations of commercially important fish species (especially juveniles) with deep-sea coral and sponge habitats and the contribution of those habitats to

fisheries production; determining the impacts of fishing gears and testing gear modifications to reduce any impacts; determining recovery rates of deep-sea coral and sponge communities from physical disturbance; and establishing a long-term monitoring program to determine the potential effects of climate change and ocean acidification on deep-sea coral and sponge ecosystems. Additionally, NOAA's Ocean Acidification Program is currently analyzing the carbonate mineralogy of Alaskan corals. The mineralogy data will be used in conjunction with species distribution data (depth and geographical) and the present and projected aragonite and calcite saturation horizons in Alaska to predict the effects of ocean acidification on coral resources of the North Pacific Ocean.

Petition Finding

We have reviewed the petition, the literature cited in the petition, and other literature and information available in our files. We find that the petition does not present substantial information indicating that the requested listing actions may be warranted for any of the 44 petitioned species.

Per 50 CFR 424.14(b)(2)(1), the petition clearly requests that NMFS list 44 taxa of corals as threatened or endangered under the ESA and provides the scientific names for each taxon.

Per 50 CFR 424.14(b)(2)(2), the petition provides a narrative justification for listing but does not present information on the past or present numbers or relative abundance of the petitioned taxa and provides scant information on their distribution. Based on information from the NMFS trawl surveys, the published literature, and museum records, at least 17 of the petitioned taxa have a broader depth and geographical distribution than reported in the petition. Of the 44 petitioned taxa, 22 are new to science in the past decade and have very few recorded observations, and the remaining 22 have been recorded opportunistically as bycatch in fish surveys that are not designed to sample corals. Systematic surveys have not been conducted to assess the distribution, abundance, or population trends for any of the petitioned corals, providing no basis to assess their status. We conclude that too little survey data exist to lead a reasonable person to conclude that the small number of documented occurrences of the petitioned taxa may equate to a risk of extinction due to low population size, either now or in the foreseeable future.

Per 50 CFR 424.14(b)(2)(3), the petition provides little information regarding the status of the species. We have somewhat more information including observations from bycatch in NMFS trawl surveys, but systematic surveys for these corals have not been undertaken. At least 17 of the petitioned taxa have a wider distribution than is reflected in the petition. The threats cited in the petition are ocean warming, ocean acidification, commercial fisheries, oil spills, and oil and gas exploration and development. Information presented in the petition regarding the effects of climate change and ocean acidification on the petitioned taxa is too tenuous or unsupported. Also, information in our files and the published literature (discussed above) suggests that certain corals off Alaska might be more resilient to the effects of ocean acidification than the petition implies, leading us to conclude that there is not substantial information that would lead a reasonable person to believe that the petitioned corals may be threatened with extinction due to the effects of climate change and ocean acidification, either now or in the foreseeable future. Regarding commercial fisheries, the petition discusses general threats from trawling and other bottom contact fishing but fails to provide a complete description of the protective measures that NMFS has implemented, particularly since 2006, to protect extensive areas of sea floor habitat off Alaska; many of the measures were expressly designed to protect corals. While some of the petitioned taxa may well exist in areas that remain open to bottom-contact fishing, due to the extensive fishery restrictions in place to protect coral habitats and the reasonable inference that the petitioned taxa likely have a wider distribution than has yet been documented in the limited surveys conducted to date, we find insufficient information to lead a reasonable person to believe that such fishing threatens those corals with extinction, either now or in the foreseeable future. Regarding oil spills and oil exploration and development, the petition discusses increasing human activity that may result in an increased risk of spills, but does not present substantial information suggesting that the petitioned corals will face exposure to spilled oil that would present a risk of extinction.

Per 50 CFR 424.14(b)(2)(4), the petition includes references and maps, although as noted above, we conclude that overall the petition does not provide substantial information to support its conclusions, and the maps do not accurately reflect the known distribution of the petitioned taxa (acknowledging that even the known distribution is likely not the complete distribution, since comprehensive surveys have not been undertaken).

References Cited

A complete list of all references is available upon request from the NMFS office in Juneau, Alaska (see **ADDRESSES**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 8, 2013.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, performing the functions and duties of the Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–03475 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Final Management Plan and Environmental Assessment for Monitor National Marine Sanctuary: Notice of Public Availability

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public availability.

SUMMARY: NOAA is releasing the final management plan and environmental assessment for Monitor National Marine Sanctuary.

DATE: The final management plan and environmental assessment for Monitor National Marine Sanctuary is now available.

ADDRESSES: To obtain a copy of the final management plan and environmental assessment, contact the Management Plan Review Coordinator, Monitor National Marine Sanctuary, 100 Museum Drive, Newport News, VA 23606; (757) 591–7328; or via email at *Monitor@noaa.gov.* Copies can also be downloaded from the Monitor National Marine Sanctuary (MNMS) Web site at *http://monitor.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Shannon Ricles at (757) 591–7328.

SUPPLEMENTARY INFORMATION:

I. Background Information

On January 30, 1975, the National Oceanic and Atmospheric

Administration (NOAA) designated Monitor National Marine Sanctuary (MNMS) as the nation's first national marine sanctuary. MNMS protects the wreck of the famed Civil War ironclad, USS *Monitor,* best known for its battle with the Confederate ironclad, *CSS Virginia* in Hampton Roads, VA, on March 9, 1862.

NOAA began to review the management plan for MNMS in December 2008 with public scoping (including meetings). This was followed by meetings of sanctuary advisory council working groups to develop the action plans of the management plan.

NOAA released a draft revised management plan on April 12, 2012, and accepted comments through June 22, 2012 (77 F.R. 22761). During the public comment period, NOAA held five public meetings in Raleigh, NC, Wilmington, NC, Beaufort, NC, Nags Head, NC, and Newport News, VA. Comments can be viewed at *http://www.regulations.gov* with docket number NOAA–NOS–2012–0076. All comments received are addressed in *Appendix I: Response to Public Comments.*

II. Environmental Assessment

NOAA prepared an environmental assessment, pursuant to the National Environmental Policy Act, that analyzes the environmental impacts of the revised management plan. NOAA's analysis of environmental impacts of this action resulted in a finding of no significant impact.

Dated: February 6, 2013.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries.

[FR Doc. 2013–03430 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC491

Fisheries of the Gulf of Mexico; Southeast Data, Assessment, and Review (SEDAR); Public Meeting; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Correction to notice of SEDAR Steering Committee meeting.

SUMMARY: This document corrects an error made to the meeting description in the **DATES** section for the SEDAR Steering Committee. The original document published in the **Federal Register** on February 8, 2013, and all other information remains unchanged and will not be repeated in this document. See **SUPPLEMENTARY INFORMATION.**

ADDRESSES: *SEDAR address:* 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: John Carmichael, SEDAR Program Manager; phone (843) 571–4366; email: *john.carmichael@safmc.net* or Andrea Grabman, SEDAR Administrative Assistant; phone (843) 571–4366; email: *andrea.grabman@safmc.net.*

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of February 8, 2013, in FR Doc. 2013–02870, on page 9372, in the first column, correct the **DATES** caption to read as follows:

DATES: The SEDAR Steering Committee webinar will be held on February 25, 2013, from 11 a.m. to 1 p.m. EST.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 8, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–03368 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Sea Grant Advisory Board

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of public meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Sea Grant Advisory Board (Board). Board members will discuss and provide advice on the National Sea Grant College Program in the areas of program evaluation, strategic planning, education and extension, science and technology programs, and other matters as described in the agenda found on the National Sea Grant College Program Web site at *http://www.seagrant.noaa.gov/leadership/advisory_board.html.*

DATES: The announced meeting is scheduled 8:00 a.m.–5:00 p.m. EST Monday, March 4 and 8:00 a.m.–5:00 p.m. EST Tuesday, March 5, 2013.

ADDRESSES: The meeting will be held at the Melrose Hotel, 2430 Pennsylvania Avenue Northwest, Washington, DC 20037.

Status: The meeting will be open to public participation with a 15-minute public comment period on Tuesday, March 5 at 11:00 a.m. E.S.T. (check agenda on Web site to confirm time.) The Board expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of three (3) minutes. Written comments should be received by the Designated Federal Officer by February 26, 2013 to provide sufficient time for Board review. Written comments received after February 26, 2013 will be distributed to the Board, but may not be reviewed prior to the meeting date. Seats will be available on a first-come, first-served basis.

Special Accomodations: These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Elizabeth Ban, Designated Federal Officer at 301–734–1082 by February 22, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Ban, Designated Federal Officer, National Sea Grant College Program, National Oceanic and Atmospheric Administration, 1315 East-West Highway, Room 11843, Silver Spring, Maryland 20910, (301) 734–1082.

SUPPLEMENTARY INFORMATION: The Board, which consists of a balanced representation from academia, industry, state government and citizens groups, was established in 1976 by Section 209 of the Sea Grant Improvement Act (Pub. L. 94–461, 33 U.S.C. 1128). The Board advises the Secretary of Commerce and the Director of the National Sea Grant College Program with respect to operations under the Act, and such other matters as the Secretary refers to them for review and advice.

The agenda for this meeting will be available at *http://www.seagrant.noaa.gov/leadership/advisory_board.html.*

Dated: February 6, 2013.

Jason Donaldson,

Chief Financial Officer/Chief Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2013–03446 Filed 2–13–13; 8:45 am]

BILLING CODE 3510–KA–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings, Cancellation

AGENCY: U.S. Consumer Product Safety Commission

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: Vol. 78, No. 27, Friday, February 8, 2013, page 9387.

ANNOUNCED TIME AND DATE OF MEETING: Wednesday, February 13, 2013, 10 a.m.–11 a.m.

MEETING CANCELED. For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Todd A. Stevenson, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20814 (301) 504–7923.

Dated: February 12, 2013.

Todd A. Stevenson,

Secretary.

[FR Doc. 2013–03560 Filed 2–12–13; 4:15 pm]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, February 20, 2013, 10:00 a.m.–11:00 a.m.

PLACE: Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

Matters To Be Considered

Decisional Matter: Sections 1112/1118 Requirements for Third Party Conformity Assessment Bodies—Draft Final.

A live webcast of the Meeting can be viewed at *www.cpsc.gov/webcast.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: February 12, 2013.

Todd A. Stevenson,

Secretary.

[FR Doc. 2013–03561 Filed 2–12–13; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

David Grant United States Air Force Medical Center Specialty Care Travel Reimbursement Demonstration Project

AGENCY: Department of Defense.

ACTION: Notice of demonstration project.

SUMMARY: This notice is to advise interested parties of a Military Health System (MHS) demonstration project under the authority of Title 10, United States Code, Section 1092, entitled David Grant United States Air Force Medical Center Specialty Care Travel Reimbursement Demonstration Project. This demonstration project is intended to test whether providing travel reimbursement will increase utilization of the direct care system by selected beneficiaries. The Military Treatment Facility (MTF) commander would determine based on the MTF's individual capabilities, which specialty services in the facility currently have excess capacity and then offer those specialty services to qualified beneficiaries, including TRICARE Prime, TRICARE Standard and TRICARE for Life (TFL) beneficiaries, who reside more than one hour drive time away from the David Grant United States Air Force Medical Center (DGMC). These beneficiaries would be enticed to receive this specialty care from the more distant MTF rather than a closer authorized provider through the payment of travel costs from their residence to the MTF. The travel reimbursement offered under this demonstration will include roundtrip mileage reimbursement from the patient's residence to DGMC. Reimbursement may also include overnight lodging for the patient the evening before an early morning procedure and travel for a non-medical attendant for patients when medically indicated. This demonstration will test if the travel reimbursement incentive can produce a cost of care savings related to the recapturing of selected DoD beneficiaries. This travel benefit will be authorized only when the MTF commander (or designee) determines that the DoD cost of funding the care (including the travel benefit) in the MTF is likely to be less than the DoD cost to provide the care in the purchased care system. This demonstration also seeks to maximize the utilization of DGMC specialists, maintain an adequate clinical case mix of patients for approved Graduate Medical Education program functioning in the MTF, and sustain readiness-related medical skills activities for the military providers. This demonstration would be initially conducted at DGMC and its satellite clinic, the McClellan Clinic (MCC) as well as the clinic located at Beale Air Force Base (Beale). However, it could be expanded to other MTFs with the approval of the Assistant Secretary of Defense (Health Affairs), and a subsequent **Federal Register** notification.

DATES: This demonstration will be effective 60 days from the date of this notice for a period of thirty six (36) months, unless extended by a separate action.

ADDRESSES: TRICARE Management Activity (TMA), Health Plan Operations, 7700 Arlington Boulevard, Suite 5101, Falls Church, VA 22042–5101.

FOR FURTHER INFORMATION CONTACT: For questions pertaining to this demonstration project, please contact Maj. Kevin Schultz at (707) 423–7887.

SUPPLEMENTARY INFORMATION:

a. Background

A basic principle of the TRICARE program and the Military Health System (MHS) business design is that MTFs have first priority for providing referred specialty care or inpatient care for all TRICARE Prime enrollees. If the MTF does not have the capability to provide the needed care or cannot provide the care within the required access standard, then the care will be referred to the TRICARE provider network. TRICARE Prime access standards require referrals for specialty care services to be provided with an appropriately trained provider within 4 weeks or sooner, if required, and within 1-hour travel time from the beneficiary's residence. The geographic area that represents 1-hour travel time surrounding an MTF is referred to as the Right of First Refusal (ROFR) area.

For those Prime beneficiaries that live outside the ROFR area, their specialty care is referred to the civilian network. TRICARE Standard and TFL beneficiaries maintain freedom of choice and may receive specialty care from any TRICARE authorized civilian provider or alternatively may elect to receive their care in a MTF to the extent such care is available to them.

DoD's authority to reimburse travel expenses for TRICARE beneficiaries is currently limited to the TRICARE Prime Travel Benefit, provided pursuant to 10 USC 1074i, which reimburses only Prime beneficiaries for non-emergent medically necessary specialty care that is provided more than 100 miles from the beneficiary's primary care provider's office to the nearest specialist's office.

The benefit is limited to specialty referrals when no other options for care are available within 100 miles of the primary care provider. This demonstration project is designed to test the effectiveness of a voluntary local travel reimbursement designed to recapture certain specialty care within the direct care system for beneficiaries who reside outside of the ROFR area.

David Grant United States Air Force Medical Center (DGMC) at Travis Air Force Base (AFB) is currently a 116-bed facility and fulfills a key role in the Air Force Medical Service as the second largest deployment platform. A robust TRICARE eligible population remains in the Northern California area, however much of it is located just beyond a 60-minute drive time from DGMC. DGMC also operates the McClellan satellite clinic (MCC) in Sacramento. This satellite clinic offers an opportunity to recapture a larger DoD beneficiary population than is available in the existing DGMC Prime Service Area and ROFR area for specialty care. Based on surveys of existing patients at the clinic, travel distance is the most significant factor for why patients do not utilize DGMC for specialty care that may only be available at the MTF vice the clinic.

Over the last year, DGMC specialties have begun offering outpatient services at MCC, with appointment availability varying based on patient demand. The majority of patient care can be provided at MCC including initial consults, medication management, and pre/post-operative visits. When required, the physician will schedule a patient for surgery or other procedure not available at MCC, at DGMC. The feedback from patients has been very positive as MCC offers specialty services much closer to the patient's residence.

These DGMC efforts have proven to be very successful in recapturing specialty care in the immediate area surrounding the hospital. Through this demonstration project, DGMC will now seek to reach the larger beneficiary population that resides beyond the 60 minute drive time to the MTF (those outside the ROFR area) to maximize the direct care system and improve provider currency and deployment capability through increased patient acuity and volume.

Under this demonstration, DGMC would reimburse TRICARE Prime, TRICARE Standard, and TFL beneficiaries who live outside of the ROFR area of DGMC for reasonable travel expenses when they agree to receive specialty procedures, including diagnostic and surgical procedures not otherwise available at MCC or Beale AFB, in specialties determined by the Commander of DGMC to have excess capacity. Reimbursement will only be authorized when the beneficiary resides outside of the ROFR area of the DGMC and (1) a specialty provider at MCC or Beale sends a patient to DGMC for care not available at MCC or (2) a patient is assessed by a specialist who is an authorized TRICARE provider and identified as a candidate for a surgical intervention to be performed at DGMC. There will be no requirement for a network provider outside of the ROFR area to refer the patient to DGMC, but all authorized specialty providers will be given information on how to make the referral if the patient desires to use DGMC. The demonstration project will be communicated to the non-Prime beneficiaries through multiple communications channels, to include provider outreach and other media.

For purposes of this demonstration, once the beneficiary is identified as requiring a procedure at DGMC, they will be referred to the Beneficiary Counseling and Assistance Coordinator (BCAC) at MCC. The BCAC will review the patient information and determine if the patient is eligible for travel reimbursement. If so, the BCAC will brief the patient as to the process and assist the patient in applying for the travel as well as processing any travel vouchers. Travel for a non-medical attendant (NMA) for patients who require admission may be authorized when the attendance of a NMA is medically indicated. When the patient's procedure is to occur before 8:00 a.m., then reimbursement for the patient and an NMA may be authorized for lodging for the one night prior to the procedure. The maximum reimbursement shall be the lesser of the actual lodging costs or the locality lodging rate. This shall be in addition to the normal mileage reimbursement of 51 cents per mile. If the beneficiary is hospitalized overnight, the NMA may also be authorized reimbursement for the mileage back to their residence. The MCC BCAC will assist with making arrangements at the Travis Fisher House, base lodging, or local hotel, based on availability. The amount of travel to DGMC will be minimized as much as possible by offering pre/post-operative visits at MCC, as well as diagnostic testing either at MCC or in the civilian network.

Beneficiary participation in this demonstration program is strictly voluntary; beneficiaries will be allowed to seek specialty procedures/care in the private care system if they prefer. The 60 minute drive time access to care standard for Prime beneficiaries would still be applicable, so Prime beneficiaries wanting to participate would have to waive their access to care standards. The authorization and oversight of the reimbursement and, if needed, the coordination with other healthcare insurance (OHI) plans will be the responsibility of the MTF.

b. Implementation

This demonstration will be effective 60 days from the date of this notice for a period of thirty six (36) months.

c. Evaluation

The results of this demonstration will allow a focused study on the impact a voluntary local travel reimbursement will have on encouraging TRICARE beneficiaries who live beyond a 60 minute drive time to an MTF (those outside the ROFR area) to nonetheless utilize the direct care system for needed specialty care in lieu of electing a closer, purchased care provider. Throughout the demonstration project, there will be monthly tracking of the number of DGMC inpatient admissions and outpatient encounters by demonstration participants who reside outside the DGMC ROFR area for the identified specialties. There will also be quarterly tracking of marketing initiatives to measure their effectiveness in ensuring that eligible beneficiaries in the target area are aware of the availability of specialty services at MCC and the corresponding travel reimbursement to/from DGMC. Success of the demonstration would be determined in part by a substantial increase in encounters from beneficiaries that reside outside the DGMC ROFR area for identified specialties while at the same time there is no increase in the referral rate to the network from DGMC for these same specialties for TRICARE Prime beneficiaries that reside within the ROFR area. Data will also be gathered regarding local travel reimbursement expenditures and the estimated purchased care cost-savings of demonstration participants. At the end of the demonstration, a thorough business case analysis will be conducted of the relevant expenditures and cost-savings, in addition to an assessment of the demonstration project's impact on MTF productivity, provider currency in the identified specialties, and utilization of excess capacity in the direct care system. Following this evaluation, Health Affairs may seek permanent authority to implement a travel reimbursement program for certain beneficiaries when they agree to receive specialty care in the direct care system.

Dated: February 1, 2013.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–03414 Filed 2–13–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

Waiver for Certain Defense Items Produced in the United Kingdom

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Under Secretary of Defense (Acquisition, Technology, and Logistics) is waiving the statutory limitation of 10 U.S.C. 2534 for certain defense items produced in the United Kingdom (UK). The law limits DoD procurement of certain items to sources in the national technology and industrial base. The waiver will permit procurement of enumerated items from sources in the UK, unless otherwise restricted by statute.

DATES: This waiver is effective beginning March 1, 2013 until February 28, 2014.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Foley, OUSD (AT&L) Director, Office of the Defense Procurement and Acquisition Policy, Contract Policy and International Contracting, Room 5E621, 3060 Defense Pentagon, Washington, DC 20301–3060, telephone (703) 693–1145.

SUPPLEMENTARY INFORMATION: Subsection (a) of 10 U.S.C. 2534 provides that the Secretary of Defense may procure the items listed in that subsection only if the manufacturer of the item is part of the national technology and industrial base. Subsection (i) of 10 U.S.C. 2534 authorizes the Secretary of Defense to exercise the waiver authority in subsection (d), on the basis of the applicability of paragraph (2) or (3) of that subsection, only if the waiver is made for a particular item listed in subsection (a) and for a particular foreign country. Subsection (d) authorizes a waiver if the Secretary determines that application of the limitation ''would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items'' and if he determines that ''that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.'' The Secretary of Defense has delegated the waiver authority of 10 U.S.C. 2534(d) to the Under Secretary of Defense (Acquisition, Technology, and Logistics).

DoD has had a Reciprocal Defense Procurement Memorandum of Understanding (MOU) with the UK since 1975, most recently renewed on December 16, 2004.

The Under Secretary of Defense (Acquisition, Technology, and Logistics) finds that the UK does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in the UK, and also finds that application of the limitation in 10 U.S.C. 2534 against defense items produced in the UK would impede the reciprocal procurement of defense items under the MOU.

Under the authority of 10 U.S.C. 2534, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has determined that application of the limitation of 10 U.S.C. 2534(a) to the procurement of any defense item produced in the UK that is listed below would impede the reciprocal procurement of defense items under the MOU with the UK.

On the basis of the foregoing, the Under Secretary of Defense (Acquisition, Technology, and Logistics) is waiving the limitation in 10 U.S.C. 2534(a) for procurements of any defense item listed below that is produced in the UK. This waiver applies only to the limitations in 10 U.S.C. 2534(a). This waiver applies to procurements under solicitations issued during the period from March 1, 2013 to February 28, 2014. Similar waivers have been granted since 1998, most recently in 2012 (77 FR 2278, January 17, 2012).

List of Items to Which This Waiver Applies

1. Air circuit breakers.
2. Gyrocompasses.
3. Electronic navigation chart systems.
4. Steering controls.
5. Pumps.
6. Propulsion and machinery control systems.
7. Totally enclosed lifeboats.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2013–03474 Filed 2–13–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; Demonstration Project for Participation in Maryland Multi-Payer Patient Centered Medical Home Program (MMPCMHP) Demonstration

AGENCY: Department of Defense (DoD).

ACTION: Notice of Demonstration Project.

SUMMARY: This notice advises interested parties of a Military Health System (MHS) Demonstration project under the authority of Title 10, United States Code, Section 1092, entitled Department of Defense (DoD) Enhanced Access to Patient Centered Medical Home (PCMH): Participation in Maryland Multi-payer Patient Centered Medical Home Program (MMPCMHP).

DATES: The demonstration program will be effective 30 days after publication in the **Federal Register** and have a two year duration.

ADDRESSES: TRICARE Management Activity (TMA), TRICARE Regional Office North, 1700 North Moore Street, Suite 1200, Arlington, VA 22209.

FOR FURTHER INFORMATION CONTACT: Capt. John O'Boyle, TMA, TRICARE Regional Office—North, telephone (703) 588–1831.

SUPPLEMENTARY INFORMATION: The MHS has adopted the PCMH concept as the strategy of choice for the direct care system and is now using this demonstration to evaluate and provide a PCMH model in the purchased care portion of the TRICARE program.

The MHS defines PCMH as a model of care adopted by the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Physicians, and the American Osteopathic Association that seeks to strengthen the provider-patient relationship by replacing episodic care with coordinated care and a long-term healing relationship. In PCMH practices, each patient has an ongoing relationship with a personal provider who leads a team that takes collective responsibility for patient care. The provider-led care team is responsible for providing all the patient's health care needs and, when required, arranging for appropriate care with other qualified providers.

A particular challenge in implementing the PCMH concept in the purchased care portion of the TRICARE program has been the inability to distinguish and employ reimbursement methodologies which encourage network providers to accept TRICARE beneficiaries under a Medical Home model. Current contractual incentives encourage network discounts which

may also prove counterproductive in attracting network providers to a PCMH model.

The goal of participation is to test the PCMH model in qualified primary care practices to determine if this model: (1) Provides higher quality and more cost effective care for TRICARE beneficiaries who receive medical care in participating practices and (2) leads to higher satisfaction for patients and providers. The demonstration seeks to compensate medical homes for additional services not traditionally covered through fee for service reimbursement, while creating a viable economic model for health care purchasers and maintaining administrative simplicity. As part of the demonstration, TRICARE, with other payers, will provide additional fixed, semi-annual payments to participating practices for providing documented evidence-based medicine; use of electronic medical records; care coordination; care transition management; collaboration with hospitals to prevent readmissions; and patient coaching; services. These fixed payments will be weighted based on practice size, practice share of Maryland based TRICARE beneficiaries and National Committee on Quality Assurance Patient Centered Medical Home (PPC–PCMH) recognition criteria. TRICARE Prime and Standard beneficiaries will be assigned/attributed to the MMPCMHP demonstration based on current TRICARE Prime enrollment and/or evidence of previous services provided to TRICARE Standard beneficiaries by participating practices. TRICARE for Life beneficiaries will be excluded from the demonstration. TRICARE will continue to pay claims using existing reimbursement methodologies established in 32 CFR part 199. In addition, incentive payments will be made based upon calculated shared savings and measured quality improvements. TMA Defense Health Cost Assessment and Evaluation (DHCAPE) staff will calculate TRICARE beneficiary cost savings based on Maryland Health Care Commission methodology. Pharmacy costs associated with beneficiaries attributed in the demonstration will be measured for informational purposes.

Additional information is available at *http://mhcc.maryland.gov/pcmh/* and will be available in the TRICARE Operations Manual.

Dated: February 1, 2013.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–03415 Filed 2–13–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Service Contract Inventory for Fiscal Year (FY) 2012

AGENCY: Office of the Chief Financial Officer, U.S. Department of Education.

ACTION: Notice of availability—FY 2012 service contract inventory.

SUMMARY: Through this notice, the Secretary announces the availability of the Department of Education's service contract inventory on its Web site, at *http://www2.ed.gov/fund/data/report/contracts/servicecontractinventoryappendix/servicecontractinventory.html.* A service contract inventory is a tool for assisting an agency in better understanding how contracted services are being used to support mission and operations and whether the contractors' skills are being utilized in an appropriate manner.

FOR FURTHER INFORMATION CONTACT: Andrew Sullivan, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202 by phone at 202–245–6450 or email at *Andrew.Sullivan@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 743 of Division C of the Consolidated Appropriations Act of 2010, Public Law 111–117, requires civilian agencies, other than the Department of Defense, that are required to submit an inventory in accordance with the Federal Activities Inventory Reform Act of 1998 (Pub. L. 105–270, 31 U.S.C. 501 note) to submit their inventories to the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) by December 31, 2012. In addition, section 743 requires these agencies, which include the Department of Education, to (1) Make the inventory available to the public by posting the inventory on its agency homepage, (2) provide OFPP with the Web site address (URL) on which the inventory is being posted so that the inventory can be linked to a central OMB Web page, and (3) publish in the **Federal Register** a notice announcing that the inventory is available to the public along with the name, telephone number, and email address of an agency point of contact.

Through this notice, the Department announces the availability of its inventory on the following Web site: *http://www2.ed.gov/fund/data/report/contracts/servicecontractinventoryappendix/servicecontractinventory.html.* The point of contact for the inventory is provided under the **FOR FURTHER INFORMATION CONTACT** section in this notice.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., Braille, large print, or audiotape) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Program Authority: Section 743 of Division C of the Consolidated Appropriations Act of 2010, Pub. L. 111–117.

Dated: February 8, 2013.

Jim Ropelewski,

Acting Deputy Chief Financial Officer.

[FR Doc. 2013–03441 Filed 2–13–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Portsmouth

AGENCY: Department of Energy (DOE).

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Portsmouth. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, March 7, 2013 6:00 p.m.

ADDRESSES: Ohio State University, Endeavor Center, 1862 Shyville Road, Piketon, Ohio 45661.

FOR FURTHER INFORMATION CONTACT: Greg Simonton, Alternate Deputy Designated

Federal Officer, Department of Energy Portsmouth/Paducah Project Office, Post Office Box 700, Piketon, Ohio 45661, (740) 897–3737, *Greg.Simonton@lex.doe.gov*.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management and related activities.

Tentative Agenda

- Call to Order, Introductions, Review of Agenda
- Approval of January Minutes
- Deputy Designated Federal Officer's Comments
- Federal Coordinator's Comments
- Presentation
- Liaisons' Comments
- Administrative Issues
- Subcommittee Updates
- Public Comments
- Final Comments from the Board
- Adjourn

Public Participation: The meeting is open to the public. The EM SSAB, Portsmouth, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Greg Simonton at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Greg Simonton at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Greg Simonton at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.ports-ssab.energy.gov/*.

Issued at Washington, DC, on February 8, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–03437 Filed 2–13–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a combined meeting of the Environmental Monitoring, Surveillance and Remediation Committee and Waste Management Committee of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico (known locally as the Northern New Mexico Citizens' Advisory Board [NNMCAB]). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, March 13, 2013, 2:00 p.m.–4:00 p.m.

ADDRESSES: NNMCAB Conference Room, 94 Cities of Gold Road, Pojoaque, NM 87506.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board, 94 Cities of Gold Road, Santa Fe, NM 87506. Phone (505) 995–0393; Fax (505) 989–1752 or Email: *msantistevan@doeal.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Purpose of the Environmental Monitoring, Surveillance and Remediation Committee (EMS&R): The EMS&R Committee provides a citizens' perspective to NNMCAB on current and future environmental remediation activities resulting from historical Los Alamos National Laboratory operations and, in particular, issues pertaining to groundwater, surface water and work required under the New Mexico Environment Department Order on Consent. The EMS&R Committee will keep abreast of DOE–EM and site programs and plans. The committee will work with the NNMCAB to provide assistance in determining priorities and the best use of limited funds and time. Formal recommendations will be proposed when needed and, after consideration and approval by the full NNMCAB, may be sent to DOE–EM for action.

Purpose of the Waste Management (WM) Committee: The WM Committee reviews policies, practices and procedures, existing and proposed, so as to provide recommendations, advice, suggestions and opinions to the NNMCAB regarding waste management operations at the Los Alamos site.

Tentative Agenda

1. Approval of Agenda
2. Approval of Minutes of February 13, 2013
3. Old Business
4. New Business
5. Update from Executive Committee—Carlos Valdez, Chair
6. Update from DOE—Ed Worth, Deputy Designated Federal Officer
7. 2:45 p.m. Presentation
8. 3:45 p.m. Public Comment Period
9. 4:00 p.m. Adjourn

Public Participation: The NNMCAB's EMS&R and WM Committees welcome the attendance of the public at their combined committee meeting and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Committees either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.energy.gov/.*

Issued at Washington, DC, on February 11, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–03436 Filed 2–13–13; 8:45 am]

BILLING CODE 6405–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, March 20, 2013 1:00 p.m.–7:00 p.m.

ADDRESSES: Marriott Pyramid North, 5151 San Francisco Road NE., Albuquerque, NM 87109.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 94 Cities of Gold Road, Santa Fe, NM 87506. Phone (505) 995–0393; Fax (505) 989–1752 or Email: *Menice.Santistevan@nnsa.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE-EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

1:00 p.m.
Call to Order by Deputy Designated Federal Officer (DDFO), Ed Worth
Establishment of a Quorum: Roll Call and Excused Absences, William Alexander
Welcome and Introductions, Carlos Valdez, Chair
Approval of Agenda and January 30, 2013 Meeting Minutes
1:30 p.m. Public Comment Period
1:45 p.m. Old Business
- Written Reports
- Other Items

2:00 p.m. New Business
2:30 p.m. Update from DDFO, Ed Worth
- Update from DOE
- Other Items

2:45 p.m. Break
3:00 p.m. Update on Remediation of the 33 Shafts at Area G
4:30 p.m. Update from Liaison Members
- Los Alamos National Security, Jeffrey Mousseau
- New Mexico Environment Department, John Keiling
- Environmental Protection Agency (Region 6), Ed Worth for Rich Mayer
- DOE, Peter Maggiore

5:00 p.m. Dinner Break
6:00 p.m. Public Comment Period
6:15 p.m. Consideration and Action on Draft Recommendation(s) to DOE, Carlos Valdez
6:45 p.m. Wrap-Up and Comments from Board Members, Carlos Valdez
7:00 p.m. Adjourn, Ed Worth, DDFO

Public Participation: The EM SSAB, Northern New Mexico, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.energy.gov/.*

Issued at Washington, DC, on February 11, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–03434 Filed 2–13–13; 8:45 am]

BILLING CODE 6405–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Proposed Agency Information Collection

AGENCY: Office of Energy Efficiency and Renewable Energy, 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 reinstatement under the provisions of the Paperwork Reduction Act of 1995. A **Federal Register** Notice with a 60-Day comment solicitation period on this information collection was published on May 24, 2012, Vol. 77, No. 101, pg. 31000. The information collection requests a three-year approval of its Customer Electricity Data Access and Control Questionnaire, OMB Control Number 1910–5164. The proposed collection will gather and share information about customer access to electricity usage data. The information will be shared on the DOE-supported OpenEI Web site where consumers can learn about the access offered by their electricity provider to energy usage data. Visitors to the Web site will also be able to learn about measures they can take to use energy more efficiently and economically.

DATES: Comments regarding this collection must be received on or before March 18, 2013. 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: 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 Jamie Vernon by fax at 202–586–9260, or by email at *Jamie.Vernon@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT: For information or to request a copy of the collection instrument contact: Jamie Vernon by fax at 202–586–9260, or by email at *Jamie.Vernon@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.:* 1910–5164; (2) *Information Collection Request Title:* Customer Electricity Data Access and Control Questionnaire; (3) *Type of Request:* Reinstatement; (4) *Purpose:* The U.S. Department of Energy (DOE) Office of Energy Efficiency and Renewable Energy (EERE) has developed and launched a new consumer-focused Web site *(http://openei.org/utilityaccess)* with the capability to map how and what electricity use data utilities provide to their customers. An online questionnaire device captures and publishes the necessary information as a series of web-based maps upon completion by electricity providers. Each electric utility has the opportunity to fill out a web-based questionnaire that will automatically generate the informational maps. Consumers can visit the maps and Web site to learn about data access offered by their utility

and how to use energy more efficiently. Generation of such maps requires DOE to collect information from electricity providers about data access and sharing services offered to their customers. DOE is requesting a 3-year approval to continue to collect and report this information using an improved collection instrument. This information collection request may be relevant to electric utilities, energy management professionals and residential and commercial electricity customers; (5) *Annual Estimated Number of Respondents:* 3,261; (6) Annual Estimated Number of Total Responses: 3,261; (7) *Annual Estimated Number of Burden Hours:* 1087; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $0.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974 (FEA Act), as amended, codified at 15 U.S.C. 772(b) and Section 1301 of the Energy Independence and Security Act of 2007 (EISA), as amended, codified at 42 U.S.C. 17381.

Issued in Washington, DC, on February 6, 2013.

Carla Frisch,

Acting Director of Policy and Analysis, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

[FR Doc. 2013–03438 Filed 2–13–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM07–16–000 and RM01–5–000]

Information Collection Activities and Request for Comments

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Energy Regulatory Commission (Commission) invites public comment on a proposed collection of information that the Commission is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995 (PRA). This collection of information relates to the application to interstate and intrastate natural gas pipelines and interstate oil pipelines of the Commission's revised Company Registration procedures.[1]

DATES: Comments regarding this proposed information collection must be received on or before April 15, 2013.

ADDRESSES: You may submit comments (identified by Docket Nos. RM07–16–000 and RM01–5–000) by either of the following methods:

- *eFiling at Commission's Web Site: http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov*, or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

FOR FURTHER INFORMATION CONTACT: Ellen Brown, by email at *DataClearance@FERC.gov,* telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION: This collection of information relates to the application to interstate and intrastate natural gas pipelines and interstate oil pipelines of the Commission's revised Company Registration procedures.

These procedures will replace the use of random-number generated passwords to authenticate access to a company registration account with a superior method of authentication. Under the revised procedures, a regulated natural gas and oil pipeline will be able to maintain a list of eRegistered agents whom the pipeline has authorized to submit a particular type of filing. Implementation of these changes will provide increased flexibility for regulated entities to manage their company registration accounts and to designate agents to make filings at the Commission. These changes also will reduce the need for pipelines to institute measures to protect password integrity, including the need to request new passwords if existing passwords are compromised.[2] These revised procedures are expected to go into effect in October 2013.

OMB's regulations [3] require approval of certain information collection requirements that impose identical reporting or recordkeeping requirements imposed on ten or more persons. Without consideration of potential cost savings in reduced password management and requests for new passwords, the one-time burden on interstate and intrastate natural gas and oil pipelines to transition to the revised system is estimated to be one hour per respondent at a cost of $35.99/hour for support staff.[4]

Information Collection Costs: The Commission projects the average annual burden and cost of compliance with these regulations to be the following:

Data collection	Number of respondents	Hours per response (1 response per respondent)	Total hours	Total cost
FERC–545—NGA Pipelines	161	1	161	$5,794
FERC–549—NGPA Pipelines	200	1	200	7,198
FERC–550—Oil Pipelines	200	1	200	7,198

[1] Concurrent with this Notice, the Commission is issuing a separate order on ''Revisions to Company Registration and Establishing Technical Conference'' with additional details on the requirements.

[2] A description of the procedures can be found in the Commission's order in *Filing Via the Internet,* Docket Nos. RM07–16–000 and RM01–5–000, 142 FERC ¶ 61,097 (2013) (*http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13174100).*

[3] 5 CFR 1320.

[4] The estimated burden on electric utilities for compliance with this requirement was included in Order No. 770, 77 FR 71,288 (Nov. 30, 2012) and is incorporated in FERC–920, Electric Quarterly Report, OMB Control No. 1902–0255. Those reporting requirements will be submitted to OMB for review after OMB issues a decision on another pending item under that Control Number. (Only one item per OMB Control Number can be pending at OMB for PRA review at a time.)

We estimate that pipelines will have the initial implementation burden of one hour and may annually review or make revisions to their list of designated agents. The total annual cost for all respondents is: $20,190.

Title: FERC–545, Gas Pipeline Rates: Rate Change (Non-Formal), OMB Control No. 1902–0154; FERC–549, Gas Pipeline Rates: NGPA Title III Transactions and Part 341, OMB Control No. 1902–0086; and FERC–550, Oil Pipeline Rates: Tariff Filings, OMB Control No. 1902–0089.

Action: Revised company registration information requirements.

Respondents: Interstate and intrastate natural gas pipelines and interstate oil pipelines.

Frequency of Responses: One-time initial implementation and periodic updates as needed.

Need for Information: The changes are being implemented to enhance the security of natural gas and oil pipelines' company registration accounts and to provide pipelines with an enhanced ability to manage filing permissions.

Internal Review: We have reviewed the changes and determined that the changes are necessary, conforming to the Commission's need for efficient information collection, communication, and management within the energy industry. We have assured ourselves, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: February 8, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–03399 Filed 2–13–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14483–000]

Westfield Water Resources Department; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, Protests, Recommendations, and Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 14483–000.

c. *Date filed:* January 22, 2013.

d. *Applicant:* Westfield Water Resources Department.

e. *Name of Project:* Sackett Filtration Plant Hydroelectric Project.

f. *Location:* The proposed Sackett Filtration Plant Hydroelectric Project would be located on a water supply pipeline entering the Sackett Filtration Plant in Hampden County, Massachusetts. The land on which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r

h. *Applicant Contact:* Mr. Charles Darling, Water Systems Engineer, Westfield Water Resources Department, 28 Sackett Street, Westfield, MA 01085; phone (413) 572–6243.

i. *FERC Contact:* Robert Bell, (202) 502–6062, *robert.bell@ferc.gov.*

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* Due to the small size of the proposed project, as well as the resource agency consultation letters filed with the application, the 60-day timeframe specified in 18 CFR 4.34(b) for filing all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; 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.* The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor 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.

l. *Description of the project:* The proposed Sackett Filtration Plant Hydroelectric Project would consist of: (1) A proposed 16.19-foot-long, 12-inch-diameter intake pipe; (2) a proposed powerhouse containing one proposed generating unit with an installed capacity of 80 kilowatts; (3) a proposed 9.42-foot-long, 12-inch-diamter exit pipe; and (4) appurtenant facilities. The applicant estimates the project would have an average annual generation of 0.4745 gigawatt-hours.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the Web at *http://www.ferc.gov/docs-filing/elibrary.asp* using the ''eLibrary'' link. Enter the docket number, P–14483, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. *Development Application*—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

o. *Protests or Motions to Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests 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 protests or motions to intervene must be received on or before the specified deadline date for the particular application.

p. All filings must (1) Bear in all capital letters the title ''PROTEST,'' ''MOTION TO INTERVENE,'' ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (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, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and seven copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. 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: February 7, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–03366 Filed 2–13–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–444–000.

Applicants: Cheyenne Plains Gas Pipeline Company LLC.

Description: Supplement to January 11, 2013 Request for Waiver of Cheyenne Plains Gas Pipeline Company, L.L.C.

Filed Date: 1/30/13.

Accession Number: 20130130–5295.

Comments Due: 5 p.m. ET 2/11/13.

Docket Numbers: RP13–545–000.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: pro forma—EP2DART Conversion to be effective 12/31/9998.

Filed Date: 2/6/13.

Accession Number: 20130206–5075.

Comments Due: 5 p.m. ET 2/19/13.

Docket Numbers: RP13–546–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: 02/06/13 Negotiated Rates—JP Morgan Ventures Corp (HUB)—6025–89 to be effective 2/6/2013.

Filed Date: 2/6/13.

Accession Number: 20130206–5080.

Comments Due: 5 p.m. ET 2/19/13.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 7, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–03448 Filed 2–13–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–336–000.

Applicants: Questar Pipeline Company.

Description: Notice of Commencement of Service to be effective N/A.

Filed Date: 2/7/13.

Accession Number: 20130207–5058.

Comments Due: 5 p.m. ET 2/19/13.

Docket Numbers: RP13–547–000.

Applicants: Dauphin Island Gathering Partners.

Description: Negotiated Rates 2013–02–08 to be effective 2/8/2013.

Filed Date: 2/7/13.

Accession Number: 20130207–5047.

Comments Due: 5 p.m. ET 2/19/13.

Docket Numbers: RP13–548–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 02/07/13 Negotiated Rates—Sequent Energy Management (HUB)—3075–89 to be effective 2/6/2013.

Filed Date: 2/7/13.

Accession Number: 20130207–5130.

Comments Due: 5 p.m. ET 2/19/13.

Docket Numbers: RP11–1711–000.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission, LLC submits tariff filing per 154.501: 2012 Cashout Report Filing to be effective N/A.

Filed Date: 2/8/13.

Accession Number: 20130208–5037.

Comments Due: 5 p.m. ET 2/20/13.

Docket Numbers: RP13–550–000.

Applicants: White River Hub, LLC.

Description: White River Hub, LLC submits tariff filing per 154.204: Sec. 12.5 Imbalance Payback Option to be effective 3/11/2013.

Filed Date: 2/8/13.

Accession Number: 20130208–5043.

Comments Due: 5 p.m. ET 2/20/13.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP12–130–004.

Applicants: Paiute Pipeline Company.

Description: Fourth Revised Volume No. 1–A to be effective 5/3/2012.

Filed Date: 2/7/13.

Accession Number: 20130207–5057.

Comments Due: 5 p.m. ET 2/19/13.

Docket Numbers: RP13–365–003.

Applicants: TC Offshore LLC.

Description: TC Offshore LLC submits tariff filing per 154.203: Compliance to RP13–365–000 to be effective 12/3/2012.

Filed Date: 2/7/13.

Accession Number: 20130207–5131.

Comments Due: 5 p.m. ET 2/19/13.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 8, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–03429 Filed 2–13–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6764–036]

BMB Enterprises, Inc.; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 CFR part 380, Commission staff has reviewed the application for amendment of license for the partially constructed but not operating Sixmile Creek Project (FERC No. 6764) and has prepared an environmental assessment (EA). The project is located on the Sixmile Creek in Sanpete County, Utah. The project would occupy 10.86 acres of federal lands administered by the U.S. Department of Agriculture, Forest Service.

The EA contains the Commission staff's analysis of the potential environmental effects of the proposed addition of new generating capacity and concludes that authorizing the amendment, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room 2–A of the Commission's offices at 888 First Street NE., Washington, DC 20426. The EA also may be viewed on the Commission's Internet 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 with eLibrary, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY contact (202) 502–8695.

Any comments should be filed within 60 days from the date of this notice. Comments may be filed electronically via the Internet. See 18 CFR 385.200(a)(1)(iii) and instructions on the Commission's Web site at *http://ferc.gov.docs/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docsfiling/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filings, 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.

Dated: February 7, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–03367 Filed 2–13–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–899–000]

Abest Power & Gas, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Abest Power & Gas, LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is February 28, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also 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.

Dated: February 8, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–03432 Filed 2–13–13; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:20 a.m. on Tuesday, February 12, 2013, the Board of Directors of the Federal Deposit Insurance Corporation

met in closed session to consider matters related to the Corporation's supervision, corporate, and resolution activities.

In calling the meeting, the Board determined, on motion of Vice Chairman Thomas M. Hoenig, seconded by Director Jeremiah O. Norton (Appointive), concurred in by Director Thomas J. Curry (Comptroller of the Currency), Director Richard Cordray (Director, Consumer Financial Protection Bureau), and Chairman Martin J. Gruenberg, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street NW., Washington, DC.

Dated: February 12, 2013.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–03579 Filed 2–12–13; 4:15 pm]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Re-Establishment of the Advisory Group on Prevention, Health Promotion, and Integrative and Public Health

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The U.S. Department of Health and Human Services announces re-establishment of the Advisory Group on Prevention, Health Promotion, and Integrative and Public Health (hereafter referred to as ''the Advisory Group''). Authorization to re-establish the Advisory Group is given under Executive Order 13631, dated December 7, 2012.

FOR FURTHER INFORMATION CONTACT: Corinne Graffunder, Designated Federal Officer (DFO) of the Advisory Group, Office of the Associate Director for Policy; Centers for Disease Control and Prevention; 1600 Clifton Road NE., MS D–28; Atlanta, GA 30329; Telephone: (404) 639–7514; and/or the following person may be contacted: Olga Nelson, Committee Management Officer, Office of the Assistant Secretary for Health; Department of Health and Human Services; 200 Independence Avenue SW., Room 714B; Washington, DC 20201; Telephone: (202) 690–5205; Fax: (202) 401–2222.

SUPPLEMENTARY INFORMATION: It was mandated under the Patient Protection and Affordable Care Act that the President establish the Advisory Group. The President complied with the statute under Executive Order 13544, dated June 10, 2010. The Advisory Group was established as a non-discretionary federal advisory committee. Functioning as a federal advisory committee, the Advisory Group is governed by provisions of the Federal Advisory Committee Act (FACA). FACA stipulates that appropriate action must be taken to renew the charter for a federal advisory committee every two years in order for the committee to continue to operate. Under Executive Order 13544, authorization was given for the Advisory Group to operate for two years, from June 10, 2010 to June 10, 2012. Since the Advisory Group was established by Presidential directive, it was necessary for appropriate action to be taken by the President or agency head to give authorization for the Advisory Group to be continued. A subsequent directive was issued, Executive Order 13591, dated November 23, 2011, to give authorization for the Advisory Group to continue to operate until September 30, 2012. No action was taken to continue the Advisory Group after the designated termination date. Therefore, the Advisory Group was terminated on September 30, 2012.

On December 7, 2012, Executive Order 13631 was issued. This directive gives authorization for the Advisory Group to be re-established. A charter was developed to re-establish the Advisory Group. The charter was approved by the Secretary of Health and Human Services and filed with the appropriate Congressional committees, the Library of Congress, and the Committee Management Secretariat under the General Services Administration (GSA) on February 6, 2013.

Objectives and Scope of Activities. The Advisory Group provides recommendations and advice to the National Prevention, Health Promotion, and Public Health Council (hereafter referred to as the ''Council''). The Advisory Group provides assistance to the Council in carrying out its mission. The Advisory Group develops policy and program recommendations and advises the Council on lifestyle-based chronic disease prevention and management, integrative health care practices, and health promotion.

Membership and Designation. The Advisory Group is authorized to consists of not more than 25 non-federal members, who are appointed by the President. In appointing members, the President is to ensure that the Advisory Group includes a diverse group of licensed health professionals, including integrative health practitioners who have expertise in (1) Worksite health promotion; (2) community services, including community health centers; (3) preventive medicine; (4) health coaching; (5) public health education; (6) geriatrics; and (7) rehabilitation medicine.

The Advisory Group had 22 members when it was terminated on September 30, 2012. It is stipulated under Executive Order 13631 that the same members who were serving on the Advisory Group when it was terminated shall be reappointed as if the Advisory Group had continued without termination. Members of the Advisory Group are classified as special Government employees (SGEs).

Administrative Management and Support. HHS provides funding and administrative support for the Advisory Group to the extent permitted by law within existing appropriations. Staff within Office of the Assistant Secretary for Health (OASH) provide management and oversight for support services provided to the Advisory Group. OASH is a staff division within the Office of the Secretary, HHS.

The Advisory Group reports to the Surgeon General, U.S. Public Health Service. The Office of the Surgeon General is a program office that is organizationally located within OASH.

A copy of the charter and information on activities and accomplishments of the Advisory Group can be obtained from the designated contacts or by accessing the FACA database that is maintained by the GSA Committee Management Secretariat. The Web site for the FACA database is *http://fido.gov/facadatabase/.*

Authority: Authority to establish the Advisory Group was given under Executive Order 13544, dated June 10, 2010, in accordance with Section 4001 of the Patient Protection and Affordable Care Act, Public Law 111–148, dated March 23, 2010. The Advisory Group was terminated on September 30, 2012, by Executive Order 13591, dated November 23, 2011. Authority

for the Advisory Group to be re-established is given under Executive Order 13631, dated December 7, 2012. The Advisory Group is governed by provisions of the Federal Advisory Committee Act (FACA), Public Law 92–463, as amended (5 U.S.C. App.), which sets forth standards for the formation and use of advisory committees.

Dated: February 8, 2013.

Wanda K. Jones,

Principal Deputy Assistant Secretary for Health.

[FR Doc. 2013–03466 Filed 2–13–13; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier HHS–OS–18521–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit a new Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting that ICR to OMB, OS seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before April 15, 2013.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the document identifier HHS–OS–18521–60D for reference.

Information Collection Request Title: Evaluation of Implementation of the Viral Hepatitis Action Plan.

Abstract: In response to the viral hepatitis epidemic in the United States, the Department of Health and Human Services (HHS) released the Action Plan for the Prevention, Care, and Treatment of Viral Hepatitis (Action Plan) in May 2011 to provide a comprehensive strategic plan to address viral hepatitis B and C. Implementation of the Action Plan requires actions across a variety of agencies including national, state/local government, community-based organizations, and the private sector. The Evaluation of Implementation of the Viral Hepatitis Action Plan will assess state and local response to activities that support the Action Plan, identify barriers to implementation and strategies to address these barriers, and inform future viral hepatitis efforts.

Need and Proposed Use of the Information: The purpose of this project is to evaluate the state and local response to and implementation of the Action Plan and examine viral hepatitis activities that are occurring in the four jurisdictions that have been pre-selected for the evaluation: Alabama, Massachusetts, New York, and Washington State. The information collected through the evaluation will position OASH to better understand implementation of the Action Plan at the state and local levels and barriers that might be occurring in the selected jurisdictions. The evaluation will also serve to examine the landscape of viral hepatitis activities that are taking place in the selected jurisdictions. The results of the evaluation will enable OASH to understand and identify potential strategies to strengthen local implementation of the Action Plan, address barriers, and inform future implementation efforts.

Likely Respondents: State Viral Hepatitis Prevention Coordinators (CDC-funded state health department staff); other state and local health department stakeholders such as HIV and Immunization Program staff; national organization representatives who are involved in viral hepatitis program development and advocacy; local viral hepatitis stakeholders including health care and substance abuse treatment providers, non-profit community-based organization staff and volunteers, and others identified by the State Viral Hepatitis Prevention Coordinator (see above).

Burden Statement: The estimated burden for data collection involves scheduling and conducting key informant interviews among a variety of stakeholder groups including the CDC-funded Adult Viral Hepatitis Prevention Coordinators, state and local health departments, community-based organizations, correctional facilities, and healthcare providers. These interviews will be conducted in four states (Alabama, Massachusetts, New York, and Washington). Up to twelve additional interviews will also be conducted with select national-level stakeholders. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Adult Viral Hepatitis Prevention Coordinators	4	1	1.5	6
State and local health departments	16	1	45/60	12
Community-based organizations	12	1	30/60	6
National organizations	12	1	30/60	6
Correctional facilities	12	1	30/60	6
Healthcare providers	12	1	30/60	6
Total				42

OS specifically requests comments on (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.

Keith A. Tucker,

Information Collection Clearance Officer.

[FR Doc. 2013–03401 Filed 2–13–13; 8:45 am]

BILLING CODE 4150–47–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–576A]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections 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.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Organ Procurement Organization's (OPOs) Health Insurance Benefits Agreement and Supporting Regulations at 42 CFR 486.301–486.348; *Use:* The Medicare and Medicaid Programs Final Conditions for Coverage for Organ Procurement Organizations (OPOs) require OPOs to sign agreements with the Center for Medicare and Medicaid Services (CMS) in order to be reimbursed and perform their services. The information provided on this form serves as a basis for continuing the agreements with CMS and the OPOs for participation in the Medicare and Medicaid programs for reimbursement of service. *Form Number:* CMS–576A (OCN: 0938–0512); *Frequency:* Occasionally; *Affected Public:* Private Sector: Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 58; *Total Annual Responses:* 58; *Total Annual Hours:* 116. (For policy questions regarding this collection contact Peggye Wilkerson at 410–786–4857. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by April 15, 2013:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: February 11, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–03452 Filed 2–13–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0899]

Draft Environmental Assessment and Preliminary Finding of No Significant Impact Concerning a Genetically Engineered Atlantic Salmon; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending the comment period for two draft environmental review documents for which a notice of availability appeared in the **Federal Register** of December 26, 2012. In that notice, FDA made available for comment the Agency's draft environmental assessment (EA) of the proposed conditions of use specified in materials submitted by AquaBounty Technologies, Inc., in support of a new animal drug application (NADA) concerning a genetically engineered (GE) Atlantic salmon and a preliminary finding of no significant impact (FONSI) for those specific conditions of use. The Agency is taking this action in response to a request for an extension to allow interested persons additional time to submit comments.

DATES: Submit either electronic or written comments by April 26, 2013.

ADDRESSES: Submit electronic comments to: *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Eric Silberhorn, Center for Veterinary Medicine (HFV–162), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855; 240–276–8247; *abig@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of December 26, 2012 (77 FR 76050), FDA published a notice of availability with a 60-day comment period to make available for public comment the Agency's draft EA of the proposed conditions of use specified in materials submitted by AquaBounty Technologies, Inc., in support of an NADA concerning a GE

Atlantic salmon and a preliminary FONSI for those specific conditions of use. Comments on the draft EA and FONSI will inform FDA's decision whether to require an environmental impact statement (EIS) or finalize the EA and FONSI for this NADA.

The Agency has received a request for a 60-day extension of the comment period for the draft EA and FONSI. The request conveyed concern that the current 60-day comment period does not allow sufficient time to respond.

FDA has considered the request and is extending the comment period for the draft EA and FONSI for 60 days, until April 26, 2013. The Agency believes that a 60-day extension allows adequate time for interested persons to submit comments without significantly delaying the Agency's decision on whether to finalize these documents or prepare an EIS.

II. Request for Comments

Interested persons may submit either electronic comments regarding these documents to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Dated: February 11, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–03445 Filed 2–13–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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: National Institute of General Medical Sciences Initial Review Group; Training and Workforce Development Subcommittee A.

Date: March 12, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: John J. Laffan, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3An.18J, Bethesda, MD 20892, 301–594–2773, *laffanjo@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: February 8, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–03361 Filed 2–13–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Minority Health and Health Disparities Special Emphasis Panel; NIMHD Conference Grant Review (R13).

Date: March 15, 2013.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Hui Chen, M.D., Scientific Review Officer, National Institute on Minority Health and Health Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 594–7784, *chenhui@mail.nih.gov.*

Dated: February 7, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–03357 Filed 2–13–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

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 meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Vestibular Prosthesis Research Application.

Date: March 25, 2013.

Time: 4:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer Division of Extramural Activities, National Institutes of Health/NIDCD 6120 Executive Blvd.—MSC 7180, Rockville, MD 20892, (301) 496–8683, *kellya2@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Outcome Research Application.

Date: March 26, 2013.

Time: 12:30 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Rockville, MD 20892, (301) 496–8683, *kellya2@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing and Balance Clinical Trial Review.

Date: March 29, 2013.

Time: 10:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Christine A. Livingston, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892, (301) 496–8683, *livingsc@mail.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD VSL Clinical Trial Applications Review.

Date: April 9, 2013.

Time: 11:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Rockville, MD 20892, (301) 496–8683, *kellya2@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; LRP Applications Review.

Date: April 9, 2013.

Time: 12:00 p.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Sheo Singh, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892, 301–496–8683, *singhs@nidcd.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: February 8, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–03360 Filed 2–13–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 a meeting of the Board of Scientific Counselors for Basic Sciences National Cancer Institute.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Cancer Institute, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors for Basic Sciences National Cancer Institute, NCI Board of Scientific Counselors Meeting (Basic Sciences).

Date: March 12, 2013.

Time: 9:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and, competence of individual investigators.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Florence E. Farber, Ph.D., Executive Secretary, Office of the Director, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Room 2205, Bethesda, MD 20892, 301–496–7628, *ff6p@nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: February 8, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–03358 Filed 2–13–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 a meeting of the Board of Scientific Counselors for Clinical Sciences and Epidemiology National Cancer Institute.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL CANCER INSTITUTE, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors for Clinical Sciences and Epidemiology, National Cancer Institute; NCI Board of Scientific Counselors Meeting (Clinical Sciences and Epidemiology).

Date: March 11, 2013.

Time: 9:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Contact Person: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Brian E. Wojcik, Ph.D., Senior Review Administrator, Institute Review Office, Office of The Director, National Cancer Institute, 6116 Executive Boulevard, Room 2201, Bethesda, MD 20892, (301) 496–7628, *wojcikb@mail.nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: February 8, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–03359 Filed 2–13–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 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: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Ancillary Studies Review.

Date: April 4, 2013.

Time: 2:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 7, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–03356 Filed 2–13–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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: National Institute of General Medical Sciences Initial Review Group: Training and Workforce Development Subcommittee B.

Date: March 13, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn, 7301 Waverly Street, Bethesda, MD 20814.

Contact Person: Arthur L. Zachary, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3An.12, Bethesda, MD 20892, 301–594–2886, *zachary@nigms.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: February 8, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–03354 Filed 2–13–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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: Microbiology, Infectious Diseases and AIDS Initial Review Group: Acquired Immunodeficiency Syndrome Research Review Committee.

Date: March 21–22, 2013*Time:* 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Vasundhara Varthakavi, Ph.D., Scientific Review Officer, Scientific Review Program, NIH/NIAID/DEA/ARRB, 6700 B Rockledge Drive, Room 3256, Bethesda, MD 20892–7616, 301–451–1740, *varthakaviv@niaid.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 7, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–03355 Filed 2–13–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2012–0069]

Privacy Act of 1974; Department of Homeland Security Immigration and Customs Enforcement-007—Alien Criminal Response Information Management System of Records

AGENCY: Privacy Office, Department of Homeland Security.

ACTION: Notice of modification to existing Privacy Act System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security, U.S. Immigration and Customs Enforcement is updating and renaming an existing system of records titled, ''Department of Homeland Security/Immigration and Customs Enforcement-007—Law Enforcement Support Center Alien

Criminal Response Information Management System of Records.'' With the publication of this updated system of records, several changes are being made: (1) The name is being changed; (2) new categories of individuals have been added; (3) new routine uses have been added to allow Immigration and Customs Enforcement to share information from the system; and (4) the retention period of Brady Act check records has been corrected and the retention period for National Sex Offender Registrant records and for individuals for whom non-criminal queries are conducted have been added. A Privacy Impact Assessment update for the Alien Criminal Response Information Management system is being published concurrently with this notice. It can be found on the DHS Web site at *http://www.dhs.gov/privacy.* The exemptions for the existing system of records notice will continue to be applicable for this system of records notice (74 FR 45079, August 31, 2009), and this system will continue to be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before March 18, 2013. In particular, comments are requested concerning the application of the exemptions to the newly added categories of individuals. This new system will be effective March 18, 2013.

ADDRESSES: You may submit comments, identified by docket number DHS–2012–0069 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Jonathan R. Cantor, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Lyn Rahilly (202–732–3300), Privacy Officer, U.S. Immigration and Customs Enforcement, 500 12th Street SW., Stop 5004 Washington, DC 20536–5004; Jonathan R. Cantor, (202–343–1717), Acting Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Homeland Security (DHS) is updating and reissuing DHS/Immigration and Customs Enforcement (ICE)–007—Law Enforcement Support Center (LESC) Alien Criminal Response Information Management System (ACRIMe) system of records notice (SORN) (75 FR 8377, February 24, 2010), to shorten the system name, add new categories of individuals and routine uses, and update the retention period of records related to Brady Act checks, National Sex Offender Registrants, and individuals for whom non-criminal queries are conducted. The new system name is DHS/ICE–007—Alien Criminal Response Information Management System (ACRIMe). This system of records describes information maintained in an ICE information system of the same name, which is used by ICE personnel to receive and respond to immigration status inquiries made by other agencies about individuals who are arrested, screened as part of a background check in order to determine suitability for employment, access, or other purposes, or otherwise encountered by those agencies. ACRIMe also supports the creation and maintenance of lookout records in the Federal Bureau of Investigation (FBI) National Crime Information Center (NCIC) system on persons wanted by ICE for crimes or as fugitive aliens. ACRIMe also supports the operation of the ICE tip line, where members of the public can notify ICE of suspected violations of law, and the operation of the Law Enforcement Support Center call center, which takes calls from other law enforcement agencies seeking assistance from ICE.

Concurrent with the publication of this SORN update, ICE is publishing an update to the ACRIMe Privacy Impact Assessment (PIA) to describe several updates to the data maintained in that system in support of ICE's immigration enforcement mission. ICE is adding new categories of individuals to the DHS/ICE–007—ACRIMe SORN to adequately describe the individuals whose information is maintained in the system via the interoperability process. The ACRIMe PIA update is available on the DHS Privacy Office web site at *http://www.dhs.gov/privacy.*

Under interoperability's original use, the fingerprints of individuals arrested by or in the custody of a law enforcement agency participating in the ICE Secure Communities Program are sent to the FBI's Integrated Automated Fingerprint Identification System (IAFIS)/Next Generation Identification (NGI) for matching against the FBI's criminal fingerprint holdings. Through interoperability, the fingerprints are also checked against the DHS Automated Biometric Identification System (IDENT) and, if the submitted fingerprints match fingerprints in IDENT, the FBI generates an Immigration Alien Query (IAQ) that is sent to the ACRIMe. An ICE employee uses ACRIMe to research the subject of the IAQ, determine the immigration status of the subject, and generate an Immigration Alien Response (IAR), which ACRIMe sends back to the FBI Criminal Justice Information Services (CJIS) Division. The FBI combines and sends the IDENT response and the IAR back to the agency that conducted the fingerprint check for awareness if they are technically capable of receiving the response. ACRIMe also sends the IAR to the appropriate ICE field office to determine the appropriate enforcement action, if any, to take against the individual.

As described in the ACRIMe PIA update, ACRIMe's use under interoperability has been expanded to assist other agencies that screen individuals for various purposes, including administration of criminal justice, national security, and background checks/investigations conducted for employment, access, and other suitability purposes. The appendices to the PIA list the new uses of interoperability that ACRIMe now supports. The appendices will be updated as new interoperability users are added and as existing users change how they use interoperability. It should be noted that although ACRIMe is supporting new uses under interoperability, the process by which IAQs (queries) are submitted to ACRIMe and responses (IARs) are sent back to the FBI CJIS Division and ultimately to the agency submitting the request, remains the same as occurs under Secure Communities. For example, one of the new uses of ACRIMe is to assist agencies that are conducting background checks/investigations on individuals for employment, access, or other suitability purposes. The fingerprints of the individuals being screened are checked against IDENT and IAQs are sent to ACRIMe for any matches. ICE personnel research the subjects of the IAQ, determine the immigration status of the subjects, and return IARs on them.

Using interoperability, ICE will also begin to screen convicted sex offenders whose fingerprints are captured during federal, state, local, and tribal law

enforcement processes that enroll these individuals in sex offender registries. ICE places a high priority on targeting for removal those aliens with criminal records who pose a threat to public safety, such as sex offenders. When a convicted sex offender is released from incarceration, the individual is required to register as a sex offender with authorities in the state in which he or she resides. During the registration process, state authorities typically capture the individual's fingerprints and biographic information and transmit them to the FBI CJIS Division for inclusion in the National Sex Offender Registry, and to update IAFIS and the individual's FBI criminal record. Via interoperability, the FBI CJIS Division automatically runs the individual's fingerprints against IDENT. If the fingerprints match fingerprints in IDENT, an IAQ is generated and sent to ACRIMe. ICE users research the immigration status of the individual and generate an IAR containing the results of that research in ACRIMe. The IAR is sent to the relevant ICE field office, which determines the appropriate enforcement action to take against the individual, if any. A similar process is used when there are changes to the convicted sex offender's information. The state authorities send the individual's information to the FBI CJIS Division. They update the person's record, run the individual's fingerprints against IDENT, and if the fingerprints match fingerprints in IDENT, an IAQ is generated and sent to ACRIMe. The processing of the convicted sex offender information varies from the standard interoperability process in one respect only: ACRIMe does not send a copy of the IAR to the FBI CJIS Division or to the agency that registered the sex offender. Instead, the IAR is only distributed and used within ICE for enforcement purposes.

New categories of individuals have been added to the DHS/ICE–007—ACRIMe SORN to describe the convicted sex offenders and other types of individuals whose information is being processed through ACRIMe under these new interoperability programs including individuals about whom a background check is being performed for employment, access, or other suitability purposes. As new interoperability users are approved by DHS, the ACRIMe PIA appendix will be updated to describe them and conforming changes will be made to this SORN, if required.

Additionally, new routine uses have been added to allow ICE to share information from the system. Below is a summary of the new routine uses and their corresponding letter:

(J) To federal, state, local, tribal, territorial, or international agencies seeking to verify or ascertain the citizenship or immigration status of an individual for a purpose within the agency's jurisdiction;

(N) To a former employee of DHS for purposes of responding to an official inquiry or facilitating communications with a former employee that may be relevant for personnel-related or other official purposes;

(V) To prospective claimants and their attorneys for the purpose of negotiating the settlement of an actual or prospective claim against DHS prior to litigation or proceedings;

(X) To the Department of Justice (DOJ), Federal Bureau of Investigation (FBI) in order to facilitate responses to fingerprint-based immigration status queries;

(Y) To federal, state, local, tribal, territorial, international, or foreign government agencies or entities to enable consultation to assist in the processing of redress requests;

(Z) To federal, state, local, tribal, territorial, foreign, or international agencies regarding a requesting agency's decision concerning the hiring or retention of an individual or if the information is relevant and necessary to a DHS decision concerning the hiring or retention;

(AA) To federal, state, local, tribal, territorial, foreign, or international agencies, if DHS determines the information is relevant and necessary to the agency's decision concerning the hiring or retention of an individual and failure to disclose the information is likely to create a risk;

(BB) To federal, state, local, tribal, territorial, foreign, or international agencies seeking information on the subjects of wants, warrants, or lookouts for law enforcement purposes;

(CC) To federal, state, local, tribal, territorial, or foreign government agencies or organizations, or international organizations, lawfully engaged in collecting law enforcement intelligence;

(DD) To foreign governments in order to notify them concerning an alien who is incapacitated, an unaccompanied minor, or deceased.

(EE) To federal, state, local, tribal, and territorial courts or government agencies involved in criminal investigation or prosecution, pretrial services, sentencing, parole, probation or other aspects of the criminal justice process, and to counsel representing an individual in a proceeding, in order to ensure the integrity of the justice system by informing these recipients of the existence of an immigration detainer on that individual or that individual's status in removal proceedings, voluntary departure, or custodial status/location.

Finally, the retention period for Brady Act check records has been corrected. Previously, the SORN incorrectly stated that the records were retained for twenty-four (24) hours. The records are retained for five (5) years in order to provide ICE with sufficient time to follow up on any leads generated by Brady Act record check information. Additionally, the SORN is being updated to reflect the retention period for biometric and biographic immigration status check records for National Sex Offender Registrants and individuals for whom non-criminal queries are conducted. Information on National Sex Offender Registrants will be maintained for seventy-five (75) years while records pertaining to non-criminal queries will only be retained for thirty (30) years.

Portions of the DHS/ICE–007 ACRIMe System of Records are exempt from one or more provisions of the Privacy Act because of criminal, civil and administrative enforcement requirements. Individuals may request information about records pertaining to them stored in the DHS/ICE–007 ACRIMe System of Records as outlined in the ''Notification Procedure'' section below. ICE reserves the right to exempt various records from release. Pursuant to 5 U.S.C. 552a(j)(2), the Secretary of Homeland Security has exempted portions of this system of records from subsections (c)(3) and (4); (d); (e)(1), (2), (3), (4)(G), (4)(H), (5) and (8); (f); and (g) of the Privacy Act. In addition, the system has been exempted from subsections (c)(3) and (4); (d); (e)(1), (4)(G), (4)(H), and (f) pursuant to 5 U.S.C. 552a(k)(2). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c), and (e) and have been published in the **Federal Register** as addition to Title 28, Code of Federal Regulations (28 CFR 16.99). In addition, to the extent a record contains information from other exempt systems of records; ICE will rely on the exemptions claimed for those systems. In the context of this updated SORN, the Department is requesting comment on the application of these exemptions to the newly added categories of individuals.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government

collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other particular identifier assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals when systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/ICE–007 ACRIMe System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

System of Records

DHS/ICE—007

SYSTEM NAME:

Alien Criminal Response Information Management (ACRIMe).

SECURITY CLASSIFICATION:

Unclassified and Law Enforcement Sensitive (LES).

SYSTEM LOCATION:

Records are maintained in the ACRIMe information technology system and associated paper records at the U.S. Immigration and Customs Enforcement (ICE) Law Enforcement Support Center (LESC) in Williston, Vermont, at ICE Headquarters, and at other ICE field office locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered in this system include:

(1) Individuals who are the subjects of immigration status inquiries submitted to ICE or immigration checks conducted by ICE, including:

A. Individuals who are encountered by, arrested by, under the investigation of, or in the custody of a criminal justice agency.

B. Individuals convicted of sexual offenses required to register as a sexual offender.

C. Individuals subject to background checks or investigations by or under the authority of a federal, state, local, tribal, or territorial agency to determine eligibility or suitability for employment, access, or other purposes.

D. Individuals applying to obtain/purchase a firearm in the United States and whose information has been submitted to ICE for the purpose of conducting an immigration status check in support of background checks required by the Brady Handgun Violence Protection Act (Brady Act) or other applicable laws.

(2) Individuals who are the subjects of criminal arrest warrants and immigration lookouts that ICE has entered into the Federal Bureau of Investigation's (FBI) National Crime Information Center (NCIC) System.

(3) Individuals who report tips concerning customs and immigration violations, suspicious activity or other law enforcement matters to the Department of Homeland Security (DHS)/ICE and individuals about whom those reports are made.

(4) Law enforcement officers or other personnel working for criminal justice agencies who contact ICE for reasons relating to the purposes of this system of records, or for other law enforcement assistance.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system may include:

(1) Biographic identifiers, other identifiers, and contact information (e.g., name, aliases, date and place of birth, address, telephone number, Social Security Number (SSN), Alien Registration Number (A-Number), driver's license number, other personal identification numbers, fingerprint identification number, passport number).

(2) Visa, border, immigration and citizenship information (e.g., citizenship and/or immigration status, application for benefit information, visa and travel history).

(3) Criminal history information (e.g., FBI number, booking number, current charge[s], custodial status, past offenses and convictions).

(4) NCIC hit confirmation records, which consist of information supporting the entry of criminal warrants or immigration lookouts into the NCIC system, such as criminal arrest warrant information, fingerprints and photographs, other information identifying the individual, and records reflecting the purpose/basis for the warrant or lookout. Records of inquiries received from criminal justice agencies regarding potential matches against ICE-created NCIC records, and records pertaining to ICE's research, resolution, and response to those inquiries.

(5) Background investigation records, which consist of identifying and other information received from agencies requesting an immigration status check on individuals as part of a background check for employment, gun ownership, or other reasons; research conducted by ICE during the conduct of the immigration status check; and ICE's research, resolution, and response to those inquiries.

(6) Criminal justice immigration status check records, which consist of identifying and other information received from criminal justice agencies requesting an immigration status check on individuals in the context of a criminal justice matter; prioritization of requests; research conducted by ICE during the conduct of the immigration status check; and ICE's research, resolution, and response to those inquiries.

(7) Public tip records, which consist of information contained in tips received from the public or other sources regarding customs and immigration violations, or other violations of law, and suspicious activities. This includes identifying and contact information about the individual reporting the tip (if provided) and information about the person or persons who are the subject of the tip.

(8) Information pertaining to ICE's follow-up activities regarding a tip or other information received pursuant to the activities supported by this system of records, including leads for ICE investigations and referrals to other agencies.

(9) Identification and authentication information for law enforcement officers or other criminal justice personnel who contact ICE.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

8 U.S.C. 1103, 8 U.S.C. 1324(b)(3); 8 U.S.C. 1360(b); Section 504 of the Immigration and Nationality Act of 1990 (INA) (Pub. L. 101–649); the Brady Handgun Violence Protection Act of

1993 (Pub. L. 103–159); FY 2008 Consolidated Appropriations Act (Pub. L. 110–161, 121 Stat. 1844, 2050 (2007)); and the INA provisions regarding removal of criminal aliens (INA § 237(a)(2) and § 238).

PURPOSE(S):

The purposes of this system are to:

(1) Identify and arrest individuals in the United States who may be subject to removal under the Immigration and Nationality Act, as amended.

(2) Respond to inquiries from criminal justice agencies that seek to determine the immigration status of an individual in the context of a criminal justice matter for the purpose of identifying and arresting those who may be subject to removal.

(3) Inform criminal justice agencies and agencies conducting background checks whether an individual is under investigation and/or wanted by ICE or other criminal justice agencies.

(4) Receive, process and act on information received from the general public and other sources regarding suspicious activities and actual or potential violations of laws enforced by ICE or DHS, and to refer any other actionable information to the appropriate agencies for action.

(5) Provide assistance to domestic, foreign, and international agencies that contact ICE and the LESC on matters within the scope of ICE's law enforcement authorities, including violations of U.S. customs and immigration laws.

(6) Collect and analyze data to evaluate the effectiveness and quality of services provided to other agencies in support of the purposes described above, and of ICE's customs and immigration law enforcement efforts generally.

(7) Identify potential criminal activity, immigration violations, and threats to homeland security; uphold and enforce the law; and ensure public safety.

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, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including U.S. Attorneys Offices, or other federal agency conducting litigation or proceedings before any court, adjudicative or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made pursuant to a written Privacy Act waiver at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of the suspected or confirmed compromise, there is a risk of identity theft or fraud, harm to economic or property interests, harm to an individual, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS' efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To federal, state, local, tribal, territorial, or foreign government agencies or multilateral government organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil, criminal, or regulatory laws.

H. To federal, state, local, tribal, territorial, foreign, or international agencies, if the information is relevant and necessary to a requesting agency's decision concerning individuals who are being screened with respect to their participation in, attendance at, or other relation to a national or special security event.

I. To domestic governmental agencies seeking to determine the immigration status of persons who have applied to purchase/obtain a firearm in the United States, pursuant to checks conducted on such persons under the Brady Handgun Violence Prevention Act or other applicable laws.

J. To federal, state, local, tribal, territorial, or international agencies seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law.

K. To courts, magistrates, administrative tribunals, opposing counsel, parties, and witnesses, in the course of immigration, civil, or criminal proceedings (including discovery, presentation of evidence, and settlement negotiations) and when DHS determines that use of such records is relevant and necessary to the litigation before a court or adjudicative body when any of the following is a party to or have an interest in the litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where the government has agreed to represent the employee; or

4. The United States, where DHS determines that litigation is likely to affect DHS or any of its components.

L. To federal, state, local, tribal, territorial, foreign or international agencies in order to refer reports of suspicious activity, tips, potential violations of law and other relevant information to agencies with appropriate jurisdiction, authorities, and/or need-to-know concerning the matters.

M. To the Department of Justice (DOJ), Federal Bureau of Prisons (BOP) and other federal, state, local, territorial, tribal and foreign law enforcement or custodial agencies for the purpose of

placing an immigration detainer on an individual in that agency's custody, or to facilitate the transfer of custody of an individual to DHS from the other agency.

N. To a former employee of DHS for purposes of responding to an official inquiry by federal, state, local, tribal, territorial government agencies or professional licensing authorities; or facilitating communications with a former employee that may be relevant and necessary for personnel-related or other official purposes where DHS requires information or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

O. To federal, state, local, tribal, territorial, or foreign government agencies, as well as to other individuals and organizations during the course of an investigation by DHS or the processing of a matter under DHS's jurisdiction, or during a proceeding within the purview of the immigration and nationality laws, when DHS deems that such disclosure is necessary to carry out its functions and statutory mandates or to elicit information required by DHS to carry out its functions and statutory mandates.

P. To international, foreign, intergovernmental, and multinational government agencies, authorities, and organizations in accordance with law and formal or informal international arrangements.

Q. To the Office of Management and Budget (OMB) in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process as set forth in the Circular.

R. To the U.S. Senate Committee on the Judiciary or the U.S. House of Representatives Committee on the Judiciary when necessary to inform members of Congress about an alien who is being considered for private immigration relief.

S. To the Department of State when it requires information to consider and/or provide an informed response to a request for information from a foreign, international, or intergovernmental agency, authority, or organization about an alien or an enforcement operation with transnational implications.

T. To federal, state, local, territorial, tribal, international, or foreign criminal, civil, or regulatory law enforcement authorities when the information is necessary for collaboration, coordination, and de-confliction of investigative matters, prosecutions, and/or other law enforcement actions to avoid duplicative or disruptive efforts and to ensure the safety of law enforcement officers who may be working on related law enforcement matters.

U. To federal, state, local, tribal, territorial, or foreign government agencies or entities or multinational government agencies where DHS desires to exchange relevant data for the purpose of developing, testing, or implementing new software or technology whose purpose is related to this system of records.

V. To prospective claimants and their attorneys for the purpose of negotiating the settlement of an actual or prospective claim against DHS or its current or former employees, in advance of the initiation of formal litigation or proceedings.

W. To federal and foreign government intelligence or counterterrorism agencies or components when DHS becomes aware of an indication of a threat or potential threat to national or international security, or when such disclosure is to support the conduct of national intelligence and security investigations or to assist in anti-terrorism efforts.

X. To the Department of Justice (DOJ), Federal Bureau of Investigation (FBI) in order to facilitate responses to fingerprint-based immigration status queries that are sent to ICE, including queries that the FBI sends on behalf of another agency.

Y. To federal, state, local, tribal, territorial, international, or foreign government agencies or entities for the purpose of consulting with that agency or entity:

1. To assist in making a determination regarding redress for an individual in connection with the operations of a DHS component or program;

2. To verify the identity of an individual seeking redress in connection with the operations of a DHS component or program; or

3. To verify the accuracy of information submitted by an individual who has requested such redress on behalf of another individual.

Z. To federal, state, local, tribal, territorial, foreign, or international agencies, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or the issuance, grant, renewal, suspension or revocation of a security clearance, license, contract, grant, or other benefit; or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit.

AA. To federal, state, local, tribal, territorial, foreign, or international agencies, if DHS determines (1) the information is relevant and necessary to the agency's decision concerning the hiring or retention of an individual, or the issuance of a security clearance, license, contract, grant, or other benefit, and (2) failure to disclose the information is likely to create a risk to government facilities, equipment, or personnel; sensitive information; critical infrastructure; or the public safety.

BB. To federal, state, local, tribal, territorial, foreign, or international agencies seeking information on the subjects of wants, warrants, or lookouts, or any other subject of interest, for purposes related to administering or enforcing the law, national security, immigration, or intelligence, when consistent with a DHS mission-related function.

CC. To federal, state, local, tribal, territorial, or foreign government agencies or organizations, or international organizations, lawfully engaged in collecting law enforcement intelligence, whether civil or criminal, to enable these entities to carry out their law enforcement responsibilities, including the collection of law enforcement intelligence.

DD. To foreign governments in order to notify them concerning an alien who is incapacitated, an unaccompanied minor, or deceased.

EE. To federal, state, local, tribal, and territorial courts or government agencies involved in criminal investigation or prosecution, pretrial services, sentencing, parole, probation, bail bonds, child welfare services, or any other aspect of the criminal justice process, and to counsel representing an individual in a criminal, civil, or child welfare proceeding, in order to ensure the integrity of the justice system by informing these recipients of the existence of an immigration detainer on that individual or that individual's status in removal proceedings, including removal, voluntary departure, or custodial status/location. Disclosure of that individual's Alien Registration Number (A-Number) and country of birth is also authorized to facilitate use of the ICE Online Detainee Locator System by the aforementioned individuals and agencies. This routine use does not authorize disclosure to bail bond companies or agents.

FF. To appropriate federal, state, local, tribal, foreign or international criminal justice agencies, or other authorized users of NCIC, to respond to inquiries regarding a person who is or

may be the subject of an ICE-generated NCIC criminal arrest warrant or immigration lookout record.

GG. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities behind locked doors. Electronic records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Records may be retrieved by personal, biographic, or biometric identifiers such as name, date of birth, place of birth, address, A-Number(s), FBI criminal history number(s), Social Security Number, Fingerprint Identification Number, and passport number.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer systems containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

ICE is seeking approval for a records retention schedule for the records described in this system of records. ICE proposes to maintain the IAQ and IAR records pertaining to criminal biometric and biographic immigration status checks and pertaining to National Sex Offender Registrants for seventy-five (75) years. The IAQ and IAR records pertaining to non-criminal biometric and biographic immigration queries will be kept for thirty (30) years. Records pertaining to Brady Act, special security event, and OPM checks will be kept for five (5) years from the date an immigration status determination is made and an IAR returned, after which the records will be deleted from the ACRIMe system. ICE proposes to maintain NCIC Module records (containing the underlying basis for the ICE-generated NCIC record) for 75 years from the date the record is removed from NCIC. ICE also proposes to maintain Communication Center Module records containing NCIC Hit Confirmation calls for 75 years and follow-up calls to IARs for the time period consistent with the type of query conducted. Additionally, ICE proposes to maintain tips and suspicious activity reporting in the Communications Center Module for ten (10) years from the date of the tip.

SYSTEM MANAGER AND ADDRESS:

Unit Chief, Law Enforcement Support Center, U.S. Immigration and Customs Enforcement, 188 Harvest Lane, Williston, VT 05495.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, ICE will consider individual requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to ICE's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, U.S. Department of Homeland Security, 245 Murray Drive SW., Building 410, STOP–0655, Washington, DC 20528–0655.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. § 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should:

- Explain why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created; and
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records.

If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without the above information, the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are obtained from ICE and other federal, state, local, tribal, foreign, and international criminal justice agencies (e.g., law enforcement agencies, investigators, prosecutors, correctional institutions, police departments, and parole boards).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Pursuant to 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from subsections (c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f); and (g) of the Privacy Act. In addition, the system has been exempted from subsections (c)(3), (d), and (e)(1), (4)(G), (4)(H), and (f) pursuant to 5 U.S.C. 552a(k)(2). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c), and (e) and have been published in the **Federal Register** as additions to Title 28, Code of Federal Regulations (28 CFR 16.99). In addition, to the extent a record contains information from other exempt systems of records, ICE will rely on the exemptions claimed for those systems.

Dated: January 24, 2013.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2013–03377 Filed 2–13–13; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0087]

Agency Information Collection Activities: Application for Citizenship and Issuance of Certificate Under Section 322, Form N–600K; Revision of a Currently Approved Collection

ACTION: 30-Day Notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on December 3, 2012, at 77 FR 71609, allowing for a 60-day public comment period. USCIS received two public comment submissions in connection with the 60-day notice.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until March 18, 2013. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be directed to the OMB USCIS Desk Officer via email at *oira_submission@omb.eop.gov.* The comments submitted to the OMB USCIS Desk Officer may also be submitted to DHS via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2007–0019 or via email at *uscisfrcomment@uscis.dhs.gov.* All submissions received must include the agency name and the OMB Control Number 1615–0087.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including 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.

Overview of this Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Citizenship and Issuance of Certificate Under Section 322.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form N–600K; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. This form provides an organized framework for establishing the authenticity of an applicant's eligibility and is essential for providing prompt, consistent and correct processing of such applications for citizenship under section 322 of the Immigration and Nationality Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 3,242 responses at 2 hours and 5 minutes (2.083 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 6,753 annual burden hours.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2134; Telephone 202–272–8377.

Dated: February 8, 2013.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2013–03382 Filed 2–13–13; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–C–11]

Notice of Submission of Proposed Information Collection to OMB HOME Investment Partnerships Program: Correction

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice; Correction.

SUMMARY: On February 8, 2013, at 77 FR 9407 HUD published a notice of submission of proposed Information Collection to OMB entitled ''HOME Investment Partnerships Program.'' This document corrects the Form Numbers.

Correction

Form Numbers: HUD 40093, SF 1199A, HUD 27055, HUD 40107, HUD 401107A.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov.* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

Dated: February 8, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–03473 Filed 2–13–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

[NPS–WASO–CONC–12180; PPMVSCS1Y.Y00000; PPWOBSADC0]

Notice of Public Meeting: Concessions Management Advisory Board

AGENCY: National Park Service, Interior.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act that the 26th meeting of the Concessions Management Advisory Board (the Board) will be held as indicated below.

DATES: The meeting will be held March 20, 2013, at the Four Points by Sheraton, 1201 K Street NW., Washington, DC 20005, beginning at 9 a.m. Members of the public are invited to attend. A public comment period will be held.

FOR FURTHER INFORMATION CONTACT: Erica Chavis, National Park Service, Commercial Services Program, 1201 Eye Street NW., Washington, DC 20005, Telephone: 202/513–7156.

SUPPLEMENTARY INFORMATION: The Board was established by Title IV, Section 409 of the National Parks Omnibus Management Act of 1998, November 13, 1998 (Pub. L. 105–391). The purpose of the Board is to advise the Secretary and the National Park Service on matters relating to management of concessions in the National Park System. The members of the Advisory Board are: Dr. James J. Eyster, Ms. Ramona Sakiestewa, Mr. Richard Linford, and Ms. Michele Michalewicz.

Topics that will be presented during the meeting include:

- General Commercial Services Program Updates
- Concession Contracting Status Update
- Standards, Evaluations, and Rate Approval Project Update
- Simplifying Contract Management and the Proposal Process
- Incentive Programs for Concessioners
- Innovative Visitor Services
- Public Comment—Limited to 3 minutes per person

The meeting will be open to the public, however, facilities and space for accommodating members of the public are limited, and persons will be accommodated on a first-come-first-served basis.

Assistance to Individuals With Disabilities at the Public Meeting

The meeting site is accessible to individuals with disabilities. If you plan to attend and will require an auxiliary aid or service to participate in the meeting (e.g., interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice at least 2 weeks before the scheduled meeting date. Attempts will be made to meet any request(s) we receive after that date, however, we may not be able to make the requested auxiliary aid or service available because of insufficient time to arrange for it.

Anyone may file with the Board a written statement concerning matters to be discussed. The Board may also permit attendees to address the Board, but may restrict the length of the presentations, as necessary to allow the Board to complete its agenda within the allotted time. Such requests should be made to the Director, National Park Service, Attention: Chief, Commercial Services Program, at least 7 days prior to the meeting. Draft minutes of the meeting will be available for public inspection approximately 6 weeks after the meeting, at the Commercial Services Program office located at 1201 Eye Street NW., 11th Floor, Washington, DC.

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: February 7, 2013.

Lena McDowall,

Associate Director, Business Services.

[FR Doc. 2013–03455 Filed 2–13–13; 8:45 am]

BILLING CODE 4312–53–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

List of Allottees or Heirs Determined To Receive Monetary Compensation Under the White Earth Reservation Land Settlement Act of 1985, as Amended

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: Pursuant to Section 8(c) of the White Earth Land Settlement Act of 1985 (the Act), Public Law 99–264 (100 Stat. 61), as amended this notice lists individuals whose whereabouts are unknown. Therefore as described in the Act undeliverable monetary compensation payments which have been determined to fall within the scope of sections 4(a), 4(b), or 5(c) of the Act are being published.

FOR FURTHER INFORMATION CONTACT: Patricia L. Olby, Superintendent, Minnesota Agency, Bureau of Indian Affairs, 522 Minnesota Ave., Bemidji, Minnesota 56601, Telephone (218) 751–2011.

SUPPLEMENTARY INFORMATION: The White Earth Reservation Land Settlement Act of 1985, Public Law 99–264 (100 Stat. 61) as amended by Public Law 100–153 (101 Stat. 886), Public Law 100–212 (101 Stat. 1433), and Public Law 101–301 (104 Stat. 210), provides for alternative methods of resolving disputes relative to the title to certain allotments for which trust patents were issued to White Earth Chippewa Indians. Section 4(a) and 4(b) of the Act define circumstances by which the title to an allotment may have been taken or transferred through questionable means during the trust period. The Act authorizes the Secretary of the Interior to: (1) Identify the allotments or interest therein which were taken or transferred under identified circumstances, (2) determine the individuals entitled to compensation pursuant to the Act, and (3) ascertain the amount of compensation to which each such individual is entitled.

In addition, section 5(c) of the Act provides that the White Earth Band of Chippewa Indians shall be compensated for allotments which were granted to individuals who had died prior to the selection dates of their respective allotments.

Under Section 8(a) of the Act, the compensation for the taking or transfer of an allotment or interest is to be based on the fair market value of the allotment or interest therein as of the date of such taking or transfer, less any consideration actually received at the time. The compensation to be paid under the Act shall include interest compounded annually at 5 percent from the date of the questionable taking or transfer, until March 24, 1986, and at the general rate of interest earned by Department of the Interior funds thereafter. The Secretary is authorized to issue written notices of compensation determination for the allottees or heirs entitled thereto. Such notice shall describe the basis for the Secretary's determination, the process whereby such compensation was determined, the method of payment,

and the applicable time limits for judicial review of the determination. Any individual who has already elected to file suit in the Federal District Court for the District of Minnesota to seek the recovery of title to an allotment or interest therein, or damages, is barred under section 6(c) from receiving any compensation under the Act.

The Secretary shall give written notice only to those allottees or heirs whose addresses can be ascertained by reasonable and diligent efforts; otherwise such notice shall be given by publication in the **Federal Register**.

The Secretary's administrative determination of the appropriate amount of compensation computed pursuant to the provisions of the Act may be judicially reviewed pursuant to the Administrative Procedure Act not later than one hundred and eighty days after the issuance of notice as aforesaid; after such time the Secretary's determination shall be conclusive and all judicial reviews shall be barred. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Minnesota.

The Secretary of the Interior shall then make a diligent effort to locate each allottee or heir; however, if after two years from the date on which a determination becomes conclusive an allottee or heir cannot be located the Secretary of the Interior shall declare the amount owing to such allottee or heir forfeit.

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

Dated: February 5, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

Instruction Sheet

There are four (4) columns containing the following;

English Name: English names of the allottees and/or heir, including given name, middle initial, middle name, maiden name, married name, and other English names.

Ojibway Name: The name of the allottee and/or heir in Ojibway, the native language of the White Earth Band of the White Earth Band of Chippewa Indians. The names are shown with phonetic spellings.

Claim Number: Each questionable taking or transfer has been assigned a 10, 11 or 12 Character Issue Number. In every instance, the first six characters F53408, are identical and denote the Midwest Regional Office, Minnesota Agency and White Earth Indian Reservation. The last four, five or six characters identify the specific taking or transfer.

Heirship Level: All allottees and/or heirs will be assigned a one to eight character heirship level. This entry is a combination of alphabet and numeral characteristics define each undivided interest inherited.

If you wish further information about allotments or interest therein which are contained in this list, call or write the WELSA Project office in care of the Bureau of Indian Affairs. The address and telephone number are indicated in the **FOR FURTHER INFORMATION CONTACT** section of this document. Be sure to include the complete Issue Number in any correspondence with the Bureau of Indian Affairs.

Notice to Individuals Entitled to Compensation Determination Under the White Earth Reservation Land Settlement Act of 1985

English name	Ojibway name	Issue No.	Heirship
Bellanger-Knorr, Laurie Kay	None	F5340800003	S3
Benford, Paulein	None	F534082135	B1D
Brown, Gerda Herta	None	F534080320	A
Bush, Jr., Charles Eugene/John	None	F534082074	A1A1C
Spadino, Ernest Ryan Butler	None	F534080852	A5A3E
Spadino, Ernest Ryan Butler	None	F534080852	A1C5
Spadino, Ernest Ryan Butler	None	F534080852	A1G
Spadino, Ernest Ryan Butler	None	F534080852	A5A7
Christianson, Renee Jeanette	None	F534080436	A26D6
Christianson, Renee Jeanette	None	F534080436A	A26D6
Christianson, Renee Jeanette	None	F534080436B	A26D6
Croud, Kim Laurie Buckanaga	None	F534080337	D6B
Dalve, Richard Dean	None	F534080591	G4
Dalve, Richard Dean	None	F534080591	A6D
Dalve, Richard Dean	None	F534080591	B4D
Dalve, Richard Dean	None	F534080591	D5D
Dalve, Richard Dean	None	F534080591	A1D4
Dalve, Richard Dean	None	F534080591	A3E4
Dalve, Richard Dean	None	F534080591	A3A4D
Dalve, Richard Dean	None	F534080591	D1D4
Estey, Charles Edsel	None	F534080891	A1F22
Estey, Denise Claire Bond	None	F534080891	A1F21
Fox, James	None	F534081226	A1A
Fox, James	None	F534081226	A3
Fox, James	None	F534081226	A11A1
Fox, James	None	F534081226	A6A1
Fox, James	None	F534081226	A4A
Fox, James	None	F534081226	A1B1
Fox, James	None	F534081226	A11A2A
Fox, James	None	F534081226	A6A2A
Gunino, Claudio Godinez	None	F534081265	D3A
Gunino, Cladio Godinez	None	F534081278B	H1D3A
Hafner, Michael William	None	F534080372	A20
Havron, David	None	F534082115	A3H
Havron, David	None	F534082115A	A3H
Havron, David	None	F534082106	C1C8
Havron, David	None	F534080996	A3A3H
Havron, David	None	F534080996A	A3A3H

English name	Ojibway name	Issue No.	Heirship
Volz, Tammy Hight	None	F534081010	B8B
Volz, Tammy Hight	None	F534081010A	B8B
Hill, Robert Dean	None	F534081211	C11
Hill, Robert Dean	None	F534081211	L
Kegg, Darren Dean	None	F534081786	A2B5
Kegg, Darren Dean	None	F534081786	A3B2E
Kegg, Darren Dean	None	F534081786	C2E
Kegg, Darren Dean	None	F534081786	D2B5
Kegg, Darren Dean	None	F534081786	A6Q
Kegg, Darren Dean	None	F534081786	D5Q
Kegg, Darren Dean	None	F534081786	A3E17
Laframboise, Antoine Kevin	None	F534081015	A1C1Q4
Laframboise, Antoine Kevin	None	F534081015	A1D1A17D
Laframboise, Lyle E	None	F534081015	A1C1Q1
Laframboise, Lyle E	None	F534081015	A1D1A17A
Madison, Anthony Garrett	None	F534080969	K7
Madison, Anthony Garrett	None	F534080969	G4G
McGee, Darlene Kaye	None	F534080600	A4A2
McGee, Darlene Kaye	None	F534080600	A4C
McGee, Darlene Kaye	None	F534080600	A2G
McGee, Darlene Kaye	None	F534080600A	A4A2
McGee, Darlene Kaye	None	F534080600A	A4C
McGee, Darlene Kaye	None	F534080600A	A2G
Patrick, Alfred Darren	None	F534080790	L2
Patrick, Alfred Darren	None	F534080790A	L2
Peabody, Rebecca Beatrice	None	F534080891	A1F11C
Persinger, Lincoln Lynn	None	F534081226	A1D6
Persinger, Lincoln Lynn	None	F534081226	A6A4F
Persinger, Lincoln Lynn	None	F534081226	A7F
Persinger, Lincoln Lynn	None	F534081226	A11A4F
Persinger, Lincoln Lynn	None	F534081226	A4C6
Persinger, Lincoln Lynn	None	F534081226	A11A2C6
Persinger, Lincoln Lynn	None	F534081226	A6A2C6
Persinger, Lincoln Lynn	None	F534081226	A1B3F
Peterson, Wendy Lou	None	F534080443	D1B2
Peterson, Wendy Lou	None	F534080443A	D1B2
Quarles, Gary Duane	None	F534081872	I4A
Quarles, Gary Duane	None	F534081872	I1A1
Roberts, Tracy	None	F534081202	A1A2C2
Roberts, Tracy	None	F534081202	B1A1B3B
Roberts, Tracy	None	F534081202	A1A2A8
Roberts, Tracy	None	F534081202	B1A1B1H
Roberts, Tracy	None	F534081202A	A1A2C2
Roberts, Tracy	None	F534081202A	B1A1B3B
Roberts, Tracy	None	F534081202A	A1A2A8
Roberts, Tracy	None	F534081202A	B1A1B1H
Shaugobay, Janice Marie	None	F534081270	A2B16D
Shaugobay, Janice Marie	None	F534081270	A2B18
Shaugobay, Janice Marie	None	F534081270A	A2B16D
Shaugobay, Janice Marie	None	F534081270A	A2B18
Shaugobay, Ruth Ann	None	F53481270	A2B16C
Shaugobay, Ruth Ann	None	F53481270A	A2B16C
Simmons, Muriel Susan	None	F534080053	B3C
Simmons, Muriel Susan	None	F534080043	F2C
Simmons, Muriel Susan	None	F534080043	E1B2C
Simmons, Muriel Susan	None	F534080043	E4B3
Simmons, Muriel Susan	None	F534080043	B2B3
Swanson, Jr., Richard D	None	F534080834	A7A
Thomas, John Charles	None	F534080517	B6C1A
Thomas, John Charles	None	F534080123I	B1C3A
Thomas, John Charles	None	F534080123I	B1D1A
Thomas, John Charles	None	F534080123I	F3A1
Thomas, John Charles	None	F534080123I	G1A
Thomas, John Charles	None	F534080123I	A4A1
Thomas, John Charles	None	F534080123I	A3C1A

[FR Doc. 2013–03457 Filed 2–13–13; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–10756, AA–11061, AA–10764, AA–10765, AA–10766, AA–11083; LLAK–944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that the Bureau of Land Management (BLM) will issue an appealable decision to Chugach Alaska Corporation. The decision will approve conveyance of the surface and subsurface estates in certain lands pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq*). The lands are located south of Tatitlek, Alaska, and contain 65.05 acres. Notice of the decision will also be published four times for four consecutive weeks in the *Anchorage Daily News.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

2. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until March 18, 2013 to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at 907–271–5960 or by email at *ak.blm.conveyance@blm.gov.* Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Dina L. Torres,

Land Transfer Resolution Specialist, Branch of Alaska Land Transfer.

[FR Doc. 2013–03439 Filed 2–13–13; 8:45 a.m.]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–6980–C; LLAK944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision will be issued by the Bureau of Land Management (BLM) to Huna Totem Corporation. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*). The subsurface estate in these lands will be conveyed to Sealaska Corporation when the surface estate is conveyed to Huna Totem Corporation. The lands are in the vicinity of Hoonah, Alaska, and are located in:

Copper River Meridian, Alaska

T. 43 S., R. 62 E.,
Sec. 33.
Containing 8.51 acres.

Notice of the decision will also be published four times for four consecutive weeks in the *Juneau Empire.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

2. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until March 18, 2013 to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at 907–271–5960 or by email at *ak.blm.conveyance@blm.gov.* Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Dina L. Torres,

Land Transfer Resolution Specialist, Division of Lands and Cadastral.

[FR Doc. 2013–03440 Filed 2–13–13; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCON06000 L16100000.DP0000]

Notice of Meetings, Dominguez-Escalante National Conservation Area Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM), Dominguez-Escalante National Conservation Area Advisory Council (Council) will meet as indicated below.

DATES: Meetings will be held on April 3, 2013, May 1, 2013, and May 29, 2013. All meetings will begin at 3 p.m. and will normally adjourn at 6 p.m. Any changes in the duration of the meetings will be posted on the Dominguez-Escalante Resource Management Plan Web site at *http://www.blm.gov/co/st/en/nca/denca/denca_rmp.html.* Field trips may be scheduled as well. Notice of field trips will also be posted online.

ADDRESSES: The meeting on April 3 will be held at the Mesa County Courthouse Annex, Multi-Purpose Room, 544 Rood

Avenue, Grand Junction, CO. The meeting on May 1 will be held at the Delta County Courthouse, Room 234, 501 Palmer Street, Delta, CO. The meeting on May 29 will be held at the Mesa County Courthouse Annex, Training Room A, 544 Rood Avenue, Grand Junction, CO.

FOR FURTHER INFORMATION CONTACT: Katie Stevens, Advisory Council Designated Federal Official, 2815 H Road, Grand Junction, CO 81506; phone: (970) 244–3049; email: *kasteven@blm.gov*.

SUPPLEMENTARY INFORMATION: The 10-member Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with the resource management planning process for the Dominguez-Escalante National Conservation Area and Dominguez Canyon Wilderness. Topics of discussion during the meeting may include informational presentations from various resource specialists working on the resource management plan, as well as Council reports related to the following topics: Recreation, fire management, land-use planning process, invasive species management, travel management, wilderness, cultural resource management, and other resource management topics of interest to the Council that were raised during the planning process. These meetings are anticipated to occur monthly. Dates, times and agendas for additional meetings may be determined at future Advisory Council Meetings and will be published in the **Federal Register** and announced through local media and on the BLM's Web site for the Dominguez-Escalante planning effort, *www.blm.gov/co/st/en/nca/denca/denca_rmp.html*. These meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will have time allocated at the beginning and end of the meeting for hearing public comments. Depending on the number of people wishing to comment and time available, the time for individual oral comments may be limited at the discretion of the chair.

Helen M. Hankins,

BLM Colorado State Director.

[FR Doc. 2013–03425 Filed 2–13–13; 8:45 am]

BILLING CODE 4310–JB–P

INTERNATIONAL TRADE COMMISSION

[Docket No. 2938]

Certain Integrated Circuit Devices and Products Containing the Same; Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Integrated Circuit Devices and Products Containing the Same,* DN 2938; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Acting Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and 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 has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Tela Innovations, Inc. on February 8, 2013. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain integrated circuit devices and products containing the same. The complaint names as respondents HTC Corporation of Taiwan; HTC America, Inc. of Bellevue, WA; LG Electronics, Inc. of Korea; LG Electronics U.S.A., Inc. of Englewood Cliffs, NJ; LG Electronics MobileComm U.S.A., Inc. of San Diego, CA; Motorola Mobility LLC of Libertyville, IL; Nokia Corporation (Nokia Oyj) of Finland; Nokia, Inc. of Sunnyvale, CA; Pantech Co., Ltd. of Korea and Pantech Wireless Inc. of Atlanta, GA.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) Identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) Indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) Explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by

noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 2938'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: February 8, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–03442 Filed 2–13–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–488 and 731–TA–1199–1200 (Final)]

Large Residential Washers From Korea and Mexico

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from Korea of large residential washers that the U.S. Department of Commerce (Commerce) has determined are subsidized by the Government of Korea and sold in the United States at less than fair value (LTFV). The Commission further determines that an industry in the United States is materially injured by reason of imports from Mexico of large residential washers that the Commerce has determined are sold in the United States at LTFV. The products subject to these investigations are provided for in subheading 8450.20.00 of the Harmonized Tariff Schedule of the United States, and imported under statistical reporting number 8450.20.0090. Products subject to these investigations may also be imported under HTS subheadings 8450.11.00, 8450.90.20 or 8450.90.60.

Background

The Commission instituted these investigations effective December 30, 2011, following receipt of a petition filed with the Commission and Commerce by Whirlpool Corporation, Benton Harbor, MI. The final phase of the investigations was scheduled by the Commission following notification of a preliminary determination by Commerce that imports of large residential washers from Korea were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and that imports of large residential washers from Korea and Mexico were sold at LTFV within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on August 24, 2012 (77 FR 51569). The hearing was held in Washington, DC, on December 11, 2012, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on February 8, 2013. The views of the Commission are contained in USITC Publication 4378 (February 2013), entitled *Certain Large Residential Washers From Korea and Mexico: Investigation Nos. 701–TA–488 and 731–TA–1199–1200 (Final).*

By order of the Commission.

Issued: February 8, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–03422 Filed 2–13–13; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

DEPARTMENT OF JUSTICE

Task Force on Research on Violence Against American Indian and Alaska Native Women; Meeting

AGENCY: Office on Violence Against Women, United States Department of Justice.

ACTION: Notice of Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of the forthcoming public meeting of the Task Force on Research on Violence Against American Indian and Alaska Native Women(hereinafter ''the Task Force'').

DATES: The meeting will take place on March 7, 2013 from 8:30 a.m. to 5:00 p.m. and March 8 from 8:30 a.m. to 12:30 p.m.

ADDRESSES: The meeting will take place at the Office of Justice Programs, U.S. Department of Justice, 810 7th Street NW., 3rd Floor Ballroom, Washington, DC 20531. The public is asked to pre-register by March 1, 2013 for the meeting due to security considerations and so that there is adequate space (see below for information on pre-registration).

FOR FURTHER INFORMATION CONTACT: Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W.121, Washington, DC 20530; by telephone at: (202) 514–8804; email: *Lorraine.edmo@usdoj.gov;* or fax: (202) 307–3911. You may also view information about the Task Force on the Office on Violence Against Women Web site at: *http://www.ovw.usdoj.gov/section904-taskforce.html.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. Title IX of the Violence Against Women Act of 2005 (VAWA 2005) requires the Attorney General to establish a Task Force to assist the National Institute of Justice (NIJ) to develop and implement a program of research on violence against American Indian and Alaska Native women, including domestic violence, dating violence, sexual assault, stalking, and murder. The program will evaluate the effectiveness of the Federal, state, and tribal response to violence against Indian women, and will propose recommendations to improve the government response. The Attorney General, acting through the Director of the Office on Violence Against Women, established the Task Force on March 31, 2008.

A meeting previously scheduled for October 30 and 31, 2012, and previously

announced in the **Federal Register**, was cancelled due to extreme weather conditions. The March 7–8 meeting will include an update on NIJ's program of research, an overview of NIJ's Federal Response Study, an overview of the Center for Disease Control's 2010 General Population National Intimate Partner and Sexual Violence Surveillance Study (NISVS) and NIJ's American Indian and Alaska Native NISVS Oversample Study, an overview of NIJ's proposed sampling plan for a baseline study, and a presentation on refinement and field implementation of the Tribal Study of Public Safety and Public Health Issues Facing American Indian and Alaska Native Women as well as facilitated Task Force member discussion. In addition, the Task Force is also welcoming public oral comment at this meeting and has reserved an estimated 15 minutes on March 7 and on March 8 from 11:45 p.m. to 12:00 p.m. for this purpose. Members of the public wishing to address the Task Force must contact Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W.121, Washington, DC 20530; by telephone at: (202) 514–8804; email: *Lorraine.edmo@usdoj.gov;* or fax: (202) 307–3911. The meeting will take place on March 7, 2013 from 8:30 a.m. to 5:00 p.m. and will include a lunch break and on March 8 from 8:30 a.m. to 12:30 p.m. Time will be reserved for public comment from 11:45 a.m. to 12:00 p.m. on March 7 and 8. See the section below for information on reserving time for public comment.

Access: This meeting will be open to the pubic but registration on a space available basis and for security reasons is required. All members of the public who wish to attend must register in advance of the meeting by March 1, 2013 by contacting Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, by email: *Lorraine.edmo@usdoj.gov;* or fax: (202) 307–3911. All attendees will be required to sign in and be processed through Security at the Lobby Visitors Desk. Please bring photo identification and allow extra time prior to the start of the meeting.

All members of the press who wish to attend and/or record any part of the meeting must register in advance of the meeting by March 1, 2013 by contacting Lorraine Edmo as noted above. In addition to being processed through Security at the Lobby Visitors Desk, all members of the press are required to sign in at meeting registration and must present government-issued photo I.D. (such as a driver's license) as well as valid media credentials. Please allow extra time prior to the start of the meeting for registering.

The meeting site is accessible to individuals with disabilities. Individuals who require special accommodation in order to attend the meeting should notify Lorraine Edmo no later than March 1, 2013.

Written Comments: Interested parties are invited to submit written comments by March 1, 2013 to Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W.121, Washington, DC 20530 by mail; or by email: *Lorraine.edmo@usdoj.gov;* or by fax: (202) 307–3911.

Public Comment

Persons interested in participating during the public comment period of the meeting are requested to reserve time on the agenda by contacting Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, by email: *Lorraine.edmo@usdoj.gov;* or fax: (202) 307–3911 by March 1, 2013. Requests must include the participant's name, organization represented, if appropriate, and a brief description of the subject of the comments. Each participant will be permitted approximately 3 to 5 minutes to present comments, depending on the number of individuals reserving time on the agenda. Participants are also encouraged to submit written copies of their comments at the meeting. Comments that are submitted to Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W.121, Washington, DC 20530 by mail; by email: *Lorraine.edmo@usdoj.gov;* or fax: (202) 307–3911 before March 1, 2013 will be circulated to Task Force members prior to the meeting.

Given the expected number of individuals interested in presenting comments at the meeting, reservations should be made as soon as possible. Persons unable to obtain reservations to speak during the meeting are encouraged to submit written comments, which will be accepted at the meeting location or may be mailed to the attention of Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 145 N Street NE., Suite 10W.121, Washington, DC 20530.

Dated: February 7, 2013.

Bea Hanson,

Acting Director, Office on Violence Against Women.

[FR Doc. 2013–03454 Filed 2–13–13; 8:45 am]

BILLING CODE 4410–EX–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Mine Rescue Teams, Arrangements for Emergency Medical Assistance, and Arrangements for Transportation for Injured Persons

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, ''Mine Rescue Teams, Arrangements for Emergency Medical Assistance, and Arrangements for Transportation for Injured Persons,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before March 18, 2013.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain*, on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR is to re-authorize existing information collection requirements supporting regulations 30 CFR part 49 regarding the

availability of mine rescue teams, alternate mine rescue capability for small and remote mines and mines with special mining conditions, inspection and maintenance records of mine rescue equipment and apparatus, physical requirements for team members and alternates, and experience and training requirements for team members and alternates. Mine operators, miners, and the MSHA use this information to formulate an appropriate rescue capability within the guidelines set forth in these standards.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0078. The current approval is scheduled to expire on February 28, 2013; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on October 19, 2012 (77 FR 64360).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0078. The OMB is particularly interested in comments that:

- 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;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- 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, e.g., permitting electronic submission of responses.

Agency: DOL–MSHA.

Title of Collection: Mine Rescue Teams, Arrangements for Emergency Medical Assistance, and Arrangements for Transportation for Injured Persons.

OMB Control Number: 1219–0078.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 254.

Total Estimated Number of Responses: 20,043.

Total Estimated Annual Burden Hours: 10,111.

Total Estimated Annual Other Costs Burden: $309,067.

Dated: February 8, 2013.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2013–03404 Filed 2–13–13; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Amendment to the Information Collection Requirements of Prohibited Transaction Exemption 77–4 for Certain Transactions Between Investment Companies and Employee Benefit Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (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 public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Employee Benefits Security Administration (EBSA) is soliciting comments on the proposed amendment to the information collection request (ICR) contained in Prohibited Transaction Exemption 77–4 that is described below. A copy of the ICR may be obtained by contacting the office listed in the **ADDRESSES** section of this notice. ICRs also are available at reginfo.gov (*http://www.reginfo.gov/public/do/PRAMain*).

DATES: Written comments must be submitted to the office shown in the **ADDRESSES** section on or before April 15, 2013.

ADDRESSES: G. Christopher Cosby, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5711, Washington, DC 20210, (202) 693–8410, FAX (202) 693–4745 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

Prohibited Transaction Exemption (PTE) 77–4 provides relief from the restrictions of section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986, as amended (the Code), for an employee benefit plan's purchase or sale of shares of an open-end investment company registered under the Investment Company Act of 1940 (mutual fund) when an investment advisor for the mutual fund or its affiliate is: (1) A plan fiduciary; and (2) not an employer of employees covered by the plan.

Section II(d) of PTE 77–4 contains certain conditions for the exemptive relief and provides, in pertinent part, that:

> A second fiduciary with respect to the plan, who is independent of and unrelated to the fiduciary/investment adviser or any affiliate thereof, receives a current prospectus issued by the investment company, and full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including the nature and extent of any differential between the rates of such fees, the reasons why the fiduciary/investment adviser may consider such purchases to be appropriate for the plan, and whether there are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations.

The conditions impose ICRs that are subject to the PRA. This notice requests public comment on the Department's proposed revision to the ICRs that would provide that delivery of a ''summary prospectus'' may be used to satisfy the condition in section II(d) of PTE 77–4 requiring the delivery of a mutual fund's prospectus to the second fiduciary if the summary prospectus meets the requirements of the Securities and Exchange Commission's (SEC)

revised disclosure provisions for mutual funds including a summary prospectus rule that were published in 2009.[1] Pursuant to the SEC's revised disclosure provisions, mutual funds also are required to send the full prospectus to the investor upon an investor's request [2] and to provide the full prospectus on-line at a specified Internet site.[3]

An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a valid OMB control number. A summary of the current burden estimates for the revised ICR follows:

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Class Exemption 77–4 for Certain Transactions Between Investment Companies and Employee Benefit Plans.

Type of Review: Amendment to a currently approved collection of information.

OMB Number: 1210–0049.

Affected Public: Business or other for-profit; Not-for-profit institutions.

Respondents: 700.

Responses: 363,000.

Estimated Total Burden Hours: 33,600.

Estimated Total Burden Cost (Operating and Maintenance): $213,000.

II. Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the collections of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- 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, e.g., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICRs for OMB approval of the extension of the information collection; they will also become a matter of public record.

Dated: February 8, 2013.

Joseph S. Piacentini,

Director, Office of Policy and Research, Employee Benefits Security Administration.

[FR Doc. 2013–03398 Filed 2–13–13; 8:45 am]

BILLING CODE 4510–29–P

[1] See 74 FR 4546 (January 26, 2009). The final rule adopted, among other things, parallel amendments to SEC Form N–1A (the registration form for mutual funds) and to Rule 498 (which includes the content requirements for a summary prospectus).

[2] 17 CFR 230.498(f).

[3] 17 CFR 230.498.

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Number D–11657]

ZRIN EBSA–2012–0015

Proposed Amendment to Prohibited Transaction Exemption 2006–06 (PTE 2006–06) for Services Provided in Connection with the Termination of Abandoned Individual Account Plans

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of Extension of Comment Period for Proposed Amendment to PTE 2006–06.

SUMMARY: The Department of Labor (the Department) is extending the comment period for a proposed amendment to PTE 2006–06, a prohibited transaction class exemption issued under the Employee Retirement Income Security Act of 1974 (ERISA). PTE 2006–06 provides an exemption for certain transactions entered into on behalf of individual account pension plans that have been abandoned by their sponsors.

DATES: Written comments and requests for a public hearing must be received by the Department on or before March 18, 2013.

ADDRESSES: All written comments and requests for a public hearing concerning the proposed amendment should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attention: PTE 2006–06 Amendment. Comments may be submitted electronically by using the Federal eRulemaking portal at *www.regulations.gov* (follow instructions for submission of comments). Interested persons are also invited to submit comments and hearing requests to EBSA via email to: *moffitt.betty@dol.gov* or by fax to 202–219–0204 by the end of the scheduled comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments and hearing requests will also be available online at *www.regulations.gov* and *www.dol.gov/ebsa,* at no charge.

All comments will be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information), or confidential business information, that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Chris Motta, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8540 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On December 12, 2012, the Department published a notice of the pendency before the Department of a proposed amendment to PTE 2006–06. The amendment to PTE 2006–06 was proposed in connection with the Department's proposed amendment of regulations relating to the Termination of Abandoned Individual Account Plans, the Safe Harbor for Distributions from Terminated Individual Account Plans, and the Special Terminal Report for Abandoned Plans. PTE 2006–06 provides an exemption from the restrictions of ERISA section 406(a)(1)(A) through (D), ERISA section 406(b)(1) and (b)(2) and from the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of Code section 4975(c)(1)(A) through (E).

The proposed amendment to PTE 2006–06 would expand the definition of a qualified termination administrator (a QTA) to include bankruptcy trustees and certain persons designated by such trustees to act as QTAs. The Department is proposing the amendment because it has determined that, in certain instances, it may be appropriate for a bankruptcy trustee to provide termination services to a plan.

The comment period was scheduled to close on February 11, 2013. Notice of the right to comment was provided in the **Federal Register** on December 12, 2012. However, due to administrative error, a copy of the proposed amendment to PTE 2006–06 was not posted to *www.regulations.gov* until January 22, 2013. Accordingly, the Department is extending the comment

period for the proposed amendment to PTE 2006–06 to March 18, 2013.

Signed at Washington, DC, this 8th day of February, 2013.

Lyssa E. Hall,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2013–03463 Filed 2–13–13; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (13–010)]

NASA Advisory Council; Aeronautics Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Aeronautics Committee of the NASA Advisory Council. The meeting will be held for the purpose of soliciting, from the aeronautics community and other persons, research and technical information relevant to program planning.

DATES: Thursday, February 28, 2013, 9:00 a.m. to 4:00 p.m.; Friday, March 1, 2013, 8:30 a.m.to 12:15 p.m.; Local Times.

ADDRESSES: National Aeronautics and Space Administration Headquarters, Room 6E40, 300 E Street SW., Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Susan L. Minor, Executive Secretary for the Aeronautics Committee, National Aeronautics and Space Administration Headquarters, Washington, DC 20546, (202) 358–0566, or *susan.l.minor@nasa.gov*.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. Any person interested in participating in the meeting by Webex and telephone should contact Ms. Susan L. Minor at (202) 358–0566 for the web link, toll-free number and passcode. The agenda for the meeting includes the following topics:

- Aeronautics Research Mission Directorate (ARMD) Budget Status
- ARMD External Guidance Planning
- ARMD Future Direction
- National Research Council Autonomy Study Planning
- Integrated Systems Research Program Future Direction
- Unmanned Aircraft Systems Subcommittee Outbrief
- ARMD Strategic Implementation Plan

It is imperative that these meetings be held on this date to accommodate the scheduling priorities of the key participants. Attendees will be requested to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. U.S. citizens will need to show a valid, officially-issued picture identification such as driver's license to enter the NASA Headquarters building (West Lobby—Visitor Control Center) and must state that they are attending the NASA Advisory Council Aeronautics Committee meeting in conference room 6E40 before receiving an access badge. All non-U.S. citizens must fax a copy of their passport, and print or type their name, current address, citizenship, company affiliation (if applicable) to include address, telephone number, and their title, place of birth, date of birth, U.S. visa information to include type, number, and expiration date, U.S. Social Security Number (if applicable), Permanent Resident green card number and expiration date (if applicable), and place and date of entry into the U.S., to Susan Minor, NASA Advisory Council Aeronautics Committee Executive Secretary, FAX 202–358–4060, by no less than 8 working days prior to the meeting. Non-U.S. citizens will need to show their Passport or Permanent Resident green card to enter the NASA Headquarters building. For questions, please call Susan Minor at (202) 358–0566.

Susan M. Burch,

Acting Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2013–03343 Filed 2–13–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings; Notice

The National Science Board's *ad hoc* Committee Regarding Recommendations for NSF Director, pursuant to NSF regulations (45 CFR Part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a meeting for the transaction of National Science Board business, as follows:

DATE AND TIME: Wednesday, February 13, 2013 at 4:30 p.m. EST.

SUBJECT MATTER: Discussion of recommendations for the next NSF Director.

STATUS: Closed.

This meeting will be held by teleconference originating at the National Science Board Office, National Science Foundation, 4201Wilson Blvd., Arlington, VA 22230.

Please refer to the National Science Board Web site (*www.nsf.gov/nsb*) for information or schedule updates, or contact: Ann Bushmiller, National Science Foundation, 4201Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7000.

Ann Bushmiller,

NSB Senior Legal Counsel.

[FR Doc. 2013–03650 Filed 2–12–13; 4:15 pm]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings; Notice

The National Science Board, pursuant to NSF regulations (45 CFR Part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of National Science Board business and other matters specified, as follows:

AGENCY HOLDING MEETING: National Science Board (NSF).

DATE AND TIME: February 20, 2013, from 8:00 a.m. to 5:00 p.m., and February 21, from 8:00 a.m. to 11:45 a.m.

PLACE: These meetings will be held at the National Science Foundation, 4201 Wilson Blvd., Rooms 1235 and 1295, Arlington, VA 22230. All visitors must contact the Board Office (call 703–292–7000 or send an email message to *nationalsciencebrd@nsf.gov*) at least 24 hours prior to the meeting and provide name and organizational affiliation. All visitors must report to the NSF visitor desk located in the lobby at the 9th and N. Stuart Streets entrance to receive a visitor's badge.

WEBCAST INFORMATION: The public meetings and public portions of meetings will be webcast. To view the meetings, go to *http://www.tvworldwide.com/events/nsf/130220/* and follow the instructions.

UPDATES: Please refer to the National Science Board Web site *www.nsf.gov/nsb* for additional information. Meeting information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/*.

AGENCY CONTACT: Jennie L. Moehlmann, *jmoehlma@nsf.gov*, (703) 292–7000.

PUBLIC AFFAIRS CONTACT: Dana Topousis, *dtopousi@nsf.gov*, (703) 292–7750.

STATUS: Portions open; portions closed.

Open Sessions

February 20, 2013

8:00–8:05 a.m. (Chairman's introduction)
8:05–8:20 a.m. (Joint CPP/CSB)
9:30–12:30 p.m. (CPP)
9:30–10:30 a.m. (CSB)
1:30–3:00 p.m. (CEH)
3:00–4:00 p.m. (SEI)
4:00–4:45 p.m. (A&O)

February 21, 2013

8:30–10:00 a.m. (TF Administrative Burden)
10:00–11:00 a.m. (Plenary)

Closed Sessions

February 20, 2013

8:20–9:20 a.m. (Joint CPP/CSB)
10:30–11:00 a.m. (CSB)
2:15–4:00 p.m. (CPP)
4:45–5:00 p.m. (A&O)

February 21, 2013

8:00–8:30 a.m. (Plenary executive closed)
11:15–11:45 a.m. (Plenary closed)

MATTERS TO BE DISCUSSED:

Wednesday, February 20, 2013

Committee on Programs and Plans and Committee on Strategy and Budget, Joint Meeting

Open Session: 8:05–8:20 a.m.

- Committee Chairs' Remarks
- Discussion Item: NSF Annual Facilities Plan

Committee on Programs and Plans and Committee on Strategy and Budget, Joint Meeting

Closed Session: 8:20–9:20 a.m.

- Discussion Item: NSF Annual Facilities Plan

Committee on Programs and Plans (CPP)

Open Session: 9:30–12:30 p.m.

- Approval of Open CPP Minutes for December 2012 (NSB/CPP–12–48)
- Committee Chairman's Remarks
- Discussion Item: Review of CPP Charge
- Information Item: Arctic Support Contract—Annual Update (NSB/CPP–13–1)
- Information Item: SAGE/GAGE GEO Proposals
- Information Item: Renewal of Award for Management of the National Center for Atmospheric Research (NCAR)
- Information Item: ALMA Operations Update on Recompetition
- Information Item: Update on the Science of Learning Centers Program
- CPP Program Portfolio Planning—Water; Next Steps and Schedule for Future Program Portfolio Discussions

Committee on Programs and Plans (CPP)

Closed Session: 2:15–4:00 p.m.

- Committee Chairman's Remarks
- Approval of Closed CPP Minutes for December 2012 (NSB/CPP–12–47)
- Continued Discussion on Blue Ribbon Panel Recommendations
- Action Item: National Ecological Observatory Network (NEON) Operations and Maintenance (NSB/CPP–13–3)
- Action Item: Authorization to fund *Sustained-Petascale in Action: Blue Waters Enabling Transformative Science and Engineering* (NSB/CPP–13–4)

Committee on Strategy and Budget (CSB)

Open Session: 9:30–10:30 a.m.

- Committee Chairman's Remarks
- Approval of CSB Open Minutes for December 2012 Meeting (NSB/CSB–12–16)
- NSF FY 2013 Budget Update
- NSF Strategic Plan Update
- Study on Trends in Science Budgets
- Other Committee Business

Committee on Strategy and Budget (CSB)

Closed Session: 10:30–11:00 a.m.

- Committee Chairman's Remarks
- Approval of CSB Closed Minutes for December 2012 Meeting (NSB/CSB–12–17)
- NSF FY 2014 and Future Budget Development

Committee on Education and Human Resources (CEH)

Open Session: 1:30–3:00 p.m.

- Approval of May 4, 2012 Open Meeting Minutes (NSB/CEH–12–6) and February 11, 2013 Open Teleconference Meeting Minutes (NSB/CEH–13–3)
- Introductory Remarks by the Chairman and Vice Chairman
- Graduate Education to Prepare the Future STEM Workforce
- Innovations in Undergraduate STEM Education—Discipline-Based Education Research Report by the National Academy of Sciences; Building Community Support to Implement ''Vision and Change''
- Identification of Other Potential Topics of Committee Interest—Implications and Status of Massively Open Online Courses (MOOCs) for STEM Education and an Update on NSF MOOC-related Activities; Next Steps for Finalizing and Implementing Committee Priorities

Committee on Science & Engineering Indicators (SEI)

Open Session: 3:00–4:00 p.m.

- Chairman's Remarks
- Approval of December Meeting Minutes (NSB/SEI–12–16)
- Update on *Science and Engineering Indicators 2014* Production
- Update on the development of *Science and Engineering Indicators 2014* Mobile Application
- Taking Advantage of Digital Delivery for *Indicators:* Project Update
- Discussion of Potential Topics for Companion(s) to *Indicators 2014*
- Update on Potential NSB Panel Discussion on Research Universities
- Update on the Revised ''STEM Education Data and Trends'' Online Tool
- Chairman's Summary

Committee on Audit and Oversight (A&O)

Open Session: 4:00–4:45 p.m.

- Approval of Minutes of the December 2012 Meeting (NSB/A&O–12–14)
- Committee Chairman's Opening Remarks
- Inspector General's Update
- Chief Financial Officer's Update
- Periodic Review of Committee Charge
- Committee Chairman's Closing Remarks

Committee on Audit and Oversight (A&O)

Closed Session: 4:45–5:00 p.m.

- Committee Chairman's Opening Remarks
- FY 2014 Planning
- Committee Chairman's Closing Remarks

Thursday, February 21, 2013

Plenary Board Meeting

Executive Closed Session: 8:00–8:30 a.m.

- Approval of Executive Closed Session Minutes, December 2012 Meeting (NSB–12–64)
- Approval of Honorary Award Recommendation
- Candidate Site for 2013 Board Retreat and Off-Site Meeting and Visits
- Recommendation on Appointment of NSF Director

Task Force on Administrative Burdens

Open Session: 8:30–10:00 a.m.

- Approval of the January 17, 2013 Teleconference Minutes (NSB/AB–12–64)
- Task Force Chairman's Remarks
- Discussion Item: The Federal Demonstration Partnership's Current Initiatives and Results of the 2012 Faculty Workshop
- Discussion Item: Initiatives of the Research Business Models Interagency Working Group of the Social, Behavioral and Economic Research Subcommittee of the Committee on Science of the National Science and Technology Council
- General Discussion—Data Collection Initiatives, Request for Information; A–81 (Omni Circular); Public Meetings with the Scientific Community

Plenary Board Meeting

Open Session: 10:00–11:00 a.m.

- Approval of Open Session Minutes, December 2012 (NSB–12–64)
- Chairman's Report
- Director's Report
- Open Committee Reports

Plenary Board Meeting

Closed Session: 11:15–11:45 a.m.

- Approval of Closed Session Minutes, December 2012 (NSB–12–65)
- Awards and Agreements/Resolutions—
  - Directorate for Biological Sciences (BIO), Emerging Frontiers Office (EF): Initial Operations for the National Ecological Observatory Network (NEON) (NSB–13–7)
  - Directorate for Computer and Information Science and Engineering (CISE), Division of Advanced Cyberinfrastructure (ACI): Authorization to fund *Sustained-Petascale in Action: Blue Waters Enabling Transformative Science and Engineering* (NSB–13–8)
- Closed Committee Reports

MEETING ADJOURNS: 11:45 a.m.

Ann Bushmiller,

Senior Counsel to the National Science Board.

[FR Doc. 2013–03651 Filed 2–12–13; 4:15 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0029]

Service Contracts Inventory

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is providing for public information its Inventory of Contracts for Services for Fiscal Year (FY) 2012. The inventory includes service contract actions over $25,000 that were awarded in FY 2012.

ADDRESSES: Please refer to Docket ID NRC–2013–0029 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and are publicly available, using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0029. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The Inventory of Contracts for Services for FY 2012 can be accessed under ADAMS accession number ML12362A385. The inventory was published on the NRC Web site at the following location: *http://www.nrc.gov/about-nrc/contracting.html.*
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Lori Konovitz, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–492–3627 or email: *lori.konovitz@nrc.gov.*

SUPPLEMENTARY INFORMATION: In accordance with Section 743 of Division C of the FY 2010 Consolidated Appropriations Act, Public Law 111–117, the NRC is publishing this notice to advise the public of the availability of its FY 2012 Service Contracts Inventory. The inventory provides information on service contract actions over $25,000 that were awarded in FY 2012. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory contains the following data:

1. A description of the services purchased;
2. The total dollar amount obligated for the services under the contract, and the funding source for the contract;
3. The contract type and date of the award;
4. The name of the contractor and place of performance;
5. Whether the contract is a personal services contract; and
6. Whether the contract was awarded on a non-competitive basis.

The NRC will analyze the data in the inventory for the purpose of determining if its contract labor is being used in an effective and appropriate manner and if the mix of federal employees and contractors in the agency is effectively balanced. The NRC developed the inventory by pulling data from the Federal Procurement Data System—Next Generation. The inventory does not include contractor proprietary or sensitive information.

Dated at Rockville, Maryland, this 7th day of February 2013.

For the Nuclear Regulatory Commission.

James C. Corbett,

Director, Division of Contracts, Office of Administration.

[FR Doc. 2013–03435 Filed 2–13–13; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Removal of Confirm Service From the Market-Dominant Product List

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service hereby provides notice that it has filed a request with the Postal Regulatory Commission to remove Confirm® service from the Mail Classification Schedule's Market-Dominant product list.

DATES: *Effective date:* February 14, 2013.

FOR FURTHER INFORMATION CONTACT: John F. Rosato, 202–268–8597.

SUPPLEMENTARY INFORMATION: On February 1, 2013, the United States Postal Service® filed with the Postal Regulatory Commission a request to remove Confirm service from the Mail Classification Schedule's Market-Dominant product list, pursuant to 39 U.S.C. 3642. This request would update the Mail Classification Schedule by

recognizing that the functionality of Confirm service has been incorporated into IMb Tracing™, and all Confirm service subscriptions have expired as of January 21, 2013. Interested persons may comment on, or view documents pertinent to this request at *www.prc.gov,* Docket No. MC2013–38.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–03379 Filed 2–13–13; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68876; File No. SR–NYSE–2013–09]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Exchange Rule 80C To Establish Rules To Comply With the Requirements of the Plan To Address Extraordinary Market Volatility Submitted to the Commission Pursuant to Rule 608 of Regulation NMS

February 8, 2013.

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 January 25, 2013, 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 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 Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 80C to establish rules to comply with the requirements of the Plan to Address Extraordinary Market Volatility submitted to the Commission pursuant to Rule 608 of Regulation NMS. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 amend Exchange Rule 80C to establish rules to comply with the requirements of the Plan to Address Extraordinary Market Volatility submitted to the Commission pursuant to Rule 608 of Regulation NMS under the Act (the ''Plan''). The Exchange proposes to adopt the changes for a pilot period that coincides with the pilot period for the Plan, which is currently scheduled as a one-year pilot to begin on April 8, 2013.

Background

Since May 6, 2010, when the markets experienced excessive volatility in an abbreviated time period, *i.e.,* the ''flash crash,'' the equities exchanges and FINRA have implemented market-wide measures designed to restore investor confidence by reducing the potential for excessive market volatility. Among the measures adopted include pilot plans for stock-by-stock trading pauses [4] and related changes to the equities market clearly erroneous execution rules [5] and more stringent equities market maker quoting requirements.[6] On May 31, 2012, the Commission approved the Plan, as amended, on a one-year pilot basis.[7] In addition, the Commission approved changes to the equities market-wide circuit breaker rules on a pilot basis to coincide with the pilot period for the Plan.[8]

[4] *See, e.g.,* NYSE Rule 80C.

[5] *See, e.g.,* NYSE Rule 128.

[6] *See, e.g.,* NYSE Rule 104(a)(1)(B).

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (Order Approving, on a Pilot Basis, the National Market System Plan To Address Extraordinary Market Volatility).

[8] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–038; SR–BYX–2011–025; SR–BX–2011–068; SR–CBOE–2011–087; SR–C2–2011–024; SR–CHX–2011–30; SR–EDGA–2011–31; SR–EDGX–2011–30; SR–FINRA–2011–054; SR–ISE–2011–61; SR–NASDAQ–2011–131; SR–NSX–2011–11; SR–NYSE–2011–48; SR–NYSEAmex–2011–73; SR–NYSEArca–2011–68; SR–Phlx–2011–129).

The Plan is designed to prevent trades in individual NMS Stocks from occurring outside of specified Price Bands.[9] As described more fully below, the requirements of the Plan are coupled with Trading Pauses to accommodate more fundamental price moves (as opposed to erroneous trades or momentary gaps in liquidity). All trading centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, are required to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the requirements specified in the Plan.[10] As set forth in more detail in the Plan, Price Bands consisting of a Lower Price Band and an Upper Price Band for each NMS Stock are calculated by the Processors.[11] When the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band, the Processors shall disseminate such National Best Bid (Offer) with an appropriate flag identifying it as unexecutable. When the National Best Bid (Offer) is equal to the Upper (Lower) Price Band, the Processors shall distribute such National Best Bid (Offer) with an appropriate flag identifying it as a Limit State Quotation.[12] All trading centers in NMS Stocks must maintain written policies and procedures that are reasonably designed to prevent the display of offers below the Lower Price Band and bids above the Upper Price Band for NMS Stocks. Notwithstanding this requirement, the Processor shall display an offer below the Lower Price Band or a bid above the Upper Price Band, but with a flag that it is non-executable. Such bids or offers shall not be included in the National Best Bid or National Best Offer calculations.[13]

Trading in an NMS Stock immediately enters a Limit State if the National Best Offer (Bid) equals but does not cross the Lower (Upper) Price Band.[14] Trading for an NMS stock exits a Limit State if, within 15 seconds of entering the Limit State, all Limit State Quotations were executed or canceled in their entirety. If the market does not exit a Limit State within 15 seconds, then the Primary Listing Exchange would declare a five-minute trading

[9] Unless otherwise specified, capitalized terms used in this rule filing are based on the defined terms of the Plan.

[10] The Exchange is a Participant in the Plan.

[11] *See* Section (V)(A) of the Plan.

[12] *See* Section VI(A) of the Plan.

[13] *See* Section VI(A)(3) of the Plan.

[14] *See* Section VI(B)(1) of the Plan.

pause pursuant to Section VII of the LULD Plan, which would be applicable to all markets trading the security.[15] In addition, the Plan defines a Straddle State as when the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band and the NMS Stock is not in a Limit State. For example, assume the Lower Price Band for an NMS Stock is $9.50 and the Upper Price Band is $10.50, such NMS stock would be in a Straddle State if the National Best Bid were below $9.50, and therefore non-executable, and the National Best Offer were above $9.50 (including a National Best Offer that could be above $10.50). If an NMS Stock is in a Straddle State and trading in that stock deviates from normal trading characteristics, the Primary Listing Exchange may declare a trading pause for that NMS Stock.

Proposed Amendment to Rule 80C

The Exchange is required by the Plan to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the limit up-limit down and trading pause requirements specified in the Plan. In response to the new Plan, the Exchange proposes to amend its Rules accordingly. The Exchange proposes to add Rule 80C(a) to define that ''Plan'' means the Plan to Address Extraordinary Market Volatility Submitted to the Securities and Exchange Commission Pursuant to Rule 608 of Regulation NMS under the Securities Exchange Act of 1934, Exhibit A to Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012), as it may be amended from time to time. The Exchange proposes to add Rule 80C(a)(2) to state that the Exchange is a Participant in, and subject to the applicable requirements of, the Plan, which establishes procedures to address extraordinary volatility in NMS Stocks. In addition, proposed Rule 80C(a) provides that all capitalized terms not otherwise defined in this Rule shall have the meanings set forth in the Plan or Exchange rules, as applicable.

The Exchange proposes to add Rule 80C(a)(3) to provide that member organizations shall comply with the applicable provisions of the Plan. The Exchange believes that this requirement will help ensure the compliance by its members with the provisions of the Plan as required pursuant to Section II(B) of the Plan.[16]

The Exchange proposes to add Rule 80C(a)(4) to provide that Exchange systems shall not display or execute buy (sell) interest above (below) the Upper (Lower) Price Bands, unless such interest is specifically exempted under the Plan. The Exchange believes that this requirement is reasonably designed to help ensure the compliance with the limit up-limit down and trading pause requirements specified in the Plan, by preventing executions outside the Price Bands as required pursuant to Section VI(A)(1) of the Plan.[17]

The Exchange proposes Rules regarding the treatment of certain trading interest on the Exchange in order to prevent executions outside the Price Bands and to comply with the new LULD Plan. In particular, the Exchange proposes to add Rule 80C(a)(5) that provides that Exchange systems shall reprice and/or cancel buy (sell) interest that is priced or could be executed above (below) the Upper (Lower) Price Band. Any interest that is repriced pursuant to this Rule shall retain its time stamp of original order entry. Specifically, the Exchange proposes the following provisions regarding the repricing and/or canceling of certain trading interest:

- *Market Orders.* If a market order cannot be fully executed at or within the Price Bands, Exchange systems shall display the unexecuted portion of the buy (sell) market order at the Upper (Lower) Price Band.[18]
- *Limit-priced Interest.* Both displayable and non-displayable incoming limit-priced interest to buy (sell) that is priced above (below) the Upper (Lower) Price Band shall be repriced to the Upper (Lower) Price Band. Exchange systems shall also reprice resting limit-priced interest to buy (sell) to the Upper (Lower) Price Band if Price Bands move and the price of resting limit-priced interest to buy (sell) moves above (below) the Upper (Lower) Price Band. If the Price Bands move and the original limit price of repriced interest is at or within the Price Bands, Exchange systems shall reprice such interest to its original limit price.[19]
- *IOC Orders.* If an IOC order cannot be fully executed at or within the Price Bands, Exchange systems shall cancel any unexecuted portion of the IOC Order.
- *DMM Interest.* Exchange systems shall cancel DMM Interest to buy (sell) that is entered manually or via DMM-specific order entry methodology if such interest is priced above (below) the Upper (Lower) Price Band. DMM Interest to buy (sell) that is entered via the same order entry methodology as off-Floor interest shall be repriced pursuant to paragraph (a)(5)(B) of this Rule.
- *Market Pegging Interest.* Market Pegging Interest to buy (sell) shall peg to the specified pegging price or the Upper (Lower) Price Band, whichever is lower (higher).
- *Sell Short Orders.* During a Short Sale Price Test, as set forth in Rule 440B(b), short sale orders priced below the Lower Price Band shall be repriced to the higher of the Lower Price Band or the Permitted Price, as defined in Rule 440B(e).[20]
- *Floor Broker Cross Function.* Exchange systems shall not execute orders crossed pursuant to the process provided for in Supplementary Material .10 to Rule 76, if the price of the proposed cross transaction is outside of the Price Bands.
- *NYBX.* An order to buy (sell) entered into the NYBX Facility pursuant to Rule 1600 that is priced above (below) the Upper (Lower) Price Band shall be rejected. Exchange systems shall also cancel resting orders to buy (sell) in the NYBX Facility if Price Bands move and the price of a resting buy (sell) order moves above (below) the Upper (Lower) Price Band.
- *Original Order Instructions.* Any interest repriced pursuant to Exchange Rule 80C(a) shall return to its original order instructions for purposes of the re-opening transaction following a Trading Pause.

The Exchange believes these provisions are reasonably designed to prevent executions outside the Price Bands as required by the limit up-limit down and trading pause requirements specified in the Plan. The Exchange believes that allowing trading interest that would otherwise execute outside the Prices Bands to reprice and keep its original time stamp helps ensure that trading interest retains its priority while preventing executions in violation with the limit up-limit down and trading pause requirements. The Exchange notes that retention of an original timestamp when interest is repriced occurs only under the operation of this Rule in order to prevent executions outside the Price Bands and to comply

[15] The primary listing market would declare a trading pause in an NMS Stock; upon notification by the primary listing market, the Processor would disseminate this information to the public. No trades in that NMS Stock could occur during the trading pause, but all bids and offers may be displayed. *See* Section VII(A) of the Plan.

[16] *See* Section II(B) of the Plan.

[17] *See* Section VI(A)(1) of the Plan.

[18] If market participants do not want to have their orders repriced to the Price Band, market Participants may cancel the unexecuted portion of the order or submit such order as an IOC order.

[19] *See id.*

[20] Since there is no Permitted Price for short sale exempt orders, short sale exempt orders are treated the same as other orders under this Rule.

with the new LULD Plan and in no other circumstances.[21] To the extent that repricing of trading interest is not practical due to systems restrictions such as in the case of the DMM Interest that is entered manually or via DMM-specific order entry methodology and trading interest entered into the NYBX Facility, the Exchange proposes to cancel the trading interest in order to prevent executions outside the Price Bands. The Exchange will not reprice a Floor Broker Cross that would execute outside the Price Bands because such orders are intended to be crossed at the entered price or not at all. Instead, the Exchange will return the unexecuted orders to the Floor Broker. The Exchange believes that adding certainty to the treatment and priority of trading interest in these situations will encourage market participants to continue to provide liquidity to the Exchange and thus promote a fair and orderly market.

The Exchange proposes Rule 80C(a)(6) that provides that the Exchange systems shall not route buy (sell) interest to an away market displaying a sell (buy) quote that is above (below) the Upper (Lower) Price Band. The Exchange believes that this provision is reasonably designed to prevent an execution outside the Price Bands in a manner that promotes compliance with the limit up-limit down and trading pause requirements specified in the Plan.

In addition, the Exchange proposes Rule 80C(a)(7) that provides that the Exchange may declare a Trading Pause for a NMS Stock listed on the Exchange when (i) the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band and the NMS Stock is not in a Limit State; and (ii) trading in that NMS Stock deviates from normal trading characteristics. An Exchange Floor Official may declare such Trading Pause during a Straddle State if such Trading Pause would support the Plan's goal to address extraordinary market volatility.[22] The Exchange believes that this provision is reasonably designed to comply with Section VII(A)(2) of the Plan.[23]

Consistent with the Plan's requirements for the Exchange to establish, maintain, and enforce policies and procedures that are reasonably designed to comply with the trading pause requirements specified in the Plan, the Exchange also proposes to amend the Rules regarding Trading Pauses to correspond with the LULD Plan. The Exchange proposes to provide that during Phase 1 of the Plan, a Trading Pause in Tier 1 NMS Stocks subject to the requirements of the Plan, shall be subject to Plan requirements and Exchange Rule 80C(b)(2); a Trading Pause in Tier 1 NMS Stocks not yet subject to the requirements of the Plan shall be subject to the requirements in paragraphs (b)(1)–(5) of this Rule; and a Trading Pause in Tier 2 NMS Stocks shall be subject to the requirements set forth in Exchange Rule 80C(b)(1)(B)–(5). The proposed change will allow the Trading Pause requirements in Exchange Rule 80C(b)(1) to continue to apply to Tier 1 NMS Stocks during the beginning of Phase I until they are subject to the Plan requirements. Once the Plan has been fully implemented and all NMS Stocks are subject to the Plan, a Trading Pause under the Plan shall be subject to Exchange Rule 80C(b)(2). These proposed changes are designed to comply with Section VIII of the Plan to ensure implementation of the Plan's requirements.[24]

Finally, the Exchange proposes to amend Rule 1600 to correspond with the changes to Rule 80C. Specifically, the Exchange proposes to provide that pursuant to Rule 80C(a)(50)(H), an order to buy (sell) entered into the NYBX Facility pursuant to Rule 1600 that is priced above (below) the Upper (Lower) Price Band shall be rejected. The NYBX Facility shall also cancel resting orders to buy (sell) in the NYBX Facility if Price Bands move and the price of a resting buy (sell) order moves above (below) the Upper (Lower) Price Band. The Exchange believes that this change will help Users of the NYBX Facility to understand how the requirements of Rule 80C and the LULD Plan apply to such transactions.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act[25] in general, and furthers the objectives of Section 6(b)(5),[26] in particular, in that it 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.

The proposal promotes just and equitable principles of trade and removes impediments to, and perfects the mechanism of, a free and open market and a national market system by ensuring that the Exchange systems will not display or execute trading interest outside the Price Bands as required by the limit up-limit down and trading pause requirements specified in the Plan.

The proposal will also ensure that the trading interest on the Exchange is either repriced to maintain priority or canceled in a manner that promotes just and equitable principles of trade and removes impediments to, and perfects the mechanism of, a free and open market and a national market system. Specifically, the proposal will help allow market participants to continue to trade NMS Stocks within Price Bands in compliance with the Plan with certainty on how certain orders and trading interest will be treated. Thus, reducing uncertainty regarding the treatment and priority of trading interest with the Price Bands should help encourage market participants to continue to provide liquidity during times of extraordinary market volatility that occur during Regular Trading Hours.

The proposal also promotes just and equitable principles of trade and removes impediments to, and perfects the mechanism of, a free and open market and a national market system by ensuring that orders in NMS Stocks are not routed to other exchanges in situations where an execution may occur outside Price Bands, and thereby is reasonably designed to prevent an execution outside the Price Bands in a manner that promotes compliance with the limit up-limit down and trading pause requirements specified in the Plan.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes are being made to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the limit up-limit down and trading pause requirements specified in the Plan, of which other equities exchanges are also Participants of. Other competing equity exchanges are subject to the same limit up-limit down and trading pause requirements specified in the Plan. Thus, the proposed changes will not

[21] The Exchange notes repricing of trading interest under ordinary circumstances outside of this Rule may be different than pursuant to the proposed Rule. For example, repricing of Market Pegging Interest and Sell Short Orders under ordinary circumstances would receive a new time stamp after repricing.

[22] The Exchange will develop written policies and procedures to determine when to declare a Trading Pause in such circumstances.

[23] *See* Section VII(A)(2) of the Plan.

[24] *See* Section VIII of the Plan.

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

impose any burden on competition while providing certainty of treatment and execution of trading interest on the Exchange to market participants during periods of extraordinary volatility in NMS stock while in compliance with the limit up-limit down and trading pause requirements specified in the Plan.

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 [27] and Rule 19b–4(f)(6) thereunder.[28] 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.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act [29] to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–NYSE–2013–09 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–NYSE–2013–09. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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 10:00 a.m. and 3:00 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–NYSE–2013–09 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03389 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[27] 15 U.S.C. 78s(b)(3)(A)(iii).

[28] 17 CFR 240.19b–4(f)(6).

[29] 15 U.S.C. 78s(b)(2)(B).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68882; File No. SR–ICC–2012–23]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Add Rules Related to the Clearing of iTraxx Europe Index CDS

February 8, 2013.

On December 6, 2012, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–ICC–2012–23 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 December 26, 2012.[3] The Commission did not receive comments on the proposal.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day from the publication of notice of filing of this proposed rule change is February 9, 2013. The Commission is extending this 45-day time period.

The proposed rule change relates to ICC's adoption of rules to permit the clearing of iTraxx Europe credit default swap indices. The proposed rule change is novel because no clearing agency located in the United States currently provides clearing services for these products. As a result, and in order to provide the Commission with sufficient time to consider the proposed rule change, the Commission finds it is appropriate to designate a longer period within which to take action on the proposed rule change.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates March 26, 2013, as the date

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Securities Exchange Act Release No. 34–68481 (December 19, 2012), 77 FR 76109 (December 26, 2012).

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–ICC–2012–23).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03391 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68887; File No. SR–CBOE–2013–017]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

February 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 1, 2013, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') 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 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 the Substance of the Proposed Rule Change

The Exchange is proposing to amend the Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule. Specifically, the Exchange proposes to amend its Volume Incentive Program (''VIP''), through which the Exchange credits each Trading Permit Holder (''TPH'') the per contract amount resulting from each public customer (''C'' origin code) order transmitted by that TPH which is executed electronically on the Exchange in all multiply-listed option classes (excluding Qualified Contingent Cross (''QCC'') trades and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Rule 6.80), provided the TPH meets certain volume thresholds in a month. The proposed changes are to take effect on February 1, 2013.

First, the Exchange proposes to change the different fee tier thresholds in the VIP. Currently, qualification for the different fee rates at different tiers in the VIP is based on a TPH's percentage of national customer volume in multiply-listed options monthly. The current qualification tiers are set to, in ascending order, 0 through 0.75%,[3] above 0.75% through 2.25%, above 2.25% through 3.50%, above 3.50% through 5.00%, and above 5.00%. The purpose of the change is to eliminate the fifth qualification tier and adjust the threshold percentages for tier one through tier four. The Exchange is proposing to amend the tiers to be, in ascending order, 0 through 0.75%, above 0.75% through 2.00%, above 2.00% through 2.75%, and above 2.75%. Lowering the upper thresholds in the second and third tiers, along with the corresponding lower thresholds in the third and fourth tiers, allows for a greater number or participants to achieve a higher payment in the VIP Program.

The Exchange also proposes to change the amounts of the credits in the tiers of the VIP. The credit in the second tier will be increased from $0.07 per contract to $0.10 per contract, the credit in the third tier will be decreased from $0.12 per contract to $0.11 per contract, and the credit in the fourth tier will decrease from $0.18 to $0.14 per contract. Going forward, the relative volume thresholds and credit amounts will be as follows:

Percentage thresholds of national customer volume in multiply-listed options classes (monthly)	Per contract credit
0%–0.75%	$0.00
Above 0.75%–2.00%	0.10
Above 2.00%–2.75%	0.11
Above 2.75	0.14

The purpose of increasing the credit in the second tier and decreasing the credits in the third and fourth tiers is to rationalize the opportunity to receive a credit under the VIP across a broader set of participants. Lowering the credit in the third and fourth tiers allows the Exchange to make up for lowering the thresholds in tier two through tier four.

Next, the Exchange is proposing to eliminate the VIP credit of $0.10 per contract at every tier in VIP. Currently this $0.10 credit is given at every tier, including the $0.00 tier, on each leg, for customer, complex multiply-listed options contracts, when executed electronically against a non-public customer origin. The Exchange is proposing to eliminate this additional credit. Eliminating this credit allows the Exchange to make up for threshold and credit adjustments as proposed above.

Finally, the Exchange is proposing to add to the notes on the VIP table. The Exchange is proposing to amend the section of the ''Notes'' on the VIP table to state that the VIP payment will be calculated from the first executed contract at the applicable threshold per contract credit. Stated in a different way, VIP payments will be made at the highest achieved tier for each contract executed in that month. Under the current VIP, VIP payments are made for the number of applicable contracts executed in each tier. For example, if TPH Firm XYZ executes 2.50% of the total national customer volume in the month of April, XYZ would receive a $0.00 credit for the contracts at 0.75% of the market and below, a credit of $0.10[4] for the contracts above 0.75% through 2.00% of the market, and $0.11 for each contract above 2.00% of the market through the total 2.50% of the market. In the proposed VIP Program, XYZ will receive a credit of $0.11 for each contract executed in the month of

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Each tier is based on the percentage of total national customer volume in multiply-listed options monthly.

[4] For sake of the example, credit amounts being applied are the proposed credit changes as mentioned above.

April. The purpose of the proposed change is to provide a greater incentive to direct greater customer trade volume to the Exchange to achieve a greater monthly percentage and receive a greater credit for all executed contracts at the greatest level achieved.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[6] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes that the proposed changes to amend the fee tier thresholds in the VIP are reasonable. Specifically, decreasing the upper thresholds in the second and third tiers, and thus the corresponding lower thresholds in third and fourth tiers, is reasonable because the slight changes are designed to provide TPHs a greater ability to reach higher tiers. These changes are equitable and not unfairly discriminatory because they will be applied to all TPHs. The Exchange believes that the proposed changes to increase the credit in the second tier of the VIP and decrease the credits in the third and fourth tiers each are reasonable. In the case of the increase in the credit for the second tier, the change will allow TPHs who reach the percentage threshold in that tier to receive an increased credit for doing so. In the case of the decrease in the credit for the third and fourth tiers, the change will still allow TPHs who reach the percentage threshold in that tier to receive a credit which is higher than such TPH would receive in the tier immediately below it. These changes are equitable and not unfairly discriminatory because they will be applied to all TPHs.

The proposed changes to eliminate the VIP credit of $0.10 per contract at every tier in VIP is reasonable given the other proposed lower threshold and credits in the VIP. Though the Exchange is eliminating the additional credit, through the proposed changes, TPHs have a greater ability to reach higher tiers. Thus, eliminating the fee [sic] is reasonable when coupled with the other changes to the VIP. The elimination of this credit is equitable and not unfairly discriminatory as it applies to all TPHs. Finally, the Exchange believes that amending the Notes Section of the VIP is reasonable because it allows TPHs to receive a greater credit by applying the greatest credit obtained to all trades done in that particular month. This change is equitable and not unfairly discriminatory because it will be applied to all TPHs.

Moreover, the purpose of all of the proposed changes is to encourage the sending and electronic execution of customer multiply-listed options volume to the Exchange. This increased volume creates greater trading opportunities that benefit all market participants (including TPHs that do not reach the higher-credit tiers in the VIP). Further, the increased volume and improved trading opportunities will provide such TPHs with a better opportunity to reach the higher-credit tiers in the VIP.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE 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. To the extent that some of the changes to the VIP may attract greater trading volume to CBOE (and away from other exchanges), the Exchange does not believe the proposed changes will impose any burden on intermarket competition. The Exchange notes that, should the proposed changes make CBOE more attractive for trading, market participants trading on other exchanges can always elect to become TPHs on CBOE. Further, the Exchange exists in a competitive marketplace, and to the extent that these proposed changes make other exchanges less competitive with CBOE, market participants trading on those other exchanges can elect to trade on CBOE.

The Exchange does not believe the proposed changes will impose any burden on intramarket competition. Though the proposed changes only benefit TPHs that meet the VIP thresholds, the purpose of all of the proposed changes is to encourage the sending and electronic execution of customer multiply-listed options volume to the Exchange. This increased volume creates greater trading opportunities that benefit all market participants (including TPHs that do not reach the higher-credit tiers in the VIP). Further, the proposed changes apply to all TPHs.

The Exchange does not believe that the proposed changes to eliminate the VIP credit of $0.10 per contract at every tier in VIP will impose any burden on intermarket competition because the change is minimal and the VIP program already gives a credit to qualifying TPHs. Further, to the extent that any change in intramarket competition may result from this change, such possible change is justifiable and offset because the changes to such fees are designed to attract greater customer order flow to the Exchange. This would bring greater liquidity to the market, which benefits all market participants. The Exchange does not believe that the elimination of the additional $0.10 credit will cause any unnecessary burden on intermarket competition because the changes are minimal and only apply to certain TPHS that qualify for the VIP.

The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange, and the Exchange believes that such structure will help the Exchange remain competitive with those fees and rebates assessed by other venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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[8] thereunder. 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.

[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).

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–CBOE–2013–017 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–CBOE–2013–017. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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 10:00 a.m. and 3:00 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–CBOE–2013–017, and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03394 Filed 2–13–13; 8:45 am]

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[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68885; File No. SR–BYX–2013–006]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Pilot Program Related To Trading Pauses Due to Extraordinary Market Volatility

February 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 30, 2013, BATS–Y Exchange, Inc. (''BYX'' or ''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 Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it 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

The Exchange is proposing to extend a pilot program previously approved by the Commission related to Rule 11.18, entitled ''Trading Halts Due to Extraordinary Market Volatility.''

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant 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 purpose of this filing is to extend the effectiveness of the Exchange's rule related to individual stock circuit breakers, which is contained in Rule 11.18(d) and Interpretation and Policy .05 to Rule 11.18. The rule, explained in further detail below, is currently operating as a pilot program set to expire on February 4, 2013.

On October 4, 2010, the Exchange filed an immediately effective filing to adopt various rule changes to bring BYX Rules up to date with the changes that had been made to the rules of BATS Exchange, Inc., the Exchange's affiliate, while BYX's Form 1 Application to register as a national securities exchange was pending approval. Such changes included changes to the Exchange's Rule 11.18, on a pilot basis, to provide for uniform market-wide trading pause standards for individual securities in the S&P 500® Index, the Russell 1000® Index and specified Exchange Traded Products that experience rapid price movement.[5] More recently, the Exchange proposed expansion of the pilot program to apply to all NMS stocks.[6] This expansion was approved on June 23, 2011.[7] The pilot program relating to trading pause standards has been extended five times since its inception.[8] The Exchange believes the benefits to market participants from the individual stock trading pause rule should be continued on a pilot basis until individual stocks become, on a

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.196–4(f)(6)(iii).

[5] Securities Exchange Act Release No. 63097 (October 13, 2010), 75 FR 64767 (October 20, 2010) (SR–BYX–2010–002).

[6] Securities Exchange Act Release No. 64433 (May 6, 2011), 76 FR 27680 (May 12, 2011) (SR–BYX–2011–011).

[7] Securities Exchange Act Release No. 64735 (June 23, 2011), 76 FR 38243 (June 29, 2011) (File Nos. SR–BATS–2011–016; SR–BYX–2011–011; SR–BX–2011–025; SR–CBOE–2011–049; SR–CHX–2011–09; SR–EDGA–2011–15; SR–EDGX–2011–14; SR–FINRA–2011–023; SR–ISE–2011–028; SR–NASDAQ–2011–067; SR–NYSE–2011–21; SR–NYSEAmex–2011–32; SR–NYSEArca–2011–26; SR–NSX–2011–06; SR–Phlx–2011–64).

[8] Securities Exchange Act Release No. 63513 (December 9, 2010), 75 FR 78784 (December 16, 2010) (SR–BYX–2010–007); Securities Exchange Act Release No. 64214 (April 6, 2011), 76 FR 20430 (April 12, 2011) (SR–BYX–2011–007); Securities Exchange Act Release No. 65082 (August 9, 2011), 76 FR 50800 (August 16, 2011) (SR–BYX–2011–018); Securities Exchange Act Release No. 66189 (January 19, 2012), 77 FR 3827 (January 25, 2012) (SR–BYX–2012–001); Securities Exchange Act Release No. 67522 (July 27, 2012), 77 FR 46134 (August 2, 2012) (SR–BYX–2012–015).

rolling basis, subject to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[9]

The Exchange, in conjunction with other national securities exchanges and FINRA, recently filed an amendment to the Plan to change the date of initial operations of the Plan from February 4, 2013 to April 8, 2013. The extension proposed herein would allow the pilot to continue to operate without interruption until implementation of the Limit Up-Limit Down Plan, which will occur on a rolling basis.

The Exchange proposes to extend the effective date of the pilot from the current scheduled expiration date of February 4, 2013 until February 4, 2014. The Exchange also proposes to modify the definition of ''Circuit Breaker Securities'' subject to the individual stock circuit breaker pilot to mean all NMS stocks other than NMS stocks subject to the Limit Up-Limit Down Plan. Accordingly, as securities become subject to the Limit Up-Limit Down Plan, they will no longer be Circuit Breaker Securities subject to the individual stock trading pause pilot.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[10] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[11] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The proposed rule change is also consistent with Section 11A(a)(1) of the Act[12] in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning decisions to pause trading in a security when there are significant price movements. The Exchange believes that the pilot program is working well, that it has been infrequently invoked during the previous months, and that the extension of the pilot will allow the Exchange to further assess the effect of the pilot on the market until securities become subject to the Limit Up-Limit Down Plan on a rolling basis.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes are being made to extend the operation of the trading pause pilot to allow the pilot to continue to operate without interruption until implementation of the Limit Up-Limit Down Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same trading pause requirements specified in the Plan. Thus, the proposed changes will not impose any burden on competition while providing trading pause requirements specified in the Plan.

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 written comments on 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[13] and Rule 19b–4(f)(6) thereunder.[14] 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)[15] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the pilot program to continue uninterrupted. Accordingly, the Commission hereby grants the Exchange's request and designates the proposal operative upon filing.[17]

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–BYX–2013–006 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–BYX–2013–006. 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

[9] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78k–1(a)(1).

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

[15] 17 CFR 240.19b–(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] 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).

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 10:00 a.m. and 3:00 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–BYX–2013–006 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03392 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68877; File No. SR–EDGA–2013–07]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGA Exchange, Inc. Fee Schedule

February 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2013, EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees and rebates applicable to Members [3] of the Exchange pursuant to EDGA Rule 15.1(a) and (c). All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at www.directedge.com, at the Exchange's principal office, and at the Public Reference Room of the Commission.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently assesses a charge of $0.0003 per share for Members' orders that yield Flag RY. The Exchange proposes to increase the rate it charges for Flag RY from $0.0003 per share to $0.0005 per share for Members' orders that route to the BATS Y-Exchange, Inc. (''BATS BYX'') and add liquidity. This proposed change represents a pass through of the rate that Direct Edge ECN LLC (d/b/a DE Route) (''DE Route''), the Exchange's affiliated routing broker dealer, is charged for routing orders to BATS BYX that do not qualify for additional volume tiered discounts, as described in BATS BYX's fee filing with the Securities and Exchange Commission.[4]

The Exchange proposes to implement these amendments to its fee schedule on February 1, 2013.

[3] As defined in Exchange Rule 1.5(n).

[4] *See* Securities Exchange Act Release No. 68665 (January 16, 2013), 78 FR 4946 (January 23, 2013) (SR–BYX–2013–001).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[5] in general, and furthers the objectives of Section 6(b)(4),[6] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

The Exchange's proposed fee increase for Flag RY represents a pass-through rate where BATS BYX charges DE Route $0.0005 per share for Members' orders that route to BATS BYX through DE Route and add liquidity, and then DE Route charges the Exchange $0.0005 per share, and then the Exchange charges its Members $0.0005 per share. The Exchange's proposal represents an equitable allocation of reasonable dues, fees, and other charges among Members of the Exchange and other persons using its facilities because the Exchange does not levy additional fees or offer additional rebates for orders that it routes to BATS BYX through DE Route. Prior to BATS BYX's January 2013 fee filing, BATS BYX charged DE Route a fee of $0.0003 per share for orders yielding Flag RY, which DE Route passed through to the Exchange and the Exchange passed through to its Members. In BATS BYX's January 2013 fee filing, BATS BYX increased the rate it charges its customers, such as DE Route, from $0.0003 per share to a charge of $0.0005 per share for orders that are routed to BATS BYX and add liquidity. Therefore, the Exchange believes that the proposed change in Flag RY from a fee of $0.0003 per share to a fee of $0.0005 per share is equitable and reasonable because it accounts for the pricing changes on BATS BYX. In addition, the proposal allows the Exchange to continue to charge its Members a pass-through rate for orders that are routed to BATS BYX and add liquidity using DE Route. The Exchange notes that routing through DE Route is voluntary. Lastly, the Exchange also believes that the proposed amendment is non-discriminatory because it applies uniformly to all Members.

The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members. The Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.

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.

Regarding Flag RY, the Exchange believes its proposal to assess a charge of $0.0005 per share increases competition among trading centers because it offers customers an alternative means to route to BATS BYX and add liquidity for the same price as entering orders on BATS BYX directly. The Exchange believes that its proposal will have no burden on intramarket competition because the rate applies uniformly to all Members.

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 unsolicited written comments from Members or other interested parties.

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 Rule 19b–4(f)(2) [8] thereunder. 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–EDGA–2013–07 *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–EDGA–2013–07. 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 10:00 a.m. and 3:00 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–EDGA–2013–07 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03408 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 19b–4(f)(2)[sic].

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68881; File No. SR–ICC–2012–24]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Add Rules Related to the Clearing of European Corporate Single-Name CDS

February 8, 2013.

On December 6, 2012, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–ICC–2012–24 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 December 26, 2012.[3] The Commission did not receive comments on the proposal.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day from the publication of notice of filing of this proposed rule change is February 9, 2013. The Commission is extending this 45-day time period.

The proposed rule change relates to ICC's adoption of rules to permit the clearing of standard single-name CDS contracts referencing European corporate reference entities. The proposed rule change is novel because no clearing agency located in the United States currently provides clearing services for these products. As a result, and in order to provide the Commission with sufficient time to consider the proposed rule change, the Commission finds it is appropriate to designate a longer period within which to take action on the proposed rule change.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 34–68482 (December 19, 2012), 77 FR 76156 (December 26, 2012).

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

designates March 26, 2013, as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–ICC–2012–24).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03409 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68884; File No. SR–EDGA–2013–04]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGA Rule 11.14 To Extend the Operation of the Single Stock Circuit Breaker Program

February 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 30, 2013, EDGA Exchange, Inc. (''EDGA'' or ''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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend EDGA Rule 11.14 to extend the operation of the single stock circuit breaker pilot program (the ''Pilot'') from the current scheduled expiration date of February 4, 2013 until the earlier of the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (the ''Plan'') or February 4, 2014. All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

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 Exchange proposes to amend EDGA Rule 11.14 to extend the operation of the Pilot from the current scheduled expiration date of February 4, 2013[3] until the earlier of the initial date of operations of the Plan or February 4, 2014. The Pilot will continue to operate as to individual securities until such security is subject to the Plan.

EDGA Rule 11.14 requires the Exchange to pause trading in an individual security listed on the Exchange if the primary listing market for such stock issues a trading pause. Such trading pause will continue until trading has resumed on the primary listing market. However, the Exchange may resume trading in such stock if trading has not resumed on the primary listing market and ten minutes have passed since the individual stock trading pause message has been received from the responsible single plan processor. The Pilot was developed and implemented as a market-wide initiative by the Exchange and other national securities exchanges in consultation with the Securities and Exchange Commission (the ''Commission'') staff and is currently applicable to all NMS stocks and specified exchange-traded products.[4]

The extension proposed herein would allow the Pilot to continue to operate without interruption until implementation of the Plan.[5] The Plan will begin initial operations on April 8, 2013.[6] If the Plan has an initial date of operations before February 4, 2014, the proposed Pilot for trading pauses would expire at that time.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] 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 that the change proposed herein meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements, which promotes just and equitable principles of trade and

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Release No. 67501 (July 25, 2012), 77 FR 45396 (July 31, 2012) (SR–EDGA–2012–31).

[4] The Exchange notes that the other national securities exchanges and the Financial Industry Regulatory Authority have adopted the Pilot in substantially similar form. *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (File Nos. SR–BATS–2010–014; SR–EDGA–2010–01; SR–EDGX–2010–01; SR–BX–2010–037; SR–ISE–2010–48; SR–NYSE–2010–39; SR–NYSEAmex–2010–46; SR–NYSEArca-2010–41; SR–NASDAQ–2010–061; SR–CHX–2010–10; SR–NSX–2010–05; and SR–CBOE–2010–047) and Securities Exchange Act Release No. 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (SR–FINRA–2010–025). *See also* Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (File Nos. SR–BATS–2010–018; SR–BX–2010–044; SR–CBOE–2010–065; SR–CHX–2010–14; SR–EDGA–2010–05; SR–EDGX–2010–05; SR–ISE–2010–66; SR–NASDAQ–2010–079; SR–NYSE–2010–49; SR–NYSEAmex–2010–63; SR–NYSEArca–2010–61; and SR–NSX–2010–08 and Securities Exchange Act Release No. 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010) (SR–FINRA–2010–033). *See also* Securities Exchange Act Release No. 63500 (December 9, 2010), 75 FR 78309 (December 15, 2010) (SR–NYSE–2010–81). A proposal to, among other things, expand the Pilot to include all NMS stocks not already included therein was implemented on August 8, 2011. *See* Securities Exchange Act Release No. 64735 (June 23, 2011), 76 FR 38243 (June 29, 2011) (File Nos. SR–BATS–2011–016; SR–BYX–2011–011; SR–BX–2011–025; SR–CBOE–2011–049; SR–CHX–2011–09; SR–EDGA–2011–15; SR–EDGX–2011–14; SR–FINRA–2011–023; SR–ISE–2011–028; SR–NASDAQ–2011–067; SR–NYSE–2011–21; SR–NYSEAmex–2011–32; SR–NYSEArca–2011–26; SR–NSX–2011–06; and SR–Phlx–2011–64).

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (Order Approving, on a Pilot Basis, the National Market System Plan To Address Extraordinary Market Volatility by 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 MKT LLC, and NYSE Arca, Inc).

[6] Letter from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Markets, to Elizabeth Murphy, Secretary, Securities and Exchange Commission, dated January 17, 2013.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

removes impediments to, and perfects the mechanism of, a free and open market and a national market system. Additionally, extension of the Pilot until the earlier of the initial date of operations of the Plan or February 4, 2014 would allow the Pilot to continue to operate without interruption while the Exchange and the Commission further assess the effect of the Pilot on the marketplace or whether other initiatives should be adopted in lieu of the current Pilot, which contributes to the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes are being made to extend the Pilot until the earlier of the initial date of operations of the Plan or February 4, 2014 would allow the Pilot to continue to operate without interruption until implementation of the Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same trading pause requirements specified in the Plan. Thus, the proposed changes will not impose any burden on competition while providing trading pause requirements specified in the Plan.

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 written comments on 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 [9] and Rule 19b–4(f)(6) thereunder.[10] 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) [11] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the pilot program to continue uninterrupted. Accordingly, the Commission hereby grants the Exchange's request and designates the proposal operative upon filing.[13]

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–EDGA–2013–04 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–EDGA–2013–04. 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 10:00 a.m. and 3:00 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–EDGA–2013–04 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. [14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03410 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] 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).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68874; File No. SR–FINRA–2012–010]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend FINRA Rule 6440 (Trading and Quotation Halt in OTC Equity Securities)

February 8, 2013.

I. Introduction

On December 20, 2012, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rule 6440 (Trading and Quotation Halt in OTC Equity Securities). The proposed rule change was published for comment in the **Federal Register** on December 31, 2012.[3] The Commission received one comment letter regarding the proposal.[4] This order approves the proposed rule change.

II. Description of the Proposal

FINRA Rule 6440 (Trading and Quotation Halt in OTC Equity Securities) generally provides that, in circumstances where it is necessary to protect investors and the public interest, FINRA may direct members to halt trading and quotations in OTC Equity Securities.[5] FINRA may impose a ''Foreign Regulatory Halt'' when a foreign securities exchange, market, or regulatory authority halts trading for regulatory reasons in an OTC Equity Security or a security underlying an American Depository Receipt (''ADR'') that is an OTC Equity Security (''OTC ADR'') listed on or registered with such foreign securities exchange or market.[6] FINRA, however, will not impose a trading and quotation halt if the Foreign Regulatory Halt was imposed solely for material news, a regulatory filing deficiency, or operational reasons.[7] In addition, FINRA may impose a ''Derivative Halt'' when a national securities exchange or foreign securities exchange or market halts trading in a listed security of which the OTC Equity Security or the security underlying an OTC ADR is a derivative or component.[8] Further, FINRA may impose an ''Extraordinary Event Halt'' when it determines that an extraordinary event has occurred or is ongoing that has had a material effect on the market for the OTC Equity Security or has caused, or has the potential to cause, major disruption to the marketplace and/or significant uncertainty in the settlement and clearance process.[9]

FINRA proposes to amend Rule 6440(a)(1) to permit FINRA to initiate a trading and quotation halt as a result of a Foreign Regulatory Halt when the foreign halt is imposed for news pending.[10] FINRA indicates that historically it has not halted in these instances because FINRA lacks privity with OTC equity issuers and cannot compel such issuers to disclose information to FINRA.[11] FINRA believes that with the growth of foreign securities markets and the ease at which trading can occur across jurisdictions and markets, increased coordination of trading halts across markets would protect investors by reducing instances of potentially material disparities in information regarding the security, or even fraudulent or manipulative trading in the security, and would act to protect U.S. investors.[12]

FINRA Rule 6440(b)(1) provides that upon receipt of information from a foreign securities exchange or market on which an OTC Equity Security or a security underlying the OTC ADR is listed or registered, or from a regulatory authority overseeing such issuer, exchange, or market, FINRA will promptly evaluate the information and determine whether a trading and quotation halt in the OTC Equity Security is appropriate. FINRA proposes to amend Rule 6440(b)(1) to clarify that FINRA may initiate a trading and quotation halt in an OTC Equity Security as a result of a Foreign Regulatory Halt or Derivative Halt upon notice from another reliable third-party source (*e.g.,* The Depository Trust & Clearing Corporation, broker-dealers, or financial news data vendors) where FINRA can validate the information provided.[13] The proposed revision to Rule 6440(b)(1) will provide that upon notice, not simply receipt of information, of a Foreign Regulatory Halt or Derivative Halt from (i) the national or foreign securities exchange or market on which the OTC Equity Security or the security underlying the OTC ADR is listed or registered; (ii) a regulatory authority overseeing such issuer, exchange, or market; or (iii) another reliable third-party source where FINRA can validate the information provided, FINRA will promptly initiate a trading and quotation halt in the OTC Equity Security.[14]

Currently, under Rule 6440(b)(3), trading and quotations in an OTC Equity Security may resume when FINRA determines that the basis for the halt no longer exists, or when ten business days have elapsed from the date FINRA initiated the trading and quotation halt in the security, whichever occurs first. FINRA proposes to add new Rule 6440(b)(2) to provide that, after it initiates a halt in an OTC Equity Security as a result of a Foreign Regulatory Halt or a Derivative Halt, FINRA may continue the halt in trading and quoting in the OTC market for the OTC Equity Security until such time as FINRA receives notice that the applicable regulatory authority has or intends to resume trading in the security, even if such halt is longer than ten business days.[15]

FINRA proposes to amend Rule 6440(b)(3) to provide that, with respect to a halt in an OTC Equity Security as

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68526 (December 21, 2012), 77 FR 77162 (''Notice'').

[4] *See* web comment from Suzanne H. Shatto, dated January 3, 2013, *available at http://www.sec.gov/comments/sr-finra-2012-010/finra2012010.shtml.* This commenter stated that ''this circuit breaker does not serve the public well and provides brokers/marketmakers/high frequency traders with the ability to limit their losses.'' The Commission believes that this comment is not pertinent to the proposed rule change, which concerns trading and quotation halts for OTC Equity Securities and not market-wide circuit breakers.

[5] FINRA Rule 6420 defines ''OTC Equity Security'' as ''any equity security that is not an 'NMS stock' as that term is defined in Rule 600(b)(47) of SEC Regulation NMS; provided, however, that the term 'OTC Equity Security' shall not include any Restricted Equity Security.'' *See* FINRA Rule 6420(f).

[6] *See* FINRA Rule 6440(a)(1).

[7] *See* FINRA Rule 6440(a)(1).

[8] *See* FINRA Rule 6440(a)(2).

[9] *See* FINRA Rule 6440(a)(3).

[10] *See* Notice, *supra* note 3, 77 FR at 77163. The limitations in Rule 6440(a)(1) relating to FINRA's halt authority where the Foreign Regulatory Halt is imposed solely for a regulatory filing deficiency or operational reasons would remain.

[11] *See id.*

[12] *See id.*

[13] *See id.* FINRA states that it verifies all third-party information relating to trading and quotation halts in foreign markets before it acts upon such information. *See id.* at 77164. FINRA believes that having the authority to halt trading and quotation in an OTC Equity Security upon notice from a reliable third-party source that can be validated would allow FINRA to act more promptly to initiate trading and quotation halts in such securities. *See id.*

[14] The commencement of the trading and quotation halt for the OTC Equity Security will be effective simultaneous with the issuance of appropriate public notice by FINRA. *See* proposed FINRA Rule 6440(b)(1).

[15] FINRA stated that it will disseminate an appropriate public notice that a trading and quotation halt initiated under Rule 6440 is no longer in effect. *See* proposed FINRA Rule 6440(b)(4).

a result of an Extraordinary Event Halt, trading and quotations in the OTC market for the OTC Equity Security may resume when FINRA determines that the basis for the halt no longer exists, or when ten business days have elapsed from the date FINRA initiated the trading and quotation halt in the security, whichever occurs first. In addition, FINRA will be permitted to extend an Extraordinary Event Halt for subsequent periods of up to ten business days each if, at the time of any such extension, FINRA finds that the extraordinary event is ongoing and determines that the continuation of the halt beyond the prior ten business day period is necessary in the public interest and for the protection of investors.[16]

III. Discussion and Commission's Findings

After careful review of the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of Section 15A(b) of the Act[17] and the rules and regulations thereunder applicable to a national securities association.[18] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[19] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, to protect investors and the public interest, and Section 15A(b)(11) of the Act,[20] which requires, among other things, that FINRA rules relating to quotations be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.

The Commission believes that FINRA's trading and quotation halt rule for OTC Equity Securities, when appropriately applied under the circumstances specified in the rule, as proposed to be amended, is designed to promote the protection of investors and the public interest and to produce fair and informative quotations, and to prevent fictitious or misleading quotations, for OTC Equity Securities. Permitting FINRA to initiate a trading and quotation halt as a result of a Foreign Regulatory Halt that is imposed for news pending should enable FINRA to initiate trading and quotation halts in OTC Equity Securities under a broader set of circumstances than currently exists, which could help to reduce the potential that investors may trade on incomplete or inaccurate information in these securities. In addition, permitting FINRA to initiate a halt as a result of a Foreign Regulatory Halt or Derivative Halt upon notice from another reliable third-party source where FINRA can validate the information provided should allow FINRA to initiate a halt more promptly when such a halt is warranted.

The Commission further believes that the provisions relating to the duration of a trading and quotation halt are reasonably designed to protect investors and the public interest and to produce fair and informative quotations, and to prevent fictitious or misleading quotations, for OTC Equity Securities. The Commission believes that it is reasonable for a halt in an OTC Equity Security as a result of a Foreign Regulatory Halt or a Derivative Halt to run concurrently with, and for as long as, the halt imposed on the security in the market on which it is listed or registered. In addition, allowing FINRA to extend an Extraordinary Event Halt for subsequent periods of up to ten business days will help allow for resolution of the event before trading and quoting in the OTC market for the OTC Equity Security resumes. The Commission notes that FINRA would be permitted to extend an Extraordinary Event Halt only if it finds that the extraordinary event is ongoing and determines that the continuation of the halt beyond the initial ten business day halt period is necessary and appropriate in the public interest and for the protection of investors.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–FINRA–2012–010) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03387 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[16] *See* proposed FINRA Rule 6440, Supplementary Material .01. FINRA believes that the authority to halt beyond the initial ten business day period is vital in the OTC marketplace where concerns regarding settlement and clearance, pricing, or other extraordinary events can take time to be resolved. *See* Notice, *supra* note 3, 77 FR at 77164.

[17] 15 U.S.C. 78*o*–3(b).

[18] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 15 U.S.C. 78*o*–3(b)(6).

[20] 15 U.S.C. 78*o*–3(b)(11).

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68872; File No. SR–MSRB–2013–01]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Relating to Amendments to MSRB Rules G–37 and G–8 and Form G–37

February 8, 2013.

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 February 4, 2013, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board'') 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 MSRB. 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 MSRB is filing with the Commission a proposed rule change consisting of amendments to Rules G–37, on political contributions and prohibitions on municipal securities business, and G–8, on books and records, and Form G–37 (the ''proposed rule change''). The MSRB requested an effective date for the proposed rule change of no later than the start of the second calendar quarter following the date of SEC approval.

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2013-Filings.aspx,* at the MSRB's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB 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 MSRB 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 proposed rule change amends Rule G–37 to require the public disclosure of additional information related to contributions made by brokers, dealers and municipal securities dealers (''dealers''), their municipal finance professionals (''MFPs''),[3] political action committees (''PACs'') controlled by the dealer or their MFPs and non-MFP executive officers[4] (individually, a ''covered party'' and collectively, ''covered parties'') to bond ballot campaigns and the municipal securities business[5] engaged in by dealers resulting from voter approval of the bond ballot measure to which such contributions were given. The additional information will be required to be reported on revised MSRB Form G–37[6] and submitted to the MSRB.[7] The proposed rule change also amends Rule G–8 to require dealers to maintain records pertaining to the additional information disclosed under the proposed amendments to Rule G–37. The proposed rule change is further described below under ''Summary of Proposed Rule Change'' and under ''Discussion of Comments.''

Background

Rule G–37, in effect since 1994, has provided substantial benefits to the industry and the investing public by greatly reducing the direct connection between political contributions given to issuer officials[8] and the awarding of municipal securities business to dealers. Rule G–37 requires dealers to disclose (on Form G–37) certain contributions to issuer officials, contributions to bond ballot campaigns, and payments to political parties of states and political subdivisions made by covered parties. The rule prohibits dealers from engaging in municipal securities business with an issuer within two years after contributions to an official of such issuer are made by certain covered parties (other than certain permitted *de minimis* contributions).[9] The rule's prohibition on engaging in municipal securities business is not triggered by contributions that are made to bond ballot campaigns by covered parties.

Bond Ballot Contributions

Since February 1, 2010,[10] the MSRB has required disclosure, under Rule G–37, of non-*de minimis* contributions[11] to bond ballot campaigns made by covered parties. Rule G–37 also requires dealers to maintain records of such reportable contributions to bond ballot campaigns pursuant to Rule G–8. The 2010 amendments to Rule G–37 and the corresponding amendments to Rule G–8 resulted, in part, from concerns that contributions by covered parties to bond ballot campaigns could assist dealers with obtaining municipal securities business. The amendments also resulted from the MSRB's concern about the lack of effective transparency regarding bond ballot campaign contributions.[12]

Some industry participants and market observers continue to express concerns regarding the potential adverse effect on the integrity of the municipal securities market from dealer and dealer personnel contributions to bond ballot campaigns.[13] The proposed rule change addresses these concerns by augmenting the disclosures currently required under Rule G–37. These more detailed disclosures also will help inform the Board whether further action regarding bond ballot campaign contributions is warranted, up to and including a corresponding ban on engaging in

[3] Rule G–37(g)(iv) defines municipal finance professional as: (A) Any associated person primarily engaged in municipal securities representative activities (exclusive of sales activities with natural persons); (B) any associated person (including but not limited to any affiliated person of the dealer, as defined in Rule G–38) who solicits municipal securities business; (C) any associated person who is both (i) a municipal securities principal or a municipal securities sales principal and (ii) a supervisor of any persons described in (A) or (B) above; (D) any associated person who is a supervisor of any person described in (C) above up through and including, in the case of a dealer other than a bank dealer, the Chief Executive Officer or similarly situated official and, in the case of a bank dealer, the officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's municipal securities dealer activities; or (E) any associated person who is a member of the dealer (or, in the case of a bank dealer, the separately identifiable department or division of the bank) executive or management committee or similarly situated officials, if any.

[4] Rule G–37(g)(v) defines non-MFP executive officer as an associated person in charge of a principal business unit, division or function or any other person who performs similar policy making functions for the dealer (or, in the case of a bank dealer, the separately identifiable department or division of the bank, as defined in Rule G–1), but does not include any MFP. Although Rule G–37 requires disclosure of non-MFP executive officer contributions, such contributions do not result in a ban on engaging in municipal securities business.

[5] Rule G–37(g)(vii) defines municipal securities business as: (A) The purchase of a primary offering of municipal securities from an issuer on other than a competitive bid basis (*e.g.,* a negotiated underwriting); (B) the offer or sale of a primary offering of municipal securities on behalf of any issuer (*e.g.,* a private placement); (C) the provision of financial advisory or consultant services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide such services on other than a competitive bid basis; or (D) the provision of remarketing agent services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide such services on other than a competitive bid basis.

[6] MSRB Form G–37 is the document pursuant to which dealers disclose contribution information as currently required by Rule G–37. The form is being revised to conform to the requirements resulting from the proposed rule change.

[7] Form G–37 is submitted by dealers through the existing MSRB Political Contribution Submission Service, which is the current system that accepts the submissions of Form G–37. Submitted Forms G–37 are made publicly available through the MSRB Web site.

[8] Rule G–37(g)(vi) defines ''official of such issuer'' or ''official of an issuer'' as any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate: (A) For elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.

[9] Contributions made by MFPs to issuer officials for whom such MFP is entitled to vote will not result in a ban on municipal securities business if such contributions, in total, do not exceed $250 to each issuer official, per election.

[10] *See* Securities Exchange Act Release No. 61381 (January 20, 2010), 75 FR 4126 (January 26, 2010) (File No. SR–MSRB–2009–18).

[11] Dealers are not required to disclose contributions made by MFPs and non-MFP executive officers to a bond ballot campaign for a ballot initiative with respect to which such person is entitled to vote if such contributions, in total, do not exceed $250 per ballot initiative.

[12] The MSRB noted that the lack of effective transparency results from political contribution disclosure requirements that vary from state to state and the difficulty of locating and extracting the relevant dealer-related and bond initiative-related information from the various public disclosure facilities. *See* MSRB Notice 2009–35 (June 22, 2009).

[13] Similar concerns have been expressed with regard to such contributions made by some municipal advisors. The Board expects to consider undertaking parallel rulemaking with respect to municipal advisor contributions to bond ballot campaigns when it develops additional rules for municipal advisors.

municipal securities business as a result of certain contributions.

Summary of Proposed Rule Change

The MSRB requested comment on a draft of the proposed rule change on August 15, 2012.[14] The description of the proposed rule change below revises certain provisions of the draft that was provided for comment in the Request for Comment based on the MSRB's review of comment letters, as further described below and in ''Discussion of Comments'' below. The proposed rule change revises Rule G–37(e)(i)(B)(2) to provide that, in disclosing the contribution amount made to a bond ballot campaign, the dealer also must include, in the case of in-kind contributions, the value and nature of the goods or services provided, including any ancillary services provided to, on behalf of, or in furtherance of the bond ballot campaign. The proposed rule change also requires dealers to disclose the specific date on which such contributions to bond ballot campaigns were made.

Proposed Rule G–37(e)(i)(B) requires dealers to disclose the full issuer name and full issue description of any primary offering resulting from voter approval of a bond ballot measure to which a contribution required to be disclosed has been made. All information is required to be reported in the calendar quarter in which the closing date for the issuance that was authorized by the bond ballot measure occurred. The proposed rule change contains a look-back provision for bond ballot campaign contributions that are made by an MFP or a non-MFP executive officer during the two years prior to an individual becoming an MFP or a non-MFP executive officer of a dealer.[15] The look-back provision will limit the additional disclosures required under proposed Rule G–37(e)(i)(B) to those items that would have been required to be disclosed if such individual had been an MFP or a non-MFP executive officer at the time of such contribution. Proposed Rule G–37(e)(i)(B) also requires dealers to disclose both the amount and source of any payments or reimbursements related to any bond ballot contribution, received by a dealer or its MFPs from any third party.[16]

The proposed rule change revises Rule G–37(g) to expand the definition of ''contribution'' and create a new term, the ''reportable date of selection.'' The proposed amendments to the definition of ''contribution'' distinguish between contributions made to an official of an issuer and contributions made to a bond ballot campaign. The term ''reportable date of selection'' is defined to refer to the specific date on which a dealer is selected, either in writing or orally, to engage in municipal securities business that must be reported on Form G–37.

Lastly, conforming amendments to Rule G–8(a)(xvi)(H) and (I) require dealers to maintain records of the supplemental information related to bond ballot campaign contributions that are required to be disclosed on Form G–37 under the proposed rule change.

Effective Date Of Proposed Rule Change

The MSRB requested an effective date for the proposed rule change no later than the start of the second calendar quarter following the date of SEC approval.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which provides that the MSRB's rules shall:

> be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act because it is intended to protect investors and the public interest and prevent fraudulent and manipulative acts and practices by adding greater specificity to the public disclosures surrounding contributions made by covered parties to bond ballot campaigns, and any municipal securities business awarded pursuant to such bond ballot measure. Access to such information in a centralized format on the MSRB's Web site (through Form G–37) has and will continue to substantially increase the amount of information available to market participants, thereby increasing market transparency and strengthening market integrity. The revisions also will assist the MSRB in its on-going review of Rule G–37 and potential conflicts of interest or other practices that may present challenges to the integrity of the municipal securities market related to political contributions by dealers and dealer personnel.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The MSRB solicited comment on the potential burdens of the proposed rule change in the Request for Comment. Among the questions asked were:

- Would the draft amendments help to protect the integrity of the municipal securities market, and are there specific benefits that issuers, investors and the public (including taxpayers) would realize from adopting the draft amendments?
- Would the draft amendments have any negative effects on issuers, investors and the public, or on the fairness, efficiency or overall integrity of the municipal securities market? If so, please describe in detail.
- Dealers are already required to collect, report and retain records of certain information in connection with bond ballot campaigns under the current provisions of Rules G–37 and G–8. What would be the incremental additional burden, if any, to dealers to collect, report and retain records of the additional items of information that would be required under the draft amendments?
- Are there alternative methods to providing the protections sought under the draft amendments that the MSRB should consider and that would be more effective and/or less burdensome?

The specific comments and responses thereto are discussed in Part 5. Of those commenters addressing issues of burdens, two stated that any burden in connection with the proposed rule change would be outweighed by the benefits, and five commenters supported even more expansive regulation to, among other things, ban dealers from making contributions to bond ballot campaigns. The MSRB addressed those commenters that were critical of the burdens from the proposed rule change by clarifying certain definitions and allowing additional time for implementation. The MSRB also notes that dealers already are required to report information on certain contributions and municipal

[14] *See* MSRB Notice 2012–43 (August 15, 2012) (''Request for Comment'').

[15] There is a similar look-back provision in current Rule G–37 for contributions to issuer officials. *See* Rule G–37(b)(i). As with that provision, disclosure is only required with respect to municipal securities business that results from the bond ballot measure after the effective date of the proposed rule change.

[16] Third parties include issuers.

securities business on Form G–37. The proposed rule change augments existing Rule G–37 by providing greater clarity and context to the information already provided under the rule. The MSRB believes that the burdens resulting from the proposed new disclosures are outweighed by the benefits accruing to investors and the marketplace in general.

The MSRB believes that these incremental burdens are necessary and appropriate to address ongoing concerns of pay-to-play practices with respect to bond ballot campaign contributions. The additional information required to be reported under the proposed rule change should be readily available to dealers and the public and is generally consistent with the type of information currently required to be reported under Rule G–37.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In the Request for Comment,[17] the MSRB requested comment on a draft of the proposed rule change. Specifically, the MSRB sought comment on whether the proposed revisions to Rule G–37 and Rule G–8, as described herein, that would require additional public disclosure of certain information related to contributions made by covered parties to bond ballot campaigns, and the municipal securities business engaged in by dealers resulting from the bond ballot campaign to which they contributed, on revised Form G–37, and the maintenance of records related to such contributions, would be useful and helpful to the market in monitoring and accessing such dealer contribution information. In addition, the Board sought comments from the industry and other interested parties on all aspects of the proposed rule change and the range of practices that are undertaken by dealers, municipal advisors and other market participants in connection with contributions to bond ballot campaigns and related activities that can give rise to concerns regarding the integrity of the municipal securities market.

Discussion Of Comments

Comments on the Request for Comment were received from: (1) Barclays; (2) California Association of County Treasurers and Tax Collectors (''CACTTC''); (3) Center for Competitive Politics (''CCP''); (4) Government Financial Strategies Inc. (''GFS''); (5) Magis Advisors (''Magis''); (6) Morgan Stanley; (7) National Association of Independent Public Finance Advisors (''NAIPFA''); and (8) Securities Industry and Financial Markets Association (''SIFMA''). Summaries of these comments and the MSRB's responses follow.

General Support

Comments: Barclays stated the ''Board has clearly identified the legitimate concerns of industry participants and market observers regarding the adverse effect bond ballot activity by dealers and MFPs has on the integrity of the municipal securities market. Such concerns have a tendency to extend beyond issuances supported by bond ballot campaigns and reflect poorly on our industry as a whole.'' GFS stated that the disclosures contemplated by the proposed rule change would be an important step in preventing pay-to-play activities related to bond ballot campaign contributions. The MSRB discusses additional comments from these and other commenters below.

The Board should consider amendments to Rule G–37 to ban dealer contributions to bond ballot campaigns, or impose a ban on future business similar to that for certain dealer campaign contributions to issuer officials.

Comments: CACTTC recommended that the MSRB consider amendments to the rule that would include, ''an outright ban on brokers, dealers, or any other municipal finance professionals from contributing to bond ballot measures and/or their related committees'' and argued that such a ''ban would simply expand the existing ban on political contributions to public officials involved in approving related bond transactions.'' [18] CACTTC stated that pay-to-play activities in municipal bond elections and transactions undermines the competitive process that ensures that taxpayer money is spent in the most efficient and effective manner and suggested that the MSRB amend Rule G–37 to ''either shed light on or eliminate pay-to-play activities.'' Magis expressed opposition to any circumstance where any market professional is permitted to directly, or indirectly, contribute to bond ballot campaigns that serve the interests of such a participant.

Barclays asked the Board to seek a more direct means to ''address conflicts of interest, actual and apparent, raised by cash and in-kind contributions of dealers and their municipal finance personnel (''MFPs'') to bond ballot campaigns.'' Barclays suggested that the Board consider measures that would prohibit dealers from engaging in municipal securities business for a clearly defined period of time after the dealer or any of its MFPs has made a non-*de minimis* cash or in-kind contribution to support a bond ballot campaign authorizing such municipal securities business. Barclays argued that the terms of such a prohibition should not turn on whether a dealer expects to be, or is, reimbursed for such contributions, and should apply with respect to the kinds of support activities identified in the Request for Comment [19] (*e.g.,* polling) whether or not local law would permit an issuer to engage in such activity.

Morgan Stanley cited a San Francisco Chronicle article that observed that ''in 150 of 155 cases (97%) where a dealer contributed to support a bond ballot election that authorized the bonds the underwriter was hired to underwrite'' and stated that ''[t]he continued allowance of this widely perceived pay-to-play practice damages the integrity of the municipal marketplace and allows outsiders (regulators, journalists and politicians) to question the practices of our marketplace.'' NAIPFA stated that the proposed amendments to Rule G–37 do not go far enough in terms of curtailing the practice of contributing to bond ballot campaign committees and will likely not have a significant impact on such contributions. NAIPFA also stated that it is unsure how the amendments alone will benefit issuers or the public interest since the proposed rule change does not prohibit or limit the practice of contributions to bond ballot campaigns. Finally, NAIPFA stated that bond ballot contributions are often made, ''for the purpose of influencing the selection or retention of underwriters, and are thus the equivalent of the impermissible pay-to-play contributions already banned under current Rule G–37.'' GFS believes that further action will be warranted as the Board continues to examine this area of rulemaking.

MSRB Response: The MSRB believes that the additional disclosures required by the proposed rule change are an appropriate regulatory response to the concerns identified. The MSRB believes that providing public access to disclosures of dealer contributions to bond ballot campaigns in a centralized format on the MSRB's Web site (through Form G–37) has substantially increased the amount of information available to

[17] *See* footnote 14.

[18] CACTTC indicated that the bond ballot contribution problem is most prevalent for school district financings in California due to proposition 39. The proposition was enacted in 2000 and, lowered to 55% from 66%, the amount of voter approval needed to approve a bond ballot measure.

[19] *See* footnote 14.

market participants, thereby increasing market transparency and strengthening market integrity.

The information gathered pursuant to the proposed rule change, coupled with the existing requirements of Rule G–37, will assist the Board as it continues to monitor dealer and dealer personnel contribution disclosures. Such monitoring will allow the Board to determine, in the future, whether a corresponding ban on business, as a result of such contributions, would be necessary to address any real or perceived linkage between such contributions to bond ballot campaigns (and related activities) and the award of municipal securities business.

The MSRB should amend Rule G–37 to request certain additional disclosures related to dealers' and their MFPs' contributions to bond ballot campaigns.

Comments: CACTTC supported the additional disclosure requirements for bond ballot campaigns and stated that an amendment to Rule G–37 is ''necessary to reduce the perception of pay-to-play and to help ensure that underwriters and other municipal financial professionals are not awarded bond transactions because they have contributed to related bond ballot measures.'' SIFMA [20] also supported the proposed rule change to require disclosure of whether a dealer or any of its MFPs or non-MFP executive officers received payments or reimbursements, related to any bond issuance resulting from a bond ballot campaign to which the dealer, its MFP or non-MFP executive officer or applicable PAC contributed, from any third party. SIFMA stated that these payments or reimbursements are not common and should be disclosed. SIFMA stated that such payments would be known to the dealer and disclosure would not cause much burden on the dealer and it would be material if any such payments were made. SIFMA also supported the proposed rule change to require dealers to provide the complete name of the entity that will issue the bonds that were authorized by the bond ballot campaign, to which a contribution was made by the dealer, its MFP or non-MFP executive officer (other than a *de minimis* contribution) or applicable PAC. SIFMA stated that the name of the issuer is always known by the dealer and would be beneficial if disclosed on Form G–37 and that such increased transparency would create more benefits than burdens on the regulated dealer community.

GFS expressed concern about the lack of transparency in school bond campaign fundings and how it leads to corruption. GFS stated that it would be helpful to place in the public record information regarding the specific issuers and bond issues implicated through the actions of MFPs. GFS suggested requiring the disclosure, ''of compensation in excess of general industry compensation practices * * *.'' GFS also suggested requiring the disclosure of relevant information to investors when firms participating in the bond issue have contributed to election campaigns and the election campaigns to which the underwriters have contributed are administered by municipal advisors. Magis stated that there may be compelling reasons to require that disclosure of potential conflicts of interest also be made in official statements ''in order to avoid introducing error or omission to the issuer's official statement.'' GFS also recommended requiring reporting of payments made by underwriters to (not only payments received from) other professionals, such as financial advisors and election advisors and channeled through bond ballot campaigns.

MSRB Response: The MSRB believes that the additional disclosures that will be required under the proposed rule change provide the appropriate types of information that should be disclosed to the general public, including investors, about when firms participating in bond issues have contributed to election campaigns, by providing additional information that has not previously been collected and made available to the public. Such additional information includes: (a) Requiring dealers to disclose the full issuer name and the full issue description, which will provide increased public disclosure of the specific primary offering or offerings that resulted from the bond ballot campaign to which the dealer, or their personnel, contributed and was required to disclose under existing Rule G–37; and (b) requiring dealers to disclose additional information about in-kind contributions that are made to bond ballot campaigns, including the value and nature of goods and services that are provided to the campaign and any ancillary services that are provided to, on behalf of, or in furtherance of the bond ballot campaign by a dealer.

The MSRB does not believe there presently is a readily accessible standard or a ''base-line'' level of compensation for municipal securities transactions that would allow disclosure of ''excess'' compensation as urged by GFS. In response to comments suggesting that dealers should disclose whether a bond ballot campaign is administered by a municipal advisor, the MSRB believes that actual knowledge of whether the bond ballot campaign is administered by a municipal advisor would be required, and that such information is not generally known or available to support a comprehensive disclosure standard for the industry at this time.

In response to Magis's suggestion to require the disclosure of potential conflicts of interest in official statements, the MSRB notes that it does not have regulatory authority over issuers, and therefore does not have the authority to establish requirements regarding the content of official statements. The MSRB believes that GFS's recommendation to report the payments made by underwriters to other professionals that may be channeled through bond election campaigns is not necessary because, to the extent that such payments would represent indirect contributions by the dealer to a bond ballot campaign, such indirect contributions already are required to be disclosed under current Rule G–37.

The proposed amendments to Rule G–37 raise constitutional concerns.

Comments: CCP noted its concerns that ''the Board may take further action regarding dealer and dealer personnel contributions to bond ballot campaigns, up to and including a corresponding ban on business as a result of certain contributions.'' CCP stated that the Board has overlooked the long-standing constitutional distinction between contributions to candidates and those given to support or oppose ballot initiatives. ''Simply put, ballot measure committees receive stronger constitutional protection against government regulation than do candidates.'' CCP also argued that the MSRB's concern about certain practices related to bond ballot campaigns have nothing to do with the creation of a *quid pro quo* arrangement between the bond ballot measure committee and the contributors because the bond ballot measure committee is, under the law, an entirely separate entity from the issuer. ''There is no identity of interests between the person supported for election and the person making hiring and issuing decisions, as is the case in the candidate context and as the D.C. Circuit required in *Blount*. The Board's announcement and analysis make no mention of this crucial distinction.'' CCP suggested that the Board take into consideration the fact that ''ballot issue, ballot measure, and independent expenditure committees are granted far more constitutional protection than are candidate committees.''

[20] Morgan Stanley supports the SIFMA comment letter.

MSRB Response: The MSRB recognizes the distinctions between contributions to candidates and bond ballot campaigns. The MSRB believes that the requirement under the proposed rule change to have dealers provides additional, basic information pertaining to contributions to bond ballot campaigns and any subsequent municipal securities business does not impinge upon the First Amendment rights of individuals and/or firms that will be responsible for providing disclosure of bond ballot campaign contributions.[21] As noted previously, the proposed rule change only will require disclosure of additional information pertaining to contributions to, and municipal securities business from, bond ballot campaigns and will not prohibit contributions to such campaigns.

Certain dealer and dealer personnel contributions to, and activities related to, bond ballot campaigns violate state laws in certain jurisdictions.

Comments: Magis cited an opinion of the California Legislative Counsel's Office that ''a school district or other local agency may not condition the award of an agreement to provide bond underwriting services on the underwriter also providing campaign services in support of that bond measure or another bond measure proposed by the school district or other local agency.'' Magis also stated that California law prohibits the expenditure of public monies on electioneering.

GFS argued that certain bond ballot campaign practices are contrary to the Best Practice recommendation of the Government Finance Officers Association and that

> [t]here are variations in bond election contribution patterns. Other underwriters simply administer bond election campaigns themselves. In doing so, those firms provide both monetary and in-kind value. Those underwriters may advertise this function as a ''service'' provided to issuers. Yet, in California and other states the issuers cannot administer bond election campaigns themselves. Still, in those facts and circumstances, the issuers invariably employ those underwriters to underwrite the bonds the voters approve. The practice has the appearance of those issuers doing indirectly through municipal finance professionals what the issuers cannot do directly.

MSRB Response: The MSRB has previously stated that contributions and expenditures by certain dealers and dealer personnel may assist an issuer in avoiding state law restrictions, and depending on the totality of the facts and circumstances, could independently violate Rule G–17, even if not precluded by Rule G–37.[22] The MSRB does not believe that any additional changes in Rule G–37 are necessary at this time.

The proposed amendments to the definitions of ''contribution'' and ''de minimis'' in Rule G–37 are problematic.

Comments: SIFMA stated that including election services or collateral work provided on behalf of an issuer, in addition to work done on behalf of a bond ballot campaign committee, in the revised definition of ''contribution'' to include the full range of cash and in-kind contributions is a significant change that greatly expands the scope of the reporting obligations to cover frequent routine communications between issuers and underwriters. SIFMA believes the proposed amendment blurs the line between work done for the bond ballot campaign committee which is to be reported on Form G–37 and traditional work for the issuer completed as part of the public finance transaction. SIFMA stated that only in-kind contributions to the bond ballot committee itself should be reportable and that references to work provided to the issuer should be struck from the proposed rule change. SIFMA argued that it would be burdensome on the dealer community to separately distinguish, track, quantify and report such information to the MSRB. SIFMA agreed that work done for or contributions made to the actual bond ballot campaign committee should be disclosed, as the bond ballot campaign committee is a separate legal entity from the issuer.

NAIPFA stated its support of the MSRB's proposed amendment to address ''in-kind'' contributions. GFS stated that it would be helpful to include reporting of in-kind contributions and the value of in-kind contributions, which are excluded from current reporting requirements under Rule G–37.

MSRB Response: The MSRB believes the public disclosure of all political contributions, including cash and in-kind services, will allow for greater public scrutiny of such contributions and the potential connection between them and the awarding of municipal securities business. However, the MSRB agrees that the definition of ''contribution'' should not include work provided to or on behalf of the issuer that is related to the completion of municipal securities business. The MSRB has amended the proposed rule change to clarify the appropriate nexus between ancillary services provided to, on behalf of, or in furtherance of a bond ballot campaign by a dealer or dealer personnel. The revisions will assist with clarifying that in-kind contributions that would be required to be reported by dealers will solely be required with respect to activities related to a bond ballot campaign and not with respect to activities undertaken to complete the associated municipal securities business.

The MSRB also notes that the term ''contribution,'' as defined in Rule G–37, includes anything of value, which has been interpreted to include in-kind contributions.[23] The proposed rule change will establish that the disclosure of in-kind contributions must include both the value and the nature of the goods or services provided.

The proposed amendments will impose undue burdens on dealers.

Comment: CCP stated that the proposed rule change would impose only recordkeeping burdens and would do little to advance the MSRB's anticorruption mission. CCP stated that the recordkeeping requirements for in-kind contributions do little to prevent corruption and would chill a kind of political participation—volunteer work. In addition, CCP stated that by requiring recordkeeping of non-*de minimis* contributions, and defining such contributions at the same rate as those

[21] In *Blount* v. *Securities and Exchange Commission,* 61 F.3d 938, 948 (DC Cir. 1995), the District Court determined that existing Rule G–37 advanced a compelling governmental interest to protect investors that did not abridge First Amendment rights and stated that ''municipal finance professionals are not in any way restricted from engaging in the vast majority of political activities, including making direct expenditures for the expression of their views * * *.''

[22] MSRB Rule G–17 provides that, in the conduct of its municipal securities or municipal advisory activities, each dealer and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice. These principles of fair practice have previously been viewed as applicable in the context of the MSRB's efforts to eliminate pay-to-play activities in the municipal securities market. *See, e.g.,* MSRB Notice 2003–32 (August 6, 2003); *In the Matter of Pryor, McClendon, Counts & Co. et al.,* Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order (February 6, 2002) (broker-dealer violated Rule G–17 by concealing certain political contributions that would have triggered a ban on business under Rule G–37). *See also* MSRB Reports, Draft Rule G–37, Concerning Political Contributions in the Municipal Securities Market, Volume 13, Number 4 (August, 1993); Testimony of Charles W. Fish, Chairman, Municipal Securities Rulemaking Board before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, United States House of Representatives (September 7, 1993) at 59, n.86.

[23] *See* Rule G–37 Interpretations, Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business: Rule G–37, Question II. 18 (May 24, 1994). For example, if a MFP uses dealer's resources (*e.g.,* a political position paper prepared by dealer personnel) or incurs expenses in the conduct of dealer volunteer work (*e.g.,* hosting a reception), then the value of such resources or expenses would constitute a contribution.

for candidates, the proposed revisions conflate contributions to candidates with those to support or oppose ballot initiatives.

MSRB Response: The MSRB believes the requirements of the proposed rule change are necessary and appropriate and will assist the Board and the public in determining whether the awarding of municipal securities business is linked to certain dealer and dealer personnel contributions to bond ballot campaigns. The proposed rule change will assist with advancing the anticorruption objective of Rule G–37. The MSRB believes that potential burdens that may be caused by the recordkeeping requirements of the proposed rule change will be offset by the benefits to the MSRB and the public through greater clarity and context to existing bond ballot campaign contribution disclosures. The MSRB notes that dealers currently report certain political campaign contributions and the increased reporting and submission requirements of the proposed rule change will only involve a slight, incremental increase to existing requirements.

The MSRB also notes that certain dealers also are required to report bond ballot contribution information at the state and local level. These requirements demonstrate the strong public interest for reporting such contributions, and for dealers in such jurisdictions, the burdens of the proposed rule change are arguably even lower.

The MSRB does not believe that the proposed rule change will prohibit or regulate personal volunteer work by dealers and MFPs nor will it chill volunteer work as suggested by CCP. The proposed rule change will require the disclosure of the contribution amounts that are made to bond ballot campaigns by covered parties which, in the case of in-kind contributions, include both the value and the nature of the goods or services provided, including any ancillary services provided to, on behalf of, or in furtherance of the bond ballot campaign. As with existing Rule G–37, the proposed rule change does not prohibit or restrict individual personal volunteer work.[24]

The MSRB does not agree with CCP's comment that defining *de minimis* contributions at the same level as those for candidates, and the attendant recordkeeping requirements for in-kind contributions, is improper. Rather, the MSRB believes that there are efficiencies in maintaining consistent *de minimis* levels for Rule G–37, even with respect to in-kind contributions.

Comment: SIFMA stated that requiring the dealer to provide the specific date on which a contribution was given by the dealer to the bond ballot campaign is burdensome depending upon the number of non-*de minimis* reportable contributions that need to be tracked and reported to the MSRB. SIFMA requested that the MSRB not expand the Form G–37 disclosure to include the specific date the dealer was selected to engage in municipal securities business because the date the dealer was selected to engage in such municipal securities business may not be clear or ascertainable by the dealer. SIFMA believes that each issuer typically has its own method for the selection and final approval of underwriters, which makes it difficult or impossible to standardize the process.

MSRB Response: In response to SIFMA's concern over difficulties in identifying the precise date when a dealer is selected to engage in a municipal securities business, the MSRB has proposed defining a new term: ''reportable date of selection.'' Specifically, the ''reportable date of selection'' will be the date of the earliest to occur of (i) The execution of an engagement letter, (ii) the execution of a bond purchase agreement, or (iii) the receipt of formal notification (provided either in writing or orally) from, or on behalf of, the issuer that the dealer has been selected to engage in municipal securities business.

Comments: SIFMA requested that any rule change be applied from its effective date forward, with no contributions made, or transactions sold or issued before the effective date of the rule, be subject to reporting. SIFMA proposed ''a two-year look back for contributions by current individual MFPs or non-MFPs executive officers for bond ballot campaign contributions that result in a municipal bond offering underwritten by the dealer, to be phased in from the effective date of the rule.''[25] SIFMA also proposed a limitation on reporting municipal securities business resulting from a bond ballot campaign to which a contribution was made so that the dealer would only be required to look back two years prior to the business being undertaken, and that ''transactions underwritten by the dealer after a contribution was made to a bond ballot campaign committee by a former employee should not need to be reported.''

NAIPFA stated that ''any burden, incremental or otherwise, placed upon municipal market participants in connection with the imposition of the Amendments will be outweighed by the benefits that the Amendments will have to the municipal market in terms of improving hiring practices, market transparency, and the policing'' of dealer contributions to bond ballot campaigns. Similarly, GFS stated that it does not believe the disclosure requirements that are contemplated by the proposed rule change would impose undue burdens on underwriters, nor would a future extension of the disclosure requirements to municipal advisors.

MSRB Response: The MSRB believes that the proposed rule change should only apply with respect to municipal securities business with a sale or issuance date on or after the effective date of the proposed rule change. As a result, dealers will not be required to supplement the bond ballot campaign disclosures made with respect to offerings prior to the effective date. However, with respect to offerings after the effective date, dealers must look back at any contribution made by a covered party on or after February 1, 2010 (the date on which dealers were first required to record and disclose contributions to bond ballot campaigns).[26]

In addition, the MSRB believes that the look-back provisions for contributions made by an individual prior to becoming an MFP or a non-MFP executive officer of a dealer should be limited to two years, consistent with the existing timeframe for which such

[24] *Ibid.* The MSRB has previously provided guidance regarding the treatment of contributions as the use of dealer resources or the incurrence of expenses by dealers in connection with a political campaign. The MSRB has made clear that Rule G–37 does not prohibit or limit individuals from providing volunteer services in support of an issuer official, and has also noted that certain incidental expenses incurred by such individual would generally not be treated as a contribution. *See* Rule G–37 Question and Answer II.18 (May 24, 1994). For example, personal expenses incurred by an MFP in the conduct of volunteer work, which expenses are purely incidental to the volunteer work and are unreimbursed by the dealer (*e.g.,* cab fares and personal meals), would not constitute a contribution. Also *see* Rule G–37, Question II.19 (August 18, 1994). An employee of a dealer generally can donate their time to an issuer official's campaign without such time being viewed as a contribution by the dealer to the official, so long as the employee is volunteering his or her time during non-work hours, or is using previously accrued vacation time or the dealer is not otherwise paying the employee's salary (*e.g.,* an unpaid leave of absence). These principles would apply equally to individuals providing volunteer services in connection with a bond ballot campaign.

[25] SIFMA also stated any applicable look back provision should not take into account contributions made, or transactions sold or issued before the effective date of the rule.

[26] *See* footnote 10.

contributions are ordinarily attributable to the dealer under Rule G–37. The MSRB also believes that dealers must continue to report primary offerings pertaining to bond ballot campaign contributions of an MFP or non-MFP executive officer that left the dealer, as such contributions are properly attributable to such dealer.

The proposed amendments to Rule G–37 should apply to municipal advisors.

Comments: NAIPFA believes that municipal advisors should be subject to the proposed amendments when and if adopted. In addition, NAIPFA supported the inclusion of municipal advisors within the provisions of current Rule G–37 and, in particular, those portions contained within Rule G–37(c) and (d) in order to prevent municipal advisors from circumventing their disclosure obligations as well as the ban on campaign contributions. GFS stated that ''[a]mong other things, once the definition of the 'municipal advisor' concept is finalized by the Securities and Exchange Commission, financial advisors and other municipal advisors can be brought within the scope of the regulation.'' Magis and SIFMA also supported the application of the proposed amendments to municipal advisors.

MSRB Response: The MSRB previously proposed a new rule that would apply pay-to-play restrictions to municipal advisors but withdrew such proposal pending final rulemaking by the SEC on a permanent municipal advisor registration rule and related definitional matters.[27] The MSRB will consider including the same types of disclosures required by the proposed rule change in any such rule it may propose in the future with regard to municipal advisors.

Rule G–37 should have more timely and/or expansive reporting requirements.

Comments: GFS recommended that the Board consider requiring reporting promptly after contributions are made, and in any event, prior to elections and in time to inform the electorate. Magis expressed concern that existing Form G–37 submissions by underwriters occur only quarterly and suggested that the Board consider ''more timely disclosure of these conflicts of interest prior to the bond election. * * *''

MSRB Response: The MSRB believes that the current quarterly reporting scheme required under Rule G–37 provides adequate and timely information about dealer and dealer personnel contributions to bond ballot campaigns and does not intend to expand the reporting requirements at this time.

The EMMA system should provide for easier access to the disclosures submitted by dealers relating to bond ballot campaign contributions and related information.

Comments: GFS stated that ''EMMA's online campaign contribution report records are difficult to search in a systematic manner. For example, EMMA's records cannot be searched at present by issuer names or titles of bond issues, which voters may wish to do.'' GFS recommended making campaign contribution reports more easily searchable on EMMA by issuer name and by titles of bond issues. Magis also stated that EMMA is exceedingly difficult to search by issuer name because the records are ''dealer name-centric.'' Magis supports the ability to access Form G–37 information by state or type of issuer.

MSRB Response: Comments about the usability and functionality of disclosure on EMMA are beyond the scope of the proposed rule change. The MSRB is continually evaluating the effectiveness of EMMA and may consider initiating such changes in the future.

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 up to 90 days (i) as the Commission may designate 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 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–MSRB–2013–01 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–2013–01. 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 10:00 a.m. and 3:00 p.m. Copies of the 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–2013–01 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03385 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[27] *See* MSRB Notice 2011–46 (August 19, 2011); MSRB Notice 2011–51 (September 12, 2011).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68880; File No. SR–Phlx–2013–10]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Certain Fees in Section II of the Pricing Schedule

February 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on January 25, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section II of the Pricing Schedule entitled ''Multiply Listed Options Fees'' [3] to amend fees applicable to a Firm. The Exchange also proposes to make a technical amendment to Section VI entitled ''Membership Fees.''

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated the proposed amendment to be operative on February 1, 2013.

The text of the proposed rule change is provided in Exhibit 5. The text of the proposed rule change is also available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to increase certain fees applicable to Firms in Section II of the Pricing Schedule to more closely align the electronic Firm Penny Pilot Options [4] Transaction Charge with other fees in Sections II of the Pricing Schedule.

Currently, the Exchange assesses Firm Options Transaction Charges in Penny Pilot Options as follows: $0.40 per contract for an electronic order and $0.25 per contract for an order originating from the Exchange floor. The Exchange assesses Firm Options Transaction Charges in non-Penny Pilot Options [5] as follows: $0.45 per contract for an electronic order and $0.25 per contract for an order originating from the Exchange floor. The Exchange proposes to increase the electronic Firm Options Transaction Charge in Penny Pilot Options from $0.40 to $0.44 per contract.

Currently, the Exchange reduces electronic Firm Options Transaction Charges in Penny Pilot and non-Penny Pilot Options to $0.13 per contract and $0.00 per contract for electronic Complex Orders that add liquidity for a given month provided that a Firm has volume greater than 600,000 electronically-delivered contracts in a month (''Electronic Firm Fee Discount''). The Exchange proposes to reduce electronic Firm Options Transaction Charges in Penny Pilot and non-Penny Pilot Options, including electronic Complex Orders that add liquidity,[6] to $0.17 per contract [7] if a Firm meets the volume requirement of the Electronic Firm Fee Discount. Finally, the Exchange proposes to amend the Firm volume requirement for the Electronic Firm Fee Discount by lowering it from 600,000 electronically-delivered contracts to 500,000 electronically-delivered contracts.

The Exchange also proposes to amend Section VI, Part A of the Pricing Schedule entitled ''Permit and Registration Fees'' to make a technical amendment to correct the text of the Pricing Schedule. The Exchange amended the Permit Fees on January 2, 2013 to increase the Permit Fee for Phlx Members transacting business on Phlx from $2,000 to $2,100 per month.[8] At that time, the Exchange inadvertently did not also update the paragraph explaining how a member qualifies for the lower Permit Fee. The Exchange proposes to update the Pricing Schedule to reflect the Permit Fee for Phlx Members transacting business on Phlx is $2,100 in note 15 which accompanies the Permit Fee to update and clarify the Pricing Schedule.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act [9] in general, and furthers the objectives of Section 6(b)(4) of the Act,[10] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that increasing the Firm Options Transaction Charge from $0.40 to $0.44 per contract is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Multiply Listed Options includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed.

[4] The Penny Pilot was established in January 2007; and in October 2009, it was expanded and extended through June 30, 2013. *See* Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR–Phlx–2006–74) (notice of filing and approval order establishing Penny Pilot); 60873 (October 23, 2009), 74 FR 56675 (November 2, 2009) (SR–Phlx–2009–91) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60966 (November 9, 2009), 74 FR 59331 (November 17, 2009) (SR–Phlx–2009–94) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61454 (February 1, 2010), 75 FR 6233 (February 8, 2010) (SR–Phlx–2010–12) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62028 (May 4, 2010), 75 FR 25890 (May 10, 2010) (SR–Phlx–2010–65) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62616 (July 30, 2010), 75 FR 47664 (August 6, 2010) (SR–Phlx–2010–103) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 63395 (November 30, 2010), 75 FR 76062 (December 7, 2010) (SR–Phlx–2010–167) (notice of filing and immediate effectiveness extending the Penny Pilot); 65976 (December 15, 2011), 76 FR 79247 (December 21, 2011) (SR–Phlx–2011–172) (notice of filing and immediate effectiveness extending the Penny Pilot); 67326 (June 29, 2012), 77 FR 40126 (July 6, 2012) (SR–Phlx–2012–86) (notice of filing and immediate effectiveness extending the Penny Pilot); and 68534 (December 21, 2012), 77 FR 77174 (December 31, 2012) (notice of filing and immediate effectiveness extending the Penny Pilot). See also Exchange Rule 1034.

[5] Non-Penny Pilot refers to options classes not in the Penny Pilot.

[6] Today, a Firm that qualifies for the Electronic Firm Fee Discount would not be assessed an Options Transaction Charge for electronic Complex Orders that add liquidity because they are entitled to a fee reduction to $0.00 per contract.

[7] Today, a Firm that qualifies for the Electronic Firm Fee Discount would not be assessed a charge for electronic Complex Orders that add liquidity. Pursuant to this proposal, a Firm would be assessed $0.17 per contract for electronic Complex Orders that add liquidity.

[8] *See* Securities Exchange Act Release No. 68473 (December 19, 2012), 77 FR 76128 (December 19, 2012) (SR–Phlx–2012–140).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

reasonable because this fee is within the range of other fees in Section II of the Pricing Schedule. The Exchange currently assesses an electronic Firm Options Transaction Charge in non-Penny Pilot Options of $0.45 per contract and an electronic Broker-Dealer Options Transaction Charge in Penny Pilot Options of $0.45 per contract. The Exchange generally assesses lower fees for Penny Pilot Options as compared to non-Penny Pilot Option because those securities are among the most actively traded and liquid options. This is the case today for Specialist, Market Maker and Broker-Dealer Fees.[11]

The Exchange believes that increasing the Firm Options Transaction Charge from $0.40 to $0.44 per contract is equitable and not unfairly discriminatory for the reasons which follow. Firms will continue to be assessed a higher fee than a Customer who pays no fee to transact electronic Penny Pilot Options. Customer order flow brings unique benefits to the market which benefits all market participants through increased liquidity. Similarly, Firms will continue to be assessed higher fees than Specialists[12] and Market Makers[13] in electronic Penny Pilot Options[14] because Specialists and Market Makers have obligations to the market and regulatory requirements,[15] which normally do not apply to other market participants. They have obligations to make continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with a course of dealings. The proposed differentiation as between Customers, Specialists and Market Makers and other market participants recognizes the differing contributions made to the liquidity and trading environment on the Exchange by these market participants, as well as the differing mix of orders entered. Broker-Dealers and Firms today pay higher fees as compared to a Professional[16] for electronic Penny Pilot Options transactions and this would not change. With respect to Professionals, they have access to more information and technological advantages as compared to Customers and Professionals do not bear the obligations of Specialists or Market Makers. Also, Professionals engage in trading activity similar to that conducted by Specialists or Market Makers. For example, Professionals continue to join bids and offers on the Exchange and thus compete for incoming order flow. For these reasons, the Exchange believes that Professionals may be priced higher than a Customer and may be priced equal to or higher than a Specialist or Market Maker. Finally, the Firm will continue to be assessed a lower fee as compared to a Broker-Dealer. The Exchange believes that increasing the Firm electronic Penny Pilot Options Transaction Charge to $0.44 per contract does not misalign the current rate differentials between a Broker-Dealer and a Firm because the Exchange is narrowing the differential to $.01 per contract. Further, the Exchange is increasing the discounted fee for Firms that qualify for the Electronic Firm Fee Discount for all electronic orders, including electronic Complex Orders that add liquidity, to $0.17 per contract. This will also serve to further align the rate differentials as between a Broker-Dealer and a Firm.

The Exchange believes that it is reasonable to decrease the Electronic Firm Fee Discount for electronic Options Transaction Charges in Penny Pilot and non-Penny Pilot Options from $0.13 to $0.17 per contract, decrease the fee deduction for Firm electronic Complex Orders that add liquidity from no fee to $0.17 per contract and decrease the Firm volume requirement from 600,000 to 500,000 electronically-delivered contracts because the Exchange is continuing to offer Firms discounts if they qualify for the Electronic Firm Fee Discount. By decreasing the Firm volume requirement from 600,000 to 500,000 electronically-delivered contracts, the Exchange believes that additional market participants transacting Firm orders would be able to qualify for the discount. Despite the increase to the Firm electronic Penny Pilot Options Transaction Charge, the Exchange believes the amendments to the Electronic Firm Fee Discount should continue to attract electronic Firm volume to the Exchange.

The Exchange believes that it is equitable and not unfairly discriminatory to decrease the Electronic Firm Fee Discount for electronic Options Transaction Charges in Penny Pilot and non-Penny Pilot Options from $0.13 to $0.17 per contract, decrease the fee deduction for Firm electronic Complex Orders that add liquidity from no fee to $0.17 per contract and decrease the Firm volume requirement from 600,000 to 500,000 electronically-delivered contracts for the Electronic Firm Fee Discount because all Firms will continue to have an opportunity to qualify for this incentive as they do today, provided they achieve the requisite volume. The Exchange also believes that the increased opportunity to obtain the Electronic Firm Fee Discount, because of the reduced volume requirement, will assist Firms to offset the increased Firm fee proposed herein. While the Exchange is decreasing the discount (from no charge to $0.17 per contract) on Firm electronic Complex Orders that add liquidity, the Exchange believes that reducing the discount for all Firm electronic Penny Pilot and non-Penny Pilot Options Transaction Charges by the same amount is equitable and not unfairly discriminatory.

Finally, the Exchange believes that the technical amendment to Section VI of the Pricing Schedule to amend the reference to the Permit Fee for Phlx Members transacting business on Phlx is reasonable, equitable and not unfairly discriminatory because the proposed amendment should clarify the incorrect text on the Pricing Schedule and provide consistent information in that section of the Pricing Schedule.

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. The Exchange believes that increasing the electronic Firm Penny Pilot Options Transaction Charge does not misalign the pricing in Section II as between the market participants. The Firm electronic Options Transaction Charges in Penny Pilot Options would continue to be higher than Customer fees, electronic Professional fees and electronic Specialist and Market Maker fees in

[11] The Exchange assesses an electronic Specialist and Market Maker Options Transaction Charge in Penny Pilot Options of $0.22 per contract as compared to an electronic Specialist and Market Maker Options Transaction Charge in non-Penny Pilot Options of $0.23 per contract. The Exchange assesses an electronic Broker Dealer Options Transaction Charge in Penny Pilot Options of $0.45 per contract as compared to an electronic Broker Dealer Options Transaction Charge in non-Penny Pilot Options of $0.60 per contract.

[12] A "Specialist" is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

[13] A "Market Maker" includes Registered Options Traders (Rule 1014(b)(i) and (ii)), which includes Streaming Quote Traders (*see* Rule 1014(b)(ii)(A)) and Remote Streaming Quote Traders (*see* Rule 1014(b)(ii)(B)). Directed Participants are also market makers.

[14] Specialists and Market Maker pay $0.22 per contract to transact electronic Penny Pilot Options.

[15] *See* Rule 1014 titled "Obligations and Restrictions Applicable to Specialists and Registered Options Traders."

[16] The term "Professional" means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Rule 1000(b)(14).

Penny Pilot Options. Additionally, the increased Firm fee narrows the differential as between Firms and Broker-Dealers. Further, the Exchange is offsetting the Firm fee increase with an increased opportunity to obtain the Electronic Firm Fee Discount of $0.17 per contract by decreasing the Firm volume requirement. The increased Firm discount of $0.17 per contract applies equally to all Firms. The Exchange does not believe that any of the proposed amendments impose a burden on competition as between market participants. The Exchange proposes to balance an increased fee applicable only to Firms with an increased opportunity for Firms to benefit from a discount.

The Exchange operates in a highly competitive market, comprised of eleven exchanges, in which market participants can easily and readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Accordingly, the fees that are assessed by the Exchange must remain competitive with fees charged by other venues and therefore must continue to be reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than competing venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[17] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2013–10 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–2013–10. 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 10:00 a.m. and 3:00 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–Phlx–2013–10 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03390 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68889; File No. SR–Phlx–2013–15]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change for the Permanent Approval of a Pilot Program To Permit PSX To Accept Inbound Orders Routed by Nasdaq Execution Services LLC From the BX Equities Market

February 8, 2013.

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 February 6, 2013, NASDAQ OMX PHLX, LLC (''Exchange'' or ''Phlx'') 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 is filing with the Commission a proposed rule change for the permanent approval of its pilot program to permit the NASDAQ OMX PSX facility of PHLX (''System'') to accept inbound orders routed by Nasdaq Execution Services LLC (''NES'') from the NASDAQ OMX BX Equities Market of NASDAQ OMX BX, Inc. (''BX'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 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

In conjunction with BX providing outbound routing services to all markets using its affiliated routing broker, NES,[4] PHLX proposed that NES be permitted to route orders from BX to the Exchange on a pilot basis, subject to certain limitations and conditions, as described below.[5] The current pilot program expires March 30, 2013.[6]

NES is a broker-dealer and member of NASDAQ, PHLX and BX. NES provides all routing functions for The NASDAQ Stock Market (''NASDAQ''), BX and PHLX. BX, NASDAQ, PHLX and NES are affiliates. Accordingly, the affiliate relationship between PHLX and NES, its member, raises the issue of an exchange's affiliation with a member of such exchange. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[7]

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange of which it is a member, the Exchange previously proposed, and the Commission approved, limitations and conditions on NES's affiliation with the Exchange.[8] Also recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange previously proposed, and the Commission approved,[9] NES's affiliation with the Exchange to permit the Exchange to accept inbound orders that NES routes in its capacity as a facility of NASDAQ, subject to the certain limitations and conditions. The Exchange now proposes to permit PHLX to accept inbound orders that NES routes in its capacity as a facility of BX on a permanent basis, subject to the limitations and conditions of this pilot:

- First, the Exchange and FINRA maintain a Regulatory Contract, as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[10] Pursuant to the Regulatory Contract and the 17d–2 Agreement, FINRA is allocated regulatory responsibilities to review NES's compliance with certain Exchange rules.[11] Pursuant to the Regulatory Contract, however, PHLX retains ultimate responsibility for enforcing its rules with respect to NES.
- Second, FINRA monitors NES for compliance with the Exchange's trading rules, and collects and maintains certain related information.[12]
- Third, FINRA provides a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, the Exchange has in place PHLX Rule 985, which requires The NASDAQ OMX Group, Inc., as the holding company owning both the Exchange and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to the Exchange.

The Exchange has met all the above-listed conditions. By meeting the above conditions, the Exchange has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with the Exchange. Because the Exchange has met all the above-listed conditions, it now seeks permanent approval of this inbound routing relationship. The Exchange will continue to comply with the conditions 1–4 stated above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general, and with Sections 6(b)(5) of the Act,[14] in particular, in that the proposal 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because the proposed rule change will allow the Exchange to continue to receive inbound orders from NES, acting in its capacity as a facility of BX, in a manner consistent with prior approvals and established protections. The Exchange believes that these conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange to its advantage.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Permanent approval of the current pilot program does not raise any issues of intramarket competition because it involves inbound routing from an affiliated exchange. Nor does it result in a burden on competition among exchanges, because there are many competing exchanges that provide routing services, including through an affiliate.

[4] *See* Securities Exchange Act Release No. 65470 (October 3, 2011), 76 FR 62489 (October 7, 2011) (SR–BX–2011–048).

[5] *See* Securities Exchange Act Release No. 65553 (October 13, 2011), 76 FR 64987 (October 19, 2011) (SR–Phlx–2011–138).

[6] *See* Securities Exchange Act Release No. 67996 (October 5, 2012), 77 FR 62282 (October 12, 2012) (SR–Phlx–2012–118).

[7] *See* Securities Exchange Act Release Nos. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR–NASDAQ–2008–098); and 62736 (August 17, 2010), 75 FR 51861 (August 23, 2010) (SR–NASDAQ–2010–100).

[8] *See* Securities Exchange Act Release No. 62877 (September 9, 2010), 75 FR 56633 (September 16, 2010) (SR–PHLX–2010–79).

[9] *Id.*

[10] 17 CFR 240.17d–2.

[11] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[12] Pursuant to the Regulatory Contract, both FINRA and the Exchange collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of BX routing orders to PHLX) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.

[13] 15 U.S.C. 78f.

[14] 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 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 shall: (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–2013–15 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–2013–15. 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 business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also 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–2013–15 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03396 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68888; File No. SR–CBOE–2012–120]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval to Proposed Rule Change To Establish a Pilot Program, as Modified by Amendment Nos. 2, 3, and 4, To List and Trade a P.M.-Settled S&P 500 Index Option Product

February 8, 2013.

I. Introduction

On December 5, 2012, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to permit the listing and trading of P.M.-settled options on the Standard & Poor's 500 Index (''S&P 500''). On December 17, 2012, the Exchange filed Amendments No. 1 and 2 to the proposed rule change.[3] The proposed rule change was published for comment in the **Federal Register** on December 26, 2012.[4] On January 4, 2013, the Exchange filed Amendment No. 3 to the proposed rule change.[5] On January 29, 2013, the Exchange filed Amendment No. 4 to the proposed rule change.[6] The Commission received no comment letters on the proposal. This order approves the proposed rule change, as modified, on a twelve-month pilot basis.

II. Description of the Proposal

The Exchange is proposing to amend its rules to permit it to list and trade, on a pilot basis, cash-settled S&P 500 index options with third-Friday-of-the-month (''Expiration Friday'') expiration dates for which the exercise settlement value will be based on the index value derived from the closing prices of component securities (''P.M.-settled''). The proposed contract (referred to as ''SPXPM'') is currently traded on a pilot basis on C2 Options Exchange, Incorporated (''C2'') (the ''C2 Pilot Program'').[7] CBOE is proposing to list and trade SPXPM on the same terms as the C2 Pilot Program, except that CBOE intends to list and trade SPXPM for an initial pilot period of twelve months.[8] CBOE and C2 will not concurrently list and trade SPXPM. In other words, C2 (which is wholly owned by the same corporation, CBOE Holdings, Inc., as CBOE) will cease trading SPXPM upon the introduction of SPXPM trading on CBOE. CBOE initially represented that it intended to begin trading SPXPM on or around January 22, 2013, but in Amendment No. 4, CBOE instead represented its intent to begin trading SPXPM on February 19, 2013.[9]

CBOE will list and trade SPXPM in a manner similar to how SPXPM currently is listed and traded on C2. In

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[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange withdrew Amendment No. 1 on December 17, 2012. In Amendment No. 2, the Exchange represented that it does not believe that CBOE Trading Permit Holders will experience significant operations issues when trading P.M.-settled S&P 500 Index products on CBOE.

[4] *See* Securities Exchange Act Release No. 68457 (December 18, 2012), 77 FR 76135 (December 26, 2012) (''Notice''). An amendment to the Notice was published in the **Federal Register** on January 8, 2013 with a corrected deadline for comments of January 16, 2013. *See* Securities Exchange Act Release No. 68457 (December 18, 2012), 78 FR 1296 (January 8, 2013).

[5] In Amendment No. 3, the Exchange explained that any P.M.-settled S&P 500 Index options series that are part of the SPX options class and that have an expiration on any day other than the third Friday of every month will remain under the SPXPM class to avoid investor confusion. Because Amendment No. 3 is technical in nature, the Commission is not publishing it for comment.

[6] In Amendment No. 4, the Exchange modified the anticipated start date for the listing and trading of the proposed contact on CBOE from January 22, 2013 to February 19, 2013. *See* Notice, *supra* note 4, at 76136. Because Amendment No. 4 is technical in nature, the Commission is not publishing it for comment.

[7] *See* Securities Exchange Act Release No. 65256 (September 2, 2011), 76 FR 55969 (September 9, 2011) (''C2 SPXPM Approval Order'').

[8] The C2 Pilot Program is a fourteen month pilot.

[9] *See* Amendment No. 4, *supra* note 6.

particular, SPXPM on CBOE will use a $100 multiplier, and the minimum trading increment will be $0.05 for options trading below $3.00 and $0.10 for all other series. Strike price intervals will be set no less than 5 points apart. Consistent with existing rules for index options, the Exchange will allow up to twelve near-term expiration months, as well as LEAPS. Expiration processing will occur on the Saturday following Expiration Friday. The product will have European-style exercise and will not be subject to position limits, though there would be enhanced reporting requirements. The Exchange represents that the conditions for listing SPXPM on CBOE will be similar to those for SPX, which already is listed and traded on CBOE.[10]

The Exchange proposes that SPXPM be approved on a pilot basis for an initial period of twelve months. As part of the pilot program, the Exchange committed to submit a pilot program report to the Commission at least two months prior to the expiration date of the pilot program (the ''annual report''). The annual report will contain the same information currently provided to the Commission pursuant to the C2 Pilot Program and would include an analysis of volume, open interest, and trading patterns. The analysis will examine trading in the proposed option product as well as trading in the securities that comprise the S&P 500 index. In addition, for series that exceed certain minimum open interest parameters, the annual report will provide analysis of index price volatility and share trading activity. In addition to the annual report, the Exchange committed to provide the Commission with periodic reports while the pilot is in effect that would contain some, but not all, of the information contained in the annual report (''interim reports''). This information is identical to the information that C2 is required to report to the Commission pursuant to the C2 Pilot Program.

III. Discussion and Commission Findings

After careful consideration of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[11] and, in particular, the requirements of Section 6 of the Act.[12] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[13] which requires that an exchange have rules designed to remove impediments to and perfect the mechanism of a free and open market and to protect investors and the public interest, to allow CBOE to conduct a limited, and carefully monitored, pilot as proposed.

As noted in the Commission's order approving the listing and trading of SPXPM on C2 on a pilot program basis, the Commission has concerns about the potential impact on the market at expiration for the underlying component stocks for a P.M.-settled, cash-settled index option such as SPXPM.[14] The potential impact today remains unclear, given the significant changes in the closing procedures of the primary markets over the past two decades. The Commission is mindful of the historical experience with the impact of P.M. settlement of cash-settled index derivatives on the underlying cash markets, but recognizes that these risks may be mitigated today by the enhanced closing procedures that are now in use at the primary equity markets.

To assist the Commission in assessing any potential impact of a P.M.-settled S&P 500 index option on the options markets as well as the underlying cash equities markets, CBOE will be required to submit data to the Commission in connection with the pilot in exactly the same scope and format as C2 was required to submit as a condition of Commission approval of SPXPM on a pilot basis. The Commission believes that CBOE's proposed twelve-month pilot, together with the data and analysis that CBOE will provide to the Commission, will allow CBOE and the Commission to monitor for and assess any potential for adverse market effects. Specifically, the data and analysis will assist the Commission in evaluating the effect of allowing P.M. settlement for S&P 500 index options on the underlying component stocks.

CBOE's proposed twelve-month pilot will enable the Commission to collect current data to assess and monitor for any potential for impact on markets, including the underlying cash equities markets. In particular, the data collected from CBOE's pilot program will help inform the Commission's consideration of whether the SPXPM pilot should be modified, discontinued, extended, or permanently approved. The P.M. settlement pilot information should help the Commission assess the impact on the markets and determine whether other changes are necessary. Furthermore, the Exchange's ongoing analysis of the pilot should help it monitor any potential risks from large P.M.-settled positions and take appropriate action on a timely basis if warranted.

As the Commission noted when it approved C2's proposal to list and trade SPXPM, approval of CBOE's proposal to transfer listing of SPXPM from C2 to CBOE could benefit investors and the public interest to the extent it attracts trading in P.M.-settled S&P 500 index options from the opaque OTC market to the more transparent exchange-listed markets, where trading in the product will be subject to exchange trading rules and exchange surveillance.[15]

The Exchange represents that it has adequate surveillance procedures to monitor trading in these options thereby helping to ensure the maintenance of a fair and orderly market, and has represented that it has sufficient capacity to handle additional traffic associated with this new listing.[16] In addition, CBOE represents that it does not expect that its Trading Permit Holders will experience significant operation issues as a result of the cessation of trading on C2 of SPXPM upon the introduction of trading of SPXPM on CBOE.[17] CBOE stated that there are no C2 Trading Permit Holders that are not also CBOE Trading Permit Holders, so any C2 Trading Permit Holder that is currently trading SPXPM on C2 will have access to trade SPXPM on CBOE.[18]

For the reasons discussed above, the Commission finds that CBOE's proposal is consistent with the Act, including Section 6(b)(5) thereof, in that it is designed to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest. As it found in the case of C2's original proposal to list and trade SPXPM, and in light of the enhanced closing

[10] *See* Notice, *supra* note 4, at 76136.

[11] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f.

[13] 15 U.S.C. 78f(b)(5).

[14] *See* C2 SPXPM Approval Order, *supra* note 7, at 55972, 55974–55975.

[15] *See* C2 SPXPM Approval Order, *supra* note 7, at 55976.

[16] *See* Notice, *supra* note 4, at 76138.

In addition, the Commission notes that CBOE would have access to information through its membership in the Intermarket Surveillance Group with respect to the trading of the securities underlying the S&P 500 index, as well as tools such as large options positions reports to assist its surveillance of SPXPM options.

In approving the proposed rule change, the Commission also has relied upon the Exchange's representation that it has the necessary systems capacity to support new options series that will result from this proposal. *See* Notice, *supra* note 4, at 76138.

[17] *See* Notice, *supra* note 4, at 76136.

[18] *See* Amendment No. 2, *supra* note 3.

procedures at the underlying markets and the potential benefits to investors discussed above, the Commission finds that it is appropriate and consistent with the Act to approve CBOE's proposal on a pilot basis. The collection of data during the pilot and CBOE's active monitoring of any effects of SPXPM on the markets will help CBOE and the Commission assess any impact of P.M. settlement in today's market.

As noted in Amendment No. 4, CBOE represented its intent to begin trading SPXPM on February 19, 2013, which is the first day of a new expiration cycle for options.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[19] that the proposed rule change (SR–CBOE–2012–120), as modified by Amendment Nos. 2, 3, and 4, be, and hereby is, approved, as amended, on a 12 month pilot basis set to expire on February 8, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03395 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68891; File No. SR–NASDAQ–2013–028]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change for the Permanent Approval of a Pilot Program To Permit Inbound Orders Routed by Nasdaq Execution Services LLC From the NASDAQ OMX BX Equities Market and NASDAQ OMX PSX

February 8, 2013.

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 February 6, 2013, The NASDAQ Stock Market LLC (''Exchange'' or ''Nasdaq'') 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 a rule change for the permanent approval of its pilot program to permit inbound orders routed by Nasdaq Execution Services LLC (''NES'') from the NASDAQ OMX BX Equities Market of NASDAQ OMX BX, Inc. (''BX'') and the NASDAQ OMX PSX facility of NASDAQ OMX PHLX LLC (''PHLX'').

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

In conjunction with BX and PHLX providing outbound routing services to all markets using their affiliated routing broker, NES,[4] NASDAQ proposed that NES be permitted to route orders from BX and PHLX, respectively, to the Exchange on a pilot basis, subject to certain conditions and limitations, as described below.[5] The current pilot program expires March 30, 2013.[6]

NES is a broker-dealer and member of NASDAQ, PHLX and BX. NES provides all routing functions for NASDAQ, BX and PHLX. BX, NASDAQ, PHLX and NES are affiliates. Accordingly, the affiliate relationship between NASDAQ and NES, its member, raises the issue of an exchange's affiliation with a member of such exchange. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[7]

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange of which it is a member, the Exchange previously proposed, and the Commission approved, limitations and conditions on NES's affiliation with the Exchange.[8] The Exchange now proposes to permit NASDAQ to accept inbound orders that NES routes in its capacity as a facility of BX and PHLX on a permanent basis, subject to the imitations [sic] and conditions of this pilot:

- First, the Exchange and FINRA maintain a Regulatory Contract, as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[9] Pursuant to the Regulatory Contract and the 17d–2 Agreement, FINRA is allocated regulatory responsibilities to review NES's compliance with certain Exchange rules.[10] Pursuant to the Regulatory Contract, however, NASDAQ retains ultimate responsibility for enforcing its rules with respect to NES.
- Second, FINRA monitors NES for compliance with the Exchange's trading rules, and collects and maintains certain related information.[11]
- Third, FINRA provides a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.

[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 Nos. 65470 (October 3, 2011), 76 FR 62489 (October 7, 2011) (SR–BX–2011–048); and 65469 (October 3, 2011), 76 FR 62486 (October 7, 2011) (SR–Phlx–2011–108).

[5] *See* Securities Exchange Act Release No. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011) (SR–NASDAQ–2011–142).

[6] *See* Securities Exchange Act Release No. 67997 (October 5, 2012), 77 FR 62293 (October 12, 2012) (SR–NASDAQ–2012–112).

[7] *See* Securities Exchange Act Release Nos. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR–NASDAQ–2008–098); and 62736 (August 17, 2010), 75 FR 51861 (August 23, 2010) (SR–NASDAQ–2010–100).

[8] *Id.*

[9] 17 CFR 240.17d–2.

[10] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[11] Pursuant to the Regulatory Contract, both FINRA and the Exchange collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of BX and PHLX routing orders to NASDAQ) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.

• Fourth, the Exchange has in place NASDAQ Rule 2160(c), which requires The NASDAQ OMX Group, Inc., as the holding company owning both the Exchange and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to the Exchange.

The Exchange has met all the above-listed conditions. By meeting the above conditions, the Exchange has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with the Exchange. Because the Exchange has met all the above-listed conditions, it now seeks permanent approval of this inbound routing relationship. The Exchange will continue to comply with the conditions 1–4 stated above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[12] in general, and with Sections 6(b)(5) of the Act,[13] in particular, in that the proposal 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because the proposed rule change will allow the Exchange to continue to receive inbound orders from NES, acting in its capacity as a facility of BX and PHLX, in a manner consistent with prior approvals and established protections. The Exchange believes that these conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange to its advantage.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Permanent approval of the current pilot program does not raise any issues of intramarket competition because it involves inbound routing from an affiliated exchange. Nor does it result in a burden on competition among exchanges, because there are many competing exchanges that provide routing services, including through an affiliate.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 shall: (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–NASDAQ–2013–028 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–NASDAQ–2013–028. 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 business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also 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–NASDAQ–2013–028 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03411 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78f.

[13] 15 U.S.C. 78f(b)(5).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68873; File No. SR–CBOE–2013–016]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change To Permit the Minimum Price Variation for Mini-Options To Be the Same as Permitted for Standard Options on the Same Security

February 8, 2013.

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 January 31, 2013, Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') 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 Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to permit the minimum price variation for mini-option contracts that deliver 10 shares to be the same as permitted for standard options that deliver 100 shares on the same security. The text of the proposed rule change is available on the Exchange's Web site *http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission.

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

CBOE recently amended its rules to allow for the listing of mini-options that deliver 10 physical shares on SPDR S&P 500 (''SPY''), Apple, Inc. (''AAPL''), SPDR Gold Trust (''GLD''), Google Inc. (''GOOG'') and Amazon.com Inc. (''AMZN'').[3] Mini-options trading is expected to commence in March 2013. Prior to the commencement of trading mini-options, the Exchange proposes to establish and permit the minimum price variation for mini-option contracts to be the same as permitted for standard options on the same security. In addition to giving market participants clarity as to the minimum pricing increments for mini-options, the filing would harmonize penny pricing between mini-options and standard options on the same security.

Of the five securities on which mini-options are permitted, four of them (SPY, AAPL, GLD and AMZN) participate in the Penny Pilot Program. Under the Penny Pilot Program:

- The minimum price variation for AAPL, GLD and AMZN options is $0.01 for all quotations in series that are quoted at less than $3 per contract and $0.05 for all quotations in series that are quoted at $3 per contract or greater;[4] and
- The minimum price variation for SPY options is $0.01 for all quotations in all series.[5]

In the lead up to the launch of mini-options trading, the Exchange has polled firms with customer bases of potential product users and they have indicated a preference that premium pricing for mini-options match what is currently permitted for standard options that deliver 100 physical shares on the same securities. Specifically, firms' systems are configured using the ''root symbol'' of an underlying security and cannot differentiate, for purposes of minimum variation pricing, between contracts on the same security. Mini-options will be loaded into firms' systems using the same ''root symbol'' that is used for standard options on the same security. As a result, it is believed that existing systems will not be able to assign different minimum pricing variations to different contracts on the same security. As a result, firms have indicated their preference that there be matched pricing between mini-options and standard options on the same security because their systems, which are programmed using ''root symbols,'' would not be able to assign different minimum pricing variations to mini-options and standard options on the same security.

Because mini-options are a separate class from standard options on the same security, mini-options would have to qualify separately for entry into the Penny Pilot Program. This, however, is not possible by product launch (or possibly ever) for a number of reasons. First, there is a six calendar month trading volume criteria for entry into the Penny Pilot Program, which mini-options cannot satisfy prior to launch. Second, even if mini-options met the trading volume criteria, replacement classes are only added to the Penny Pilot Program on the second trading day following January 1 and July 1 in a given year. Finally, there is a price test for entry into the Penny Pilot Program which excludes ''high premium'' classes, which are defined as classes priced at $200 per share or higher at the time of selection. As of the date of this filing, three of the five securities (AAPL, AMZN and GOOG) eligible for mini-options would be excluded as ''high premium'' classes, even though two of those securities (AAPL and AMZN) are in the Penny Pilot Program for standard options. The Exchange notes that GOOG is not in the Penny Pilot Program.[6]

The Exchange, therefore, is proposing to establish a pricing regime for mini-options separate from the Penny Pilot Program that permits the minimum price variation for mini-option contracts to be the same as permitted for standard options on the same security, which would encompass penny pricing for mini-option contracts on securities that participate in the Penny Pilot Program.[7]

As to the Penny Pilot Program, the Exchange believes that there are several good reasons to allow penny pricing for mini-options on securities that currently participate in the Penny Pilot Program, without requiring mini-options to separately qualify for the Penny Pilot Program. First, the Penny Pilot Program applies to the most actively-traded, multiply-listed option classes. Likewise, the five securities which may underlie mini-options were chosen because of the significant liquidity in standard options on the same security. The Exchange also believes that the marketplace and investors will be expecting the minimum price variation for contracts on the same security to be the same. Second, one of the primary goals of the Penny Pilot Program is to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68656 (January 15, 2013), 78 FR 4526 (January 22, 2013) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to List and Trade Option Contracts Overlying 10 Shares of Certain Securities) (SR–CBOE–2013–001).

[4] *See* CBOE Rule 6.42(3).

[5] *See* CBOE Rule 6.42(3) and Securities Exchange Act Release No. 61478 (February 3, 2010), 75 FR 6762 (February 10, 2010) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to [sic] Relating to the Penny Pilot Program) (SR–CBOE–2010–09).

[6] The minimum price variation for standard options on GOOG is $0.05 for all quotations in series that are quoted at less than $3 per contract and $0.10 for all quotations in series that are quoted at $3 per contract or greater. *See* CBOE Rule 6.42(1) and (2).

[7] As noted in the Exchange's original mini-option filing, mini-options are limited to five securities and any expansion of the program would require that a subsequent proposed rule change be submitted to the Commission. The current proposal is limited to the five securities originally approved to underlie mini-options. The Exchange anticipates that a similar minimum pricing variation regime would be included in any rule change to expand the mini-option program.

narrow the bid-ask spreads of exchange-traded options to reduce the cost of entering and exiting positions. This same goal can similarly be accomplished by permitting penny pricing for mini-option contracts on securities that already participate in the Penny Pilot Program. Finally, the Exchange believes that penny pricing for mini-options is desirable for a product that is geared toward retail investors. Mini-options are on high priced securities and are meant to be an investment tool with more affordable and realistic prices for the retail average investor. Penny pricing for mini-options on securities that are currently in the Penny Pilot Program would benefit the anticipated users of mini-options by providing more price points. The Exchange notes that it is not requesting penny pricing for all of the five securities eligible for mini-options trading; but rather is seeking to permit matched penny pricing for mini-options on those securities for which standard options already trade in pennies.

In addition to an expressed market preference for matched minimum increment pricing (including penny pricing) between mini-options and standard options on the same securities, the Exchange believes that its rules establish precedent for the current proposal. Specifically, CBOE Rule 6.42.03 provides, among other things, that matched penny pricing between SPY and Mini-S&P 500 Index (''XSP'') options is permitted. As to SPY and XSP options, the rationale for matched pricing was that the underlying SPY ETF is designed to track the performance of the S&P 500 Index and XSP options are options based on the S&P 500 Index.[8] In support of this earlier filing, the Exchange believed that having the same minimum price variation for SPY and XSP options was necessary for consistency and for competitive reasons.

To effect the current proposed rule changes, CBOE proposes to amend CBOE Rules 6.42 and 5.5. As to CBOE Rule 6.42 (Minimum Increments for Bids and Offers), CBOE proposes adding new Interpretation and Policy .04 that would be an internal cross reference to new proposed Interpretation and Policy .22(d) to CBOE Rule 5.5 as the provision that sets forth the minimum price variation for bids and offers for mini-options. Proposed Interpretation and Policy .22(d) to CBOE Rule 5.5 would provide as follows:

The minimum price variation for bids and offers for mini-options shall be the same as permitted for standard options on the same security. For example, if a security participates in the Penny Pilot Program, mini-options on the same underlying security may be quoted in the same minimum increments, e.g., $0.01 for all quotations in series that are quoted at less than $3 per contract and $0.05 for all quotations in series that are quoted at $3 per contract or greater, $0.01 for all SPY option series, and mini-options do not separately need to qualify for the Penny Pilot Program.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the potential additional traffic associated with this proposal. The Exchange does not believe that this increased traffic will become unmanageable since mini-options are limited to a fixed number of underlying securities.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder, including the requirements of Section 6(b) of the Act.[9] In particular, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [10] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that investors and other market participants would benefit from the current rule proposal because it would clarify and establish the minimum price variation for mini-options prior to the commencement of trading. The Exchange believes that the marketplace and investors will be expecting the minimum price variation for contracts on the same security to be the same. As a result, the Exchange believes that this change would lessen investor and marketplace confusion because mini-options and standard options on the same security would have the same minimum price variation.

While price protection between mini-options and standard options on the same security is not required, the Exchange believes that consistency between mini-options and standard options as to the minimum price variation is desirable and is designed to promote just and equitable principles of trade. Matching the minimum price variation between mini-options and standard options on the same security would help to eliminate any unnecessary arbitrage opportunities that could result from having contracts on the same underlying security traded in different minimum price increments. Similarly, matched minimum pricing would hopefully generate enhanced competition among liquidity providers. The Exchange believes that matched pricing for mini-options and standard options on the same security would attract additional liquidity providers who would make markets in mini-options and standard options on the same security. In addition to the possibility of more liquidity providers, the Exchange believes that the ability to quote mini-options and standard options on the same security in the same minimum increments would hopefully result in more efficient pricing via arbitrage and possible price improvement in both contracts on the same security. The Exchange also believes that allowing penny pricing for mini-options on securities that currently participate in the Penny Pilot Program (without mini-options having to qualify separately for entry into the Penny Pilot Program) will benefit the marketplace and investors because penny pricing in mini-options may also accomplish one of the primary goals of the Penny Pilot Program, which is to narrow the bid-ask spreads of exchange-traded options to reduce the cost of entering and exiting positions. Finally, the proposed rule would be beneficial from a logistical perspective since firms' existing systems are configured using the ''root symbol'' of an underlying security and would not be able to assign different minimum pricing variations to mini-options and standard options on the same security.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE 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. Specifically, since mini-options are permitted on multiply-listed classes, other exchanges that have received approval to trade mini-options will have the opportunity to similarly establish the minimum price variation for mini-options prior to the anticipated launch in March 2013. CBOE also believes that the proposed rule change will enhance competition by allowing

[8] *See* Securities Exchange Act Release No. 56565 (September 27, 2007), 72 FR 56403 (October 3, 2007) (Order Granting Approval to a Proposed Rule Change Regarding the Extension and Expansion of the Penny Pilot Program) (SR–CBOE–2007–98).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

products on the same security to be priced in the same minimum price increments.

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

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 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–CBOE–2013–016 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–CBOE–2013–016. 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 10:00 a.m. and 3:00 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–CBOE–2013–016 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03386 Filed 2–13–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68890; File No. SR–BX–2013–013]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change Requesting Permanent Approval of a Pilot Program To Receive Inbound Equities Orders From PSX Through NES

February 8, 2013.

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 February 6, 2013, NASDAQ OMX BX, Inc. (''Exchange'' or ''BX'') 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 has filed a proposed rule change for the permanent approval of the Exchange's pilot program to permit the BX Equities Market (''System'') to accept inbound orders routed by Nasdaq Execution Services LLC (''NES'') from the NASDAQ OMX PSX facility of NASDAQ OMX PHLX LLC (''PHLX'').

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

In conjunction with PHLX providing outbound routing services on PSX to all markets using its affiliated routing broker, NES,[4] BX proposed that NES be permitted to route orders from PHLX to the Exchange on a pilot basis, subject to certain limitations and conditions, as described below.[5] The current pilot program expires March 30, 2013.[6]

NES is a broker-dealer and member of NASDAQ, PHLX and BX. NES provides all routing functions for The NASDAQ Stock Market (''NASDAQ''), BX and PHLX. BX, NASDAQ, PHLX and NES are affiliates. Accordingly, the affiliate relationship between BX and NES, its member, raises the issue of an exchange's affiliation with a member of such exchange. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and

[11] 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. 65469 (October 3, 2011), 76 FR 62486 (October 7, 2011) (SR–Phlx–2011–108).

[5] *See* Securities Exchange Act Release No. 65514 (October 7, 2011), 76 FR 63969 (October 14, 2011) (SR–BX–2011–066).

[6] *See* Securities Exchange Act Release No. 67995 (October 5, 2012), 77 FR 62292 (October 12, 2012) (SR–BX–2012–066).

potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[7]

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange of which it is a member, the Exchange previously proposed, and the Commission approved, limitations and conditions on NES's affiliation with the Exchange.[8] Also recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange previously proposed, and the Commission approved,[9] NES's affiliation with the Exchange to permit the Exchange to accept inbound orders that NES routes in its capacity as a facility of NASDAQ, subject to the certain limitations and conditions. The Exchange now proposes to permit BX to accept inbound orders that NES routes in its capacity as a facility of PHLX on a permanent basis, subject to the limitations and conditions of this pilot:

- First, the Exchange and FINRA maintain a Regulatory Contract, as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[10] Pursuant to the Regulatory Contract and the 17d–2 Agreement, FINRA is allocated regulatory responsibilities to review NES's compliance with certain Exchange rules.[11] Pursuant to the Regulatory Contract, however, BX retains ultimate responsibility for enforcing its rules with respect to NES.
- Second, FINRA monitors NES for compliance with the Exchange's trading rules, and collects and maintains certain related information.[12]
- Third, FINRA provides a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, the Exchange has in place BX Rule 2140(c), which requires The NASDAQ OMX Group, Inc., as the holding company owning both the Exchange and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to the Exchange.

The Exchange has met all the above-listed conditions. By meeting the above conditions, the Exchange has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with the Exchange. Because the Exchange has met all the above-listed conditions, it now seeks permanent approval of this inbound routing relationship. The Exchange will continue to comply with the conditions 1–4 stated above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general, and with Sections 6(b)(5) of the Act,[14] in particular, in that the proposal 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because the proposed rule change will allow the Exchange to continue to receive inbound orders from NES, acting in its capacity as a facility of PHLX, in a manner consistent with prior approvals and established protections. The Exchange believes that these conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange to its advantage.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Permanent approval of the current pilot program does not raise any issues of intramarket competition because it involves inbound routing from an affiliated exchange. Nor does it result in a burden on competition among exchanges, because there are many competing exchanges that provide routing services, including through an affiliate.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 shall: (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

[7] *See* Securities Exchange Act Release Nos. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR–NASDAQ–2008–098); and 62736 (August 17, 2010), 75 FR 51861 (August 23, 2010) (SR–NASDAQ–2010–100).

[8] *See* Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (File Nos. SR–BSE–2008–02; SR–BSE–2008–23; SR–BSE–2008–25; SR–BSECC–2008–01) (''Order approving the Acquisition of the Boston Stock Exchange, Incorporated by The NASDAQ OMX Group, Inc.'').

[9] *Id.*

[10] 17 CFR 240.17d–2.

[11] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[12] Pursuant to the Regulatory Contract, both FINRA and the Exchange collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of PHLX routing orders to BX) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(5).

• Send an email to *rule-comments@sec.gov*. Please include File Number SR–BX–2013–013 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–2013–013. 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 business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also 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–2013–013 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03397 Filed 2–13–13; 8:45 am]

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[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68878; File No. SR–EDGX–2013–07]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule

February 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2013, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') 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 its fees and rebates applicable to Members [3] of the Exchange pursuant to EDGX Rule 15.1(a) and (c). All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As defined in Exchange Rule 1.5(n).

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently assesses a charge of $0.0003 per share for Members' orders that yield Flag RY. The Exchange proposes to increase the rate it charges for Flag RY from $0.0003 per share to $0.0005 per share for Members' orders that route to the BATS Y-Exchange, Inc. (''BATS BYX'') and add liquidity. This proposed change represents a pass through of the rate that Direct Edge ECN LLC (d/b/a DE Route) (''DE Route''), the Exchange's affiliated routing broker dealer, is charged for routing orders to BATS BYX that do not qualify for additional volume tiered discounts, as described in BATS BYX's fee filing with the Securities and Exchange Commission.[4]

The Exchange proposes to add Flag RT to its fee schedule for Members' orders that route to away trading centers using the ROUT routing strategy [5] and remove liquidity from the away exchange. The Exchange proposes to assess a fee of $0.0030 per share for orders yielding Flag RT.

The Exchange proposes to add Flag RX to its fee schedule for Members' orders that route to away trading centers using the ROUX routing strategy [6] and remove liquidity from the away exchange. The Exchange proposes to assess a fee of $0.0030 per share for orders yielding Flag RX.

The Exchange proposes to implement these amendments to its fee schedule on February 1, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[7] in general, and furthers the objectives of Section 6(b)(4),[8] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

The Exchange's proposed fee increase for Flag RY represents a pass-through rate where BATS BYX charges DE Route $0.0005 per share for Members' orders that route to BATS BYX through DE Route and add liquidity, and then DE Route charges the Exchange $0.0005 per share, and then the Exchange charges its

[4] *See* Securities Exchange Act Release No. 68665 (January 16, 2013), 78 FR 4946 (January 23, 2013) (SR–BYX–2013–001).

[5] As defined in Exchange Rule 11.9(b)(3)(c)(ii).

[6] As defined in Exchange Rule 11.9(b)(3)(c)(iii).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

Members $0.0005 per share. The Exchange's proposal represents an equitable allocation of reasonable dues, fees, and other charges among Members of the Exchange and other persons using its facilities because the Exchange does not levy additional fees or offer additional rebates for orders that it routes to BATS BYX through DE Route. Prior to BATS BYX's January 2013 fee filing, BATS BYX charged DE Route a fee of $0.0003 per share for orders yielding Flag RY, which DE Route passed through to the Exchange and the Exchange passed through to its Members. In BATS BYX's January 2013 fee filing, BATS BYX increased the rate it charges its customers, such as DE Route, from $0.0003 per share to a charge of $0.0005 per share for orders that are routed to BATS BYX and add liquidity. Therefore, the Exchange believes that the proposed change in Flag RY from a fee of $0.0003 per share to a fee of $0.0005 per share is equitable and reasonable because it accounts for the pricing changes on BATS BYX. In addition, the proposal allows the Exchange to continue to charge its Members a pass-through rate for orders that are routed to BATS BYX and add liquidity using DE Route. The Exchange notes that routing through DE Route is voluntary. Lastly, the Exchange also believes that the proposed amendment is non-discriminatory because it applies uniformly to all Members.

The Exchange believes that its proposal to assess a charge of $0.0030 per share for orders that yield Flag RT represents an equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. By electing the ROUT routing strategy, Members' orders check the System for available shares and then are sent to destinations on the System routing table,[9] and any unexecuted shares are posted to EDGX, unless otherwise instructed. The Exchange believes that the proposed rate of $0.0030 per share for orders that yield Flag RT is equitable because it is comparable to the Exchange's default rate of $0.0029 per share that it charges Members for routing to away trading destinations and removing liquidity from the away exchange and also accounts for the increased costs associated with the ROUT routing strategy routing to all displayed markets including more costly destinations such as NYSE Arca, Inc. (''NYSE Arca'') and The NASDAQ Stock Market LLC (''NASDAQ''). In addition, the Exchange believes that the proposed rate of $0.0030 per share for orders that yield Flag RT is reasonable because it is comparable to the fees charged by other exchanges for similar routing strategies. Namely, BATS Exchange, Inc. (''BATS BZX'') charges its customers a rate of $0.0029 per share for orders using its Parallel D or Parallel 2D routing strategies;[10] and NASDAQ charges its customers a rate of $0.0030 per share for orders using its SCAN and STGY routing strategies.[11] Lastly, the Exchange also believes that the proposed amendment is non-discriminatory because it applies uniformly to all Members.

The Exchange believes that its proposal to assess a charge of $0.0030 per share for orders that yield Flag RX represents an equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. By electing the ROUX routing strategy, Members' orders check the System for available shares and then are sent to destinations on the System routing table, and any unexecuted shares are posted to EDGX, unless otherwise instructed. The Exchange believes that the proposed rate of $0.0030 per share for orders that yield Flag RX is equitable because it is comparable to the Exchange's default rate of $0.0029 per share that it charges Members for routing to away trading destinations and removing liquidity from the away exchange and also accounts for the increased costs associated with the ROUX routing strategy routing to all displayed markets including more costly destinations such as NYSE Arca and NASDAQ. In addition, the Exchange believes that the proposed rate of $0.0030 per share for orders that yield Flag RX is reasonable because it is comparable to the fees charged by other exchanges for similar routing strategies. Namely, BATS BZX charges its customers a rate of $0.0029 per share for orders using its Parallel D or Parallel 2D routing strategies; and NASDAQ charges its customers a rate of $0.0030 per share for orders using its SKIP and SKNY routing strategies.[12] Lastly, the Exchange also believes that the proposed amendment is non-discriminatory because it applies uniformly to all Members.

The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members. The Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

These proposed rule changes do not impose any burdens on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believes that any of the changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors.

Regarding Flag RY, the Exchange believes its proposal to assess a charge of $0.0005 per share increases competition among trading centers because it offers customers an alternative means to route to BATS BYX and add liquidity for the same price as entering orders on BATS BYX directly. The Exchange believes that its proposal will have no burden on intramarket competition because the rate applies uniformly to all Members.

Regarding Flag RT, the Exchange believes that its proposal to assess a fee of $0.0030 per share for Members' orders that route using the ROUT routing strategy and remove liquidity from the away exchange will increase competition because it is comparable to the rates charged by BATS BZX and NASDAQ for similar routing strategies. The Exchange believes that its proposal will have no burden on intramarket competition because the rate applies uniformly to all Members. The Exchange believes that its proposal will

[9] As defined in Exchange Rule 11.9(b)(3).

[10] *See* BATS BZX Fee Schedule, *http://cdn.batstrading.com/resources/regulation/rule_book/BZX_Fee_Schedule.pdf. See also* BATS BZX Rules 11.13(a)(3)(B) and (C) (describing Parallel D and Parallel 2D as routing options under which an order checks the BATS's system for available shares and then is sent to destinations on the BATS's system routing table and the BATS's system may route to multiple destinations at a single price level simultaneously through Parallel D or Parallel 2D routing). Rules of BATS Exchange, Inc., *http://cdn.batstrading.com/resources/regulation/rule_book/BATS_Exchange_Rulebook.pdf.*

[11] *See* NASDAQ, Price List—Trading & Connectivity, *http://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2#route. See also* NASDAQ, Routing Strategies and Order Types Guide, *http://www.nasdaqtrader.com/content/ProductsServices/Trading/Workstation/rash_strategy.pdf* (describing SCAN and STGY routing strategies).

[12] *See* NASDAQ, Routing Strategies and Order Types Guide, *http://www.nasdaqtrader.com/content/ProductsServices/Trading/Workstation/rash_strategy.pdf* (describing SKIP and SKNY routing strategies).

increase competition for routing services because the market for order execution is competitive and the Exchange's proposal provides customers with another alternative to route their orders. The Exchange notes that routing through DE Route is voluntary.

Regarding Flag RX, the Exchange believes that its proposal to assess a fee of $0.0030 per share for Members' orders that route using the ROUX routing strategy and remove liquidity from the away exchange will increase competition because it is comparable to the rates charged by BATS BZX and NASDAQ for similar routing strategies. The Exchange believes that its proposal will have no burden on intramarket competition because the rate applies uniformly to all Members. The Exchange believes that its proposal will increase competition for routing services because the market for order execution is competitive and the Exchange's proposal provides customers with another alternative to route their orders. The Exchange notes that routing through DE Route is voluntary.

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 unsolicited written comments from Members or other interested parties.

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 [13] and Rule 19b–4(f)(2) [14] thereunder. 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–EDGX–2013–07 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–EDGX–2013–07. 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 10:00 a.m. and 3:00 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–EDGX–2013–07 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03426 Filed 2–13–13; 8:45 am]

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[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 19b–4(f)(2)[sic].

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68875; File No. SR–NYSEMKT–2013–05]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Exchange Rule 80C—Equities To Establish Rules To Comply With the Requirements of the Plan To Address Extraordinary Market Volatility Submitted to the Commission Pursuant to Rule 608 of Regulation NMS

February 8, 2013.

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 January 25, 2013, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') 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 Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 80C—Equities to establish rules to comply with the requirements of the Plan to Address Extraordinary Market Volatility submitted to the Commission pursuant to Rule 608 of Regulation NMS. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, on the Commission's Web site at *http://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 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,

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 amend Exchange Rule 80C—Equities to establish rules to comply with the requirements of the Plan to Address Extraordinary Market Volatility submitted to the Commission pursuant to Rule 608 of Regulation NMS under the Act (the ''Plan''). The Exchange proposes to adopt the changes for a pilot period that coincides with the pilot period for the Plan, which is currently scheduled as a one-year pilot to begin on April 8, 2013.

Background

Since May 6, 2010, when the markets experienced excessive volatility in an abbreviated time period, *i.e.,* the ''flash crash,'' the equities exchanges and FINRA have implemented market-wide measures designed to restore investor confidence by reducing the potential for excessive market volatility. Among the measures adopted include pilot plans for stock-by-stock trading pauses [4] and related changes to the equities market clearly erroneous execution rules [5] and more stringent equities market maker quoting requirements.[6] On May 31, 2012, the Commission approved the Plan, as amended, on a one-year pilot basis.[7] In addition, the Commission approved changes to the equities market-wide circuit breaker rules on a pilot basis to coincide with the pilot period for the Plan.[8]

The Plan is designed to prevent trades in individual NMS Stocks from occurring outside of specified Price Bands.[9] As described more fully below, the requirements of the Plan are coupled with Trading Pauses to accommodate more fundamental price moves (as opposed to erroneous trades or momentary gaps in liquidity). All trading centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, are required to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the requirements specified in the Plan.[10] As set forth in more detail in the Plan, Price Bands consisting of a Lower Price Band and an Upper Price Band for each NMS Stock are calculated by the Processors.[11] When the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band, the Processors shall disseminate such National Best Bid (Offer) with an appropriate flag identifying it as unexecutable. When the National Best Bid (Offer) is equal to the Upper (Lower) Price Band, the Processors shall distribute such National Best Bid (Offer) with an appropriate flag identifying it as a Limit State Quotation.[12] All trading centers in NMS Stocks must maintain written policies and procedures that are reasonably designed to prevent the display of offers below the Lower Price Band and bids above the Upper Price Band for NMS Stocks. Notwithstanding this requirement, the Processor shall display an offer below the Lower Price Band or a bid above the Upper Price Band, but with a flag that it is non-executable. Such bids or offers shall not be included in the National Best Bid or National Best Offer calculations.[13]

Trading in an NMS Stock immediately enters a Limit State if the National Best Offer (Bid) equals but does not cross the Lower (Upper) Price Band.[14] Trading for an NMS stock exits a Limit State if, within 15 seconds of entering the Limit State, all Limit State Quotations were executed or canceled in their entirety. If the market does not exit a Limit State within 15 seconds, then the Primary Listing Exchange would declare a five-minute trading pause pursuant to Section VII of the LULD Plan, which would be applicable to all markets trading the security.[15] In addition, the Plan defines a Straddle State as when the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band and the NMS Stock is not in a Limit State. For example, assume the Lower Price Band for an NMS Stock is $9.50 and the Upper Price Band is $10.50, such NMS stock would be in a Straddle State if the National Best Bid were below $9.50, and therefore non-executable, and the National Best Offer were above $9.50 (including a National Best Offer that could be above $10.50). If an NMS Stock is in a Straddle State and trading in that stock deviates from normal trading characteristics, the Primary Listing Exchange may declare a trading pause for that NMS Stock.

Proposed Amendment to Rule 80C—Equities

The Exchange is required by the Plan to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the limit up-limit down and trading pause requirements specified in the Plan. In response to the new Plan, the Exchange proposes to amend its Rules accordingly.

The Exchange proposes to add Rule 80C(a) to define that ''Plan'' means the Plan to Address Extraordinary Market Volatility Submitted to the Securities and Exchange Commission Pursuant to Rule 608 of Regulation NMS under the Securities Exchange Act of 1934, Exhibit A to Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012), as it may be amended from time to time. The Exchange proposes to add Rule 80C(a)(2) to state that the Exchange is a Participant in, and subject to the applicable requirements of, the Plan, which establishes procedures to address extraordinary volatility in NMS Stocks. In addition, proposed Rule 80C(a) provides that all capitalized terms not otherwise defined in this Rule shall have the meanings set forth in the Plan or Exchange rules, as applicable.

The Exchange proposes to add Rule 80C(a)(3) to provide that member organizations shall comply with the applicable provisions of the Plan. The Exchange believes that this requirement will help ensure the compliance by its members with the provisions of the Plan as required pursuant to Section II(B) of the Plan.[16]

The Exchange proposes to add Rule 80C(a)(4) to provide that Exchange systems shall not display or execute buy (sell) interest above (below) the Upper (Lower) Price Bands, unless such interest is specifically exempted under the Plan. The Exchange believes that this requirement is reasonably designed to help ensure the compliance with the

[4] *See, e.g.,* Exchange Rule 80C.

[5] *See, e.g.,* Exchange Rule 128.

[6] *See, e.g.,* Exchange Rule 104(a)(1)(B).

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (Order Approving, on a Pilot Basis, the National Market System Plan To Address Extraordinary Market Volatility).

[8] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–038; SR–BYX–2011–025; SR–BX–2011–068; SR–CBOE–2011–087; SR–C2–2011–024; SR–CHX–2011–30; SR–EDGA–2011–31; SR–EDGX–2011–30; SR–FINRA–2011–054; SR–ISE–2011–61; SR–NASDAQ–2011–131; SR–NSX–2011–11; SR–NYSE–2011–48; SR–NYSEAmex–2011–73; SR–NYSEArca–2011–68; SR–Phlx–2011–129).

[9] Unless otherwise specified, capitalized terms used in this rule filing are based on the defined terms of the Plan.

[10] The Exchange is a Participant in the Plan.

[11] *See* Section (V)(A) of the Plan.

[12] *See* Section VI(A) of the Plan.

[13] *See* Section VI(A)(3) of the Plan.

[14] *See* Section VI(B)(1) of the Plan.

[15] The primary listing market would declare a trading pause in an NMS Stock; upon notification by the primary listing market, the Processor would disseminate this information to the public. No trades in that NMS Stock could occur during the trading pause, but all bids and offers may be displayed. *See* Section VII(A) of the Plan.

[16] *See* Section II(B) of the Plan.

limit up-limit down and trading pause requirements specified in the Plan, by preventing executions outside the Price Bands as required pursuant to Section VI(A)(1) of the Plan.[17]

The Exchange proposes Rules regarding the treatment of certain trading interest on the Exchange in order to prevent executions outside the Price Bands and to comply with the new LULD Plan. In particular, the Exchange proposes to add Rule 80C(a)(5) that provides that Exchange systems shall reprice and/or cancel buy (sell) interest that is priced or could be executed above (below) the Upper (Lower) Price Band. Any interest that is repriced pursuant to this Rule shall retain its time stamp of original order entry. Specifically, the Exchange proposes the following provisions regarding the repricing and/or canceling of certain trading interest:

- *Market Orders.* If a market order cannot be fully executed at or within the Price Bands, Exchange systems shall display the unexecuted portion of the buy (sell) market order at the Upper (Lower) Price Band.[18]
- *Limit-Priced Interest.* Both displayable and non-displayable incoming limit-priced interest to buy (sell) that is priced above (below) the Upper (Lower) Price Band shall be repriced to the Upper (Lower) Price Band. Exchange systems shall also reprice resting limit-priced interest to buy (sell) to the Upper (Lower) Price Band if Price Bands move and the price of resting limit-priced interest to buy (sell) moves above (below) the Upper (Lower) Price Band. If the Price Bands move and the original limit price of repriced interest is at or within the Price Bands, Exchange systems shall reprice such interest to its original limit price.[19]
- *IOC Orders.* If an IOC order cannot be fully executed at or within the Price Bands, Exchange systems shall cancel any unexecuted portion of the IOC Order.
- *DMM Interest.* Exchange systems shall cancel DMM Interest to buy (sell) that is entered manually or via DMM-specific order entry methodology if such interest is priced above (below) the Upper (Lower) Price Band. DMM Interest to buy (sell) that is entered via the same order entry methodology as off-Floor interest shall be repriced pursuant to paragraph (a)(5)(B) of this Rule.
- *Market Pegging Interest.* Market Pegging Interest to buy (sell) shall peg to the specified pegging price or the Upper (Lower) Price Band, whichever is lower (higher).
- *Sell Short Orders.* During a Short Sale Price Test, as set forth in Rule 440B(b), short sale orders priced below the Lower Price Band shall be repriced to the higher of the Lower Price Band or the Permitted Price, as defined in Rule 440B(e).[20]
- *Floor Broker Cross Function.* Exchange systems shall not execute orders crossed pursuant to the process provided for in Supplementary Material .10 to Rule 76, if the price of the proposed cross transaction is outside of the Price Bands.
- *Original Order Instructions.* Any interest repriced pursuant to Exchange Rule 80C(a) shall return to its original order instructions for purposes of the re-opening transaction following a Trading Pause.

The Exchange believes these provisions are reasonably designed to prevent executions outside the Price Bands as required by the limit up-limit down and trading pause requirements specified in the Plan. The Exchange believes that allowing trading interest that would otherwise execute outside the Prices Bands to reprice and keep its original time stamp, helps ensure that trading interest retains its priority while preventing executions in violation with the limit up-limit down and trading pause requirements. The Exchange notes that retention of an original timestamp when interest is repriced occurs only under the operation of this Rule in order to prevent executions outside the Price Bands and to comply with the new LULD Plan and in no other circumstances.[21] To the extent that repricing of trading interest is not practical due to systems restrictions such as in the case of the DMM Interest that is entered manually or via DMM-specific order entry methodology, the Exchange proposes to cancel the trading interest in order to prevent executions outside the Price Bands. The Exchange will not reprice a Floor Broker Cross that would execute outside the Price Bands, because such orders are intended to be crossed at the entered price or not at all. Instead, the Exchange will return the unexecuted orders to the Floor Broker. The Exchange believes that adding certainty to the treatment and priority of trading interest in these situations will encourage market participants to continue to provide liquidity to the Exchange and thus promote a fair and orderly market.

The Exchange proposes Rule 80C(a)(6) that provides that the Exchange systems shall not route buy (sell) interest to an away market displaying a sell (buy) quote that is above (below) the Upper (Lower) Price Band. The Exchange believes that this provision is reasonably designed to prevent an execution outside the Price Bands in a manner that promotes compliance with the limit up-limit down and trading pause requirements specified in the Plan.

In addition, the Exchange proposes Rule 80C(a)(7) that provides that the Exchange may declare a Trading Pause for a NMS Stock listed on the Exchange when (i) the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band and the NMS Stock is not in a Limit State; and (ii) trading in that NMS Stock deviates from normal trading characteristics. An Exchange Floor Official may declare such Trading Pause during a Straddle State if such Trading Pause would support the Plan's goal to address extraordinary market volatility.[22] The Exchange believes that this provision is reasonably designed to comply with Section VII(A)(2) of the Plan.[23]

Consistent with the Plan's requirements for the Exchange to establish, maintain, and enforce policies and procedures that are reasonably designed to comply with the trading pause requirements specified in the Plan, the Exchanges also proposes to amend the Rules regarding Trading Pauses to correspond with the LULD Plan. The Exchange proposes to provide that during Phase 1 of the Plan, a Trading Pause in Tier 1 NMS Stocks subject to the requirements of the Plan, shall be subject to Plan requirements and Exchange Rule 80C(b)(2); a Trading Pause in Tier 1 NMS Stocks not yet subject to the requirements of the Plan shall be subject to the requirements in paragraphs (b)(1)–(5) of this Rule; and a Trading Pause in Tier 2 NMS Stocks shall be subject to the requirements set forth in Exchange Rule 80C(b)(1)(B)–(5). The proposed change will allow the Trading Pause requirements in Exchange Rule 80C(b)(1) to continue to

[17] *See* Section VI(A)(1) of the Plan.

[18] If market participants do not want to have their orders repriced to the Price Band, market Participants may cancel the unexecuted portion of the order or submit such order as an IOC order.

[19] *See id.*

[20] Since there is no Permitted Price for short sale exempt orders, short sale exempt orders are treated the same as other orders under this Rule.

[21] The Exchange notes repricing of trading interest under ordinary circumstances outside of this Rule may be different than pursuant to the proposed Rule. For example, repricing of Market Pegging Interest and Sell Short Orders under ordinary circumstances would receive a new time stamp after repricing.

[22] The Exchange will develop written policies and procedures to determine when to declare a Trading Pause in such circumstances.

[23] *See* Section VII(A)(2) of the Plan.

apply to Tier 1 NMS Stocks during the beginning of Phase I until they are subject to the Plan requirements. Once the Plan has been fully implemented and all NMS Stocks are subject to the Plan, a Trading Pause under the Plan shall be subject to Exchange Rule 80C(b)(2). These proposed changes are designed to comply with Section VIII of the Plan to ensure implementation of the Plan's requirements.[24]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act[25] in general, and furthers the objectives of Section 6(b)(5),[26] in particular, in that it 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.

The proposal promotes just and equitable principles of trade and removes impediments to, and perfects the mechanism of, a free and open market and a national market system by ensuring that the Exchange systems will not display or execute trading interest outside the Price Bands as required by the limit up-limit down and trading pause requirements specified in the Plan.

The proposal will also ensure that the trading interest on the Exchange is either repriced to maintain priority or canceled in a manner that promotes just and equitable principles of trade and removes impediments to, and perfects the mechanism of, a free and open market and a national market system. Specifically, the proposal will help allow market participants to continue to trade NMS Stocks within Price Bands in compliance with the Plan with certainty on how certain orders and trading interest will be treated. Thus, reducing uncertainty regarding the treatment and priority of trading interest with the Price Bands should help encourage market participants to continue to provide liquidity during times of extraordinary market volatility that occur during Regular Trading Hours.

The proposal also promotes just and equitable principles of trade and removes impediments to, and perfects the mechanism of, a free and open market and a national market system by ensuring that orders in NMS Stocks are not routed to other exchanges in situations where an execution may occur outside Price Bands, and thereby is reasonably designed to prevent an execution outside the Price Bands in a manner that promotes compliance with the limit up-limit down and trading pause requirements specified in the Plan.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes are being made to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the limit up-limit down and trading pause requirements specified in the Plan, of which other equities exchanges are also Participants of. Other competing equity exchanges are subject to the same limit up-limit down and trading pause requirements specified in the Plan. Thus, the proposed changes will not impose any burden on competition while providing certainty of treatment and execution of trading interest on the Exchange to market participants during periods of extraordinary volatility in NMS stock while in compliance with the limit up-limit down and trading pause requirements specified in the Plan.

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[27] and Rule 19b–4(f)(6) thereunder.[28] 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.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act[29] to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–NYSEMKT–2013–05 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–NYSEMKT–2013–05. 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 10:00 a.m. and 3:00 p.m. Copies of such

[24] *See* Section VIII of the Plan.

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

[27] 15 U.S.C. 78s(b)(3)(A)(iii).

[28] 17 CFR 240.19b–4(f)(6).

[29] 15 U.S.C. 78s(b)(2)(B).

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–NYSEMKT–2013–05 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03388 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68883; File No. SR–EDGX–2013–04]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGX Rule 11.14 To Extend the Operation of the Single Stock Circuit Breaker Program

February 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 30, 2013, EDGX Exchange, Inc. (''EDGX'' or ''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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend EDGX Rule 11.14 to extend the operation of the single stock circuit breaker pilot program (the ''Pilot'') from the current scheduled expiration date of February 4, 2013 until the earlier of the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (the ''Plan'') or February 4, 2014. All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

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 Exchange proposes to amend EDGX Rule 11.14 to extend the operation of the Pilot from the current scheduled expiration date of February 4, 2013[3] until the earlier of the initial date of operations of the Plan or February 4, 2014. The Pilot will continue to operate as to individual securities until such security is subject to the Plan.

EDGX Rule 11.14 requires the Exchange to pause trading in an individual security listed on the Exchange if the primary listing market for such stock issues a trading pause. Such trading pause will continue until trading has resumed on the primary listing market. However, the Exchange may resume trading in such stock if trading has not resumed on the primary listing market and ten minutes have passed since the individual stock trading pause message has been received from the responsible single plan processor. The Pilot was developed and implemented as a market-wide initiative by the Exchange and other national securities exchanges in consultation with the Securities and Exchange Commission (the ''Commission'') staff and is currently applicable to all NMS stocks and specified exchange-traded products.[4]

The extension proposed herein would allow the Pilot to continue to operate without interruption until implementation of the Plan.[5] The Plan will begin initial operations on April 8, 2013.[6] If the Plan has an initial date of operations before February 4, 2014, the proposed Pilot for trading pauses would expire at that time.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] 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 that the change proposed herein meets these requirements in that it promotes

[30] 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 Release No. 67502 (July 25, 2012), 77 FR 45394 (July 31, 2012) (SR–EDGX–2012–28).

[4] The Exchange notes that the other national securities exchanges and the Financial Industry Regulatory Authority have adopted the Pilot in substantially similar form. *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (File Nos. SR–BATS–2010–014; SR–EDGA–2010–01; SR–EDGX–2010–01; SR–BX–2010–037; SR–ISE–2010–48; SR–NYSE–2010–39; SR–NYSEAmex–2010–46; SR–NYSEArca–2010–41; SR–NASDAQ–2010–061; SR–CHX–2010–10; SR–NSX–2010–05; and SR–CBOE–2010–047) and Securities Exchange Act Release No. 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (SR–FINRA–2010–025). *See also* Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (File Nos. SR–BATS–2010–018; SR–BX–2010–044; SR–CBOE–2010–065; SR–CHX–2010–14; SR–EDGA–2010–05; SR–EDGX–2010–05; SR–ISE–2010–66; SR–NASDAQ–2010–079; SR–NYSE–2010–49; SR–NYSEAmex–2010–63; SR–NYSEArca–2010–61; and SR–NSX–2010–08 and Securities Exchange Act Release No. 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010) (SR–FINRA–2010–033). *See also* Securities Exchange Act Release No. 63500 (December 9, 2010), 75 FR 78309 (December 15, 2010) (SR–NYSE–2010–81). A proposal to, among other things, expand the Pilot to include all NMS stocks not already included therein was implemented on August 8, 2011. *See* Securities Exchange Act Release No. 64735 (June 23, 2011), 76 FR 38243 (June 29, 2011) (File Nos. SR–BATS–2011–016; SR–BYX–2011–011; SR–BX–2011–025; SR–CBOE–2011–049; SR–CHX–2011–09; SR–EDGA–2011–15; SR–EDGX–2011–14; SR–FINRA–2011–023; SR–ISE–2011–028; SR–NASDAQ–2011–067; SR–NYSE–2011–21; SR–NYSEAmex–2011–32; SR–NYSEArca–2011–26; SR–NSX–2011–06; and SR–Phlx–2011–64).

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (Order Approving, on a Pilot Basis, the National Market System Plan To Address Extraordinary Market Volatility by 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 MKT LLC, and NYSE Arca, Inc).

[6] Letter from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Markets, to Elizabeth Murphy, Secretary, Securities and Exchange Commission, dated January 17, 2013.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

uniformity across markets concerning decisions to pause trading in a security when there are significant price movements, which promotes just and equitable principles of trade and removes impediments to, and perfects the mechanism of, a free and open market and a national market system. Additionally, extension of the Pilot until the earlier of the initial date of operations of the Plan or February 4, 2014 would allow the Pilot to continue to operate without interruption while the Exchange and the Commission further assess the effect of the Pilot on the marketplace or whether other initiatives should be adopted in lieu of the current Pilot, which contributes to the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes are being made to extend the Pilot until the earlier of the initial date of operations of the Plan or February 4, 2014 would allow the Pilot to continue to operate without interruption until implementation of the Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same trading pause requirements specified in the Plan. Thus, the proposed changes will not impose any burden on competition while providing trading pause requirements specified in the Plan.

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 written comments on 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 [9] and Rule 19b–4(f)(6) thereunder.[10] 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) [11] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the pilot program to continue uninterrupted. Accordingly, the Commission hereby grants the Exchange's request and designates the proposal operative upon filing.[13]

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–EDGX–2013–04 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–EDGX–2013–04. 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 10:00 a.m. and 3:00 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–EDGX–2013–04 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03447 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] 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).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68886; File No. SR–ISE–2013–10]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE Rule 2102 To Extend the Pilot Program

February 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2013, the International Securities Exchange, LLC (''ISE'' or ''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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 2102 (Hours of Business) to extend the expiration of the pilot rule.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 Exchange proposes to amend ISE Rule 2102 to extend the expiration of the pilot rule. Initial amendments to ISE Rule 2102 to allow the Exchange to pause trading in an individual stock when the primary listing market for such stock issues a trading pause were approved by the Securities and Exchange Commission (''Commission'') on June 10, 2010 on a pilot basis to end on December 10, 2010.[3] The pilot was then extended to expire on April 11, 2011.[4] On March 21, 2011, ISE Rule 2102 was amended to state that the pilot would expire on the earlier of August 11, 2011 or the date on which a limit up/limit down mechanism to address extraordinary market volatility, if adopted, would apply.[5] On August 9, 2011, ISE Rule 2102 was once again amended to extend the pilot to January 31, 2012.[6] On January 30, 2012, ISE Rule 2102 was amended to extend the pilot to July 31, 2012.[7] On July 27, 2012, ISE Rule 2102 was amended to extend the pilot to February 4, 2013.[8]

On September 10, 2010, ISE Rule 2102 was amended to expand the pilot rule to apply to the Russell 1000® Index and other specified exchange traded products.[9] On June 23, 2011, ISE Rule 2102 was amended again to expand the pilot rule to apply to all NMS Stocks.[10] The Exchange now proposes to extend the date by which this pilot rule will expire to the earlier of the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility or February 4, 2014. Extending this pilot program will provide the exchanges with a continued opportunity to assess the effect of this rule proposal on the markets. While the proposed rule change would allow the single stock circuit breaker to sunset as the Regulation NMS Plan to Address Extraordinary Market Volatility expands to cover more securities, this phasing out of the single stock circuit breaker will have no effect on the Exchange as the Exchange does not trade equity securities.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the ''Exchange Act''),[11] which requires the rules of an exchange 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 proposed rule change also is designed to support the principles of Section 11A(a)(1) [12] of the Exchange Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes uniformity across markets concerning decisions to pause trading in a security when there are significant price movements. Additionally, extending this pilot rule so that it will expire on the earlier of the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility or February 4, 2014 will provide the exchanges with a continued opportunity to assess the effect of this rule proposal on the markets. While the proposed rule change would allow the single stock circuit breaker to sunset as the Regulation NMS Plan to Address Extraordinary Market Volatility expands to cover more securities, this phasing out of the single stock circuit breaker will have no effect on the Exchange as the Exchange does not trade equity securities.

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 unsolicited written comments from members or other interested parties.

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–ISE–2010–48).

[4] *See* Securities Exchange Act Release No. 63506 (December 9, 2010), 75 FR 78301 (December 15, 2010) (SR–ISE–2010–117).

[5] *See* Securities Exchange Act Release No. 64193 (April 5, 2011), 76 FR 20062 (April 11, 2011) (SR–ISE–2011–17).

[6] *See* Securities Exchange Act Release No. 65072 (August 9, 2011), 76 FR 50513 (August 15, 2011) (SR–ISE–2011–52).

[7] *See* Securities Exchange Act Release No. 66271 (January 30, 2012), 77 FR 5587 (February 3, 2012) (SR–ISE–2012–05).

[8] *See* Securities Exchange Act Release No. 67527 (July 27, 2012), 77 FR 46530 (August 3, 2012) (SR–ISE–2012–66).

[9] *See* Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (SR–ISE–2010–66).

[10] *See* Securities Exchange Act Release No. 64735 (June 23, 2011), 76 FR 38243 (June 29, 2011) (SR–ISE–2011–028).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78k–1(a)(1).

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 [13] and Rule 19b–4(f)(6) thereunder.[14] 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) [15] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the pilot program to continue uninterrupted. Accordingly, the Commission hereby grants the Exchange's request and designates the proposal operative upon filing.[17]

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.

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] 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).

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–ISE–2013–10 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–ISE–2013–10. 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 10:00 a.m. and 3:00 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–ISE–2013–10 and should be submitted on or before March 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–03393 Filed 2–13–13; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket No. NHTSA–2012–0169]

Reports, Forms, and Recordkeeping Requirements: Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice; Correction.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on December 11, 2012 [FR Doc. 2012–29844, Vol. 77, No. 238, Pages 73736–73737].

DATES: Comments must be submitted on or before March 18, 2013.

FOR FURTHER INFORMATION CONTACT: Jonathan Walker, contract task order manager, Office of Regulatory Analysis and Evaluation, National Highway Traffic Safety Administration, 1200 New Jersey Ave. SE., NVS–432, Washington, DC 20590. Mr. Walker's phone number is 202–366–8571 and his email address is *jonathan.walker@dot.gov.*

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: Tire Pressure Monitoring Systems Special Studies.

OMB Number: 2174 Renewal.

Type of Request: Request for public comment on proposed collection of information.

Abstract: Improperly inflated tires pose a safety risk, increasing the chance of skidding, hydroplaning, longer stopping distances, and crashes due to flat tires and blowouts. In an effort to decrease the number of vehicles with improperly inflated tires, Tire Pressure Monitoring Systems (TPMS) were

mandated in Federal Motor Vehicle Safety Standard (FMVSS) No. 138, so that drivers are warned when the pressure in one or more of the vehicle's tires has fallen to 25 percent or more below the placard pressure, or a minimum level specified in the standard, whichever pressure is higher. Executive Order 12866 requires Federal agencies to evaluate their existing regulations and programs and measure their effectiveness in achieving their objectives. This survey (Tire Pressure Monitoring Systems Special Study) was conducted in order to evaluate whether the frequency of underinflated tires has decreased in vehicles with TPMS in comparison to vehicles of the same age without TPMS. Survey results led the agency to the determination that additional study is needed in regards to analogous aspects of medium- and heavy-duty (MD/HD) trucks. The supplementary study of MD/HD trucks is not expected to begin until 2014; therefore, NHTSA seeks an extension of *Tire Pressure Monitoring Systems Special Studies* in preparation for this additional work.

Affected Public: Individuals.

Estimated Total Annual Burden: 1,925 hours.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

Authority: 44 U.S.C. 3506(c)(2)(A).

James F. Simons,

Director, Office of Regulatory Analysis and Evaluation.

[FR Doc. 2013–03427 Filed 2–13–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2013–0012, Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Long-Wheel Base 2005 Mercedes-Benz G-Class (463 Chassis) Multi-Purpose Passenger Vehicles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2005 Long-Wheel Base (LWB) Mercedes-Benz G-class (463 chassis) multi-purpose passenger vehicles (MPVs) that were not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2005 LWB Mercedes-Benz G-class (463 chassis) MPV) and they are capable of being readily altered to conform to the standards.

DATE: The closing date for comments on the petition is March 18, 2013.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online 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., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. 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.

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 (65 FR 19477–78).

How to Read Comments submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: George Stevens, Office of Vehicle Safety Compliance, NHTSA (202–366–5308).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. § 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period,

NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

G&K Automotive Conversion, Inc. of Santa Ana, California (G&K)(Registered Importer 90–007) has petitioned NHTSA to decide whether nonconforming 2005 LWB Mercedes-Benz G-class (Type 463) MPVs are eligible for importation into the United States. The vehicles which WETL believes are substantially similar are 2005 LWB Mercedes-Benz G-class (Type 463) MPVs that were manufactured for importation into and sale in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified 2005 LWB Mercedes-Benz G-class (Type 463) MPVs to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS. G&K submitted information with its petition intended to demonstrate that non-U.S. certified 2005 LWB Mercedes-Benz G-class (Type 463) MPVs, as originally manufactured, conform to many FMVSS in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards. Specifically, the petitioner claims that non-U.S. certified 2005 LWB Mercedes-Benz G-class (Type 463) MPVs are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect;* 103 *Windshield Defrosting and Defogging Systems;* 104 *Windshield Wiping and Washing Systems;* 105 *Hydraulic and Electric Brake Systems;* 106 *Brake Hoses;* 113 *Hood Latch System;* 116 *Motor Vehicle Brake Fluids;* 119 *New Pneumatic Tires;* 124 *Accelerator Control Systems;* 201 *Occupant Protection in Interior Impact;* 202 *Head Restraints;* 204 *Steering Control Rearward Displacement;* 205 *Glazing Materials;* 206 *Door Locks and Door Retention Components;* 207 *Seating Systems;* 209 *Seat Belt Assemblies;* 210 *Seat Belt Assembly Anchorages;* 212 *Windshield Mounting;* 216 *Roof Crush Resistance;* 219 *Windshield Zone Intrusion;* 225 *Child Restraint Anchorage Systems;* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the vehicles are capable of being altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* Replacement of the instrument cluster with a U.S.-model component and reprogramming and initializing the vehicle control system to integrate the instrument cluster and activate the required warning systems.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Installation of U.S.- model headlamps and front and rear side marker lamps.

Standard No. 111 *Rearview Mirrors:* Replacement of the passenger-side rearview mirror with a U.S.-model component, or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection:* Reprogramming the vehicle's control system so that the required warning is activated when the key is in the ignition and the driver's door is open.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems:* Reprogramming the vehicle's control system and door modules so that the window transport mechanism is inoperative when the ignition is turned in the off position.

Standard No. 120 *Tire Selection and Rims for Motor Vehicles Other than Passenger Cars:* Installation of a tire information placard.

Standard No. 208 *Occupant Crash Protection:* Reprogramming the interior control computer to activate the seat belt warning system.

The petitioner also stated that the vehicles are equipped with an automatic restraint system that consists of a seat belt warning lamp, driver and passenger air bags and knee bolsters, air bag crash sensors, and an air bag control unit. The vehicles are also equipped in the front and rear outboard seating positions with Type 2 lap and shoulder belts identical to those found on the vehicle's U.S. certified counterpart that are self-tensioning and released by means of a single red push button.

Standard No. 214*Side Impact Protection:* Inspection of each vehicle to ensure it is equipped with door beams that meet the requirements of the standard.

Standard No. 301 *Fuel System Integrity:* Inspection of each vehicle and replacement of non-U.S. model components with U.S. model components to meet the requirement of the standard.

In addition, the petitioner states that a vehicle identification number (VIN) plate must be installed in the area of the left windshield post with the vehicle's original VIN identified as a substitute for a U.S. VIN to meet the requirements of 49 CFR Part 565.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Issued on: February 11, 2013.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2013–03459 Filed 2–13–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2013–0014, Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming 1992 Porsche Carrera Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1992 Porsche Carrera passenger cars that were not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS), are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 1992 Porsche Carrera) and they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is March 18, 2013.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online 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., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

• *Fax:* 202–493–2251.

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. 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.

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 (65 FR 19477–78).

How to Read Comments submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at *http://www.regulations.gov*. Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC (''JK''), of Baltimore, Maryland (Registered Importer 90–006) has petitioned NHTSA to decide whether nonconforming 1992 Porsche Carrera passenger cars are eligible for importation into the United States. The vehicles which JK believes are substantially similar are 1992 Porsche Carrera passenger cars that were manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared the non-U.S. certified 1992 Porsche Carrera to its U.S.-certified counterpart, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

JK submitted information with its petition intended to demonstrate that the non-U.S. certified 1992 Porsche Carrera, as originally manufactured, conforms to many FMVSS in the same manner as its U.S. certified counterpart, or is capable of being readily altered to conform to those standards. Specifically, the petitioner claims that the non-U.S. certified 1992 Porsche Carrera is identical to its U.S. certified counterpart with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 113 *Hood Latch System,* 114 *Theft Protection,* 116 *Motor Vehicle Brake Fluids,* Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 109 *New Pneumatic Tires and certain specialty tires,* 124 *Accelerator Control Systems,* 135 *Light Vehicle Brake Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 203 *Impact Protection for the Driver from the Steering Control System,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the vehicle is capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls Telltales, and Indicators:* Replacement of the instrument cluster with a U.S.-model component.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Installation of the following U.S.-model components on vehicles not already so equipped: (a) Headlamps; (b) tail lamps (c) front and rear side marker lamps; and (d) a high-mounted stop lamp.

Standard No. 111 *Rearview Mirrors:* Installation of a U.S.-model passenger side rearview mirror, or inscription of the required warning statement on the face of the existing mirror.

Standard No. 120 *Tire Selection and Rims for Vehicles other than Passenger Cars:* Installation of a tire and rim information placard.

Standard No. 208 *Occupant Crash Protection:* (a) Reprogramming the vehicle computer to activate the seat belt warning lamp in a manner that meets the standard; and (b) inspection of all vehicles and installation of the following U.S.-model components on vehicles that are not already so equipped: (1)Airbags; (2)control unit; (3) sensors; (4) seat belts; and (5) knee bolster. The petitioner states that the vehicle is equipped with an automatic restraint system that consists of dual front airbags and knee bolsters, and with combination lap and shoulder belts at the front and rear outboard seating positions that are automatic, self-tensioning, and capable of being released by means of a single red push button.

The petitioner states that each vehicle will be inspected prior to importation for compliance with the Theft Prevention Standard in 49 CFR Part 541 and that anti-theft devices will be installed on all vehicles not already so equipped.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR Part 565 and that a certification label must be affixed

to the driver's door jamb to meet the requirements of 49 CFR Part 567.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: February 11, 2013.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2013–03461 Filed 2–13–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2013–0029]

Pipeline Safety: Public Forum State One-Call Exemptions

AGENCY: Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, DOT.

ACTION: Notice; public forum.

SUMMARY: The Pipeline and Hazardous Materials Safety Administration will sponsor a public forum on state one-call exemptions. The forum will be held on March 14, 2013, in West Palm Beach, Florida at the Palm Beach County Convention Center. At the forum, PHMSA will discuss the requirements of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 relating to exemptions in state one-call programs and actions taken to date. In addition, damage prevention stakeholders will discuss existing data relating to this topic and present perspectives during panel discussions.

DATES: The public forum will be held on Thursday, March 14, 2013, from 9:30 a.m. to 5:30 p.m. EST. Name badge pickup and onsite registration will be available starting at 8:30 a.m. Refer to the forum Web site for the agenda and times at: *http://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=85.* Please note that the public forum will be webcast live and presentations will be available on the forum Web site within 30 days following the public forum.

ADDRESSES: The forum is open to all. There is no cost to attend. The forum will be held at the Palm Beach County Convention Center, 650 Okeechobee Boulevard, West Palm Beach, Florida, 33401. PHMSA is holding the forum at this location because it is the same location where the Common Ground Alliance (CGA) 811 Excavation Safety Conference & Expo will be held March 11–14, 2013, and many of the likely attendees for the PHMSA Forum will participate in the CGA Excavation Safety Conference. Attendees can make hotel arrangements for the PHMSA Forum under the CGA room block at a rate of $199.00 per night. Further details can be found at *http://www.cgaconference.com.*

Registration: To help assure that adequate space is provided, all attendees are encouraged to register for the workshop at *http://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=85.*

Comments: Members of the public may also submit written comments, either before or after the workshop. Comments should reference Docket No. PHMSA–2013–0029. Comments may be submitted in the following ways:

- *E-Gov Web Site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* DOT Docket Management System, Room W12–140, on the ground floor 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.

Instructions: Identify the Docket No. at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA has received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov.* Note: Comments will be posted without changes or edits to *http://www.regulations.gov* including any personal information provided. Please see the Privacy Act heading in the Regulatory Analyses and Notices section of the **SUPPLEMENTARY INFORMATION** for additional information.

Privacy Act Statement: Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477).

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, please contact Annmarie Robertson at 317–253–1622, or by email at *annmarie.robertson@dot.gov* by March 4, 2013.

FOR FURTHER INFORMATION CONTACT: Annmarie Robertson, Office of Pipeline Safety, at 317–253–1622 or email at *annmarie.robertson@dot.gov,* regarding the subject matter of this notice.

SUPPLEMENTARY INFORMATION: Section 3 of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (Pub. L. 112–90) requires that PHMSA address exemptions in state one-call laws in two ways: As a factor in determining eligibility for certain grants, and in a requirement to prepare a state-by-state exemption study. With respect to grant eligibility, in order to qualify for a state one-call grant under 49 U.S.C. 6106, a state may not provide any exemptions to municipalities, state agencies, or their contractors from the one-call notification system requirements of the program. This amendment takes effect 1/3/2014.

With respect to the study on the impact of exemptions on pipeline safety, Section 3(d) states:

(1) Study.—The Secretary of Transportation shall conduct a study on the impact of excavation damage on pipeline safety.

(2) Contents.—The study shall include—

(A) an analysis of the frequency and severity of different types of excavation damage incidents;

(B) an analysis of exemptions to the one-call notification system requirements in each State;

(C) a comparison of exemptions to the one-call notification system requirements in each State to the types of excavation damage incidents in that State; and

(D) an analysis of the potential safety benefits and adverse consequences of eliminating all exemptions for mechanized excavation from State one-call notification systems.

(3) Report.—Not later than 2 years after the date of enactment of this Act, the Secretary shall submit to the Committee on Transportation and Infrastructure and the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the results of the study.

PHMSA has conducted a preliminary analysis of the exemptions found in state one-call laws and regulations. PHMSA is in the process of developing a plan for addressing grant eligibility in accordance with the law and will continue to work with stakeholders concerning this requirement. This public forum will allow PHMSA, state pipeline safety representatives, excavators, pipeline operators, one-call centers, the public, facility locators, and stakeholders often affected by one-call exemptions such as railroads, local government and the farming community to share data and observations resulting from one-call exemptions and the impact of removing such exemptions. This input will facilitate PHMSA's ability to complete the study required in Section 3 of the law.

Participants of the public forum will benefit from: (1) Understanding the issue and the current status of states with regard to exemptions in one-call laws; (2) understanding the issues concerning the availability of data to support or challenge existing exemptions; and (3) listening to panelists present perspectives, both positive and negative, on the existence of exemptions in state one-call laws.

Interested persons may obtain more information on damage prevention at: *http://primis.phmsa.dot.gov/comm/DamagePrevention.htm.*

Issued in Washington, DC, on February 8, 2013.

Linda Daugherty,

Deputy Associate Administrator for Policy and Programs.

[FR Doc. 2013–03369 Filed 2–13–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35714]

Puget Sound & Pacific Railroad Company—Lease Exemption—the United States of America

Puget Sound & Pacific Railroad Company (PSAP), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease from the United States of America (the Navy), and to operate, pursuant to a lease agreement dated January 16, 2013, a 44-mile line of railroad between Shelton and Bangor, Wash., and a 4.6-mile branch line to the Bremerton Navy Yard, in Kitsap and Mason Counties, Wash., a total distance of approximately 48.6 miles (the Line).

According to PSAP, there are no mileposts on the Line. PSAP states that the lease agreement replaces a transportation agreement dated December 11, 1944, between the Navy and the Northern Pacific Railway Company (Northern Pacific)[1] that covers the operations of the Line (operating agreement). PSAP points out that, under the operating agreement, it currently provides service on the above-described 48.6 miles of rail line,[2] and will continue to provide the same common carrier service under the lease agreement.

PSAP has certified that its projected annual revenues as a result of this transaction will not result in PSAP's becoming a Class II or Class I rail carrier but that its projected annual revenue will exceed $5 million. Accordingly, PSAP is required, at least 60 days before this exemption is to become effective, to send notice of the transaction to the national offices of the labor unions with employees on the affected lines, post a copy of the notice at the workplace of the employees on the affected lines, and certify to the Board that it has done so. 49 CFR 1150.42(e).

PSAP has certified to the Board that, on January 24, 2013, it posted notice of the transaction at the workplace of the employees on the affected lines, and on January 29, 2013, it served a copy of the notice on the national office of the potentially affected employees' labor union, as required under 49 CFR 1150.42(e). However, concurrently with its notice of exemption, PSAP filed a petition for waiver of the 60-day advance labor notice requirement under 1150.42(e), asserting that no employees will be affected by the change from the operating agreement to the lease agreement, and that the transaction will not result in any operational or maintenance changes on the Line. PSAP's waiver request will be addressed in a separate decision.

PSAP states that it intends to consummate the transaction on February 28, 2013 (the effective date of this exemption). The Board will establish in the decision on the waiver request the earliest this transaction may be consummated.

If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than February 21, 2013.

An original and 10 copies of all pleadings, referring to Docket No. FD 35714, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Louis E. Gitomer, Law Offices of Louis E. Gitomer, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

Board decisions and notices are available at our Web site at *www.stb.dot.gov*.

Decided: February 11, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2013–03451 Filed 2–13–13; 8:45 am]

BILLING CODE 4915–01–P

[1] Northern Pacific is a predecessor of PSAP.

[2] *See PSAP Operating Co.—Acquis. and Operation Exemption—ParkSierra Corp.,* FD 34200 (STB served May 23, 2002).

DEPARTMENT OF THE TREASURY

Office of the Secretary

List of Countries Requiring Cooperation With an International Boycott

In accordance with section 999(a)(3) of the Internal Revenue Code of 1986, the Department of the Treasury is publishing a current list of countries which require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

On the basis of the best information currently available to the Department of the Treasury, the following countries require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

Iraq

Kuwait

Lebanon

Libya

Qatar

Saudi Arabia

Syria

United Arab Emirates

Yemen

Dated: February 7, 2013.

Danielle Rolfes,

International Tax Counsel (Tax Policy).

[FR Doc. 2013–03339 Filed 2–13–13; 8:45 am]

BILLING CODE 4810–25–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for the MeF letter

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, 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)). Currently, the IRS is soliciting comments concerning the MeF letter, Mondernized e-File—Non-compliance with Mandate for Large Corporations to file electronically.

DATES: Written comments should be received on or before April 15, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, (202) 622–6665, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Mondernized e-File—Non-compliance with Mandate for Large Corporations to file electronically.

OMB Number: 1545–2023.

Form Number: MeF letter.

Abstract: Service will contact those taxpayers who file paper income tax returns to determine if these taxpayers should have filed electronic returns under the Mandate, Treasury Regulation Section 301.6011–5T.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 20,250.

Estimated Time per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 2,080.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 5, 2013.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2013–03374 Filed 2–13–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 13797

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, 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)). Currently, the IRS is soliciting comments concerning Form 13797, Tribal Evaluation of Filing and Accuracy Compliance (TEFAC)—Compliance Check Report.

DATES: Written comments should be received on or before April 15, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, (202) 622–6665, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Tribal Evaluation of Filing and Accuracy Compliance (TEFAC)—Compliance Check Report.

OMB Number: 1545–2026.

Form Number: Form 13797.

Abstract: This form will be provided to tribes who elect to perform a self compliance check on any or all of their entities. This is a VOLUNTARY program, and the entity is not penalized for non-completion of forms or withdrawal from the program. Upon completion, the information will be used by the Tribe and ITG to develop training needs, compliance strategies, and corrective actions.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations and State, Local, or Tribal Government.

Estimated Number of Respondents: 20.

Estimated Time per Respondent: 22 hours 20 minutes.

Estimated Total Annual Burden Hours: 447.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

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 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 5, 2013.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2013–03373 Filed 2–13–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by Section 6039G

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: This notice is provided in accordance with IRC section 6039G of the Health Insurance Portability and Accountability Act (HIPPA) of 1996, as amended. This listing contains the name of each individual losing United States citizenship (within the meaning of section 877(a) or 877A) with respect to whom the Secretary received information during the quarter ending December 31, 2012. For purposes of this listing, long-term residents, as defined in section 877(e)(2), are treated as if they were citizens of the United States who lost citizenship.

Last name	First name	Middle name/initials
BOGUSKI	SARAH	ALYSON
BRENNINKMEYER	BERNARD	ANTHONY
BRIGGS	THOMAS	MARTIN
BROWN	LAVINA	RUTH
BUCHANAN	ROBERT	CHRISTIAN
CHEUNG	ALLISON	
CHO	MICHAEL	KIM
DE LAUBESPIN	ELEONORE	M J M BONAERT
DE MAREDSOUS	OLIVIER	JOHN DESCLEE
EISENMEYER	HANS	MARTIN
ELLIS	BILLY	CAROL
ELLIS	DENISE	T
GIBSON	MARGARET	JEAN
GOULANDRIS	PETER	N
HAUDENSCHILD	ROBERT	DANIEL
HESS	JOCELYN	CAMPOS
HIGHFIELD	TUCKER	M
JONSSON	N STEPHAN	W
LEUNG	JANICE	T L
LEVY-LANG	LAURENCE	MARTINE
MARC	MICHAEL	JOSEPH
MARSDEN	DAPHNE	JILL
MAR-TANG	SUE	
MASUDA	TAKASHI	
MAYER-BIENVENU	JESSICA	S
MILLMAN	BARRY	
MOHR	FREDERIC	ANDREAS
MOSER	ALFRED	
MOSER	MARTINA	
PARGAS	DAMIAN	ALAN
PAULI	MADELAINE	DORIS
PICARD	DAVID	HENRY
PREST	MARIE	THERESE
RIS-SCHNEEBERGER	ANNE	K
ROBINSON JR	RUSSELL	
SALMAND	KARINE	
SCHMITH	SCOTT	CHARLES
SHOLSETH	THOMAS	JOSEPH
SIGG	ALFRED	
STEWART	HOLLY	DAWN
STUDER	ANTON	ALOIS
VAN RAVENSTEIN	ADRIAAN	JILLARDUE EMILIUS
VARMA	SANJAY	
VOGELE	MAX	MANUEL
WOLFSON	KAREN	JANE

Dated: January 29, 2013.

Ann V. Gaudelli,

Manager, Team 103, Examinations Operations—Philadelphia Compliance Services.

[FR Doc. 2013–03378 Filed 2–13–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Season for Membership to the Electronic Tax Administration Advisory Committee (ETAAC)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Request for Nominations and Applications.

SUMMARY: The Electronic Tax Administration Advisory Committee (ETAAC) was established to provide continued input into the development and implementation of the Internal Revenue Service (IRS) strategy for electronic tax administration. The ETAAC provides an organized public forum for discussion of electronic tax administration issues in support of the overriding goal that paperless filing should be the preferred and most convenient method of filing tax and information returns. ETAAC members convey the public's perception of IRS electronic tax administration activities, offer constructive observations about current or proposed policies, programs, and procedures, and suggest improvements. Members of the ETAAC may not be federally registered lobbyists. This document seeks applicants for selection as committee members.

The Director, Return Preparer Office (RPO) will assure that the size and organizational representation of the ETAAC obtains balanced membership and includes representatives from various groups including: (1) Tax practitioners and preparers, (2) transmitters of electronic returns, (3) tax software developers, (4) large and small business, (5) employers and payroll service providers, (6) individual taxpayers, (7) financial industry (payers, payment options and best practices), (8) system integrators (technology providers), (9) academic (marketing, sales or technical perspectives), (10) trusts and estates, (11) tax exempt organizations, and (12) state and local governments. We are soliciting applicants from professional and public interest groups. Members will serve a three-year term on the ETAAC to allow for a rotation in membership which ensures that different perspectives are represented. All travel expenses within government guidelines will be reimbursed. Potential candidates must pass an IRS tax compliance check and Federal Bureau of Investigation (FBI) background investigation.

DATES: The complete application package must be received no later than Monday, April 1, 2013.

ADDRESSES: Completed applications should be submitted using one of the following methods:

- *Email:* Send to *etaac@irs.gov.*
- *Mail:* Send to Internal Revenue Service, Return Preparer Office, SE:RPO 5000 Ellin Road (M/Stop C4–470, Attn: ETAAC Analyst (C4–213), Lanham, Maryland 20706.
- *Fax:* Send via facsimile to (202) 283–2845 (not a toll-free number).

An application can be obtained by sending an email to *etaac@irs.gov* or calling (202) 283–2178 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Cassandra Daniels, (202) 283–2178 or send an email to *etaac@irs.gov.*

SUPPLEMENTARY INFORMATION: The ETAAC will also provide an annual report to Congress on IRS progress in meeting the Restructuring and Reform Act of 1998 goals for electronic filing of tax returns. This activity is based on the authority to administer the Internal Revenue laws conferred upon the Secretary of the Treasury by section 7801 of the Internal Revenue Code and delegated to the Commissioner of the Internal Revenue under section 7803 of the Internal Revenue Code. The ETAAC will research, analyze, consider, and make recommendations on a wide range of electronic tax administration issues and will provide input into the development of the strategic plan for electronic tax administration.

Applicants should describe and document their qualifications for membership to the Committee. Equal opportunity practices will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by the Department, membership will include, to the extent practicable, individuals, with demonstrated ability to represent the interests of all racial and ethnic groups, women and men, and persons with disabilities. The Secretary of Treasury will review the recommended candidates and make final selections.

Dated: January 31, 2013.

Preston B. Benoit,

Deputy Director, Return Preparer Office.

[FR Doc. 2013–03376 Filed 2–13–13; 8:45 am]

BILLING CODE 4830–01–P

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Part II

Bureau of Consumer Financial Protection

12 CFR Part 1024

Mortgage Servicing Rules Under the Real Estate Settlement Act (Regulation X); Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1024

[Docket No. CFPB–2012–0034]

RIN 3170–AA14

Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection is amending Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, and implementing a commentary that sets forth an official interpretation to the regulation. The final rule implements provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding mortgage loan servicing. Specifically, this final rule implements Dodd-Frank Act sections addressing servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide protections to such borrowers in connection with force-placed insurance. Additionally, this final rule addresses servicers' obligations to establish reasonable policies and procedures to achieve certain delineated objectives; to provide information about mortgage loss mitigation options to delinquent borrowers; to establish policies and procedures for providing delinquent borrowers with continuity of contact with servicer personnel capable of performing certain functions; and to evaluate borrowers' applications for available loss mitigation options. Further, this final rule modifies and streamlines certain existing servicing-related provisions of Regulation X. For instance, this final rule revises provisions relating to mortgage servicers' obligation to provide disclosures to borrowers in connection with transfers of mortgage servicing, and mortgage servicers' obligation to manage escrow accounts, including restrictions on purchasing force-placed insurance for certain borrowers with escrow accounts and requirements to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan. Concurrently with the issuance of this final rule, the Bureau is issuing a rule implementing amendments relating to mortgage servicing to the Truth in Lending Act in Regulation Z.

DATES: This final rule is effective on January 10, 2014.

FOR FURTHER INFORMATION CONTACT:

Regulation X (RESPA): Whitney Patross, Attorney; Jane Gao, Terry Randall or Michael Scherzer, Counsels; Lisa Cole or Mitchell E. Hochberg, Senior Counsels, Office of Regulations, at (202) 435–7700.

Regulation Z (TILA): Whitney Patross, Attorney; Marta Tanenhaus or Mitchell E. Hochberg, Senior Counsels, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Bureau of Consumer Financial Protection (Bureau) is amending Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, and implementing a commentary that sets forth an official interpretation to the regulation (the 2013 RESPA Servicing Final Rule). The final rule implements provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding mortgage loan servicing.[1] Specifically, this final rule implements Dodd-Frank Act sections addressing servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide protections to such borrowers in connection with force-placed insurance. Additionally, this final rule addresses servicers' obligations to establish reasonable policies and procedures to achieve certain delineated objectives; to provide information about mortgage loss mitigation options to delinquent borrowers; to establish policies and procedures for providing delinquent borrowers with continuity of contact with servicer personnel capable of performing certain functions; and to evaluate borrowers' applications for available loss mitigation options. Further, this final rule modifies and streamlines certain existing servicing-related provisions of Regulation X. For instance, this final rule revises provisions relating to mortgage servicers' obligation to provide disclosures to borrowers in connection with a transfer of mortgage servicing, and mortgage servicers' obligation to manage escrow accounts, including restrictions on purchasing force-placed insurance for certain borrowers with escrow accounts and requirements to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan. Concurrently with the issuance of this final rule, the Bureau is issuing a rule implementing amendments relating to mortgage servicing to the Truth in Lending Act in Regulation Z (the 2013 TILA Servicing Final Rule).

On August 10, 2012, the Bureau issued proposed rules that would have amended Regulation X, which implements RESPA,[2] as well as Regulation Z, which implements TILA,[3] regarding mortgage servicing requirements.[4] The Proposed Servicing Rules proposed to implement the Dodd-Frank Act amendments to TILA and RESPA with respect to, among other things, periodic mortgage statements, disclosures for ARMs, prompt crediting of mortgage loan payments, requests for mortgage loan payoff statements, error resolution, information requests, and protections relating to force-placed insurance. In the 2012 RESPA Servicing Proposal, the Bureau also proposed to use its authority to adopt requirements relating to servicer policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications.[5] The proposals sought to address fundamental problems that underlie many consumer complaints and recent regulatory and enforcement actions, as set forth in more detail below.

The Bureau is finalizing the Proposed Servicing Rules with respect to nine

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

[2] *See* Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrowers* (Aug. 10, 2012) available at *http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/*. The proposal was published in the **Federal Register** on September 17, 2012. 77 FR 57200 (Sept. 17 2012) (2012 RESPA Servicing Proposal).

[3] *See* Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrowers* (August 10, 2012) available at *http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/*. This proposal was also published in the **Federal Register** on September 17, 2012. 77 FR 57318 (Sept. 17, 2012) (2012 TILA Servicing Proposal; and, together with the 2012 RESPA Servicing Proposal, the Proposed Servicing Rules).

[4] The 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule are referred to collectively as the Final Servicing Rules.

[5] For ease of discussion, this notice uses the term ''discretionary rulemakings'' to refer to a set of regulations implemented using the Bureau's authorities under section 6(j), 6(k)(1)(E), or 19(a) of RESPA to expand requirements beyond those explicit in RESPA. The ''discretionary rulemakings'' include requirements relating to servicer policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications, as set forth in §§ 1024.38–41.

major topics, as summarized below, as well as certain technical and streamlining amendments. The goals of the Final Servicing Rules are to provide better disclosure to consumers of their mortgage loan obligations and to better inform consumers of, and assist consumers with, options that may be available for consumers having difficulty with their mortgage loan obligations. The amendments also address critical servicer practices relating to, among other things, correcting errors, imposing charges for force-placed insurance, crediting mortgage loan payments, and providing payoff statements. The Bureau's final rules are set forth in two separate notices because some provisions implement requirements that Congress imposed under TILA while other provisions implement requirements Congress imposed under RESPA.[6]

A. Major Topics in the Final Servicing Rules

1. Periodic billing statements (2013 TILA Servicing Final Rule). Creditors, assignees, and servicers must provide a periodic statement for each billing cycle containing, among other things, information on payments currently due and previously made, fees imposed, transaction activity, application of past payments, contact information for the servicer and housing counselors, and, where applicable, information regarding delinquencies. These statements must meet the timing, form, and content requirements provided in the rule. The rule contains sample forms that may be used. The periodic statement requirement generally does not apply to fixed-rate loans if the servicer provides a coupon book, so long as the coupon book contains certain information specified in the rule and certain other information specified in the rule is made available to the consumer. The rule also includes an exemption for small servicers as discussed below.

2. Interest rate adjustment notices (2013 TILA Servicing Final Rule). Creditors, assignees, and servicers must provide a consumer whose mortgage has an adjustable rate with a notice between 210 and 240 days prior to the first payment due after the rate first adjusts. This notice may contain an estimate of the new rate and new payment. Creditors, assignees, and servicers also must provide a notice between 60 and 120 days before payment at a new level is due when a rate adjustment causes the payment to change. The current annual notice that must be provided for adjustable-rate mortgages (ARMs) for which the interest rate, but not the payment, has changed over the course of the year is no longer required. The rule contains model and sample forms that servicers may use.

3. *Prompt payment crediting and payoff statements (2013 TILA Servicing Final Rule).* Servicers must promptly credit periodic payments from borrowers as of the day of receipt. A periodic payment consists of principal, interest, and escrow (if applicable). If a servicer receives a payment that is less than the amount due for a periodic payment, the payment may be held in a suspense account. When the amount in the suspense account covers a periodic payment, the servicer must apply the funds to the consumer's account. In addition, creditors, assignees, and servicers must provide an accurate payoff balance to a consumer no later than seven business days after receipt of a written request from the borrower for such information.

4. Force-placed insurance (2013 RESPA Servicing Final Rule). Servicers are prohibited from charging a borrower for force-placed insurance coverage unless the servicer has a reasonable basis to believe the borrower has failed to maintain hazard insurance, as required by the loan agreement, and has provided required notices. An initial notice must be sent to the borrower at least 45 days before charging the borrower for force-placed insurance coverage, and a second reminder notice must be sent no earlier than 30 days after the first notice. The rule contains model forms that servicers may use. If a borrower provides proof of hazard insurance coverage, the servicer must cancel any force-placed insurance policy and refund any premiums paid for overlapping periods in which the borrower's coverage was in place. The rule also provides that charges related to force-placed insurance (other than those subject to State regulation as the business of insurance or authorized by Federal law for flood insurance) must be for a service that was actually performed and must bear a reasonable relationship to the servicer's cost of providing the service. Where the borrower has an escrow account for the payment of hazard insurance premiums, the servicer is prohibited from obtaining force-place insurance where the servicer can continue the borrower's homeowner insurance, even if the servicer needs to advance funds to the borrower's escrow account to do so. The rule against obtaining force-placed insurance in cases in which hazard insurance may be maintained through an escrow account exempts small servicers, as discussed below, so long as any force-placed insurance purchased by the small servicer is less expensive to a borrower than the amount of any disbursement the servicer would have made to maintain hazard insurance coverage.

5. Error resolution and information requests (2013 RESPA Servicing Final Rule). Servicers are required to meet certain procedural requirements for responding to written information requests or complaints of errors. The rule requires servicers to comply with the error resolution procedures for certain listed errors as well as any error relating to the servicing of a mortgage loan. Servicers may designate a specific address for borrowers to use. Servicers generally are required to acknowledge the request or notice of error within five days. Servicers also generally are required to correct the error asserted by the borrower and provide the borrower written notification of the correction, or to conduct an investigation and provide the borrower written notification that no error occurred, within 30 to 45 days. Further, within a similar amount of time, servicers generally are required to acknowledge borrower written requests for information and either provide the information or explain why the information is not available.

6. General servicing policies, procedures, and requirements (2013 RESPA Servicing Final Rule). Servicers are required to establish policies and procedures reasonably designed to achieve objectives specified in the rule. The reasonableness of a servicer's policies and procedures takes into account the size, scope, and nature of the servicer's operations. Examples of the specified objectives include accessing and providing accurate and timely information to borrowers, investors, and courts; properly evaluating loss mitigation applications in accordance with the eligibility rules established by investors; facilitating oversight of, and compliance by, service providers; facilitating transfer of information during servicing transfers; and informing borrowers of the availability of written error resolution and information request procedures. In addition, servicers are required to retain records relating to each mortgage loan until one year after the mortgage loan is discharged or servicing is transferred, and to maintain certain documents and information for each mortgage loan in a manner that enables the services to compile it into a servicing file within five days. This section includes an exemption for small servicers as discussed below. The Bureau and

[6] Note that TILA and RESPA differ in their terminology. Whereas Regulation Z generally refers to ''consumers'' and ''creditors,'' Regulation X generally refers to ''borrowers'' and ''lenders.''

prudential regulators will be able to supervise servicers within their jurisdiction to assure compliance with these requirements but there will not be a private right of action to enforce these provisions.

7. Early intervention with delinquent borrowers (2013 RESPA Servicing Final Rule). Servicers must establish or make good faith efforts to establish live contact with borrowers by the 36th day of their delinquency and promptly inform such borrowers, where appropriate, that loss mitigation options may be available. In addition, a servicer must provide a borrower a written notice with information about loss mitigation options by the 45th day of a borrower's delinquency. The rule contains model language servicers may use for the written notice. This section includes an exemption for small servicers as discussed below.

8. Continuity of contact with delinquent borrowers (2013 RESPA Servicing Final Rule). Servicers are required to maintain reasonable policies and procedures with respect to providing delinquent borrowers with access to personnel to assist them with loss mitigation options where applicable. The policies and procedures must be reasonably designed to ensure that a servicer assigns personnel to a delinquent borrower by the time a servicer provides such borrower with the written notice required by the early intervention requirements, but in any event, by the 45th day of a borrower's delinquency. These personnel should be accessible to the borrower by phone to assist the borrower in pursuing loss mitigation options, including advising the borrower on the status of any loss mitigation application and applicable timelines. The personnel should be able to access all of the information provided by the borrower to the servicer and provide that information, when appropriate, to those responsible for evaluating the borrower for loss mitigation options. This section includes an exemption for small servicers as discussed below. The Bureau and the prudential regulators will be able to supervise servicers within their jurisdiction to assure compliance with these requirements but there will not be a private right of action to enforce these provisions.

9. Loss Mitigation Procedures (2013 RESPA Servicing Final Rule). Servicers are required to follow specified loss mitigation procedures for a mortgage loan secured by a borrower's principal residence. If a borrower submits an application for a loss mitigation option, the servicer is generally required to acknowledge the receipt of the application in writing within five days and inform the borrower whether the application is complete and, if not, what information is needed to complete the application. The servicer is required to exercise reasonable diligence in obtaining documents and information to complete the application.

For a complete loss mitigation application received more than 37 days before a foreclosure sale, the servicer is required to evaluate the borrower, within 30 days, for all loss mitigation options for which the borrower may be eligible in accordance with the investor's eligibility rules, including both options that enable the borrower to retain the home (such as a loan modification) and non-retention options (such as a short sale). Servicers are free to follow ''waterfalls'' established by an investor to determine eligibility for particular loss mitigation options. The servicer must provide the borrower with a written decision, including an explanation of the reasons for denying the borrower for any loan modification option offered by an owner or assignee of a mortgage loan with any inputs used to make a net present value calculation to the extent such inputs were the basis for the denial. A borrower may appeal a denial of a loan modification program so long as the borrower's complete loss mitigation application is received 90 days or more before a scheduled foreclosure sale.

The rule restricts ''dual tracking,'' where a servicer is simultaneously evaluating a consumer for loan modifications or other alternatives at the same time that it prepares to foreclose on the property. Specifically, the rule prohibits a servicer from making the first notice or filing required for a foreclosure process until a mortgage loan account is more than 120 days delinquent. Even if a borrower is more than 120 days delinquent, if a borrower submits a complete application for a loss mitigation option before a servicer has made the first notice or filing required for a foreclosure process, a servicer may not start the foreclosure process unless (1) the servicer informs the borrower that the borrower is not eligible for any loss mitigation option (and any appeal has been exhausted), (2) a borrower rejects all loss mitigation offers, or (3) a borrower fails to comply with the terms of a loss mitigation option such as a trial modification.

If a borrower submits a complete application for a loss mitigation option after the foreclosure process has commenced but more than 37 days before a foreclosure sale, a servicer may not move for a foreclosure judgment or order of sale, or conduct a foreclosure sale, until one of the same three conditions has been satisfied. In all of these situations, the servicer is responsible for promptly instructing foreclosure counsel retained by the servicer not to proceed with filing for foreclosure judgment or order of sale, or to conduct a foreclosure sale, as applicable.

This section includes an exemption for small servicers as defined above. However, a small servicer is required to comply with two requirements: (1) A small servicer may not make the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, and (2) a small servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a loss mitigation agreement.

All of the provisions in the section relating to loss mitigation can be enforced by individuals. Additionally, the Bureau and the prudential regulators can also supervise servicers within their jurisdiction to assure compliance with these requirements.

B. Scope of the Final Servicing Rules

The Final Servicing Rules have somewhat different scopes, with respect to the types of mortgage loan transactions covered and the loans that are exempted. With respect to the 2013 TILA Servicing Final Rule, certain requirements, specifically the periodic statement and ARM disclosure requirements, only apply to closed-end mortgage loans, whereas other requirements, specifically the requirements for crediting of payments and providing payoff statements, apply to both open-end and closed-end mortgage loans. Reverse mortgage transactions and timeshare plans are exempt from the periodic statement requirement. ARMs with terms of one year or less are exempt from the ARM disclosure requirements.

With respect to the 2013 RESPA Servicing Final Rule, certain requirements generally apply to federally related mortgage loans that are closed-end, with certain exemptions for loans on property of 25 acres or more, business-purpose loans, temporary financing, loans secured by vacant land, and certain loan assumptions or conversions. Open-end lines of credit (home equity plans) are generally exempt from the requirements in the 2013 RESPA Servicing Final Rule. The general servicing policies, procedure, and requirements, early intervention, continuity of contact, and loss mitigation procedures provisions are generally inapplicable to servicers of

reverse mortgage transactions or to servicers of mortgage loans for which the servicers are also qualified lenders under the Farm Credit Act of 1971.

In the 2013 TILA Servicing Final Rule, the Bureau is exercising its authority under TILA to provide an exemption from the periodic statement requirement for small servicers, defined as servicers that service 5,000 mortgage loans or less and only service mortgage loans the servicer or an affiliate owns or originated (small servicers). In this 2013 RESPA Servicing Final Rule, the Bureau has elected not to extend to these small servicers most provisions of the Final Rule that are not being promulgated to implement specific mandates in the Dodd-Frank Act but are, instead, being issued by the Bureau, in the exercise of its discretion, pursuant to its discretionary rulemaking authority under RESPA, as amended by the Dodd-Frank Act, and title X of the Dodd-Frank Act. The exemptions from the discretionary rulemakings include those relating to general servicing policies, procedures, and requirements; early intervention with delinquent borrowers; continuity of contact; and most of the requirements for evaluating and responding to loss mitigation applications. Further, the Bureau is not restricting small servicers from purchasing force-placed insurance for borrowers with escrow accounts for the payment of hazard insurance, so long as the cost to the borrower of the force-placed insurance obtained by a small servicer is less than the amount the small servicer would be required to disburse from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges were paid in a timely manner. Small servicers are required to comply with limited loss mitigation procedure requirements. These include (1) a prohibition on making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent and (2) a prohibition on making the first notice or filing or moving for foreclosure judgment or order of sale, or conducting a foreclosure sale, when a borrower is performing pursuant to the terms of a loss mitigation agreement. The exemptions applicable to small servicers in the 2013 TILA Servicing Rule and the 2013 RESPA Servicing Rule are also being extended to Housing Finance Agencies, without regard to the number of mortgage loans serviced by any such agency, and these agencies are included within the definition of small servicer.

II. Background

A. Overview of the Mortgage Servicing Market and Market Failures

The mortgage market is the single largest market for consumer financial products and services in the United States, with approximately $10.3 trillion in loans outstanding.[7] Mortgage servicers play a vital role within the broader market by undertaking the day-to-day management of mortgage loans on behalf of lenders who hold the loans in their portfolios or (where a loan has been securitized) investors who are entitled to the loan proceeds.[8] Over 60 percent of mortgage loans are serviced by mortgage servicers for investors.

Servicers' duties typically include billing borrowers for amounts due, collecting and allocating payments, maintaining and disbursing funds from escrow accounts, reporting to creditors or investors, and pursuing collection and loss mitigation activities (including foreclosures and loan modifications) with respect to delinquent borrowers. Indeed, without dedicated companies to perform these activities, it is questionable whether a secondary market for mortgage-backed securities would exist in this country.[9] Given the nature of their activities, servicers can have a direct and profound impact on borrowers.

Mortgage servicing is performed by banks, thrifts, credit unions, and non-banks under a variety of business models. In some cases, creditors service mortgage loans that they originate or purchase and hold in portfolio. Other creditors sell the ownership of the underlying mortgage loan, but retain the mortgage servicing rights in order to retain the relationship with the borrower, as well as the servicing fee and other ancillary income. In still other cases, servicers have no role at all in origination or loan ownership, but rather purchase mortgage servicing rights on securitized loans or are hired to service a portfolio lender's loans.[10]

These different servicing structures can create difficulties for borrowers if a servicer makes mistakes, fails to invest sufficient resources in its servicing operations, or avoids opportunities to work with borrowers for the mutual benefit of both borrowers and owners or assignees of mortgage loans. Although the mortgage servicing industry has numerous participants, the industry is highly concentrated, with the five largest servicers servicing approximately 53 percent of outstanding mortgage loans in this country.[11] Small servicers generally operate in discrete segments of the market, for example, by specializing in servicing delinquent loans, or by servicing loans that they originate.[12]

Contracts between the servicer and the mortgage loan owner specify the rights and responsibilities of each party. In the context of securitized loans, the contracts may require the servicer to balance the competing interests of different classes of investors when borrowers become delinquent. Certain provisions in servicing contracts may limit the servicer's ability to offer certain types of loan modifications to borrowers. Such contracts also may limit the circumstances under which owners or assignees of mortgage loans can transfer servicing rights to a

[7] Inside Mortg. Fin., *Outstanding 1–4 Family Mortgage Securities, in* 2 The 2012 Mortgage Market Statistical Annual 7 (2012). For general background on the market and the recent crisis, *see* the 2012 TILA–RESPA Proposal available at *http://www.consumerfinance.gov/knowbeforeyouowe/* (last accessed Jan. 10, 2013).

[8] As of June 2012, approximately 36 percent of outstanding mortgage loans were held in portfolio; 54 percent of mortgage loans were owned through mortgage-backed securities issued by Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), together referred to as the government-sponsored enterprises (GSEs), as well as securities issued by the Government National Mortgage Association (Ginnie Mae); and 10 percent of loans were owned through private label mortgage-backed securities. *Strengthening the Housing Market and Minimizing Losses to Taxpayers, Hearing Before the S. Comm. on Banking, Housing and Urban Affairs* (2012) (Testimony of Laurie Goodman, Amherst Securities), available at *http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=53bda60f-64c1-43d8-9adf-a693c31eb56b&Witness_ID=b06f2fb1-59dd-4881-86cb-1082464d3119.* A securitization results in the economic separation of the legal title to the mortgage loan and a beneficial interest in the mortgage loan obligation. In a securitization transaction, a securitization trust is the owner or assignee of a mortgage loan. An investor is a creditor of the trust and is entitled to cash flows that are derived from the proceeds of the mortgage loans. In general, certain investors (or an insurer entitled to act on behalf of the investors) may direct the trust to take action as the owner or assignee of the mortgage loans for the benefit of the investors or insurers. *See, e.g.,* Adam Levitin & Tara Twomey, *Mortgage Servicing,* 28 Yale J. on Reg. 1, 11 (2011) (Levitin & Twomey).

[9] *See, e.g.,* Levitin & Twomey, at 11 (''All securitizations involved third-party servicers * * * [m]ortgage servicers provide the critical link between mortgage borrowers and the SPV and RMBS investors, and servicing arrangements are an indispensable part of securitization.'').

[10] *See, e.g.,* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755, 763 (2011) (''Thompson'').

[11] *See Top 100 Mortgage Servicers in 2012,* Inside Mortg. Fin., Sept. 28, 2012, at 13 (As of the end of the fourth quarter of 2011, the top five largest servicers serviced $5.66 trillion of mortgage loans).

[12] Fitch Ratings, *U.S. Residential and Small Balance Commercial Mortgage Servicer Rating Criteria,* at 14–15 (Jan. 31, 2011), *available at http://www.fitchratings.com.* (account required to access information).

different servicer. Further, servicer contracts govern servicer requirements to advance payments to owners of mortgage loans, and to recoup advances made by servicers, including from ultimate recoveries on liquidated properties.

Compensation structures vary somewhat for loans held in portfolio and securitized loans,[13] but have tended to make pure mortgage servicing (where the servicer has no role in origination) a high-volume, low-margin business. Such compensation structures incentivize servicers to ensure that investment in operations closely tracks servicer expectations of delinquent accounts, and an increase in the number of delinquent accounts a servicer must service beyond that projected by the servicer strains available servicer resources. A servicer will expect to recoup its investment in purchasing mortgage servicing rights and earn a profit primarily through a net servicing fee (which is typically expressed as a constant rate assessed on unpaid mortgage balances), interest float on payment accounts between receipt and disbursement, and cross-marketing other products and services to borrowers. Under this business model, servicers act primarily as payment collectors and processors, and will have limited incentives to provide other customer service. Servicers greatly vary in the extent to which they invest in customer service infrastructure. For example, servicer staffing ratios have varied between approximately 100 loans per full-time employee to over 4,000 loans per full time employee.[14]

Servicers are generally not subject to market discipline from consumers because consumers have little opportunity to switch servicers. Rather, servicers compete to obtain business from the owners of loans—investors, assignees, and creditors—and thus competitive pressures tend to drive servicers to lower the price of servicing and scale their investment in providing service to consumers accordingly.

Servicers also earn revenue from fees assessed on borrowers, including fees on late payments, fees for obtaining force-placed insurance, and fees for services, such as responding to telephone inquiries, processing telephone payments, and providing payoff statements.[15] As a result, servicers have an incentive to look for opportunities to impose fees on borrowers to enhance revenues.

These attributes of the servicing market created problems for certain borrowers even prior to the financial crisis. For example, borrowers experienced problems with mortgage servicers even during regional mortgage market downturns that preceded the financial crisis.[16] There is evidence that borrowers were subjected to improper fees that servicers had no reasonable basis to impose, improper force-placed insurance practices, and improper foreclosure and bankruptcy practices.[17]

When the financial crisis erupted, many servicers—and especially the larger servicers with their scale business models—were ill-equipped to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they were required to process. Mortgage loan delinquency rates nearly doubled between 2007 and 2009 from 5.4 percent of first-lien mortgage loans to 9.4 percent of first-lien mortgage loans.[18] Many servicers lacked the infrastructure, trained staff, controls, and procedures needed to manage effectively the flood of delinquent mortgages they were forced to handle.[19] One study of complaints to the HOPE Hotline reported that over half of the complaints (27,000 out of 48,000) were from borrowers who could not reach their servicers and obtain information about the status of applications they had submitted for options to avoid foreclosure.[20]

Consumer harm has manifested in many different areas, and major servicers have entered into significant settlement agreements with Federal and State governmental authorities. For example, in April 2011, the Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System (Board), following on-site reviews of foreclosure processing at 14 federally regulated mortgage servicers, found significant deficiencies at each of the servicers reviewed. As a result, the OCC and the Board undertook formal enforcement actions against several major servicers for unsafe and unsound residential mortgage loan servicing practices.[21]

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[13] At securitization, the cash flow that was part of interest income is bifurcated between the loan and the mortgage servicing right (MSR). The MSR represents the present value of all the cash flows, both positive and negative, related to servicing a mortgage. Prime MSRs are largely created by the GSE minimum servicing fee rate, which is calculated as 25 basis points (bps) per annum. The servicing fee rate is typically paid to the servicer monthly and the monthly amount owed is calculated by multiplying the pro rata portion of the servicing fee rate by the stated principal balance of the mortgage loan at the payment due date. Accounting rules require that a capitalized asset be created if the ''compensation'' for servicing (including float/ancillary) exceeds ''adequate compensation.'' For loans held in portfolio, there is no bifurcation of the interest income from the loan. The owner of the loan simply negotiates pricing, terms, and standards with the servicer, which, at larger institutions, is typically a separate affiliate or subsidiary of the owner of the loans. Keefe, Bruyette & Woods, Inc., PowerPoint Presentation, *KBW Mortgage Matters: Mortgage Servicing Primer* (Apr. 2012).

[14] Richard O'Brien, *High Time for High-Touch,* Mortg. Banking, Feb. 1, 2009, at 39. Industry participants generally indicated to the Bureau that servicers targeted a loan to employee ratio of 1,000–1,200 mortgage loans per full time employee for mortgage loans that are current, and 125–150 mortgage loans per full time employee for mortgage loans that are delinquent. Between 1992 and 2000, as servicers sought to make their operations more efficient, loans serviced per full time employee increased from approximately 700 loans in 1992 to over 1,200 loans by 2000. Michael A. Stegman *et al., Preventative Servicing Is Good for Business and Affordable Homeownership Policy,* 18 Housing Pol'y Debate 243, 274 (2007). As an example of current mortgage servicing staffing levels, Ocwen services 162 mortgage loans per servicing employee. *See* Morningstar Credit Ratings, LLC, *Operational Risk Assessment—Ocwen Loan Servicing, LLC,* at 7 (2012) available at *http://www.ocwen.com/docs/Morningstar-Sept-2012.pdf.*

[15] *See, e.g.,* Bank of America, Mortgage Servicing Fees, available at *https://www8.bankofamerica.com/home-loans/mortgage-servicing-fees.go* (last accessed Jan. 11, 2013); Metro Credit Union, Mortgage Servicing Fee Schedule, available at *http://www.metrocu.org/home/fiFiles/static/documents/Mortgage_Servicing_Fee_Schedule.pdf* (last accessed Jan. 6, 2013); Acqura Loan Services, Mortgage Loan Servicing Fee Schedule, available at *http://www.acqurals.com/feeschedule.html* (last accessed Jan. 11, 2013); Sovereign Bank, FAQ—*What Are the* Mortgage Loan Servicing Fees?, available at *https://customerservice.sovereignbank.com/app/answers/detail/a_id/22/~/what-are-the-mortgage-loan-servicing-fees%3F* (last accessed Jan. 11, 2013).

[16] *See Problems in Mortgage Servicing from Modification to Foreclosure: Hearings Before the S. Comm. on Banking, Hous., & Urban Affairs,* 111th Cong. 53–54 (2010) (statement of Thomas J. Miller, Iowa Att'y Gen.) (''Miller Testimony''). *See also,* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers,* 15 Housing Pol'y Debate 753 (2004), available at *http://ssrn.com/abstract=992095.*

[17] *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers,* 15 Housing Pol'y Debate 753 (2004), available at *http://ssrn.com/abstract=992095* (collecting cases).

[18] U.S. Census Bureau, *Table 1194: Mortgage Originations and Delinquency and Foreclosure Rates: 1990 to 2010,* in The 2012 Statistical Abstract of the United States, (2012), available at *http://www.census.gov/compendia/statab/2012/tables/12s1194.pdf* (last accessed Jan. 6, 2013).

[19] *See* U.S. Dep't of the Treasury, *Making Contact: The Path to Improving Mortgage Industry Communication With Homeowners,* at 3 (2012), *available at http://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf* (last accessed Jan. 6, 2013).

[20] *See* U.S. Gov't Accountability Office, GAO–10–634, *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs,* at 15 (2010).

[21] Press Release, Office of the Comptroller of the Currency, NR 2011–47, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), available at *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html*; Press Release, Fed. Reserve Bd., *Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing* (April 13, 2011) (''Fed Press Release''), available at *http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm.* In addition to

These enforcement actions generally focused on practices relating to (1) filing of foreclosure documents without, for example, proper affidavits or notarizations; (2) failing to always ensure that loan documents were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time; (3) failing to devote sufficient financial, staffing, and managerial resources to ensure proper administration of foreclosure processes; (4) failing to devote adequate oversight, internal controls, policies and procedures, compliance risk management, internal audit, third-party management, and training to foreclosure processes; and (5) failing to oversee sufficiently outside counsel and other third-party providers handling foreclosure-related services.[22]

Other investigations of servicers have found similar problems. For example, the Government Accountability Office (GAO) has found pervasive problems in broad segments of the mortgage servicing industry impacting delinquent borrowers, such as servicers who have misled, or failed to communicate with, borrowers, lost or mishandled borrower-provided documents supporting loan modification requests, and generally provided inadequate service to delinquent borrowers. It has been recognized in Inspector General reports, and the Bureau has learned from outreach with mortgage investors, that servicers may be acting to maximize their self-interests in the handling of delinquent borrowers, rather than the interests of owners or assignees of mortgage loans.[23]

The mortgage servicing industry, however, is not monolithic. Some servicers provide high levels of customer service. Some of these servicers are compensated by investors in a way that incentivizes them to provide this level of service in order to optimize investor outcomes.[24] Other servicers provide high levels of customer service because they are servicing loans of their own retail customers within their local community or (in the case of credit unions) membership base. These servicers seek to provide other products and services to consumers—and to others within the community or membership base—and thus have an interest in preserving their reputations and relationships with their consumers. For example, as discussed further below, small servicers that the Bureau consulted as part of a process required under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) described their businesses as requiring a ''high touch'' model of customer service both to ensure loan performance and maintain a strong reputation in their local communities.[25]

B. The National Mortgage Settlement and Other Regulatory Requirements

In response to the unprecedented financial crisis and pervasive problems in mortgage servicing, including the systemic violation of State foreclosure laws by many of the largest servicers, State and Federal regulators have engaged in a number of individual servicing related enforcement and regulatory actions over the last few years and have begun discussions about comprehensive national standards.

For example, the Federal government, joined by 49 State attorneys general,[26] entered into settlements with the nation's five largest servicers in February 2012 (the National Mortgage Settlement).[27] Exhibit A to each of the settlements is a Settlement Term Sheet, which sets forth standards that each of the five largest servicers must follow to comply with the terms of the settlement.[28] The settlement standards contained in the Settlement Term Sheet are sub-divided into the following eight categories: (1) Foreclosure and bankruptcy information and documentation; (2) third-party provider oversight; (3) bankruptcy; (4) loss mitigation; (5) protections for military personnel; (6) restrictions on servicing fees; (7) force-placed insurance; and (8) general servicer duties and prohibitions.

Apart from the National Mortgage Settlement, Federal regulatory agencies have also issued guidance on mortgage servicing and loan modifications,[29] conducted coordinated reviews of the nation's largest servicers,[30] and taken enforcement actions against individual companies.[31] Further, the Bureau and other Federal agencies have been engaged since spring 2011 in informal

enforcement actions against major servicers, Federal agencies have also undertaken formal enforcement actions against major service providers to mortgage servicers.

[22] Press Release, Federal Reserve Bd., *Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing* (April 13, 2011), available at *http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm*. None of the servicers admitted or denied the OCC's or Federal Reserve Board's findings.

[23] *See, e.g.,* Jody Shenn, *PIMCO: This is who's actually going to be punished by the mortgage fraud settlement,* Bloomberg News, February 10, 2012; *cf.,* Office of Inspector Gen., Fed. Hous. Fin. Agency, *Evaluation of FHFA's Oversight of Fannie Mae's Transfer of Mortgage Servicing Rights from Bank of America to High Touch Servicers,* at 12 (Sept. 18, 2012) (''FHA OIG MSR Report''). The Inspector General for FHFA observed that ''Fannie Mae may have had (what one of its executives described as) a 'misalignment of interests' with its servicers. As guarantor or loan holder, Fannie Mae could face significant losses from a default. However, a servicer earns only a fraction of a percent of the unpaid balance of a mortgage it services and, thus, the fees derived from any particular loan may not—at least for the servicer—provide adequate incentive to undertake anything more than the bare minimum of effort in order to prevent a default. This will typically include sending out delinquency notices to borrowers who have not made timely payments, telephoning delinquent borrowers, and, ultimately, initiating foreclosure proceedings.''

[24] For example, Fannie Mae rewards servicers that provide high levels of customer service by compensating them through (1) base servicing fees, (2) incentive payments for mortgage modifications, and (3) a performance payment based on the servicer's success as contrasted with that of a benchmark portfolio. *See* FHA OIG MSR Report at 12.

[25] *See* U.S. Consumer Fin. Prot. Bureau, Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking (Jun, 11, 2012) (''Small Business Review Panel Report''), available at *www.consumerfinance.gov*.

[26] Oklahoma elected not to participate in the National Mortgage Settlement and executed a separate settlement with the servicers that are parties to the National Mortgage Settlement. *See* State of Oklahoma, Oklahoma Mortgage Settlement Fact Sheet (Feb. 9, 2012), available at *http://www.oag.ok.gov/oagweb.nsf/0/2737eec87426c427862579c10003c950/$FILE/Oklahoma%20Mortgage%20Settlement%20FAQs.pdf* (last accessed Jan. 10, 2013).

[27] The National Mortgage Settlement is available at: *http://www.nationalmortgagesettlement.com/*. The five servicers subject to the settlement are Bank of America, JP Morgan Chase, Wells Fargo, CitiMortgage, and Ally/GMAC.

[28] *See United States of America* v. *Bank of America Corp.,* at Appendix A, (National Mortgage Settlement), *available at http://www.nationalmortgagesettlement.com.*

[29] Office of the Comptroller of the Currency, OCC 2011–29, Foreclosure Management: Supervisory Guidance, OCC Bull., June 2011, *available at http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-29.html*; Letter from Edward J. DeMarco, Acting Dir. of Fed. Hous. Fin. Agency, to Hon. Elijah E. Cummings, Ranking Member, Comm. on Oversight and Gov't Reform, U.S. H. of Rep. (Jan. 20, 2012), *available at http://www.fhfa.gov/webfiles/23056/PrincipalForgivenessltr12312.pdf*; Fannie Mae, Program Guidance, Home Affordable Modification Program, *available at https://www.hmpadmin.com/portal/programs/guidance.jsp*. Fed. Hous. Fin. Agency, Frequently Asked Questions—Servicing Alignment Initiative, available at *http://www.fhfa.gov/webfiles/21191/FAQs42811Final.pdf*.

[30] *See* Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, U.S. Dep't of the Treasury, Interagency Review of Foreclosure Policies and Practices (2011) (Interagency Foreclosure Report) (a joint review of foreclosure processing of 14 federally regulated mortgage servicers during the fourth quarter of 2010 by the Federal Reserve System, Office of the Comptroller of the Currency, and Office of Thrift Supervision), *available at http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf*.

[31] *See* Interagency Foreclosure Report, at 5; Press Release, Fed. Reserve Bd., Press Release (May 24, 2012), *available at http://www.federalreserve.gov/newsevents/press/enforcement/20120524a.htm*; Press Release, Fed. Reserve Bd. (Feb. 27, 2012), *available at http://www.federalreserve.gov/newsevents/press/enforcement/20120227a.htm*; OCC Press Release.

discussions about the potential development of national mortgage servicing standards through interagency regulations and guidance.

Servicers are currently required to navigate overlapping requirements governing their servicing responsibilities. Servicers must comply with requirements established by owners or assignees of mortgage loans. These include, as applicable, (1) servicing guidelines required by Fannie Mae, Freddie Mac, and Ginnie Mae; (2) government insured program guidelines issued by the Federal Housing Administration (FHA), Department of Veterans Affairs (VA), and the Rural Housing Service; (3) contractual agreements with investors (such as pooling and servicing agreements and subservicing contracts); and (4) bank or institution policies.

Servicers are also required to consider the impact of State and even local regulation on mortgage servicing. Significantly, New York, California, and Oregon have all adopted varying statutory or regulatory restrictions on mortgage servicers. For example, the Superintendent of Banks of the State of New York repeatedly adopted short-term emergency regulations governing mortgage servicers on a continuous basis since July 2010.[32] These regulations impose obligations on servicers with respect to, among other things, consumer complaints and inquiries, statements of accounts, crediting of payments, payoff balances, and loss mitigation procedures.[33] The California Homeowner Bill of Rights, which was enacted in 2012, imposes requirements on servicers with respect to evaluations of borrowers for loss mitigation options before various foreclosure documents may be filed for California's non-judicial foreclosure process.[34] Further, Oregon implemented regulations on mortgage servicers not to engage in unfair or deceptive conduct by: assessing fees for payments made on or before a payment due date; assessing or collecting fees not authorized by a security instrument or mortgage, misrepresenting information relating to a loan modification or set forth in an affidavit, declaration, or other sworn statement detailing a borrower's default and the servicer's right to foreclose; failing to comply with certain provisions of RESPA; or failing to deal with a borrower in good faith.[35] Further, Massachusetts has recently proposed new regulations to protect consumers with respect to mortgage servicing practices, including with respect to loss mitigation procedures.[36]

C. RESPA and Regulation X

Congress originally enacted the Real Estate Settlement Procedures Act of 1974 (RESPA) based on findings that significant reforms in the real estate settlement process were needed to ensure that consumers are provided with greater and more timely information on the nature and costs of the residential real estate settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices found by Congress. *See* 12 U.S.C. 2601(a). In 1990, Congress amended RESPA by adding a new section 6 covering persons responsible for servicing federally related mortgage loans and imposing on such servicers certain obligations.[37] These included required disclosures at application concerning whether the lender intended to service the mortgage loan and disclosures upon an actual transfer of servicing rights.[38] RESPA section 6 further imposed substantive and disclosure requirements for escrow account management and required servicers to respond to ''qualified written requests''—written error resolution or information requests relating to the ''servicing'' of the borrower's mortgage loan.[39]

Section 19(a) of RESPA authorizes the Bureau (and formerly directed the Department of Housing and Urban Development (HUD)) to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of RESPA. *See* 12 U.S.C. 2617(a).

Historically, Regulation X, 24 CFR part 3500, implemented RESPA. General rulemaking authority for RESPA transferred to the Bureau on July 21, 2011. *See* sections 1061 and 1098 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and RESPA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation X, 12 CFR part 1024, implementing RESPA. 76 FR 78978 (Dec. 20, 2011). The Bureau's Regulation X took effect on December 30, 2011. The requirements in section 6 of RESPA for mortgage servicing are implemented primarily by § 1024.21.

D. The Dodd-Frank Act

The Dodd-Frank Act imposes certain new requirements related to mortgage servicing. As set forth above, some of these new requirements are amendments to RESPA addressed in this final rule and others are amendments to TILA, addressed in the 2013 TILA Servicing Final Rule.

Section 1463 of the Dodd-Frank Act added new sections 6(k), 6(*l*), and 6(m) to RESPA. 12 U.S.C. 2605. Sections 6(k)(1)(A), 6(k)(2), 6(*l*) and 6(m) impose restrictions on servicers with respect to force-placed insurance. Specifically, section 6(k)(1)(A) of RESPA provides that a servicer may not obtain force-placed hazard insurance with respect to any property secured by a federally related mortgage unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirement to maintain property insurance. Further, under section 6(*l*) of RESPA, a servicer is deemed not to have a reasonable basis for obtaining force-placed insurance, unless the servicer sends to the borrower, by first-class mail, two written notices. The first notice must be sent at least 45 days before imposing on the borrower any charge for force-placed insurance, and the second notice must be sent at least 30 days after the first written notice and at least 15 days before imposing on the borrower any charge for force-placed insurance. The notices must remind borrowers of their obligation to maintain hazard insurance on the property, alert borrowers to the servicer's lack of evidence of insurance coverage, tell borrowers what they must do to provide proof of hazard insurance coverage, and state that the servicer may obtain coverage at the borrower's expense if the borrower fails to provide evidence of coverage. Under section 6(*l*)(3) of RESPA, within fifteen days of receipt by a servicer of a borrower's

[32] New York State Department of Financial Services, Explanatory All Institutions Letter (October 7, 2012), available at *http://www.dfs.ny.gov/legal/regulations/emergency/banking/ar419lt.htm* (last accessed Dec. 7, 2012).

[33] 3 N.Y.C.R.R. 419.1 *et seq.*

[34] *See* Cal. Civ. Code § 2923.6.

[35] OAR 137–020–0805. Notably, Oregon's regulations initially implemented mortgage servicing requirements with respect to open-end lines of credit (home equity plans) and, further, required servicers to comply with GSE guidelines for loan modifications. Oregon suspended these requirements and reissued the rule as OAR 137–020–0805 on the basis that such suspension was necessary to facilitate compliance. *See* In the matter of: Suspension of OAR 137–020–0800 and Adoption of OAR 137–020–0805 (February 15, 2012), available at *http://www.oregonmla.org/WebsiteAttachments/Misc%20Events%20Attachments/OAR%20137-020-0805%202%2015%2012%20AG%20Servicing%20Rules%20(00540177).pdf* (last accessed Jan. 6, 2013).

[36] *See* Press Release, Massachusetts Division of Banks Proposes New Standards for Mortgage Servicing (Nov. 8, 2012), available at *http://www.mass.gov/ocabr/docs/dob/standards-for-mort-servicing2012.pdf* (last accessed Jan. 6, 2013).

[37] Public Law 101–625, 104 Stat. 4079 (1990), sections 941–42.

[38] *See* 12 U.S.C. 2605(a) through (e).

[39] *See* 12 U.S.C. 2605(e) and 2609.

existing insurance coverage, servicers must terminate force-placed insurance coverage and refund to the borrower any premiums charged during any period when the borrower had hazard insurance in place. Finally, section 6(m) of RESPA requires that all charges imposed on the borrower related to force-placed insurance, apart from charges subject to State regulation as the business of insurance, must be bona fide and reasonable.

Section 1463 of the Dodd-Frank Act further added section 6(k)(1)(B)–(D) of RESPA, which prohibits certain acts and practices by servicers of federally related mortgage loans with regard to responding to borrower assertions of error and requests for information. Specifically, section 6(k)(1)(B) of RESPA prohibits servicers from charging fees for responding to valid qualified written requests. Section 6(k)(1)(C) of RESPA provides that a servicer of a federally related mortgage loan must not fail to take timely action to respond to a borrower's requests to correct errors relating to: (1) Allocation of payments; (2) final balances for purposes of paying off the loan; (3) avoiding foreclosure; or (4) other standard servicer duties. Finally, section 6(k)(1)(D) provides that a servicer must respond within ten business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan. In addition, section 1463(c) amends section 6(e) of RESPA to reduce the amount of time within which servicers must correct errors and respond to requests for information. Section 1463(b) and (d) of the Dodd-Frank Act amended sections 6(f) and 6(g) of RESPA with respect to penalties for violation of section 6 of RESPA, and refund of escrow account balances, respectively.[40]

Finally, section 1463(a) of the Dodd-Frank Act adds section 6(k)(1)(E) to RESPA, which provides that a servicer of a federally related mortgage loan must ''comply with any other obligation found by the [Bureau], by regulation, to be appropriate to carry out the consumer protection purposes of this Act.'' [41] This provision provides the Bureau authority to establish prohibitions on servicers of federally related mortgage loans appropriate to carry out the consumer protection purposes of RESPA. As discussed below, in light of the systemic problems in the mortgage servicing industry discussed above, the Bureau is exercising this authority in this rulemaking to implement protections for borrowers with respect to mortgage servicing.

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]'' 12 U.S.C. 5512(b)(1). RESPA and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, the Bureau proposed to exercise its authority under section 1022(b) of the Dodd-Frank Act to prescribe rules to carry out the purposes of RESPA and title X and prevent evasion of those laws.

III. Summary of the Rulemaking Process

A. Outreach and Consumer Testing

The Bureau has conducted extensive outreach in developing the Final Servicing Rules. Prior to issuing the Proposed Servicing Rules on August 10, 2012, Bureau staff met with consumers, consumer advocates, mortgage servicers, force-placed insurance carriers, industry trade associations, other Federal regulatory agencies, and other interested parties to discuss various aspects of the statute, servicing industry operations, and consumer harm impacts. Outreach included meetings with numerous individual servicers to understand their operations and the potential benefits and burdens of the proposed mortgage servicing rules. As discussed above and in connection with section 1022 of the Dodd-Frank Act below, the Bureau has also consulted with relevant Federal regulators both regarding the Bureau's specific rules and the need for and potential contents of national mortgage servicing standards in general.

Further, the Bureau solicited input from small servicers through a Small Business Review Panel (Small Business Review Panel) with the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) and the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).[42] The Small Business Review Panel's findings and recommendations are contained in the Small Business Review Panel Report.[43] The Bureau has adopted recommendations provided by the participants on the Small Business Review Panel and includes below a discussion of such recommendations in connection with the applicable requirement.

Further, prior to the issuing the Proposed Servicing Rules on August 10, 2012, the Bureau engaged ICF Macro (Macro), a research and consulting firm that specializes in designing disclosures and consumer testing, to conduct one-on-one cognitive interviews regarding disclosures connected with mortgage servicing. During the first quarter of 2012, the Bureau and Macro worked closely to develop and test disclosures that would satisfy the requirements of the Dodd-Frank Act and provide information to consumers in a manner that would be understandable and useful. These disclosures related to the force-placed insurance notices set forth in this rule, as well as the ARM interest rate adjustment notices and the periodic statement disclosure set forth in the 2013 TILA Servicing Final Rule.

Macro conducted three rounds of one-on-one cognitive interviews with a total of 31 participants in the Baltimore, Maryland metro area (Towson, Maryland), Memphis, Tennessee, and Los Angeles, California. Participants were all consumers who held a mortgage loan and represented a range of ages and education levels. Efforts were made to recruit a significant number of participants who had trouble making mortgage payments in the last two years. During the interviews, participants were shown disclosure forms for periodic statements, ARM interest rate adjustment notices, and force-placed insurance notices. Participants were asked specific questions to test their understanding of the information presented in each of the disclosures, how easily they could find various pieces of information presented in each of the disclosures, and how they would use the information presented in each of the disclosures. The disclosures were revised after each round of testing.

After the Bureau issued the Proposed Servicing Rules, Macro conducted a fourth round of one-on-one cognitive interviews with eight participants in Philadelphia, Pennsylvania. Again, participants were consumers who held

[40] As set forth below, section 1463(d) is implemented by § 1024.34(b) of this rule. Section 1463(b), however, is not implemented by this rulemaking. Accordingly, pursuant to section 1400(c) of the Dodd-Frank Act, the amendments to section 6(f) of RESPA in section 1463(b) of the Dodd-Frank Act are effective as of January 21, 2013.

[41] 12 U.S.C. 2605(k)(1)(E).

[42] The Small Business Regulatory Enforcement Fairness Act of 1996 requires the Bureau to convene a Small Business Review Panel before proposing a rule that may have a significant economic impact on a substantial number of small entities. *See* Public Law 104–121, tit. II, 110 Stat. 847, 857 (1996) (as amended by Pub. L. 110–28, sec. 8302 (2007)).

[43] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking* (June 11, 2012) (''SBREFA Final Report''), available at *http://www.consumerfinance.gov*.

a mortgage loan and represented a range of ages and education levels. During the interviews, participants were asked to review two different versions of a servicing transfer notice and early intervention model clauses, which relate to requirements the Bureau is implementing under RESPA. Participants were asked specific questions to test their reaction to and understanding of the content of the servicing transfer notice and the early intervention model clauses. This process was repeated for each of the five clauses being tested. Specific findings from the consumer testing are discussed in detail throughout where relevant.[44]

One commenter, identifying itself as a research organization, observed that the consumer testing the Bureau has conducted with respect to the mortgage servicing disclosures follows the path of evidence-based decision-making. This commenter asserted, however, that the Bureau should consider undertaking steps in evaluating the proposed forms, including possibly undertaking additional testing because other consumer financial disclosures, including the forms the Bureau proposed with the 2012 TILA–RESPA Proposal, have gone through more testing. At the same time, however, the commenter observed that the decreased level of testing might be justified on various grounds, such as, for example, the fact that studies have found that small numbers of individuals can identify the vast majority of usability problems, the fact that the testing was done with participants familiar with mortgages, and the fact that the Bureau is working on a tight schedule to finalize rules by January 21, 2013 when statutory provisions would go into effect.

The Bureau believes that the testing it conducted is appropriate. The Bureau observes that the forms the Bureau proposed as part of the 2012 TILA–RESPA Proposal contained significantly more complicated financial information than the forms finalized as part of the current rulemakings. Additionally, the 2012 TILA–RESPA Proposal, when finalized, would substantially change consumers' mortgage shopping experience; by contrast, the Final Mortgage Servicing Rules are intended to improve, but not substantially alter, consumers' experience with their mortgage servicers. These differences, in terms of level of complication and degree of change from current practice, justify the different levels of resources the Bureau allocated to the two different testing projects. Lastly, Macro's findings show that there was notable consistency across the different rounds of testing in terms of participant comprehension that, in combination with the Bureau's expertise and knowledge of consumer understanding and behavior, gave the Bureau confidence to rely on the forms that were developed and refined through testing as a basis for the model forms included in the Final Servicing Rules.

The Bureau further emphasizes that it is not relying solely on the consumer testing to determine that any particular disclosure will be effective. The Bureau is also relying on its knowledge of, and expertise in, consumer understanding and behavior, as well as principles of effective disclosure design.

B. Small Business Regulatory Enforcement Fairness Act

As required by SBREFA, the Bureau convened a Small Business Review Panel to assess the impact of the possible rules on small servicers and to help the Bureau determine to what extent it may be appropriate to consider adjusting these standards for small servicers, to the extent permitted by law. Thus, on April 9, 2012, the Bureau provided Advocacy with the formal notification and other information required under section 609(b)(1) of the Regulatory Flexibility Act (RFA) to convene the panel.

In order to obtain feedback from small servicers, the Bureau, in consultation with Advocacy, identified five categories of small entities that may be subject to the proposed rule: Commercial banks/savings institutions, credit unions, non-depositories engaged primarily in lending funds with real estate as collateral, non-depositories primarily engaged in loan servicing, and certain non-profit organizations. The Bureau, in consultation with Advocacy, selected 16 representatives to participate in the Small Business Review Panel process from the categories of entities that may be subject to the Proposed Servicing Rules. The participants included representatives from each of the categories identified by the Bureau and comprised a diverse group of individuals with regard to geography and type of locality (*i.e.,* rural, urban, suburban, or metropolitan areas), as described in chapter 7 of the Small Business Review Panel Report.

On April 10, 2012, the Bureau convened the Small Business Review Panel. In order to collect the advice and recommendations of small entity participants, the Panel held an outreach meeting/teleconference on April 24, 2012 (Panel Outreach Meeting). To help the small entity participants prepare for the Panel Outreach Meeting, the Panel circulated briefing materials that summarized the proposals under consideration at that time, posed discussion issues, and provided information about the SBREFA process generally.[45] All 16 small entities participated in the Panel Outreach Meeting either in person or by telephone. The Small Business Review Panel also provided the small entities with an opportunity to submit written feedback until May 1, 2012. In response, the Small Business Review Panel received written feedback from 5 of the representatives.[46]

On June 11, 2012, the Small Business Review Panel submitted to the Director of the Bureau the written Small Business Review Panel Report, which includes the following: Background information on the proposals under consideration at the time; information on the types of small entities that would be subject to those proposals and on the participants who were selected to advise the Small Business Review Panel; a summary of the Panel's outreach to obtain the advice and recommendations of those participants; a discussion of the comments and recommendations of the participants; and a discussion of the Small Business Review Panel findings, focusing on the statutory elements required under section 603 of the RFA, 5 U.S.C. 609(b)(5).

In connection with issuing the Proposed Servicing Rules, the Bureau carefully considered the feedback from the small entities participating in the SBREFA process and the findings and recommendations in the Small Business Review Panel Report. The section-by-section analyses for the Final Servicing Rules discuss this feedback and the specific findings and recommendations of the Small Business Review Panel, as applicable. The SBREFA process provided the Small Business Review Panel and the Bureau with an opportunity to identify and explore opportunities to mitigate the burden of the rule on small entities while achieving the rule's purposes. It is important to note, however, that the

[44] ICF Int'l, Inc., *Summary of Findings: Design and Testing of Mortgage Servicing Disclosures* (Aug. 2012) (''Macro Report''), *available at http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0003.*

[45] The Bureau posted these materials on its Web site and invited the public to email remarks on the materials. Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Outlines Borrower-Friendly Approach to Mortgage Servicing* (Apr. 9, 2012), *available at http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-outlines-borrower-friendly-approach-to-mortgage-servicing/* (last accessed Jan. 6, 2013).

[46] This written feedback is attached as appendix A to the Small Business Review Panel Report.

Small Business Review Panel prepared the Small Business Review Panel Report at a preliminary stage of the proposal's development and that the report—in particular, the findings and recommendations—should be considered in that light. Any options identified in the Small Business Review Panel Report for reducing the proposed rule's regulatory impact on small entities were expressly subject to further consideration, analysis, and data collection by the Bureau to ensure that the options identified were practicable, enforceable, and consistent with RESPA, TILA, the Dodd-Frank Act, and their statutory purposes.

C. Summary of the Proposed Servicing Rule

The 2012 RESPA Servicing Proposal contained numerous significant revisions to Regulation X. As a preliminary matter, the Bureau proposed to reorganize Regulation X to include three distinct subparts. Subpart A (General) would have included general provisions of Regulation X, including provisions that applied to both subpart B and subpart C. Subpart B (Mortgage settlement and escrow accounts) would have included provisions relating to settlement services and escrow accounts, including disclosures provided to borrowers relating to settlement services. Subpart C (Mortgage servicing) would have included provisions relating to obligations of mortgage servicers. The Bureau also proposed to set forth a commentary that included official Bureau interpretations of Regulation X.

With respect to mortgage servicing-related provisions, the proposed rule would have amended existing provisions currently published in 12 CFR 1024.21 that relate to disclosures of mortgage servicing transfers and servicer obligations to borrowers. The Bureau proposed to include these provisions within subpart C as §§ 1024.33–1024.34. The Bureau also proposed to move certain clarifications in these provisions that were previously published in 12 CFR 1024.21 to the commentary to conform the organization of these provisions with the proposed additions to Regulation X.

The proposed rule would have established procedures for investigating and resolving alleged errors and responding to requests for information. The proposed requirements were set forth in proposed §§ 1024.35–1024.36. As proposed, these sections would have required servicers to respond to notices of error and information requests from borrowers, including qualified written requests. The Bureau's goal was to conform and consolidate the pre-existing requirements under RESPA applicable to qualified written requests, with the new requirements imposed by the Dodd-Frank Act through the addition of sections 6(k)(1)(C) and 6(k)(1)(D) of RESPA to respond to errors and information requests. The Bureau proposed to create a unified requirement for servicers to respond to notices of error and information requests provided by borrowers, without regard to whether the notices or requests constituted qualified written requests.[47] To that end, the proposed rule would have implemented the Dodd-Frank Act amendments to RESPA section 6(e) by adjusting the timeframes applicable to respond to qualified written requests, as well as errors and information requests generally, to conform to the new requirements.

Proposed § 1024.37 would have implemented limitations on servicers obtaining force-placed insurance. The proposed rule would have required servicers to provide notices to borrowers at certain timeframes before a servicer could impose a charge on a borrower for force-placed insurance. Further, the proposed rule would have required that charges related to force-placed insurance, other than charges subject to State regulation as the business of insurance or authorized by Federal flood laws, be bona fide and reasonable. Finally, the proposed rule sought to reduce the instances in which force-placed insurance would be needed by amending current § 1024.17 to require that where a borrower has escrowed for hazard insurance, servicers must advance funds to, and disburse from, an escrow account to maintain the borrower's own hazard insurance policy even if the loan obligation is more than 30 days overdue. The proposed rule also would have implemented the Dodd-Frank Act amendment to RESPA section 6(g) in proposed § 1024.34(b) by imposing requirements on servicers to refund or transfer funds in an escrow account when a mortgage loan is paid in full.

The proposed rule would have imposed obligations on servicers in four additional areas not specifically required by the Dodd-Frank Act: (1) Servicer policies and procedures, (2) early intervention for delinquent borrowers, (3) continuity of contact, and (4) loss mitigation procedures. The policies and procedures provision would have required servicers to implement policies and procedures to manage documents and information to achieve defined objectives intended to ensure that borrowers are not harmed by servicers' information management operations. Further, the policies and procedures provision would also have imposed requirements on servicers regarding record retention and management of servicing file documents. The early intervention provision would have required servicers to contact borrowers at an early stage of delinquency and provide information to borrowers about available loss mitigation options and the foreclosure process. The continuity of contact provision would have required servicers to make available to borrowers direct phone access to personnel who could assist borrowers in pursuing loss mitigation options. The loss mitigation procedures would have required servicers that offer loss mitigation options to borrowers to evaluate complete and timely applications for loss mitigation options. Servicers would have been required to permit borrowers to appeal denials of timely loss mitigation applications for loan modification programs. A servicer that received a complete and timely application for a loss mitigation option would not have been able to proceed with a foreclosure sale unless (1) the servicer denied the borrower's application and the time for any appeal had expired; (2) the borrower had declined or failed to accept an offer of a loss mitigation option within 14 days of the offer; or (3) the borrower failed to comply with the terms of a loss mitigation agreement.

D. Overview of the Comments Received

The Bureau received approximately 300 comments on the Proposed Servicing Rules. The comments came from individual consumers, consumer advocates, community banks, large bank holding companies, secondary market participants, credit unions, non-bank servicers, State and national trade associations for financial institutions in the mortgage business, local and national community groups, Federal

[47] As discussed below, RESPA sets forth a ''qualified written request'' mechanism through which a borrower can assert an error to a servicer or request information from a servicer. Section 6(k)(1)(C) and 6(k)(1)(D) of RESPA set forth separate obligations for servicers to correct certain types of errors asserted by borrowers and to provide information to a borrower regarding an owner or assignee of a mortgage loan without reference to the ''qualified written request'' process. The 2012 RESPA Servicing Proposal would have integrated the new requirements under RESPA to respond to errors and information requests with RESPA's preexisting qualified written request process. Although a borrower would still have been able to submit a ''qualified written request,'' under the proposed rule, a ''qualified written request'' would have been subject to the same error resolution or information request requirements applicable to any other type of written error notice or information request to a servicer.

and State regulators, academics, and others. Commenters provided feedback on all aspects of the Proposed Servicing Rules. Most commenters tended to focus on specific aspects of the proposals. Accordingly, in general, the comments are discussed below in the section-by-section analysis.

The majority of comments were submitted by mortgage servicers, industry groups representing servicers and businesses involved in the servicing industry. Large banks, community banks and credit unions, non-bank servicers, and industry trade associations submitted nearly all of these comments. The Small Business Administration Office of Advocacy submitted a comment and the remaining comments were submitted by vendors and attorney's representing industry interests. The Bureau also received a significant number of comments from consumer advocacy groups. The record also includes a 50-page comment by the Cornell e-Rulemaking Initiative synthesizing submissions of 144 registered participants to Cornell's Regulation Room project. Regulation Room is a pilot project designed to use different web technologies and approaches to enhance public understanding and participation in Bureau rulemakings and to evaluate the advantages and disadvantages of these techniques. Finally, the Bureau also received comments from the Small Business Administration, the Federal Housing Finance Agency, the GSEs, and from vendors and attorneys representing industry interests.

Industry commenters and their trade associations also provided comments regarding the rulemaking process, and those comments are addressed here.[48] In that regard, community banks and their trade associations stated that the Bureau should consider cumulative burden when writing regulations, setting comment deadlines, and effective dates. These commenters believed that the combination of the Bureau's rules as well as the impact of Basel III requirements with respect to accounting for mortgage servicing rights in Tier I capital may cause disruptions across all mortgage market segments. A community bank trade association indicated that community banks are likely to feel the impact of the rules more acutely, as they cannot take advantage of economies of scale in mitigating the compliance burden. A community bank trade association stated that the Bureau should consider the wide diversity among servicer business models and adapt regulations to preserve diversity within the servicing industry. The commenter emphasized that community banks have strong reputation and performance incentives to ensure that consumers are provided a high level of service.

A large bank and a number of trade association commenters stated that the Bureau should be cognizant of imposing requirements and standards potentially inconsistent with those required by settlement agreements, consent orders, and GSE or government insurance program requirements. One commenter stated that the Bureau should consider preempting State law mortgage servicing requirements to provide legal and regulatory certainty to industry participants that are evaluating the future desirability of maintaining servicing operations. A number of trade associations stated that the Bureau should not issue regulations that would impose requirements substantially similar to the National Mortgage Settlement on mortgage servicers that are not parties to the National Mortgage Settlement.

The Bureau has considered each of these comments relating to the cumulative impact of mortgage regulation, including the mortgage servicing rules; the potential for inconsistent results with current servicing obligations, including State law and the National Mortgage Settlement; and comments regarding the diversity of servicing business models and servicer sizes. The Bureau's consideration of those comments is reflected below in the section-by-section analysis with respect to various determinations made in finalizing the 2012 RESPA Servicing Proposal, including the determination to create clear requirements, the determination to maintain consistency with current servicing obligations, including those imposed by State law and the National Mortgage Settlement, and the consideration of exemptions for small servicers.

With respect to preemption of state law, the Final Servicing Rules generally do not have the effect of prohibiting state law from affording borrowers broader consumer protections relating to mortgage servicing than those conferred under the Final Servicing Rules. However, in certain circumstances, the effect of specific requirements of the Final Servicing Rules is to preempt certain limited aspects of state law. Specifically, as set forth below, § 1024.41(f) bars a servicer from making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, notwithstanding that state law may permit any such filing. Further, § 1024.33(d) incorporates a pre-existing provision in Regulation X that implements RESPA with respect to preemption of certain state law disclosures relating to mortgage servicing transfers. In other circumstances, the Bureau explicitly took into account existing standards (both State and Federal) and either built in flexibility or designed its rules to coexist with those standards. For example, as discussed below, the Bureau took into account the loss mitigation timelines and ''dual-tracking'' provisions in the National Mortgage Settlement and the California Homeowner Bill of Rights and designed timelines that are consistent with those standards. Similarly, in designing its early intervention provision the Bureau included a statement that nothing in that provision shall require a servicer to make contact with a borrower in a manner that would be prohibited under applicable law.

A number of commenters provided comments regarding language access and community blight. Two national consumer groups urged the Bureau to take action to remove barriers borrowers with limited English-proficiency face with respect to understanding the terms of their mortgages because such barriers might make these borrowers more vulnerable to bad servicing practices. One national consumer group urged the Bureau to mandate translation of all notices, documents, and bills going to borrowers. Another national consumer group urged the Bureau to consider requiring servicers to provide disclosures and services in a borrower's preferred language, noting that it

[48] Some commenters provided comments strictly with respect to the rulemaking process. One trade association commented that small servicers that participated in the Small Business Review Panel process did not have adequate time to prepare for the panel discussion and provide appropriate data, while another trade association commented that because the Bureau's proposed rules are lengthy and because some rules have overlapping comment periods, each of which has been limited to 60 days, the trade association has had difficulty dedicating staff to comment on the Bureau's proposals. As set forth in this section, the Bureau has conducted the rulemaking process, including the SBREFA process and the public comment period, in a manner that provided as much flexibility as possible to receive feedback from the SBREFA participants and public commenters in light of the deadlines required for the rulemaking. The Bureau assisted the SBA in calls and outreach with small entity participants to obtain any comments not set forth during the panel outreach with the small entity representatives. Further, with respect to public comments, the Bureau believes that the public had a meaningful opportunity to comment, which is evidenced by the significant number of comments received and their length. The Bureau offered 61 days from August 10, 2012 through October 9, 2012, for comment; and 22 days after the proposal was published in the **Federal Register** on September 17.

represents a population that speaks more than 100 different dialects. Finally, one commenter suggests that the Bureau should not only mandate disclosures in other languages but also should require servicers to provide language-capable staff to assist borrowers with limited English skills. With respect to neighborhood blight, a coalition of consumer advocacy groups and a consumer advocate that participated in outreach with the Bureau commented that the Bureau should consider implementing regulations to manage neighborhood blight by requiring servicers to maintain real estate owned (REO) property to decent, safe, and sanitary standards capable of purchase by borrowers with FHA financing.

Although some of these specific requests exceed the scope of the rulemaking, the Bureau takes seriously the important considerations of avoiding neighborhood blight and language access. The Bureau recognizes the challenges borrowers with limited English proficiency face in understanding the terms of their mortgage. The Bureau believes that servicers should communicate with borrowers clearly, including in the borrower's native language, where possible, and especially when lenders advertise in the borrower's native language. The Bureau conducted Spanish testing to support proposed rules and forms combining the TILA mortgage loan disclosure with the Good Faith Estimate (GFE) and statement required under RESPA. *See* 77 FR 54843. That testing underscores both the value of disclosures in other languages but also the challenges in translating forms using English terms of art into other languages to assure that the foreign-language version of the form effectively communicates the required information to its readers.

The Bureau has not had the opportunity to test the disclosures that the Bureau is adopting, or the pre-existing RESPA disclosures, in other languages. Accordingly, the Bureau is not imposing mandatory foreign language translation requirements or other language access requirements at this time with respect to the mortgage servicing disclosures and other requirements the Bureau is adopting under new subpart C. Although the Bureau declines at this time to implement requirements regarding language access, the Bureau will continue to consider language access generally in connection with developing disclosures and will consider further requirements on servicer communication with borrowers if appropriate. With respect to REO properties, the Bureau continues to consider whether regulations are appropriate to address the maintenance of properties owned by lenders and any potential resulting harm from community blight.

E. Other Dodd-Frank Act Mortgage-Related Rulemakings

In addition to the Final Servicing Rules, the Bureau is adopting several other final rules and issuing one proposal, all relating to mortgage credit, to implement requirements of title XIV of the Dodd-Frank Act. The Bureau is also issuing a final rule and planning to issue a proposal jointly with other Federal agencies to implement requirements for mortgage appraisals in title XIV. Each of the final rules follows a proposal issued in 2011 by the Board or in 2012 by the Bureau alone or jointly with other Federal agencies. Collectively, these proposed and final rules are referred to as the Title XIV Rulemakings.

• *Ability to Repay:* The Bureau recently issued a rule, following a May 2011 proposal issued by the Board (the Board's 2011 ATR Proposal),[49] to implement provisions of the Dodd-Frank Act (1) requiring creditors to determine that a consumer has a reasonable ability to repay covered mortgage loans and establishing standards for compliance, such as by making a ''qualified mortgage,'' and (2) establishing certain limitations on prepayment penalties, pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411, 1412, and 1414. 15 U.S.C. 1639c. The Bureau's final rule is referred to as the 2013 ATR Final Rule. Simultaneously with the 2013 ATR Final Rule, the Bureau issued a proposal to amend the final rule implementing the ability-to-repay requirements, including by the addition of exemptions for certain nonprofit creditors and certain homeownership stabilization programs and a definition of a ''qualified mortgage'' for certain loans made and held in portfolio by small creditors (the 2013 ATR Concurrent Proposal). The Bureau expects to act on the 2013 ATR Concurrent Proposal on an expedited basis, so that any exceptions or adjustments to the 2013 ATR Final Rule can take effect simultaneously with that rule.

• *Escrows:* The Bureau recently issued a rule, following a March 2011 proposal issued by the Board (the Board's 2011 Escrows Proposal),[50] to implement certain provisions of the Dodd-Frank Act expanding on existing rules that require escrow accounts to be established for higher-priced mortgage loans and creating an exemption for certain loans held by creditors operating predominantly in rural or underserved areas, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461. 15 U.S.C. 1639d. The Bureau's final rule is referred to as the 2013 Escrows Final Rule.

• *HOEPA:* Following its July 2012 proposal (the 2012 HOEPA Proposal),[51] the Bureau recently issued a final rule to implement Dodd-Frank Act requirements expanding protections for ''high-cost mortgages'' under the Homeownership and Equity Protection Act (HOEPA), pursuant to TILA sections 103(bb) and 129, as amended by Dodd-Frank Act sections 1431 through 1433. 15 U.S.C. 1602(bb) and 1639. The Bureau also is finalizing rules to implement certain title XIV requirements concerning homeownership counseling, including a requirement that lenders provide lists of homeownership counselors to applicants for federally related mortgage loans, pursuant to RESPA section 5(c), as amended by Dodd-Frank Act section 1450. 12 U.S.C. 2604(c). The Bureau's final rule is referred to as the 2013 HOEPA Final Rule.

• *Loan Originator Compensation:* Following its August 2012 proposal (the 2012 Loan Originator Proposal),[52] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring certain creditors and loan originators to meet certain duties of care, including qualification requirements; requiring the establishment of certain compliance procedures by depository institutions; prohibiting loan originators, creditors, and the affiliates of both from receiving compensation in various forms (including based on the terms of the transaction) and from sources other than the consumer, with specified exceptions; and establishing restrictions on mandatory arbitration and financing of single premium credit insurance, pursuant to TILA sections 129B and 129C as established by Dodd-Frank Act sections 1402, 1403, and 1414(a). 15 U.S.C. 1639b, 1639c. The Bureau's final rule is referred to as the 2013 Loan Originator Final Rule.

• *Appraisals:* The Bureau, jointly with other Federal agencies,[53] is issuing

[49] 76 FR 27390 (May 11, 2011).

[50] 76 FR 11598 (Mar. 2, 2011).

[51] 77 FR 49090 (Aug. 15, 2012).

[52] 77 FR 55272 (Sept. 7, 2012).

[53] Specifically, the Board of Governors of the Federal Reserve System, the Office of the

Continued

a final rule implementing Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471. 15 U.S.C. 1639h. This rule follows the agencies' August 2012 joint proposal (the 2012 Interagency Appraisals Proposal).[54] The agencies' joint final rule is referred to as the 2013 Interagency Appraisals Final Rule. As discussed in that final rule, the agencies plan to issue a supplemental proposal addressing potential additional exemptions to the appraisal requirements. In addition, following its August 2012 proposal (the 2012 ECOA Appraisals Proposal),[55] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring that creditors provide applicants with a free copy of written appraisals and valuations developed in connection with applications for loans secured by a first lien on a dwelling, pursuant to section 701(e) of the Equal Credit Opportunity Act (ECOA) as amended by Dodd-Frank Act section 1474. 15 U.S.C. 1691(e). The Bureau's final rule is referred to as the 2013 ECOA Appraisals Final Rule.

The Bureau is not at this time finalizing proposals concerning various disclosure requirements that were added by title XIV of the Dodd-Frank Act, integration of mortgage disclosures under TILA and RESPA, or a simpler, more inclusive definition of the finance charge for purposes of disclosures for closed-end mortgage transactions under Regulation Z. The Bureau expects to finalize these proposals and to consider whether to adjust regulatory thresholds under the Title XIV Rulemakings in connection with any change in the calculation of the finance charge later in 2013, after it has completed quantitative testing, and any additional qualitative testing deemed appropriate, of the forms that it proposed in July 2012 to combine TILA mortgage disclosures with the good faith estimate (RESPA GFE) and settlement statement (RESPA settlement statement) required under the Real Estate Settlement Procedures Act, pursuant to Dodd-Frank Act section 1032(f) and sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively (the 2012 TILA–RESPA Proposal).[56] Accordingly, the Bureau already has issued a final rule delaying implementation of various affected title XIV disclosure provisions.[57]

Coordinated Implementation of Title XIV Rulemakings

As noted in all of its foregoing proposals, the Bureau regards each of the Title XIV Rulemakings as affecting aspects of the mortgage industry and its regulations. Accordingly, as noted in its proposals, the Bureau is coordinating carefully the Title XIV Rulemakings, particularly with respect to their effective dates. The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings generally will take effect on January 21, 2013, unless final rules implementing those requirements are issued on or before that date and provide for a different effective date. *See* Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note. In addition, some of the Title XIV Rulemakings are required by the Dodd-Frank Act to take effect no later than one year after they are issued. *Id.*

The comments on the appropriate effective date for this final rule are discussed in detail below in part VI of this notice. In general, however, consumer advocates requested that the Bureau put the protections in the Title XIV Rulemakings into effect as soon as practicable. In contrast, the Bureau received some industry comments indicating that implementing so many new requirements at the same time would create a significant cumulative burden for creditors. In addition, many commenters also acknowledged the advantages of implementing multiple revisions to the regulations in a coordinated fashion.[58] Thus, a tension exists between coordinating the adoption of the Title XIV Rulemakings and facilitating industry's implementation of such a large set of new requirements. Some have suggested that the Bureau resolve this tension by adopting a sequenced implementation, while others have requested that the Bureau simply provide a longer implementation period for all of the final rules.

The Bureau recognizes that many of the new provisions will require creditors to make changes to automated systems and, further, that most administrators of large systems are reluctant to make too many changes to their systems at once. At the same time, however, the Bureau notes that the Dodd-Frank Act established virtually all of these changes to institutions' compliance responsibilities, and contemplated that they be implemented in a relatively short period of time. And, as already noted, the extent of interaction among many of the Title XIV Rulemakings necessitates that many of their provisions take effect together. Finally, notwithstanding commenters' expressed concerns for cumulative burden, the Bureau expects that creditors actually may realize some efficiencies from adapting their systems for compliance with multiple new, closely related requirements at once, especially if given sufficient overall time to do so.

Accordingly, the Bureau is requiring that, as a general matter, creditors and other affected persons begin complying with the final rules on January 10, 2014. As noted above, section 1400(c) of the Dodd-Frank Act requires that some provisions of the Title XIV Rulemakings take effect no later than one year after the Bureau issues them. Accordingly, the Bureau is establishing January 10, 2014, one year after issuance of the Bureau's 2013 ATR, Escrows, and HOEPA Final Rules (*i.e.,* the earliest of the title XIV Rulemakings), as the baseline effective date for most of the Title XIV Rulemakings. The Bureau believes that, on balance, this approach will facilitate the implementation of the rules' overlapping provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

The Bureau has identified certain rulemakings or selected aspects thereof, however, that do not present significant implementation burdens for industry. Accordingly, the Bureau is setting earlier effective dates for those final rules or certain aspects thereof, as applicable. Those effective dates are set forth and explained in the **Federal Register** notices for those final rules.

IV. Legal Authority

The final rule was issued on January 17, 2013, in accordance with 12 CFR 1074.1. The Bureau is issuing this final rule pursuant to its authority under RESPA and the Dodd-Frank Act. Section 1061 of the Dodd-Frank Act transferred

Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency.

[54] 77 FR 54722 (Sept. 5, 2012).

[55] 77 FR 50390 (Aug. 21, 2012).

[56] 77 FR 51116 (Aug. 23, 2012).

[57] 77 FR 70105 (Nov. 23, 2012).

[58] Of the several final rules being adopted under the Title XIV Rulemakings, six entail amendments to Regulation Z, with the only exceptions being the 2013 RESPA Servicing Final Rule (Regulation X) and the 2013 ECOA Appraisals Final Rule (Regulation B); the 2013 HOEPA Final Rule also amends Regulation X, in addition to Regulation Z. The six Regulation Z final rules involve numerous instances of intersecting provisions, either by cross-references to each other's provisions or by adopting parallel provisions. Thus, adopting some of those amendments without also adopting certain other, closely related provisions would create significant technical issues, *e.g.,* new provisions containing cross-references to other provisions that do not yet exist, which could undermine the ability of creditors and other parties subject to the rules to understand their obligations and implement appropriate systems changes in an integrated and efficient manner.

to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including HUD. 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.'' [59] RESPA and certain provisions of Title XIV of the Dodd-Frank Act are Federal consumer financial laws.[60] Accordingly, the Bureau has authority to issue regulations pursuant to RESPA and Title XIV of the Dodd-Frank Act, including implementing the additions and amendments to RESPA's mortgage servicing requirements made by Title XIV of the Dodd-Frank Act.

Section 1463 of the Dodd-Frank Act creates statutory mandates by adding new section 6(k) through (m) to RESPA. Section 1463 of the Dodd-Frank Act also amends certain consumer protection provisions set forth in existing section 6(e) through (g) of RESPA.

Regarding the statutory mandates, section 6(k) of RESPA contains prohibitions on servicers for servicing of federally related mortgage loans. Pursuant to section 6(k) of RESPA, servicers are prohibited from: (i) Obtaining force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance; (ii) charging fees for responding to valid qualified written requests; (iii) failing to take timely action to respond to a borrower's requests to correct certain types of errors; (iv) failing to respond within ten business days to a request from a borrower to provide certain information about the owner or assignee of a mortgage loan; or (v) failing to comply with any other obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. *See* RESPA section 6(k).

Section 6(*l*) of RESPA sets forth specific requirements for determining if a servicer has a reasonable basis to obtain force-placed insurance coverage. Section 6(*l*) of RESPA requires servicers to provide written notices to a borrower before imposing on the borrower a charge for a force-placed insurance policy. Section 6(*l*) of RESPA also requires a servicer to accept any reasonable form of written confirmation from a borrower of existing insurance coverage. Section 6(*l*) of RESPA further requires a servicer, within 15 days of the receipt of such confirmation, to terminate force-placed insurance and refund any premiums and fees paid during the period of overlapping coverage. Section 6(m) of RESPA requires that charges related to force-placed insurance, other than charges subject to State regulation as the business of insurance, be bona fide and reasonable.

The Dodd-Frank Act also amends existing section 6(e) through (g) of RESPA. Section 6(e) is amended by decreasing the response times currently applicable to a servicer's obligation to respond to a qualified written request. Section 6(f) is amended to increase the penalty amounts servicers may incur for violations of section 6 of RESPA. Further, section 6(g) is amended to protect borrowers by obligating servicers to refund escrow balances to borrowers when a mortgage loan is paid in full or to transfer the escrow balance in certain refinancing related situations.

The Bureau observes that in addition to the specific statutory mandates and amendments the Dodd-Frank Act established in RESPA, by adding section 6(k)(1)(E) to RESPA, the Dodd-Frank Act authorizes the Bureau, through section 6(k), to prescribe regulations that are appropriate to carry out the consumer protection purposes of the title. RESPA is a remedial consumer protection statute and imposes obligations upon servicers of federally related mortgage loans. RESPA has established a consumer protection paradigm of requiring disclosures to consumers, and establishing servicer requirements and prohibitions, for the purpose of protecting borrowers from certain potential harms. The disclosures include, for example, disclosures regarding escrow account balances and disbursements, transfers of mortgage servicing among mortgage servicers, and force-placed insurance notices. The requirements and prohibitions include requirements for servicers to respond to qualified written requests from borrowers and with respect to escrow account payments. Servicers are subject to civil liability for failure to comply with such requirements and prohibitions.

Considered as a whole, RESPA, as amended by the Dodd-Frank Act, reflects at least two significant consumer protection purposes: (1) To establish requirements that ensure that servicers have a reasonable basis for undertaking actions that may harm borrowers and (2) to establish servicers' duties to borrowers with respect to the servicing of federally related mortgage loans. Specifically, with respect to mortgage servicing, the consumer protection purposes of RESPA include responding to borrower requests and complaints in a timely manner, maintaining and providing accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options. Each of the provisions adopted in this final rule is intended to achieve some or all of these purposes.

The final rule also relies on the rulemaking and exception authorities specifically granted to the Bureau by RESPA and Title X of the Dodd-Frank Act, including the authorities discussed below:

RESPA

Section 19(a) of RESPA authorizes the Bureau to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of RESPA, which includes the consumer protection purposes laid out above. 12 U.S.C. 2617(a). In addition, section 6(j)(3) of RESPA authorizes the Bureau to establish any requirements necessary to carry out section 6 of RESPA. 12 U.S.C. 2605(j)(3)

Title X of the Dodd-Frank Act

Dodd-Frank Act section 1022(b). Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]'' 12 U.S.C. 5512(b)(1). RESPA and Title X are Federal consumer financial laws. Accordingly, in adopting this final rule, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules to carry out the purposes and objectives of RESPA and Title X and prevent evasion of those laws.

Dodd-Frank Act section 1032. Section 1032(a) of the Dodd-Frank Act provides that the Bureau ''may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to

[59] 12 U.S.C. 5581(a)(1).

[60] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include RESPA), Dodd-Frank section 1400(b), 15 U.S.C. 1601 note (defining ''enumerated consumer laws'' to include certain subtitles and provisions of title XIV).

understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' 12 U.S.C. 5532(a). The authority granted to the Bureau in Dodd-Frank Act section 1032(a) is broad, and empowers the Bureau to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.

Dodd-Frank Act section 1032(c) provides that, in prescribing rules pursuant to Dodd-Frank Act section 1032, the Bureau ''shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.'' 12 U.S.C. 5532(c). Accordingly, in developing the final rule under Dodd-Frank Act section 1032(a), the Bureau has considered available studies, reports, and other evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services. In addition, Dodd-Frank Act section 1032(b)(1) provides that ''any final rule prescribed by the Bureau under this [section 1032] requiring disclosure may include a model form that may be used at the option of the covered person for provision of the required disclosures.'' 12 U.S.C. 5532(b)(1). As required under Dodd-Frank Act section 1032(b)(3), the Bureau has validated model forms issued under Dodd-Frank Act section 1032(b)(1) through consumer testing.

The Bureau uses the specific statutory authorities set forth above, as well as the broader authorities set forth in sections 6(j)(3), 6(k), and 19(a) of RESPA, and in sections 1022 and 1032 of the Dodd-Frank Act discussed above in adopting this final rule.

Commentary

The Bureau's final rule also includes official Bureau interpretations in a supplement to Regulation X. RESPA section 19(a) authorizes the Bureau to make such reasonable interpretations of RESPA as may be necessary to achieve the consumer protection purposes of RESPA. Good faith compliance with the interpretations would afford servicers protection from liability under section 19(b) of RESPA. The Bureau's adoption of these official Bureau interpretations in the supplement substitutes for the prior practice of HUD of publishing Statements of Policy with respect to interpretations of RESPA.[61]

V. Section-by-Section Analysis

Subpart A—General

Existing Regulation X does not contain distinctive subparts. The Bureau proposed to create three distinct subparts within Regulation X. The Bureau did not receive any comments on the proposed reorganization of Regulation X. Therefore, the final rule adopts the reorganization as proposed.

Subpart A, titled ''General,'' contains general provisions as well as provisions that would have been applicable to the other two subparts of Regulation X. The Bureau proposed to place current §§ 1024.1 through 1024.5 in subpart A and, as described below, proposed to make a number of largely technical corrections to those sections.

Current § 1024.2 sets forth defined terms that are applicable to transactions covered by Regulation X, including the defined term ''Federally related mortgage loan'' that is referenced in the proposed defined term ''Mortgage loan'' in proposed subpart C. The Bureau proposed to retain most of current § 1024.2 without change, except that the Bureau proposed deletions from the defined terms ''Federally related mortgage loan'' and ''Mortgage broker'' and additions to the defined terms ''Public Guidance Documents'' and ''Servicer.''

Specifically, the Bureau proposed to modify the defined term ''Federally related mortgage loan'' to eliminate the use of the short-hand reference to ''mortgage loan'' as a substitute for ''Federally related mortgage loan'' in light of the fact that proposed § 1024.31 would have provided that the term ''mortgage loan'' for purposes of subpart C's mortgage servicing requirements is to be a defined term distinct from the defined term ''Federally related mortgage loan.'' The Bureau also proposed conforming edits that would have replaced references to ''mortgage loan'' with ''federally related mortgage loan'' in the defined terms ''Origination service,'' ''Servicer,'' and ''Servicing'' set forth in current § 1024.2 and in current §§ 1024.7(f)(3), 1024.17(c)(8), 1024.17(f)(2)(ii), 1024.17(f)(4)(iii), 1024.17(i)(2), and 1024.17(i)(4)(iii). The Bureau did not receive comments on the proposed revision to the defined term ''Federally related mortgage loan'' or the conforming edits described above. The final rule adopts the proposed revision and conforming edits as proposed.

The 2012 RESPA Servicing Proposal also would have removed a reference to loan correspondents that are approved under 24 CFR 202.8 from the defined term ''Mortgage broker'' because the reference was made obsolete when HUD amended 24 CFR 202.8 on April 20, 2010, to eliminate the FHA approval process for loan correspondents after determining that loan correspondents would no longer be approved participants in FHA programs.[62] The Bureau did not receive comments on the proposal to remove the reference to loan correspondents from the current defined term ''Mortgage broker,'' and the final rule adopts the proposed removal from the defined term ''Mortgage broker'' as proposed.

The proposal also would have modified the defined term ''Public Guidance Documents'' to clarify that such documents are available from the Bureau upon request and to provide an address for such requests. The Bureau did not receive comments on these proposed clarifications, and the final rule adopts the clarifications to the defined term ''Public Guidance Documents'' as proposed.

The proposal also would have added language to the defined term ''Servicer'' to clarify the status of the National Credit Union Administration (NCUA) as conservator or liquidating agent of a servicer or in its role of providing special assistance to an insured credit union. The current definition of ''Servicer'' provides that the Federal Deposit Insurance Corporation (FDIC) is not a servicer (1) with respect to assets acquired, assigned, sold, or transferred pursuant to section 13(c) of the Federal Deposit Insurance Act or as receiver or conservator of an insured depository institution; or (2) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by commencement of proceedings by the FDIC for conservatorship or receivership of a servicer (or an entity by which the servicer is owned or controlled). The proposed addition to the defined term ''Servicer'' would have clarified similarly that the NCUA is not a servicer (1) with respect to assets acquired, assigned, sold, or transferred, pursuant to section 208 of the Federal Credit Union Act or as conservator or liquidating agent of an insured credit

[61] The Bureau recognizes that the proposed supplement, which sets forth interpretations that relate to the proposed mortgage servicing rulemakings, is not inclusive of all interpretations of RESPA, including interpretations previously issued by the HUD. The Bureau does not intend that the publication of the supplement would withdraw or otherwise affect the status of any prior interpretations of RESPA not set forth in the supplement.

[62] *See* 75 FR 20718.

union; or (2) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan was preceded by commencement of proceedings by the NCUA for appointment of a conservator or liquidating agent of a servicer (or an entity by which the servicer is owned or controlled). The Bureau does not believe there is a basis to impose on the NCUA, when it is providing assistance to an insured credit union or in its role as conservator or liquidating agent of an insured credit union, the obligations of a servicer. The Bureau did not receive any comments concerning the proposed language. Accordingly, the Bureau adopts the proposed addition to the defined term ''Servicer'' as proposed.

The Bureau proposed to delete the text of current § 1024.3 concerning the process for the public to submit questions or suggestions regarding RESPA or to receive copies of Public Guidance Documents and to replaced it with the substance of the regulation concerning electronic disclosures set forth in current § 1024.23. The Bureau did not believe a provision of Regulation X was needed to address the process for submitting questions and requesting documents. The public may contact the Bureau to request documents, suggest changes to Regulation X, or submit questions, including questions concerning the interpretation of RESPA by mail to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G St. NW., Washington, DC 20552, or by email to *CFPB_RESPAInquiries@cfpb.gov*. Further, the final rule includes contact information to request copies of Public Guidance Documents in the defined term ''Public Guidance Documents'' in § 1024.2, as discussed above.

Current § 1024.23 states that provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) permitting electronic disclosures to consumers if certain conditions are met apply to Regulation X. Because the Bureau believes that such E-Sign Act provisions are applicable to all provisions in Regulation X, it decided that the best place for the language was in § 1024.3. In the process of moving the language in current § 1024.23 to § 1024.3, the Bureau also made technical edits to conform the language to the language of other similar Bureau regulations. The Bureau did not receive comments on these revisions to current §§ 1024.3 and 1024.23. The Final rule adopts § 1024.3 as proposed and removes § 1024.23 as proposed.

Current § 1024.4 sets forth provisions relating to reliance upon rules, regulations, or interpretations by the Bureau. The Bureau proposed to remove current § 1024.4(b) and redesignate current § 1024.4(c) as proposed § 1024.4(b). Current § 1024.4(b) provides that the Bureau may, in its discretion, provide unofficial staff interpretations but that such interpretations do not provide protection under section 19(b) of RESPA and that staff will not ordinarily provide such interpretations on matters adequately covered by Regulation X, official interpretations, or commentaries. The Bureau's policy is to assist the public in understanding the Bureau's regulations, including, but not limited to, Regulation X. The Bureau believes that this provision, which states Bureau policy, is more appropriate for the commentary and, accordingly, proposed to include the substance of this provision in the introduction to the commentary. The Bureau did not receive comments on the proposed removal of current § 1024.4(b) and re-designation of current § 1024.4(c) as proposed § 1024.4(b). The final rule adopts these revisions as proposed.

Current § 1024.5 sets forth exemptions with respect to the applicability of Regulation X. The Bureau proposed a technical correction to current § 1024.5(b)(7) to reflect that mortgage servicing-related provisions of Regulation X will be included in new subpart C and will no longer be placed in current § 1024.21. The Bureau did not receive comments on this technical correction, and the final rule adopts the technical correction to § 1024.5 as proposed, with an additional technical change to clarify the applicability of subpart C to *bona fide* transfers in the secondary market.

For reasons discussed below, current § 1024.21 is deleted. In connection with the deletion of current § 1024.21 as discussed below, the Bureau is also making a technical correction to a cross-reference in current § 1024.13(d) to language in current § 1024.21(h) that is being moved to § 1024.33(d).

Subpart B—Mortgage Settlements and Escrow Accounts

In connection with the Bureau's proposal to create three distinct subparts in Regulation X, the Bureau is organizing §§ 1024.6 through 1024.20 under new subpart B. These provisions generally relate to settlement services and escrow accounts. As described above, the Bureau is adopting the conforming edits the Bureau proposed relating to §§ 1024.7(f)(3), 1024.17(c)(8), 1024.17(f)(2)(ii), 1024.17(f)(4)(iii), 1024.17(i)(2), and 1024.17(i)(4)(iii).

Section 1024.17 Escrow Accounts

17(k) Timely Payments

Section 6(g) of RESPA establishes that if the terms of any federally related mortgage loan require a borrower to make payments to a servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make such payments from the borrower's escrow account in a timely manner as such payments become due. Existing § 1024.21(g) provides that the requirements set forth in § 1024.17(k) govern the payment of such charges. Existing § 1024.17(k)(1) provides that if the terms of a federally related mortgage loan require a borrower to make payments to an escrow account, a servicer must pay the disbursements in a timely manner (specifically, on or before the deadline to avoid a penalty) unless a borrower's payment is more than 30 days overdue. Existing § 1024.17(k)(2) requires servicers to advance funds if necessary to make the disbursements in a timely manner unless the borrower's mortgage payment is more than 30 days past due. Upon advancing funds to pay a disbursement, a servicer may seek repayment from a borrower for the deficiency pursuant to § 1024.17(f).

The Bureau proposed a new § 1024.17(k)(5) to expand the scope of these obligations with regard to continuing a borrower's hazard insurance policy. Specifically, proposed § 1024.17(k)(5) would have required that, notwithstanding § 1024.17(k)(1) and (2), a servicer must make payments from a borrower's escrow account in a timely manner to pay the premium charge on a borrower's hazard insurance, as defined in § 1024.31, unless the servicer has a reasonable basis to believe that a borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. Thus, proposed § 1024.17(k)(5) would have required a servicer to both advance funds to an escrow account and to disburse such funds to pay a borrower's hazard insurance notwithstanding that a borrower is more than 30 days delinquent.

The proposed requirement would not have applied where a servicer had ''a reasonable basis to believe that such insurance has been canceled or not renewed for reasons other than nonpayment of premium charges'' because the Bureau recognized that there were situations where timely payment by a servicer would not be sufficient to continue a policy that had

already been canceled or was not renewed for other reasons, such as, for example, risks presented by the condition of the property.

The Bureau also proposed commentary to clarify the requirements in § 1024.17(k)(5). Specifically, the Bureau proposed to clarify in comment 17(k)(5)–1 that the receipt by a servicer of a notice of cancellation or non-renewal from the borrower's insurance company before the insurance premium is due provides a reasonable basis to believe that the borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. Comment 17(k)(5)–2 would have provided three examples of situations in which a borrower's hazard insurance was canceled or not renewed for reasons other than the nonpayment of premium charges, including because the borrower cancelled the insurance policy, because the insurance company no longer writes the type of policy that the borrower carried or writes policies in the area where the borrower's property is located, or because the insurance company is no longer willing to maintain the borrower's individual policy to cover the borrower's property because of a change in risk affecting the borrower's property. Finally, proposed comment 17(k)(5)–3 would have clarified that a servicer that advances the premium payment as required by § 1024.17(k)(5) may advance the payment on a month-to-month basis, if permitted by State or other applicable law and accepted by the borrower's hazard insurance company.

The Bureau proposed § 1024.17(k)(5) to protect consumers from the unwarranted force-placement of hazard insurance. Force-placed insurance generally provides substantially less coverage for a borrower's property at a substantially higher premium cost than a borrower-obtained hazard insurance policy, as discussed below in connection with § 1024.37. Section 1463 of the Dodd-Frank Act demonstrates that Congress was concerned about the unwarranted or unnecessary force-placement of hazard insurance for mortgage borrowers. Section 6(k) of RESPA, as amended by section 1463 of the Dodd-Frank Act, evinces Congress's intent to establish reasonable protections for borrowers to avoid unwarranted force-placed insurance coverage. Section 1024.17(k)(5), though articulated differently than the protections directly set forth in section 1463, draws directly from Congress's intent as set forth in section 1463 of the Dodd-Frank Act to protect borrowers from the force-placement of hazard insurance in situations where such force-placement is unwarranted and can be avoided. When a servicer is receiving bills for the borrower's hazard insurance in connection with administration of an escrow account, a servicer who elects not to advance to a delinquent borrower's escrow account to maintain the borrower's hazard insurance, allowing that insurance to lapse, and then advances a far greater amount to a borrower's escrow account to obtain a force-placed insurance policy unreasonably harms a borrower. Section 1024.17(k)(5) implements the purposes of section 1463 of the Dodd-Frank Act to protect borrowers from the unwarranted force-placement of insurance when a servicer does not have a reasonable basis to impose the charge on a borrower.

Further, considered as a whole, one of the consumer protection purposes of RESPA, as amended by the Dodd-Frank Act, is a requirement that servicers must have a reasonable basis for undertaking actions that may harm borrowers, including delinquent borrowers. Section 1024.17(k)(5) furthers this purpose by establishing that servicers may not unnecessarily obtain force-placed insurance in situations where such placement is not warranted, that is, when a servicer is able to maintain a borrower's current hazard insurance in force by advancing and disbursing funds to pay the premiums.

The Bureau further reasoned that proposed § 1024.17(k)(5) would not increase burdens on servicers generally, because the Bureau understood that many servicers already advance hazard insurance premiums for borrowers with escrow accounts even if the borrowers' mortgage payments are more than 30 days past due. The Bureau also understands that the proposed requirement would benefit owners or assignees of mortgage loans by preventing the placement of costly and unnecessary force-placed insurance policies, the higher costs for which may be recovered from an owner or assignee in the event the property is liquidated.

The Bureau sought comment on all aspects of the proposed escrow advance provision including on whether there should be additional limitations on a servicer's duty to advance funds. For instance, the Bureau sought comments on an alternative approach under which a servicer could not charge a borrower who has an escrow account established to pay hazard insurance for force-placed insurance unless those charges would be less expensive than the charges for reimbursing the servicer for advancing funds to continue the borrower's hazard insurance policy. The Bureau further requested comment regarding whether to require further that any such force-placed insurance policy protect the borrower's interest. In addition, the Bureau observed in the proposal that § 1024.17(k)(5) would only apply when a borrower has an escrow account established to pay hazard insurance, and also invited comments on whether a servicer should be required to pay the hazard insurance premiums on behalf of a borrower who has not established an escrow account to pay for such insurance. Finally, the Bureau further requested comment on whether a servicer should be required to ask such a borrower whether the borrower would consent to the servicer renewing the borrower's hazard insurance and, with the borrower's consent, be required to advance funds to pay such premiums.

Industry commenters and their trade associations varied significantly in their comments with respect to § 1024.17(k)(5). A number of commenters, including a force-placed insurance provider and two trade associations, stated that the proposed requirement was consistent with current industry practice and would not be onerous to implement. For example, one non-bank servicer indicated that it generally advanced funds to escrow and disbursed those funds to maintain hazard insurance so long as it viewed the advances as recoverable, notwithstanding the delinquency status of the borrower.

Numerous other servicers and their trade associations, however, objected to the requirement that a servicer timely disburse funds from escrow to pay hazard insurance for borrowers who are delinquent and further that servicers should advance funds to escrow accounts that would then be disbursed to pay hazard insurance. Some industry commenters indicated that force-placed insurance is the appropriate means for insuring a property for a borrower that has not paid for hazard insurance. For example, a national trade association representing property and casualty insurers stated that the inclusion of limitations on force-placed insurance in section 1463(a) of the Dodd-Frank Act recognized that an appropriate role exists for force-placed insurance. Some commenters indicated that the procedures for obtaining force-placed insurance, specifically notices provided to borrowers, spur borrower action to communicate with servicers and to obtain insurance. These commenters believe that the threat of forced placement of insurance causes borrowers to obtain hazard insurance to avoid force-placed insurance. If the threat is effective, they argue, servicers

should not have to advance funds to escrow accounts for delinquent borrowers. One commenter, a force-placed insurance provider, urged the Bureau to first evaluate the effectiveness of the notices and procedures required by the Dodd-Frank Act before adopting a final rule requiring a servicer to advance funds for borrowers whose mortgage payments were more than 30 days overdue. Finally, one commenter hypothesized that the proposed requirement was intended as a step toward potential future actions by the Bureau to eliminate the force-placed insurance product market.

Some servicers and their trade associations questioned the Bureau's authority to require servicers to advance funds to, and disburse from, an escrow account to maintain hazard insurance. These commenters stated that (1) the Bureau does not have the authority to impose the requirement because it is not specifically set forth in the Dodd-Frank Act, (2) section 6(g) of RESPA only applies to insurance required pursuant to the terms of a federally related mortgage loan, whereas the duty to advance funds appeared to apply even for insurance not required by the terms of the loan, and (3) the requirement was an unnecessary exercise of the Bureau's authority to impose additional obligations on servicers pursuant to sections 6(k)(1)(E) and 19(a) of RESPA. Commenters further objected that the requirement to advance funds would require a servicer to provide funds to maintain coverage obtained by a borrower that exceeded the coverage required by the lender, including, for example, coverage for borrower possessions or coverage beyond hazards the lender required to be covered.

Some servicers and their trade associations further stated that the requirement to advance funds to, and disburse from, an escrow account to maintain hazard insurance would have adverse consequences for servicers, borrowers, and the insurance market. With respect to potential impact on servicers, some commenters indicated that the proposed requirement would create a disincentive to establish escrow accounts. These commenters also indicated that borrowers may incorrectly presume that servicers will advance to escrow accounts for delinquent borrowers to pay all escrow obligations, not just hazard insurance. Further, a credit union trade association commented that requiring disbursements for hazard insurance may deplete funds that may be available to pay other escrow obligations, such as tax liabilities. A commenter stated that a servicer may be responsible for a loss if a hazard insurance provider to whom it has advanced payments denies coverage because a property is vacant and is excluded from coverage; in such a situation, the commenter said that force-placed insurance is necessary because it would cover the loss.

Some servicers stated that borrowers may be unjustly enriched at the expense of their servicers by cancelling hazard insurance and obtaining for themselves refunds of premiums that were paid by their servicers. Although the Bureau had attempted to address this concern, which also was raised during the Small Business Review Panel, through proposed comment 17(k)(5)–3, servicers disagreed on the solution. Importantly, one state banking association stated that the risk of moral hazard and unjust enrichment was mitigated by proposed comment 17(k)(5)–3, which permitted the servicer to advance and disburse on a month-to-month basis, while another small bank commenter stated that the Bureau's comment permitting advancing on a month-to-month basis would increase its servicing costs because it would be paying a borrower's insurance twelve times per year.

With respect to potential impact on borrowers, several commenters suggested that the proposal would result in an increase in incidents of a borrower being double-billed for hazard insurance. These commenters incorrectly interpreted the proposal to require a servicer to pay to maintain coverage even though the borrower had decided to cancel the insurance and pay a new insurer directly. These commenters stated that borrowers may be harmed because borrowers would be responsible for duplicative hazard insurance costs, whereas a borrower would be entitled to a refund for overlapping force-placed insurance, including pursuant to the Dodd-Frank Act.

With respect to impacts on the insurance market, a number of commenters who are not insurance providers asserted that insurance providers generally view seriously delinquent borrowers as higher insurance risks compared to other borrowers. These commenters expressed concern that the Bureau's proposal could potentially mask this risk because the servicer would be required to advance premiums, even if a borrower is seriously delinquent. One commenter requested that the Bureau state that servicers may inform an insurance provider that a borrower is delinquent. In that regard, a commenter urged the Bureau to provide a form that servicers may provide to insurance providers stating that a lender is paying some identified portion of a borrower's insurance premium due to a deficiency in the borrower's escrow account.

Small banks and credit unions, as well as their trade associations and other small non-bank servicers, indicated that the impact of proposed § 1024.17(k)(5) would be particularly acute for small servicers. These commenters indicated that small servicers typically have different practices with regard to force-placed insurance than large servicers. Outreach with small servicers indicated that in certain circumstances, such servicers may not require borrowers to maintain insurance coverage, may self-insure, or may impose charges for collateral protection plans that may be less costly than advances to maintain a borrower's hazard insurance coverage. Further, commenters asserted that small servicers may be more significantly impacted by the cost of the funds required to be advanced to borrower escrow accounts.

Certain commenters requested clarification regarding whether a servicer would be entitled to recoup any required advances and whether a servicer may be liable to a borrower for failing to advance funds to, and disburse from, an escrow account to maintain hazard insurance. Further, commenters requested clarification that advancing funds is only required if the owner or assignee of a mortgage loan requires the borrower to maintain hazard insurance.

Finally, one credit union commenter requested that the Bureau exempt servicers of home equity lines of credit (HELOCs) from the proposed requirement in § 1024.17(k)(5) to advance funds. The commenter asserted that HELOCs are largely in the subordinate-lien position and requiring a servicer of HELOCs to advance would generally be needless costly to such servicers because servicers servicing liens in the first position would also be advancing payment.

The Bureau received numerous comments from consumers and consumer advocacy groups with respect to proposed § 1024.17(k)(5). These commenters strongly supported all aspects of proposed § 1024.17(k)(5) as set forth in the proposal. These commenters generally stated, however that the Bureau should go farther than the proposal and implement requirements regarding advances and disbursements to maintain hazard insurance for delinquent borrowers that do not have escrow accounts.

Commenters significantly disagreed regarding the merits of requiring advances and disbursements to maintain hazard insurance of borrowers

without escrow accounts. A number of consumer advocacy group commenters contended that the Bureau should make no distinction between homeowners that have escrow accounts and those that do not. Certain state attorney general commenters suggested instead that the Bureau should require a servicer, prior to force-placing insurance, to ask for a borrower's consent to renew voluntary coverage and to advance funds for the premium if the borrower gives consent to the creation of an escrow account. Industry commenters were nearly uniformly opposed to requiring servicers to advance funds for the hazard insurance premiums of borrowers who have not escrowed for hazard insurance, citing most often the impracticality for servicers to reinstate a lapsed policy without any gap in coverage.

The Bureau is finalizing § 1024.17(k)(5) as proposed with adjustments to address pertinent issues raised by the comments. Specifically, the Bureau is not requiring that a servicer advance funds to, or disburse funds from, an escrow account to maintain hazard insurance in all circumstances. Rather, the Bureau had adjusted the requirement in § 1024.17(k)(5)(i) to provide that a servicer may not obtain force-placed insurance unless a servicer is unable to disburse funds from the borrower's escrow account to ensure that the borrower's hazard insurance is paid in a timely manner. Thus, for example, a servicer of a mortgage loan, including a HELOC, is not required to disburse funds from an escrow account to maintain a borrower's hazard insurance, so long as the servicer does not purchase force-placed insurance.

Pursuant to § 1024.17(k)(5)(ii)(A), a servicer is unable to disburse funds if the servicer has a reasonable basis to believe that a borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. Further, § 1024.17(k)(5)(ii)(B) states that a servicer is not considered unable to disburse funds solely because an escrow account contains insufficient funds. Section 1024.17(k)(5)(ii)(C) makes clear that a servicer may seek repayment from a borrower for funds advanced to pay hazard insurance premiums. Finally, the Bureau has determined to exempt small servicers, that is, servicers that service less than 5,000 mortgage loans and only service mortgage loans owned or originated by the servicer or an affiliate so long as any force-placed insurance purchased by the small servicer is less costly to a borrower than the amount that would be required to be disbursed to maintain the borrower's hazard insurance coverage. *See* § 1024.17(k)(5)(iii). The Bureau is not implementing any requirement that a servicer advance funds to pay for a hazard insurance policy for a borrower that does not have an escrow account.

The Bureau believes that a servicer should not obtain force-placed insurance when a servicer is able to make disbursements from an escrow account to maintain hazard insurance. As set forth above, unless a policy has been cancelled for reasons other than nonpayment, a borrower's delinquency should not cause a servicer to take actions (or make omissions) that would lead to the cancellation of the borrower's voluntary insurance policy and the potential replacement of that policy with a more expensive (and less protective) force-placed insurance policy. The Bureau acknowledges that in certain circumstances, force-placed insurance is necessary. Section 1024.17(k)(5) does not prevent a servicer from obtaining force-placed insurance, subject to the requirements in § 1024.37, when such a policy is appropriate, including, for instance, where a borrower's hazard insurance policy has been cancelled for reasons other than non-payment. In that situation, a servicer may impose a charge on a borrower for a force-placed insurance policy consistent with the requirements in § 1024.37. However, as set forth above and in the proposal, the Bureau does not believe imposition of a charge for force-placed insurance is appropriate where a hazard insurance policy has not been cancelled and a servicer is able to disburse funds from an escrow account to maintain the borrower's preferred hazard insurance policy in force.[63]

The Bureau is therefore adopting § 1024.17(k)(5) in reliance on section 6(k)(1)(E) of RESPA, which authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. The Bureau has additional authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of REPSA, including section 6(g) with respect to administration of escrow accounts, and has authority pursuant to section 19(a) of RESPA to prescribe such rules and regulations, and to make such interpretations, as may be necessary to achieve the consumer protection purposes of RESPA. The Bureau also has authority to establish consumer protection regulations pursuant to section 1022 of the Dodd-Frank Act. A consumer protection purpose of RESPA is to help borrowers avoid unwarranted or unnecessary costs and fees, and further, the amendments to section 6(k) of RESPA in section 1463 of the Dodd-Frank Act evince Congress's intent to establish reasonable protections for borrowers to avoid unwarranted force-placed insurance coverage. Section 1024.17(k)(5) furthers these purposes and is therefore an appropriate regulation under section 6(j) and 6(k)(1)(E) and section 19(a) of RESPA.[64]

The Bureau does not believe that § 1024.17(k)(5) will have adverse consequences on servicers, borrowers, or the insurance market. With respect to impacts on servicers, § 1024.17(k)(5) does not create significant disincentives to maintain escrow accounts for borrowers. Escrow accounts encourage borrowers to budget for costs of homeownership and to provide funds regularly to servicers to be used to pay those costs, including for insurance, taxes, and other obligations. Lenders include escrow requirements in mortgage contracts because the use of such an account reduces risk to an owner or assignee of a mortgage loan. Servicer also generally benefit from an escrow account both as a result of the improved performance of mortgage loans and also because of the opportunity to earn a return on funds held. Further, servicers manage the impact of an obligation to make advances to escrow accounts by ensuring that advances may be recouped from an owner or assignee of a mortgage loan in the event a property is foreclosed upon and liquidated. In the absence of § 1024.17(k)(5), a servicer that obtains force-placed insurance might advance a greater amount of funds for the force-placed insurance policy and would seek to obtain repayment of those funds either from a borrower or ultimately from an owner or assignee of a mortgage loan if a property is foreclosed upon and liquidated. For these reasons, the Bureau is not persuaded that § 1024.17(k)(5) creates an incentive that would materially affect whether servicers offer escrow accounts to borrowers.

With respect to the ability of servicers to use funds in an escrow account to

[63] Notably, the National Mortgage Settlement includes a similar protection for borrowers. *See e.g., National Mortgage Settlement: Consent Agreement* A–37 (2012), *available at http://www.nationalmortgagesettlement.com.* (stating that ''For escrowed accounts, servicer shall continue to advance payments for the homeowner's existing policy, unless the borrower or insurance company cancels the existing policy.'').

[64] The Bureau notes that regulations established pursuant to section 6 of RESPA are subject to section 6(f) of RESPA, which provides borrowers a private right of action to enforce such regulations.

pay obligations other than hazard insurance, the Bureau recognizes, of course, that escrow account funds are fungible and that payment of hazard insurance necessarily requires expending funds that would have been available for payment of other escrowed obligations, including tax obligations. Servicers, on behalf of owners or assignees of mortgage loans, currently manage this risk by advancing funds to escrow accounts to pay such obligations and seeking repayment from borrowers or ultimately from proceeds payable to the owners or assignees of mortgage loans. No contrary practice is required here. Further, such a practice does not create any new or enhanced risk for servicers. Further, the Bureau has clarified in § 1024.17(k)(5)(ii)(C) that servicers may seek repayment of advances unless otherwise prohibited by applicable law. Servicers, as well as owners and assignees of mortgage loans, are capable of managing risks arising from other escrow account obligations by advancing funds to pay any such obligations as appropriate.

The Bureau also does not believe that § 1024.17(k)(5) presents a material risk to servicers from borrowers cancelling policies, receiving refunds, and, thus, becoming unjustly enriched at the expense of a servicer. A borrower that is current on a mortgage loan obligation but anticipates a future delinquency could engage in the same type of behavior during a period of an escrow account deficiency. Commenters have not demonstrated that such actions typically occur. Further, the Bureau has mitigated this risk by finalizing comment 17(k)(5)(ii)(C)–1, which provides that servicers may, but are not required to, advance payment on a month-to-month basis. Because such advancement is not required on a month-to-month basis, servicers may determine not to undertake that schedule for advances if it would impose greater costs on servicers with respect to maintaining a borrower's hazard insurance.

The Bureau is not persuaded that requiring servicers to disburse funds for hazard insurance for borrowers that are more than 30 days overdue will create incentives for borrowers not to make mortgage loan payments or to fund escrow accounts. Nothing in § 1024.17(k)(5), nor Regulation X generally, prevents servicers from charging borrowers late fees or reporting borrower failures to pay to a consumer reporting agency. These consequences to borrowers provide appropriate disincentives from obtaining the far more limited benefit of non-cancellation of a hazard insurance policy.

The Bureau is persuaded, however, by the comment that hazard insurance coverage may not provide similar protections as force-placed insurance. Many hazard insurance policies contain exclusions from coverage for properties that are vacant. In these circumstances, losses may not be covered by insurance for vacant properties. Delinquent borrowers may have a higher incidence of abandoning properties as vacant. Accordingly, the Bureau has adjusted § 1024.17(k)(5)(ii) to provide that a servicer may be considered unable to disburse funds from escrow to maintain a borrower's hazard insurance policy if the servicer has a reasonable basis to believe the borrower's property is vacant.

The Bureau does not believe that § 1024.17(k)(5) will have adverse impacts on borrowers. The only borrower harm asserted by servicers and their trade associations is that the requirement will lead to an increase in double-billing when a borrower cancels hazard insurance and obtains a new policy for which the borrower pays the insurer directly. The commenters provide no reason to believe that borrowers that are more than 30 days overdue are more likely to cancel hazard insurance and pay insurance directly than borrowers that are current on a mortgage loan obligation or less than 30 days overdue. Further, if a servicer has a reasonable basis to believe that a borrower has cancelled a hazard insurance policy, a servicer is not required to disburse funds to pay for the hazard insurance policy. Finally, when a borrower has cancelled a policy, an insurance company is unlikely to credit the amounts paid by a servicer toward that policy after the date of cancellation.[65]

Further, the Bureau does not believe that § 1024.17(k)(5) will have adverse impacts on the insurance market. Section 1024.17(k)(5) does not, as commenters state, mask any risks presented by a borrower that is more than 30 days overdue on a mortgage loan obligation. Nothing in § 1024.17(k)(5) prevents a servicer from reporting a borrower's payment history to a consumer reporting agency, and an insurance provider could, to the extent permitted by applicable law, obtaining borrower information it deems relevant to underwriting insurance, including a consumer report. In addition, if insurers are harmed by insuring borrowers who are delinquent on their mortgage loans, they face that same harm already for borrowers that do not have escrow accounts and pay hazard insurance premiums directly to their insurers. Section 1024.17(k)(5) does not present a different category of risk in that regard. With respect to one commenter's request that the Bureau issue a form for lenders and servicers to provide to insurance providers stating that a servicer is paying some identified portion of a borrower's insurance premium due to a deficiency in the borrower's escrow account, the Bureau declines. To the extent applicable law permits a lender or servicer to communicate such information to an insurance provider, the lender or servicer should not need the Bureau to develop a form for the communication.

Finally, the Bureau believes that special treatment is warranted with respect to ''small servicers'' as defined in § 1026.41(e)(4). As explained in the section by section discussion of § 1024.30(b) and in the 2013 TILA Servicing Final Rule, the Bureau has identified a class of servicers, referred to as ''small servicers'' and defined by the combination of the number of loans they service and the servicer's relationship to those loans that sets those servicers apart. With respect to the requirements set forth in § 1024.17(k)(5), outreach with small servicers indicates that small servicers' practices with respect to obtaining force-placed insurance tend to be less costly to borrowers than those utilized by larger servicers. For example, the Bureau understands that small servicers often obtain force-placed insurance in the form of collateral protection policies. The charges passed through to borrowers for such coverage, if any, may be less expensive than the costs of either maintaining a borrower's hazard insurance coverage or purchasing an individual force-placed insurance policy. At the same time, requiring such servicers to continue the borrower's hazard insurance in force, which may require advancing funds to the borrower's escrow, could cause these servicers to incur incremental expenses which, because of their size, would be burdensome for them. Because of this difference in practices, the Bureau believes it is appropriate to reduce the restrictions applicable to small servicers with respect to borrowers that have escrow accounts. Accordingly, the Bureau has exempted small servicers from the restriction in § 1024.17(k)(5)(i) and

[65] Notably, as discussed further below, the risk of double-billing when a servicer is paying toward a policy that was currently in place is markedly different than the risk presented by a requirement that a servicer obtain or renew a previously cancelled policy, which would exist if a servicer were required to disburse funds to obtain a policy for a borrower that does not have an escrow account.

1024.17(k)(5)(ii)(B), so long any force-placed insurance that is purchased by the small servicer is less costly to a borrower than the amount that would be required to be disbursed to maintain the borrower's hazard insurance coverage. The Bureau believes this partial exemption sets an appropriate balance of effectuating consumer protections for borrowers with escrow accounts and considerations that may be unique to small servicers.

After consideration of the comments received, the Bureau has also determined not to require servicers to continue hazard insurance policies and advance premium payments for borrowers who have not escrowed for hazard insurance. The Bureau understands the concern of the consumer groups that commented, but the Bureau is persuaded that it would generally be impracticable for servicers to renew the hazard insurance coverage obtained by a non-escrowed borrower without creating a significant risk of double-billing and/or a gap in coverage. For example, although the Bureau does not find concerns about double-billing of borrowers persuasive with respect to situations in which insurance coverage is being paid via disbursement from an escrow account, the Bureau is concerned that a substantially different situation results where the borrower is making direct payments and a policy is allowed to lapse due to non-payment. In those cases, it is far more likely that a consumer may have switched insurance providers without notifying the servicer, and requiring a servicer to obtain a new policy (or to reinstate a previously cancelled policy) may result in borrower harm through the purchase of duplicative insurance and double-billing of a borrower. Further, when a borrower does not have an escrow account, the servicer may not have notice before a policy lapses, and no ability to maintain the policy in continuous force. Were the Bureau to impose a duty on the servicer to pay for hazard insurance in such circumstance, such a duty would not necessarily be to maintain a current policy in force. Rather, the duty could well be to reinstate a lapsed policy or to obtain a new policy on behalf of the borrower to replace the cancelled policy. Requiring a servicer to obtain a new insurance policy on behalf of a borrower that did not have an escrow account to pay for hazard insurance may be burdensome and complex, and may not be justified. Accordingly, the Bureau declines at this time to impose requirements to obtain insurance for borrowers that do not have escrow accounts but will continue to monitor the impact of the requirements set forth in § 1024.37 with respect to force-placed insurance for any such borrowers.

Two consumer groups submitted joint comments urging the Bureau to amend current § 1024.17(k)(1) so that a servicer would be required to make timely disbursements with respect to any escrowed charge, not just hazard insurance, so long as the borrower's escrow account contained sufficient funds to do so. These consumer groups asserted that there is no reason to maintain the limitation for disbursements to borrowers that are less than 30 days overdue with respect to escrow obligations other than hazard insurance. For example, the commenters stated that the failure of a servicer to pay tax obligations in a timely manner would harm a borrower, and suggested that finalizing § 1024.17(k)(5) in isolation could cause borrower confusion because borrowers may not understand that the rule applies only to hazard insurance.

The Bureau understands the commenters' concern with respect to the impact on borrowers if an escrowed charge is not paid, but declines to amend § 1024.17(k)(1) as part of this rulemaking. Section 1024.17(k)(5), as adopted, is only a restriction on servicers' ability to obtain force-placed insurance. If a servicer will not be purchasing force-placed insurance, the servicer is not subject to the provisions of § 1024.17(k)(5). For example, a servicer that does not require a borrower to maintain insurance is not required to disburse funds to maintain the borrower's hazard insurance coverage other than as required pursuant to § 1024.17(k)(1). Because the Bureau is not imposing a blanket obligation to advance funds to escrow to pay hazard insurance premiums, the Bureau does not believe that it would be appropriate to impose such an obligation with respect to other payments to be made from escrow. Accordingly, the Bureau declines to amend § 1024.17(k)(1) as suggested.

Finally, as discussed above, the Bureau requested comments on an alternative approach to § 1024.17(k)(5), which would have added language to § 1024.37 to provide that if a borrower has an escrow account established for hazard insurance, a servicer could not charge the borrower for force-placed insurance unless the force-placed insurance obtained by a servicer was less expensive to the borrower, for comparable coverage, than would be the servicer's advancing funds to continue the borrower's hazard insurance policy. The Bureau further requested comments on whether § 1024.37 should additionally require that force-placed insurance purchased by a servicer under these circumstances protect a borrower's interests.

One large force-placed insurance provider asserted that the proposed alternative is neither necessary or realistic because proposed § 1024.17(k)(5) reflects general industry practice and because the cost of force-placed insurance is invariably more expensive to the borrower than the servicer advancing funds to continue a borrower's hazard insurance policy. On the other hand, another large force-placed insurance provider and a national trade association expressed a preference for the alternative compared to proposed § 1024.17(k)(5). These commenters preferred, however, that the alternative be placed in § 1024.17(k), and not in § 1024.37, because they believed that this alternative should only limit a servicer's force-placement of insurance in situations where an escrowed borrower's hazard insurance was canceled due to a servicer's failure to disburse funds to maintain a borrower's hazard insurance. Commenters further expressed a variety of views concerning how the scope of comparable coverage would be determined. While industry commenters acknowledged that the industry standard is to obtain force-placed coverage equal to the replacement cost of the property, two national trade associations and a large force-placed insurance provider argued that servicers must be given flexibility to determine coverage levels. In contrast, another large force-placed insurance provider suggested that the Bureau should require coverage at replacement cost value.

After consideration of the comments received on the alternative, the Bureau believes that the alternative proposal's requirement regarding comparable coverage would add unnecessary complexity to the regulation. Whether a borrower may or may not benefit from any particular coverage level is dependent on the individual circumstances of the borrower. Further, differences between coverage provided for homeowners' insurance and force-placed insurance make a comparability determination and complex and difficult process. The Bureau declines to adopt the alternative proposal with respect to obtaining comparable coverage.

Section 1024.17(k)(5), as adopted, however, is informed by the alternative and the comments received in response to the alternative. The Bureau has adjusted the requirement in

§ 1024.17(k)(5), consistent with the alternative, to reflect that a servicer's ability to disburse funds to maintain hazard insurance coverage serves as a restriction on the servicer's purchasing force-placed insurance coverage. Thus, a servicer is not required in all instances to disburse funds to maintain hazard insurance coverage for borrowers that are more than 30 days overdue; instead, a servicer may not obtain force-placed insurance coverage unless the servicer is unable to disburse funds from the borrower's escrow account pursuant to § 1024.17(k)(5). Further, the exemption for small servicers in § 1024.17(k)(5)(iii) provides that a small servicer may obtain force-placed insurance, even if the small servicer is not unable to disburse funds from a borrower's escrow account, so long as the cost to the borrower is less than the amount the small servicer would need to disburse to maintain the borrower's hazard insurance, without consideration of the specific policy coverage provisions.

17(l) System of Recordkeeping

The Bureau proposed to remove current § 1024.17(*l*), which generally requires that a servicer maintain for five years records regarding the payment of amounts into and from an escrow account and escrow account statements provided to borrowers. Current § 1024.17(*l*) further provides that the Bureau may request information contained in the servicer's records for an escrow account and that a servicer's failure to provide such information may be deemed to be evidence of the servicer's failure to comply with its obligations with respect to providing escrow account statements to borrowers.

As discussed in the proposal, the Bureau believed that the obligations set forth in current § 1024.17(*l*) would no longer be warranted in light of the information management policies, procedures, and requirements that the Bureau proposed to impose under proposed § 1024.38 and the substantially different authorities available to the Bureau with regard to requesting information from entities subject to § 1024.17. No comments were received on the removal of current § 1024.17(*l*). Accordingly, the Bureau is removing § 1024.17(*l*) as proposed.

Section 1024.18 Validity of contracts and liens

The Bureau is removing current § 1024.18. Current § 1024.18 states that ''Section 17 of RESPA (12 U.S.C. 2615) governs the validity of contracts and liens under RESPA.'' 12 U.S.C. 2615 states ''Nothing in this Act shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan.'' The Bureau believes that RESPA clearly delineates the validity and enforceability of contracts and liens and that § 1024.18 is an unnecessary restatement of the provisions of RESPA. Accordingly, in order to streamline the regulations, the Bureau is removing current § 1024.18.[66]

Section 1024.19 Enforcement

Similarly, the Bureau is removing § 1024.19. The first sentence of § 1024.19(a) states ''[i]t is the policy of the Bureau regarding RESPA enforcement matters to cooperate with Federal, state, or local agencies having supervisory powers over lenders or other persons with responsibilities under RESPA.'' The Bureau believes this statement, which reflects the Bureau's general policy to cooperate with counterpart agencies, is unnecessary. The second sentence of § 1024.19(a) states ''Federal agencies with supervisory powers over lenders may use their powers to require compliance with RESPA.'' Again, the Bureau believes this general statement of the supervisory authority of other federal agencies, which neither conveys authority nor creates limits or restrictions with respect to such authority, is unnecessary in Regulation X. Further, the third sentence of § 1024.19(a) states ''[i]n addition, failure to comply with RESPA may be grounds for administrative action by HUD under HUD regulation 2 CFR part 2424 concerning debarment, suspension, ineligibility of contractors and grantees, or under HUD regulation 24 CFR part 25 concerning the HUD Mortgagee Review Board.'' Here the Bureau believes that the applicable regulations issued by HUD are controlling and whether RESPA may serve as grounds for any such enumerated action is based on those HUD regulations. Accordingly, the Bureau believes this provision, which repeats the scope of HUD regulations, is unnecessary. Section 1024.19(a) states that ''[n]othing in this paragraph is a limitation on any other form of enforcement that may be legally available.'' Because the Bureau believes the other provisions of § 1024.19(a) are unnecessary, this remaining sentence is no longer necessary. Finally, § 1024.19(b) states that the Bureau's procedures for investigations and investigational proceedings are set forth in 12 CFR part 1080. A cross-reference to the location of the Bureau's regulations regarding investigations and investigational proceedings in Regulation X is unnecessary. Accordingly, § 1024.19 is removed in its entirety.[67]

Subpart C—Mortgage Servicing

Section 6 of RESPA sets forth a number of protections for borrowers with respect to the servicing of federally related mortgage loans that are currently implemented through Regulation X in current § 1024.21. Section 1463 of the Dodd-Frank Act amended section 6 of RESPA by adding new section 6(k) through (m) to establish new obligations on servicers for federally related mortgage loans with respect to the purchase of force-placed insurance and responses to borrowers' requests to correct errors, among other things.[68] The Bureau observes that section 6(k) also establishes the Bureau's authority to create obligations the Bureau finds appropriate to carry out the consumer protection purposes of RESPA.

Section 1463 of the Dodd-Frank Act also amended existing provisions in section 6 of RESPA with respect to a servicer's obligation to respond to qualified written requests, a servicer's administration of an escrow account. Section 1463 also increased the dollar amounts for damages for which a servicer may be liable for violations of section 6 of RESPA.

In order to implement the amendments the Dodd-Frank Act added to RESPA in a consistent and clear manner, the Bureau proposed to reorganize Regulation X to combine current Regulation X provisions relating to mortgage servicing in existing § 1024.21 with new mortgage servicing provisions the Bureau proposed to implement Dodd-Frank Act's amendment of section 6 of RESPA in a newly created subpart C. As discussed above, no comments were received on the proposed reorganization of Regulation X into three subparts and the Bureau is adopting subpart C as

[66] Although the Bureau did not propose to remove § 1024.18, the Bureau finds there is good cause to finalize this aspect of the rule without notice and comment. Because § 1024.18 simply restates, verbatim, existing statutory text, its removal will have no impact on, or significance for, any person; notice and comment therefore would be unnecessary.

[67] As with § 1024.18, the Bureau finds there is good cause to remove § 1024.19 without notice and comment. As the foregoing discussion demonstrates, § 1024.19 has no impact on, or significance for, any person; notice and comment therefore would be unnecessary.

[68] Section 1463 uses the term ''federally related mortgage'' but it amends and expands section 6 of RESPA that uses the term ''federally related mortgage loan.'' Accordingly, the Bureau interprets the ''federally related mortgage'' and ''federally related mortgage loan'' to be the same.

proposed as a separate subpart in Regulation X.

Section 1024.21 Mortgage Servicing Transfers

To incorporate mortgage servicing-related provisions within subpart C, the proposed rule would have removed § 1024.21 and would implement the provisions of § 1024.21, subject to proposed changes as discussed below, in proposed §§ 1024.31–1024.34 within subpart C. No comments were received on the removal of § 1024.21 and its incorporation within subpart C. The final rule adopts the removal of § 1024.21 as proposed and implements the provisions of § 1024.21, subject to changes adopted as discussed below, in §§ 1024.31–1024.34 within subpart C.

Section 1024.22 Severability

Current § 1024.22 states that if any particular provision of Regulation X, or its application to any particular person or circumstance is held invalid, the remainder of Regulation X or the application of such provision to any other person or circumstance shall not be affected. The Bureau proposed removing current § 1024.22 because the Bureau believes the section may create unnecessary inconsistency with respect to other Bureau regulations that do not contain corresponding provisions. By removing § 1024.22, the Bureau is not suggesting that the severability of Regulation X is changing or that the Bureau intends the new provisions to be non-severable. The Bureau intends that the provisions of Regulation X are severable and believes that if any particular provision of Regulation X, or its application to any particular person or circumstance is held invalid, the remainder of Regulation X or the application of such provision to any other provision or circumstance should not be affected. The Bureau's proposal to remove current § 1024.22 should not be construed to indicate a contrary position. The Bureau did not receive comments on the proposed removal of current § 1024.22, and accordingly, is adopting the removal of current § 1024.22 as proposed.

Section 1024.23 E-Sign Applicability

Current § 1024.23 states that provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) permitting electronic disclosures to consumers if certain conditions are met apply to Regulation X. For reasons discussed above in the section-by-section analysis of § 1024.3, the Bureau has concluded that the E-Sign Act provisions are applicable to all provisions in Regulation X. Accordingly, the Bureau decided that the best place for this language was in § 1024.3. Having received no comments on the removal of § 1024.3 or the placing of the E-Sign Act provisions in § 1024.3, the Bureau, as discussed above, is removing current § 1024.23 from Regulation X.

Section 1024.30 Scope

The proposal would have defined the scope of subpart C as any mortgage loan, as that term is defined in § 1024.31. A ''mortgage loan,'' as proposed would be any federally related mortgage loan, as defined in § 1024.2, except for open-end loans (home equity plans) and except for loans exempt from RESPA and Regulation X pursuant to § 1024.5(b). The Bureau received a significant number of comments relating to the scope of the mortgage servicing rules.

Small servicer exemption. In the 2012 TILA Servicing Proposal, the Bureau proposed an exemption to the periodic statement requirement for small servicers, defined in the 2012 TILA Servicing Proposal as servicers that service 1,000 mortgage loans or fewer and only servicer mortgage loan that the servicer or an affiliate owns or originated. The Bureau requested comment in the 2012 TILA Servicing Proposal regarding that exemption and, in the 2012 RESPA Servicing Proposal, further requested comment regarding whether the Bureau should implement a small servicer exemption for any mortgage servicing requirements proposed in Regulation X.

The Bureau received three comment letters from consumer advocacy groups with respect to a small servicer exemption from certain requirements in Regulation X. One comment from three consumer advocacy groups indicated that small servicers should be exempt from the loss mitigation procedures requirements in § 1024.41 on the basis that these servicers already have an interest in mitigating any losses that might result from proceeding with foreclosure. Two other consumer advocacy groups, however, stated their view that if a servicer cannot afford to implement the required protections, the servicer should not be permitted to service mortgage loans. Further, a large bank joined in opposing an exemption for small servicers on the basis that such an exemption does not implement consumer protections for customers of small servicers and creates artificial distinctions that provide a competitive advantage to small servicers.

The Bureau also received a significant number of comments from small banks, credit unions, and non-bank servicers, as well as their trade associations, that requested that the Bureau consider an exemption for small servicers from the mortgage servicing rules, including the discretionary rulemakings. The Bureau also received a comment letter from Advocacy urging the implementation of a small servicer exemption for requirements in Regulation X.

Many of the small banks, credit unions, and non-bank servicers that provided comments stated that their business models necessarily facilitate communication with delinquent borrowers. Per the comments, such servicers have an incentive to work with borrowers to avoid losses because typically, for small servicers, either the mortgage loan is owned by the servicer (or an affiliate) or the servicer has a customer relationship with the borrower to consider. Community banks, credit unions, and Advocacy further stated that the servicing market should not be considered simplistically; small servicers have substantially different business practices than larger servicers, including with respect to considering borrowers for loss mitigation or managing force-placed insurance. Further, such servicers have not been shown to have engaged in the servicing failures that contributed to the financial crisis, including poor oversight of third-party providers, lost documents and other process failures relating to loss mitigation evaluations, or wrongful filing of foreclosure documents that contain false information or fail to comply with applicable law.

Comments from small banks, credit unions, non-bank servicers, and their trade associations, suggested various means for defining a small servicer. Most industry commenters indicated that the proposed 1,000 mortgage loan threshold was inadequate because it would capture only the smallest servicers in the market. One trade association commenter stated that a 1,000-mortgage-loan threshold would cover only single-employee servicing operations. Most commenters indicated that the small servicer exemption threshold should be raised to between 5,000 and 15,000 mortgage loans. One commenter indicated that a small servicer threshold should be based on a delinquency percentage or foreclosure filing threshold, while a large community bank servicer stated that a small servicer exemption should include all but the top five servicers by market share.

Small servicers indicated several components of the rulemaking that would have particularly problematic impacts on small servicers. For example, many small servicers and their trade associations raised concerns

regarding the appeal process set forth in § 1024.41(h). Small servicers stated that required independent reviews for the appeal process would be difficult to implement because the size of a small servicer necessarily constrains the number of knowledgeable servicing personnel that would be able to conduct the independent review. Per the commenters, the resulting review would be without value because the independent review would be conducted by employees less familiar with, or skilled in, evaluating borrowers for loss mitigation options. Small servicers also indicated they would be burdened by implementing new notice requirements, including those set forth in § 1024.39 and § 1024.41, which, commenters believed, would only serve to require communications that are already occurring, but would impose the cost of requirements to track communications and demonstrate compliance to appropriate regulators.

In addition to the comments, the Bureau reviewed the input gained through outreach with small servicers during the Small Business Review Panel process. As discussed throughout, in order to gain feedback on small servicer impacts, the Bureau participated in a Small Business Review Panel and conducted outreach with small entities that would be subject to the regulations. The Bureau solicited feedback from the small entities participating in the Small Business Review Panel on many elements of the loss mitigation process in conjunction with other elements of the servicing proposals, including impacts on loss mitigation processes of small servicers from proposed rules relating to error resolution, reasonable information management policies and procedures, early intervention for troubled or delinquent borrowers, and continuity of contact. In particular, the Bureau requested feedback from small servicers on the following: (1) A duty to suspend a foreclosure sale while a borrower is performing as agreed under a loss mitigation option or other alternative to foreclosure; (2) the ability to adopt policies and procedures to facilitate review of borrowers for loss mitigation options; (3) the ability to provide information regarding loss mitigation early in the foreclosure process to borrowers; and (4) the ability to provide borrowers with the opportunity to discuss evaluations for loss mitigation options with designated servicer contact personnel.[69]

The small entities generally informed the Small Business Review Panel that they engaged in individualized contact with borrowers early in the foreclosure process, that some servicers completed discussions of loss mitigation options with borrowers prior to a point in time when borrowers should receive significant foreclosure-related information, and that small servicers generally worked closely with foreclosure counsel such that foreclosure processes and loss mitigation could be easily conducted simultaneously without prejudice to the loss mitigation process. Further, the small entities explained that they were willing to communicate with borrowers about loss mitigation contemporaneously with the foreclosure process, and one small entity indicated that it would be willing to halt the foreclosure process, if appropriate, in order to consider a modification.[70]

The Bureau carefully considered the comments regarding requested exemptions for small servicers, including the comments received from Advocacy. In addition, the Bureau carefully considered the specific aspects of the rule that community banks, small credit unions, and other small servicers indicated would potentially impact those institutions most significantly. The analysis conducted by the Bureau is set forth below, as well as in the analyses required pursuant to section 1022 of the Dodd-Frank Act and the Regulatory Flexibility Act.

In general, the Bureau is persuaded based on its experience, outreach, and the submission of the comments that the problematic practices that have plagued the servicing industry, particularly in recent years, are to a large extent a function of a business model in which servicing is viewed as a discrete line of business and profit center, and in which servicers compete to secure business from owners or assignees of mortgage loans based upon price. As discussed in greater detail in part II, such a model leads to a high volume, low margin business, in which servicers are not incentivized to invest in operations necessary to handle large numbers of delinquent borrowers. The significant weight of evidence of servicer failures of which the Bureau is aware involved large servicers following such a business model.

In contrast, there is a segment of servicers who service a relatively small number of mortgage loans and do not purchase or hold mortgage servicing rights for mortgage loans they do not own or did not originate. Many community bank and small credit union servicers fit this model. For example, the Bureau estimates that 10,829 banks, thrifts, and credit unions service 5,000 or fewer loans. Of these, approximately 96 percent have assets of $1 billion or less, which is the traditional threshold for denoting a community bank. The Bureau is not aware of evidence indicating the performance of these types of institutions in servicing the mortgage loans they originate or own generally results in substantial consumer harm. To the contrary, data available to the Bureau indicates that such servicers achieve significantly reduced levels of borrowers rolling into 90 or more days of delinquency or having a mortgage loan charged-off when compared to the average for all banks. For example, in 2011, the 90+ delinquency rate for community banks was 0.27 percent compared with over 6 percent for all banks. Further, the net charge-off rate for community banks was 0.66 percent against 1.31 percent for all banks. Community bank performance with respect to levels of delinquencies and charge-offs has also remained relatively stable through the financial crisis. From 2007 through 2011, the 90+ delinquency rate fluctuated between 0.27 percent in 2007 to a high of only 0.31 percent in 2009. The equivalent metric for all banks showed the 90+ delinquency rate at 0.80 percent rising rapidly to a high of 6.29 percent in 2011.

The reasons for this performance may lay in the fact that small servicers have very different incentives than large servicers. Servicers that service 5,000 or fewer mortgage loans and only service mortgage loans that the servicer or an affiliate owns or originated generally must be conscientious of the impact of servicing operations on the borrower. Any such servicer has an interest in maintaining a relationship with borrower as a customer of the bank or thrift or member of the credit union to provide other banking services. Further, such servicers must be conscientious of reputational consequences within a community or member base. Further, to the extent a servicer or an affiliate owns a mortgage loan, the servicer bears risk from the borrower's potential delinquency and default on the mortgage loan obligation and does not have an incentive to engage in practices

[69] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* appendix C at 19, 22, 24–26 (Jun, 11, 2012), *available at http://files.consumerfinance.gov/f/201208_cfpb_SBREFA_Report.pdf.*

[70] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* 26 (Jun, 11, 2012).

that may put the performance of the mortgage loan obligation at risk.

All of these considerations, as well as the performance data discussed above, persuades the Bureau that the small servicers are generally achieving the goals of the discretionary rulemakings to protect delinquent borrowers. The Bureau recognizes, however, that these small servicers may be achieving these ends through procedures that differ from those mandated in § 1024.39 and § 1024.41, with respect to early intervention and loss mitigation procedures, and that while the practice of these small servicers are, in the main, achieving the objectives delineated in § 104.38 and § 1024.40, with respect to general servicing policies, procedures, and requirements and continuity of contact, these servicers may not have systems in place to document how they are achieving these results. Thus, the Bureau believes that subjecting the small servicers to these provisions would impose costs that they could find difficult to absorb.

In sum, the Bureau is not persuaded at this time that the consumer protection purposes of RESPA necessarily would be furthered by requiring small servicers to comply with the discretionary rulemakings.

Accordingly, a small servicer as defined pursuant to 12 CFR 1026.41(e)(4), that is, a servicer that services 5,000 mortgage loans or less and only services mortgage loans that the servicer or an affiliate owns or originated, is exempt from the requirements of § 1024.38 through 41, with two exceptions.[71] First, § 1024.41(f) prohibits servicers from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is greater than 120 days delinquent. Second, § 1024.41(g) prohibits a servicer from, among other things, proceeding with a foreclosure sale if the borrower is performing under an agreement on a loss mitigation option. The Bureau deems it highly unlikely, given the considerations discussed above, that a small servicer would initiate a foreclosure with respect to a borrower who is less than 120 days delinquent to conclude a foreclosure sale if a borrower was performing under a loss mitigation agreement. Nonetheless, the Bureau does not see any reason why these basic protections should not be extended to all borrowers or why subjecting small servicers to these prohibitions would create any burden for them. Accordingly, § 1024.41(j) extends these two rules to small servicers. The analysis pursuant to section 1022 of the Dodd-Frank Act, set forth in part VII below, and the final regulatory flexibility analysis, set forth in part VIII below, provide significant additional discussion regarding the assumptions used in determining an appropriate small servicer exemption threshold of 5,000 mortgage loans.

The Bureau received comments from a nonprofit lender/servicer indicating that the mortgage servicing rules would be costly and difficult to implement, in light of the commenter's nonprofit mission and volunteer workforce. The commenter indicated that the Bureau should carry over the small servicer exemption proposed with respect to the periodic statement requirement in Regulation Z to the Regulation X requirements and should also implement a narrow exemption for nonprofit servicers. Although the Bureau declines to exempt nonprofit servicers separately, the Bureau believes that such servicers will likely fall within the small servicer exemption established by the Bureau.[72] To the extent a nonprofit servicer services more than 5,000 mortgage loans or services mortgage loans that the servicer or an affiliate does not own or did not originate, then the Bureau believes any such servicer should be required to provide appropriate consumer protection by implementing the loss mitigation procedures, notwithstanding the non-profit status of the servicer.

Other exemptions. In addition to requests for a small servicer exemption, the Bureau received comments that it should implement exemptions for housing finance agencies, reverse mortgage transactions, and servicers that are qualified lenders as defined in regulations established by the Farm Credit Administration. Housing finance agencies and their associations commented that the mission orientation of these agencies weighs in favor of exempting such agencies from certain of the proposed mortgage servicing rules. A comment from one such agency with respect to the Homeowners' Emergency Mortgage Assistance Program is instructive. That program assists a borrower experiencing hardship by extending a loan, secured by a subordinate lien on a borrower's property, to bring a borrower's first-lien mortgage loan current and, for certain borrowers, to provide continuing assistance. Absent an exemption, the servicing of the subordinate-lien mortgage loan that secures such assistance would be subject to mortgage servicing rules relating to loss mitigation, notwithstanding that the loan itself is a form of loss mitigation. In addition, the Bureau received comments from housing finance agencies indicating that the costs of certain of the rulemakings may be burdensome for housing finance agencies.

The Bureau also received comments from a trade association for reverse mortgage lenders and servicers. The commenter stated that many of the rulemakings, including the discretionary rulemakings, are not appropriate for reverse mortgage transactions. For example, loss mitigation requirements in the proposed rule were based on days of delinquency, which is an imprecise and difficult concept with respect to a reverse mortgage transaction because of the structure of the transaction. Further, the vast majority of reverse mortgage transactions are subject to regulations implemented by FHA in connection with the Home Equity Conversion Mortgage Program.

The Bureau received comments from lenders subject to regulations established by the Farm Credit Administration with respect to loss mitigation. These entities requested exemptions for mortgage loans for which a servicer is required to comply with Farm Credit Administration requirements on loss mitigation because those requirements differ markedly from those proposed by the Bureau.

The Bureau agrees that additional exemptions are appropriate for certain of the rulemakings. As discussed in more detail below, the Bureau has determined not to implement these additional exemptions to those regulations that principally implement requirements set forth in the Dodd-Frank Act. These include the requirements in §§ 1024.35 (Error Resolution Procedures), 1024.36 (Information Requests), and 1024.37 (Force-Placed Insurance). With respect to error resolution procedures and information requests, those provisions build upon the existing Qualified Written Request procedures, which are currently applicable to the servicers discussed above. Providing an

[71] The 5,000-loan threshold reflects the purposes of the exemptions that the rule establishes for these servicers and the structure of the mortgage servicing industry. The Bureau's choice of 5,000 in loans serviced for purposes of Regulation X does not imply that a threshold of that type or of that magnitude would be an appropriate way to distinguish small firms for other purposes or in other industries.

[72] The nonprofit lenders/servicer did not object to the proposed 1,000-loan threshold; the Bureau infers that this nonprofit lender/servicer would qualify as a small servicer under that threshold, much less the 5,000-loan threshold that the Bureau has implemented pursuant to § 1024.30.

exemption to these requirements would have removed a currently existing consumer protection.

The Bureau is persuaded that imposing the requirements in the discretionary rulemakings on housing finance agencies does not further the goals of those requirements and imposes undue costs on housing finance agencies. Such agencies are engaged in programs that assist mortgage loan borrowers facing hardship under the auspices of state or local governments. The Bureau believes the mission of these agencies, as articulated by the agencies and their associations, clearly demonstrates that the interests of such agencies are aligned with those of borrowers, so that imposing the discretionary rulemakings on such agencies would not further the consumer protection purposes of RESPA. Accordingly, the Bureau exempts housing finance agencies from the requirements of §§ 1024.38 through 1024.41 as well as the principal restrictions of § 1024.17(k)(5). To effectuate this exemption, the Bureau simply uses the term ''small servicer,'' because Regulation Z, as amended by the 2013 TILA Servicing Rule, defines a housing finance agency as a small servicer without regard to the number of mortgage loans serviced by a housing finance agency.

The Bureau also is persuaded that the discretionary rulemakings are not appropriate for reverse mortgage transactions. For example, many of the timing requirements in § 1024.41 relate to the length of a borrower's delinquency, which is a concept that does not apply cleanly with respect to reverse mortgage transactions. Further, the vast majority of reverse mortgage transactions are subject to regulation by FHA pursuant to the Home Equity Conversion Mortgage program. These regulations provide many protections for borrowers that are appropriate for the specific circumstances of a reverse mortgage transaction. The Bureau continues to consider appropriate requirements for reverse mortgage transactions separately from the mortgage servicing rulemakings.

Similarly, the Bureau finds that ''qualified lenders'' subject to Farm Credit Administration regulation of their loss mitigation practices should be exempt from compliance with §§ 1024.38–41. The Bureau agrees with the commenters that the Farm Credit Administrations' regulations in this area offer consumer protections comparable to those in the mortgage servicing rules and subjecting such institutions to the new rules would subject such servicers to overlapping, and potentially inconsistent, regulatory requirements. Accordingly, the Bureau has determined to exempt a servicer with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000 from the requirements of §§ 1024.38 through 41.

Finally, the Bureau has determined to revise the scope of certain sections. Section 1024.30(c) implements two limitations on the scope of subpart C. First, § 1024.33(a) is only applicable to mortgage loans that are secured by first liens. This limitation excludes from coverage subordinate-lien mortgage loans. Section 1024.33(a) is based on the existing § 1024.21, renumbered in accordance with the reorganization of Regulation X, and § 1024.21 is already limited to first-lien mortgage loans. When the TILA–RESPA Integrated Disclosure rulemaking is finalized, the Bureau anticipates that rule will alter the requirements for servicers to comply with § 1024.33(a). Accordingly, the Bureau does not believe it is beneficial to require servicers to begin implementing the requirements of § 1024.33(a) for subordinate-lien mortgage loans, only to have to adjust compliance with § 1024.33(a) upon finalization of the TILA–RESPA Integrated Disclosure rulemaking. Accordingly, the Bureau is not making a change to the scope of § 1024.33(a) and retains the limitation on the scope of that requirement to mortgage loans that are secured by a first lien.

The Bureau proposed to maintain the exclusion for open-end lines of credit (home-equity plans) covered by TILA and Regulation Z, including open-end lines of credit secured by a first lien, from the mortgage servicing requirements in subpart C of Regulation X. Open-end lines of credit, which may be federally related mortgage loans when secured by a first or subordinate lien on residential real property, have been historically excluded from regulations applicable to mortgage servicing under Regulation X. *See* current § 1024.21(a) (defining ''mortgage servicing loan''). Further, open-end lines of credit are already regulated under Regulation Z. Certain provisions of Regulation Z would substantially overlap with the servicer obligations that would be set forth in subpart C, including, for example, billing error resolution procedures. *See* 12 CFR 1026.13. The Bureau requested comment regarding whether to maintain an exemption for open-end lines of credit for the requirements in subpart C.

To the extent industry commenters responded to the Bureau's request, they supported the continued exclusion of open-end lines of credit (home-equity plans). Two consumer advocacy groups, however, jointly commented that open-end credit transactions secured by a borrower's principal residence should be fully covered by RESPA. The two commenters stated that consumer protections for open-end lines of credit (home equity plans) are less robust than consumer protections for closed-end credit, particularly in the area of disclosures, error resolution, information requests, and penalties for violation. They expressed concerns that the Bureau has failed to appreciate these differences and the potential for consumer harm when predatory lenders exploit these differences. Additionally, the commenters questioned the Bureau's authority to exempt open-end lines of credit (home-equity plans) when the statutory definition of the term ''federally related mortgage loan'' does not include such an exemption.

The Bureau believes it is necessary and appropriate at this time not to apply the requirements in subpart C to open-end credit (home equity lines). Open-end lines of credit secured by a first or subordinate lien on residential real property can constitute a federally related mortgage loans. As stated in the proposal, home equity lines of credit (HELOCs) tend to reflect better credit quality than subordinate-lien closed-end mortgage loans and share risk characteristics more similar to other open-end consumer financial products, such as credit cards, because of the access to additional unutilized credit provided by a HELOC.[73] The Bureau understands from discussions with servicers and industry representatives that the servicing of HELOCs tends to differ significantly from closed-end mortgage loans, including with respect to information systems used, lender remedies (including restricting access to the line of credit), and borrower behavior. Further, the Bureau understands that although a household may finance a property solely with an open-end line of credit, the proportion that do so is very small.[74]

In addition, the protections proposed in subpart C of Regulation X are not necessary for open-end lines of credit. As set forth above, separate error resolution and information request

[73] *See* Donghoon Lee *et al., A New Look at Second Liens,* 3, 19 (Feb. 2012), *available at http://ssrn.com/abstract=2014570* (chapter in Housing and the Financial Crisis, Edward Glaeser and Todd Sinai, eds.)

[74] *See, e.g.,* Julapa Jagtiani and William W. Lang, *Strategic Default on First and Second Lien Mortgages During The Financial Crisis,* at n.5 (Federal Reserve Bank of Philadelphia, Working Paper No. 11–3, Dec. 9, 2010), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724947.*

requirements exist under Regulation Z for open-end lines of credit. Further, the Bureau understands from servicers of open-end lines of credit that such servicers typically do not maintain escrow accounts for open-end lines of credit, require borrowers to maintain insurance for properties secured by open-end lines of credit, or force-place insurance for such borrowers. The Bureau believes that it would contravene the consumer protection purposes of RESPA for servicers to expend resources complying with overlapping or unnecessary requirements that would not benefit consumers.

Further, open-end lines of credit perform differently from closed-end mortgages with respect to loss mitigation. A borrower is in control of an open-end line of credit and can draw from that line as necessary to meet financial obligations. Many borrowers who have become delinquent on a first lien closed-end mortgage loan keep current on payments for subordinate lien open-end lines of credit in order to maintain their access to the line of credit.[75] Conversely, when borrowers experience difficulty meeting their obligations, lenders have the ability to cut off access to unutilized draws from the open-end line of credit. These features of open-end lines of credit weigh against imposing the requirements set forth for early intervention with delinquent borrowers, continuity of contact, and loss mitigation procedures on servicers for open-end lines of credit. Further, open-end lines of credit tend to differ from closed-end mortgage loans with respect to servicing information systems utilized.

For the reasons set forth above, the Bureau believes it is necessary and appropriate to achieve the purposes of RESPA to maintain the current exemption, which HUD originally adopted as 24 CFR 3500.21 nearly 20 years ago. Accordingly, this exemption is authorized under section 19(a) of RESPA.

In addition, § 1024.30(c)(2) limits the scope of §§ 1024.39 through 41 to mortgage loans that are secured by a borrower's principal residence. The purpose of the early intervention requirement, the continuity of contact requirement, and the loss mitigation procedures is to help borrowers stay in their principal residences, where possible, while mitigating the losses of loan owners and assignees, by ensuring that servicers use clear standards of review for loss mitigation options. The Bureau does not believe that this purpose is furthered by extending those protections to mortgage loans for investment, vacation, or other properties that are not principal residences. For example, in such circumstances, the protections set forth in §§ 1024.39–41 may only serve to assist a non-occupying borrower to maintain cash flow from rental revenue during a period of delinquency. Further, for certain properties that are not principal residences, there is a significant risk that a property may not be maintained and may present hazards and blight to local communities. Thus, for investment or vacation properties, the lack of borrower occupancy, and the potential rental income obtained by the borrower, vitiates the justifications for ensuring that a foreclosure process is not undertaken unless the borrower has the opportunity for review for a loss mitigation option. Finally, this limitation is consistent with the California Homeowner Bill of Rights and the National Mortgage Settlement, and its incorporation here furthers the goal of creating uniform standards.[76] Accordingly, the Bureau has limited the scope of §§ 1024.39 through 41 to mortgage loans that are secured by properties that are borrowers' principal residences.

Section 1024.31 Definitions

For purposes of subpart C, proposed § 1024.31 would have provided definitions of the following terms: ''Consumer reporting agency,'' ''Day,'' ''Hazard insurance,'' ''Loss mitigation application,'' ''Loss mitigation options,'' ''Master servicer,'' ''Mortgage loan,'' ''Qualified written request,'' ''Reverse mortgage transaction,'' ''Subservicer,'' ''Service provider,'' ''Transferee servicer,'' and ''Transferor servicer.'' For the reasons set forth below, and except as otherwise discussed, § 1024.31 is adopted as proposed.

''Consumer reporting agency''; ''Day''; ''Reverse mortgage transaction''; ''Master servicer''; ''Transferee servicer''; ''Transferor servicer.'' The Bureau proposed to move the definitions of ''Master servicer,'' ''Transferee servicer,'' and ''Transferor servicer'' from current § 1024.21(a) to proposed § 1024.31 without change. The Bureau also proposed to add new defined terms for ''Reverse mortgage transaction'' and ''Consumer reporting agency,'' in proposed § 1024.31 by adopting the same definition for those terms as is already provided in current Regulation Z and section 503 of the Fair Credit Reporting Act, 15 U.S.C. 1681a, respectively. The Bureau proposed to add a new defined term ''Day'' in proposed § 1024.31. The Bureau proposed to define ''Day'' to mean a calendar day because the Bureau believed that Congress intended that the term ''day'' by itself includes legal public holidays, Saturdays, and Sundays for purposes of RESPA. No comments were received on these proposed defined terms. The final rule adopts these terms as proposed.

''Hazard insurance.'' As discussed in the section-by-section analyses concerning §§ 1024.17(k)(5) and 1204.37, section 1463(a) of the Dodd-Frank Act amended section 6 of RESPA to establish new servicer duties with respect to the purchase of force-placed insurance on a property securing a federally related mortgage. The statute generally defines ''force-placed insurance'' as hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage.'' *See* section 6(k)(2). Thus, the statutory definition of ''force-placed insurance'' indicates that Congress intended the term ''force-placed insurance'' to mean a type of ''hazard insurance.'' However, neither the statute nor current Regulation X defines ''hazard insurance.'' The Bureau believed that it was necessary to define ''hazard insurance'' in order to implement the statute.

The Bureau proposed to add new defined term ''Hazard insurance'' in proposed § 1024.31 to mean insurance on the property securing a mortgage loan that protects the property against loss caused by fire, wind, flood, earthquake, theft, falling objects, freezing, and other similar hazards for which the owner or assignee of such loan requires insurance. The Bureau modeled the definition of ''hazard insurance'' on the definition of ''property insurance'' in typical mortgage loan contracts, in light of the fact that the statute generally prohibits servicers from obtaining force-placed insurance ''unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirement to maintain property

[75] *See, e.g.,* Julapa Jagtiani and William W. Lang, *Strategic Default on First and Second Lien Mortgages During The Financial Crisis,* at n.11 (Federal Reserve Bank of Philadelphia, Working Paper No. 11–3, Dec. 9, 2010).

[76] *See* Cal. Civ. Code § 2923.6; *see also* Attorneys Gen. *et al., National Mortgage Settlement: Consent Agreement* A–1 (2012), *available at http://www.nationalmortgagesettlement.com* stating ''[t]he provisions outlined below are intended to apply to loans secured by owner-occupied properties that serve as the primary residence of the borrower unless otherwise noted herein'').

insurance.'' *See* section 6(k)(1)(A). The Bureau thus interpreted the statute to mean that ''force-placed hazard insurance'' refers to ''property insurance'' that the borrower has failed to maintain as required by the borrower's mortgage loan contract.

The Bureau sought comment on the definition in general and in particular on the proposed inclusion of insurance to protect against flood loss. Although including flood insurance is consistent with the way typical mortgage loan contracts define ''property insurance,'' the Bureau did not believe that the Bureau's force-placed insurance regulations should apply to servicers when they are required by the Flood Disaster Protection Act of 1973 (FDPA) to purchase hazard insurance to protect against flood loss. The FDPA provides an extensive set of restrictions on flood insurance provision, and the Bureau was concerned that overlapping regulatory restrictions would be unduly burdensome and produce little consumer benefit. The Bureau thus proposed to include flood insurance as part of the general definition of ''Hazard insurance,'' but to exclude flood insurance that is required under the FDPA from the definition of ''force-placed insurance'' in proposed § 1024.37(a)(2)(i).

The Bureau did not receive comments from consumer groups or industry commenters on the proposed defined term ''Hazard insurance'' other than with respect to the treatment of flood insurance. On that topic, most industry commenters believed that simply excluding flood insurance obtained by a servicer as required by the FDPA from the definition of the term ''force-placed insurance'' in proposed § 1024.37(a)(2)(i) was workable and adequately mitigated the risk of a servicer having to comply with both regulations under the FDPA and the Bureau's force-placed insurance regulations. But one large bank servicer and one large force-placed insurance provider urged the Bureau to exclude flood insurance from the defined term ''Hazard insurance'' in § 1024.31 instead.

The large bank servicer expressed concern that the proposed definitions of ''hazard insurance'' and ''force-placed insurance'' would effectively require a servicer to strictly monitor any potential change in a mortgage's property's flood zone designation because whether the FDPA requires a servicer to obtain hazard insurance to protect against flood loss depends, among other things, on whether a property is located in an area designated as a Special Flood Hazard Area (SFHA). The commenter thus worried that the force-placed insurance requirements of § 1024.37 would become applicable instantaneously after a change in SFHA designations if that change meant that flood insurance was no longer required under the FDPA for a particular property. The Bureau, however, does not interpret § 1024.37 to apply in this way. Compliance with § 1024.37 would be required if the servicer decides to renew or replace a flood insurance policy that had been previously been required under the FDPA with a new policy after the property's SFHA designation had changed. As discussed above, the Bureau proposed to exclude hazard insurance required by the FDPA from the definition of ''force-placed insurance'' because the Bureau believes that the FDPA and other related Federal laws adequately regulated this activity. However, if a servicer chooses to renew or replace hazard insurance to protect against flood loss even though the insurance the renewal or replacement is no longer required by the FDPA, then the FDPA would not apply. The Bureau's force-placed insurance regulations are intended to fill precisely this gap to ensure that consumers have basic procedural and substantive protections in the absence of FDPA coverage. Thus, a servicer would have to check a property's flood zone designation when a servicer is about to renew or replace hazard insurance to protect against flood loss that the servicer originally obtained pursuant to the FDPA to determine whether the status has changed such that § 1024.37 would apply going forward. The Bureau believes that this presents minimal if any burden on servicers and is justified to avoid imposing unnecessary costs on borrowers.

The large force-placed insurance provider urged the same result based on statutory interpretation grounds, asserting that Congress had not intended to include flood insurance as a type of hazard insurance that would potentially be subject to the force-placed insurance requirements because section 1461 of the Dodd-Frank Act, which governs the establishment of escrow accounts for certain higher-priced mortgage loans, contains separate definitions for ''hazard insurance'' and ''flood insurance.'' The commenter acknowledged that section 1461 is distinct from section 1463 and amends different underlying statutes, TILA and RESPA respectively. Nonetheless, it asserted that both address insurance for which premiums could be paid through the establishment of escrow accounts and therefore should be interpreted in tandem.

Again, the Bureau declines to make this change. The Bureau does not believe that Congress intended the statutory definition of ''flood insurance'' and ''hazard insurance'' in section 1461 to control the interpretation of ''hazard insurance'' for purposes of section 1463(a). Indeed, section 1461 expressly limits its scope by stating that ''For purposes of this section, the following definitions [of ''flood insurance'' and ''hazard insurance''] shall apply.'' In light of this language, the Bureau does not believe that section 1461 controls. Section 1463(a) itself demonstrates that Congress expected the force-placed insurance provisions to apply to flood insurance other than that required by the FDPA. Section 6(*l*)(4) of RESPA states that nothing in the force-placed insurance provisions shall be construed as prohibiting a servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to the FDPA. This provision would have little impact if flood insurance could *never* be considered force-placed insurance within the meaning of section 1463. Thus, the Bureau believes its interpretation of the statutory terms to apply the force-place insurance requirements to flood insurance that is not required by the FDPA and thus not subject to that statute's extensive regulation is consistent with the statutory language, congressional intent, and consumers' interests. Accordingly, the Bureau adopts the proposed defined term ''Hazard insurance'' as proposed.

''Loss mitigation application.'' Proposed § 1024.31 would have defined a loss mitigation application as a submission from a borrower requesting evaluation for a loss mitigation option in accordance with procedures established by the servicer for the submission of such requests. As discussed below with respect to § 1024.41, the Bureau received comments from large bank servicers regarding the application of the loss mitigation requirements on pre-qualification and informal oral communications with borrowers.

Based on the consideration of those comments, the Bureau has determined to revise the definition of a loss mitigation application. The Bureau believes that a loss mitigation application differentiates a communication or inquiry from a borrower regarding loss mitigation options from a borrower's request for consideration for a loss mitigation option. When a borrower, orally or writing, expresses an interest in a loss mitigation option and provides any

information that would be evaluated by a servicer, that communication should be considered a loss mitigation application. A servicer must then determine whether the loss mitigation application is complete or incomplete pursuant to the requirements of § 1024.41(b). This definition of a loss mitigation application is similar to framework established in Regulation B with respect to an application for credit.

Accordingly, § 1024.31 states that a loss mitigation application means an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option.

''Loss mitigation option.'' Pursuant to the Bureau's authorities under RESPA sections 6(k)(1)(E), 6(j)(3), and 19(a), the Bureau proposed rules on error resolution (proposed § 1024.35), information management (proposed § 1024.38), early intervention (proposed § 1024.39), continuity of contact (proposed § 1024.40), and loss mitigation (proposed § 1024.41) that would have set forth servicer duties with respect to ''Loss mitigation options.''

The Bureau proposed to define ''Loss mitigation options'' at new § 1024.31 as ''alternatives available from the servicer to the borrower to avoid foreclosure.'' The Bureau also proposed to clarify through comment 31 (Loss mitigation options)-1 that loss mitigation options include temporary and long-term relief, and options that allow borrowers to remain in or leave their homes, such as, without limitation, refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short-sale, deed-in-lieu of foreclosure, and loss mitigation programs sponsored by a State or the Federal Government. The Bureau also proposed to clarify through comment 31 (Loss mitigation options)-2 that loss mitigation options available from the servicer include options offered by the owner or assignee of the loan that are made available through the servicer.

Several industry commenters addressed the Bureau's proposed definition of ''Loss mitigation options.'' One industry commenter recommended that the term ''Loss mitigation options'' should be defined as alternatives available ''from the investor through the servicer to the borrower'' to avoid foreclosure, in light of the general industry practice that loss mitigation options are generally authorized by investors rather than servicers. While one industry trade group supported the proposed definition, other commenters were concerned that the breadth of the definition could conflict with servicers' delinquency management programs because the definition would subject short-term cures to the same procedural requirements as more permanent options. Similarly, industry commenters were concerned that the proposed definition would be inconsistent with requirements under existing loss mitigation programs, such as Farm Credit Administration rules and portions of the National Mortgage Settlement.

In light of comments and upon further consideration, the Bureau is adopting a definition of the term ''Loss mitigation option'' substantially as proposed, but that incorporates the substance of proposed comment 31 (Loss mitigation options)-2 into the regulatory text. Accordingly, the final rule defines the term ''Loss mitigation option'' as an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower.

The Bureau proposed to define ''Loss mitigation options'' as alternatives available ''from the servicer'' to reflect the practical, day-to-day relationship between borrowers and servicers, in which servicers pursue loss mitigation activities with respect to delinquent borrowers on behalf of the owners or assignees of the mortgage loans. The Bureau had proposed to add comment 31 (Loss mitigation options)-2 to clarify that the proposed definition should be read to include options offered by the owner and assignee and made available through the servicer in light of the actual legal relationship between servicers and owners or assignees, in which the owner or assignee authorizes the offering of loss mitigation options. Upon further consideration, the Bureau believes that the text of the definition should reflect the underlying legal relationship between servicers and owners or assignees to avoid confusion over whether servicers may be able to authorize loss mitigation options independent of the owner or assignee of the mortgage loan. Accordingly, the Bureau is not adopting comment 31 (Loss mitigation options)-2 as proposed, but instead is amending the proposed definition to incorporate the substance of proposed comment 31 (Loss mitigation option)-2.

The definition of the term ''Loss mitigation option'' is broad to account for the wide variety of options that may be available to a borrower, the availability of which may vary depending on the underlying loan documents, any servicer obligations to the lender or assignee of the loan, the borrower's particular circumstances, and the flexibility the servicer has in arranging alternatives with the borrower. Accordingly, the Bureau is adopting proposed comment 31 (Loss mitigation option)-1 substantially as proposed to set forth examples of loss mitigation options ''without limitation.'' The Bureau has revised proposed comment 31 (Loss mitigation option)-1 to clarify that loss mitigation options include programs sponsored by ''a locality'' as well as a State or the Federal government and other non-substantive revisions describing options that allow borrowers ''who are behind on their mortgage payments to remain in their homes or to leave their homes without a foreclosure.''

While the Bureau has developed a broad definition of loss mitigation options in order to accommodate the variety of loss mitigation programs, the Bureau does not intend for the provisions of Regulation X that use the term ''Loss mitigation option'' to require servicers to offer options that are inconsistent with any investor or guarantor requirements. Thus, under the Bureau's definition, an alternative that is not made available by the owner or assignee of the mortgage loan would not be a loss mitigation option for purposes of the final rule. The Bureau discusses the final rules that use the term ''Loss mitigation option'' in the applicable section-by-section analysis below.

The final rule includes new language in comment 31 (Loss mitigation option) -2, which explains that a loss mitigation option available through the servicer refers to an option for which a borrower may apply, even if the borrower ultimately does not qualify for such option. The Bureau has included this comment to clarify that the regulatory text's reference to options ''available'' to borrowers is not intended to restrict the definition to options for which a borrower ultimately qualifies, but instead refers to options for which a borrower may apply.

''Mortgage loan.'' As discussed in detail in the section-by-section analysis of § 1024.30, the Bureau proposed to add a new defined term ''Mortgage loan'' in proposed § 1024.31 to mean any federally related mortgage loan, as that term is defined in § 1024.2, subject to the exemptions in § 1024.5(b), but does not include open-end lines of credit (home equity plans). For the reasons discussed in the section-by-section analysis of § 1024.30, the Bureau is adopting the proposed definition to the defined term ''Mortgage loan'' as proposed.

''Qualified written request.'' The Bureau proposed to adopt the defined

term ''Qualified written request'' included in current § 1024.21(a) in proposed § 1024.31 without change, except to add related commentary, proposed 31 (qualified written request) -1, that would have explained that: (1) A qualified written request is a written notice a borrower provides to request a servicer either correct an error relating to the servicing of a loan or to request information relating to the servicing of the loan; and (2) a qualified written request is not required to include both types of requests. For example, a qualified written request may request information relating to the servicing of a mortgage loan but not assert that an error relating to the servicing of a loan has occurred.

One commenter suggested that the Bureau should clarify that the policies, procedures, and penalties related to a qualified written request are the same as those related to error resolution and information requests under §§ 1024.35 and 1024.36. The Bureau agrees that it would be helpful to clarify that the error resolution and information request requirements in §§ 1024.35 and 1024.36 apply as set forth in those sections irrespective of whether the servicer receives a qualified written request, and accordingly, is adopting new comment 31 (qualified written request)-2 for that purpose. However, the Bureau does not believe it is appropriate to discuss a servicer's penalties for violation of the Bureau's regulations in either the regulation or the commentary.

In addition, the Bureau has made slight modifications to the proposed definition of ''qualified written request'' so it more closely tracks the definition included in section 6(e)(1) of RESPA. The final rule defines ''qualified written request'' to mean a written correspondence from the borrower to the servicer that includes, or otherwise enables the servicer to identify, the name and account of the borrower, and either: (1) States the reasons the borrower believes the account is in error; or (2) provides sufficient detail to the servicer regarding information relating to the servicing of the mortgage loan sought by the borrower.

''Service provider.'' The Bureau proposed to add new defined term ''Service provider'' in proposed § 1024.31 to mean any party retained by a servicer that interacts with a borrower or provides a service to the servicer for which a borrower may incur a fee. The Bureau proposed related commentary, comment 31 (service provider)-1, that would have clarified that service providers may include attorneys retained to represent a servicer or an owner or assignee of a mortgage loan in a foreclosure proceeding, as well as other professionals retained to provide appraisals or inspections of properties. Two industry groups representing appraisal professionals submitted joint comments that objected to the inclusion of appraisal professionals in the Bureau's proposed comment 31 (service provider)-1. The commenters sought clarification from the Bureau about the circumstances under which appraisers are ''service providers'' and what their obligations would be. The Bureau believes that comment 31 (service provider)-1 is clear in describing the circumstances under which appraisal professionals are ''service providers'' and thus feels no further explanation is required. While acknowledging that the Bureau's mortgage servicing rules do not directly regulate real estate appraisal services, the commenters claimed that individual appraisers and small appraisal firms would experience costly and unnecessary hardship if they were considered ''service providers.'' The Bureau disagrees. The definition of the term ''service provider'' in § 1024.31, by its terms, applies only for purposes of subpart C, and the term ''service provider'' appears only in § 1024.38 of subpart C. Section 1024.38 requires servicers maintain policies and procedures reasonably designed to ensure that they can exercise reasonable oversight of their service providers. The Bureau does not believe that requiring servicers to exercise reasonable oversight of their service providers will lead to costly and unnecessary hardship on individual appraisers and small appraisal firms.

''Subservicer.'' The Bureau proposed to adopt the defined term ''Subservicer'' included in current § 1024.21(a) in proposed § 1024.31 without change. The proposed defined term ''Subservicer'' provides that a ''subservicer'' is any servicer who does not own the right to perform servicing, but who performs servicing on behalf of the master servicer.

One commenter suggested that the Bureau should replace the reference to ''master servicer'' in the definition of ''subservicer'' with ''servicer'' to accommodate circumstances where there are multiple levels of subservicing. The example the commenter provided is one where there is one master servicer, but also a primary servicer and multiple subservicers. It appears that the commenter's concern is that people might be confused by thinking ''primary servicers'' would not be considered ''subservicers'' for purposes of subpart C of Regulation X. Based on the example provided by the commenter, the Bureau understands that a primary servicer is performing servicing on behalf of the master servicer, who owns the right to perform servicing. Because the primary servicer is not the owner of the right to perform servicing, it would be a ''subservicer'' pursuant to the proposed definition to the defined term ''Subservicer.'' Although industry practice may differentiate between levels of subservicing by referring to a servicer that directly performs servicing on behalf of a master servicer as the ''primary servicer,'' and servicers performing on behalf of the ''primary servicer'' as ''subservicers,'' for purposes of subpart C, any servicer that does not own the servicing right but performs servicing on behalf of a servicer that owns the servicing right is a subservicer. Accordingly, the Bureau believes the proposed definition to the defined term ''Subservicer'' adequately captures situations where there are multiple levels of subservicing and the defined term ''Subservicer'' is adopted as proposed.

Section 1024.32 General Disclosure Requirements

The Bureau set forth requirements applicable to disclosures required by subpart C in proposed § 1024.32. Specifically, proposed § 1024.32(a)(1) would have required that disclosures provided by servicers be clear and conspicuous, in writing, and in a form the consumer may keep. This standard is consistent with disclosure standards applicable in other regulations issued by the Bureau, including, for example, Regulation Z. *See, e.g.,* 12 CFR 1026.17(a)(1). Proposed § 1024.32(a)(2) would have permitted disclosures to be provided in languages other than English, so long as disclosures are made available in English upon a borrower's request. Further, proposed § 1024.32(b) would have permitted disclosures required under subpart C to be combined with disclosures required by applicable laws, including State laws, as well as disclosures required pursuant to the terms of an agreement between the servicer and a Federal or State regulatory agency.

The Bureau is adopting the final rule as proposed, with minor changes to § 1024.32(a)(1) to replace the term ''consumer,'' with ''recipient'' as applicable and to improve the clarity of § 1024.32. Two commenters representing industry trade groups suggested that the clarity of § 1024.32(a) could be enhanced if the final rule could remove the term ''consumer'' where permissible because the term ''consumer'' is more appropriate in the context of disclosures provided prior to

the consummation of the mortgage loan transaction.

Section 1024.33 Mortgage Servicing Transfers

RESPA section 6(a) through (d) sets forth disclosure requirements for servicing transfers that are currently implemented in § 1024.21(b) through (d) of Regulation X. 12 U.S.C. 2605(a) through (d). As part of the Bureau's proposed reorganization of Regulation X, which would have created a new subpart C to contain the Bureau's mortgage servicing rules, the Bureau proposed to move the disclosure provisions in § 1024.21(b) through (d) to new § 1024.33 and new Regulation X official interpretations. The Bureau also proposed to move the existing State law preemption provision in § 1024.21(h) to § 1024.33(d). In addition to these conforming amendments, the Bureau proposed to add certain new provisions to § 1024.33 and official commentary to § 1024.33, as discussed in more detail below.[77]

Section 1024.21(b) through (d) currently requires that borrowers receive two notices related to mortgage servicing: (1) A servicing disclosure statement provided at application notifying the applicant whether the servicing of the loan may be transferred at any time (§ 1024.21(b) and (c)); and (2) if servicing is transferred, a notice of transfer provided by the transferor and transferee servicer around the time of the transfer (§ 1024.21(d)).

33(a) Servicing Disclosure Statement

RESPA section 6(a) generally sets forth requirements for persons making federally related mortgage loans to disclose to loan applicants, at the time of application, whether servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding. 12 U.S.C. 2605(a). Current § 1024.21(b) and (c) implements requirements in RESPA section 6(a) related to the servicing disclosure statement. The Bureau's proposed § 1024.33(a) would have made certain changes to the requirements currently set forth in § 1024.21(b) and (c) pertaining to the servicing disclosure statement, including changes to the scope of applicability and delivery of the servicing disclosure statement, and certain other non-substantive technical revisions.

The Bureau proposed to limit the scope of the servicing disclosure statement to closed-end reverse mortgage transactions to conform § 1024.33(a) to the comprehensive amendments to consumer mortgage disclosures proposed by the Bureau in the 2012 TILA–RESPA Proposal.[78] Because the Bureau intended to incorporate the servicing disclosure statement requirements of RESPA section 6(a) into the consolidated disclosure forms for the TILA–RESPA Integrated Disclosure rulemaking, the Bureau had proposed to limit the scope of the servicing disclosure statement provisions in new § 1024.33 to closed-end reverse mortgage transactions because those transactions would not be covered by the 2012 TILA–RESPA Proposal.

After additional consideration, because the Bureau will not be finalizing the 2012 TILA–RESPA Proposal until after this final rule, the Bureau has decided not to finalize the language in proposed § 1024.33(a) that would have limited the scope of the provision to closed-end reverse mortgage transactions. Instead, the Bureau is finalizing § 1024.33(a) by conforming the scope to ''mortgage loans'' other than subordinate-lien mortgage loans, as discussed in the section-by-section analysis of § 1024.30(c) above. The Bureau is excluding subordinate liens in order to maintain the current coverage of the servicing disclosure statement requirement in Regulation X.[79] HUD initially implemented this exemption in reliance on its authority under section 19(a) of RESPA;[80] the Bureau relies on the same authority to maintain the current exemption. Accordingly, in the final rule, the Bureau has added language to § 1024.33(a) so that applicants for ''first-lien mortgage loans'' must receive the servicing disclosure statement, as indicated at § 1024.30(c)(1). Thus, applicants for both reverse and forward mortgage loans must receive the servicing disclosure statement. The Bureau expects to harmonize the scope of § 1024.33(a) in the final rule implementing the TILA–RESPA integrated disclosures and to provide for consolidated disclosure forms at that time.

The Bureau also proposed to add comment 33(a)(1)–2 to § 1024.33(a) to clarify that the servicing disclosure statement need only be provided to the ''primary applicant.'' Current § 1024.21(b) requires that the servicing disclosure statement be provided to mortgage servicing loan applicants, and current § 1024.21(c) provides that if co-applicants indicate the same address on their application, one copy delivered to that address is sufficient, but that if different addresses are shown by co-applicants on the application, a copy must be delivered to each of the co-applicants. The Bureau proposed to implement through commentary to § 1024.33(a) a clarification relating to providing a servicing disclosure statement for co-applicants—that when an application involves more than one applicant, notification need only be given to one applicant but must be given to the primary applicant when one is readily apparent. A credit union trade association supported this proposed change.

In its proposal, the Bureau explained that the modified requirement would reduce burdens on servicers without significantly reducing consumer protections, given that the Bureau proposed to apply the regulation only to closed-end reverse mortgage transactions. The Bureau explained that such transactions are typically only conducted with regard to a borrower's principal residence and do not involve ongoing consumer payments for the life of the loan, so that contact with servicers is generally quite minimal. The Bureau also observed that amending the current requirement would be consistent with disclosure requirements applicable to other Bureau regulations, such as the adverse action notice required under Regulation B (Equal Credit Opportunity Act).[81]

Because the Bureau is not limiting § 1024.33(a) to closed-end reverse mortgage transactions in the final rule, as originally proposed, the Bureau is not adopting proposed comment 33(a)(1)–2 as proposed and is not amending the existing requirement in § 1024.21(c), under which the servicing disclosure statement must be provided to co-applicants if different addresses are shown by co-applicants. Instead, comment 33(a)–2 contains the same guidance that originally appeared in § 1024.21(c): That if co-applicants

[77] Further, the Bureau proposed to move and amend provisions in § 1024.21(e) (pertaining to servicer responses to borrower inquiries) to new § 1024.35 (error resolution) and § 1024.36 (information requests). The Bureau's proposal also would have removed current § 1024.21(f) (damages), which had restated the damages and costs provision in RESPA section 6(f). The Bureau is removing this provision from Regulation X, which is no longer accurate following amendments to RESPA section 6(f) by section 1463(b) of the Dodd-Frank Act. The Bureau believes the damages and costs provision is more appropriate as a statutory provision.

[78] The Bureau issued the 2012 TILA–RESPA Proposal on July 9, 2012.

[79] The Bureau notes that it proposed in the 2012 TILA–RESPA Proposal to implement the servicing disclosure requirement in RESPA section 6(a) through a disclosure appearing on the Bureau's proposed Loan Estimate for both first and subordinate liens *See* 2012 TILA–RESPA Proposal, 77 FR 51116, 51230 (2012) and proposed § 1026.19(e)(1)(i).

[80] See 59 FR 65442, 65443 (1994).

[81] *See* 12 CFR 1002.9(f).

indicate the same address on their application, one copy of the servicing disclosure statement delivered to that address is sufficient; and that if different addresses are shown by co-applicants on the application, a copy must be delivered to each of the co-applicants.

Finally, in addition to proposing changes about the scope of the rule, the Bureau proposed in § 1024.33(a) to make certain non-substantive changes to language from current § 1024.21(b) and (c) to clarify the circumstances under which the servicing disclosure statement must be provided and the proper use of appendix MS–1, which provides a model form for the servicing disclosure statement. For example, § 1024.21(b) currently provides that the servicing disclosure statement must be provided ''[a]t the time an application for a mortgage servicing loan is submitted, or within three days after submission of the application.'' The Bureau's proposed § 1024.33(a) stated that the servicing disclosure statement must be provided ''[w]ithin three days (excluding legal public holidays, Saturdays, and Sundays) after a person applies [.]'' The Bureau also proposed to incorporate some of the language currently in § 1024.21(b) and (c) into new Regulation X official commentary. For example, the Bureau proposed to move § 1024.21(b)(1), which explained use of appendix MS–2, to new comment 33(a)–1; the Bureau also included generally applicable instructions for use of model forms and clauses in commentary to appendix MS. The Bureau did not receive comment on this aspect of the proposal and adopts these revisions substantially as proposed, other than with respect to the scope of the rule, discussed above.

In the final rule, the Bureau has replaced the phrase ''table funding mortgage broker'' with the phrase ''mortgage broker who anticipates using table funding,'' which the Bureau believes is clearer and better conforms to the term that currently appears in § 1024.21(b)(1). In addition, the Bureau has consolidated proposed comments 33(a)(2)–1, –2, and –3 into comment 33(a)–3, which contains disclosure preparation instructions currently in § 1024.21(b)(2).[82] Comment 33(a)–3 explains that, if the lender, mortgage broker who anticipates using table funding, or dealer in a first lien dealer loan knows at the time of the disclosure whether it will service the mortgage loan for which the applicant has applied, the disclosure should, as applicable, state that such entity will service such loan and does not intend to sell, transfer, or assign the servicing of the loan, or that such entity intends to assign, sell, or transfer servicing of such mortgage loan before the first payment is due. The comment also provides that, in all other instances, a disclosure that states that the servicing of the loan may be assigned, sold, or transferred while the loan is outstanding complies with § 1024.33(a).

The final rule also makes a technical revision to the last sentence of proposed § 1024.33(a). The final rule provides that the servicing disclosure statement is not required to be delivered if ''a person who applies for a first-lien mortgage loan is denied credit'' within the three-day period.

33(b) Notice of Transfer of Loan Servicing

RESPA section 6(b) and (c) sets forth the general requirement for the transferor and transferee servicers of a federally related mortgage loan to notify the borrower in writing of any assignment, sale, or transfer of servicing. 12 U.S.C. 2605(b) and (c). These statutory requirements are implemented through current § 1024.21(d). The Bureau had proposed to move and adopt substantially all of these requirements to new § 1024.33(b), with a few exceptions, as explained in the section-by-section analysis below. The Bureau's proposal also would have made certain non-substantive revisions to current § 1024.21(d) to clarify existing servicing transfer requirements.[83] New § 1024.33(b)(1) sets forth the general requirement to provide the servicing transfer notice. New § 1024.33(b)(2) sets forth the transfers for which a servicing transfer is not required. New § 1024.33(b)(3) sets forth the timing requirements of the notice. New § 1024.33(b)(4) sets forth the content requirements for the servicing transfer notice. The Bureau is generally adopting these provisions as proposed, except as noted in the section-by-section analysis below.

33(b)(1) Requirements for Notice and 33(b)(2) Certain Transfers Excluded

RESPA section 6(b)(1) and (c)(1) sets forth the general requirements for the transferor and transferee servicers to provide a notice of servicing transfer for any federally related mortgage loan that is assigned, sold, or transferred. 12 U.S.C. 2605(b)(1) and (c)(1). Current § 1024.21(d)(1)(i) implements the general requirement for the transferor and transferee servicers to provide the notice of transfer, which the Bureau proposed to move to new § 1024.33(b)(1). Unlike the servicing disclosure statement that the Bureau proposed in § 1024.33(a) to apply only to closed-end reverse mortgage transactions,[84] the Bureau proposed that the servicing transfer notice be provided with respect to the transfer of a ''mortgage loan,'' including forward and reverse mortgage loans.

The Bureau proposed to include in § 1024.33(b)(1) a statement that appendix MS–2 contains a model form for the notice. The reference to appendix MS–2 was previously located in § 1024.21(d)(4). Section 1024.21(d)(4) also contained language indicating that servicers could make minor modifications to the sample language but that the substance of the sample language could not be omitted or substantially altered. Similar language now appears in a general comment to appendix MS in comment MS–2, discussed below in the section-by-section analysis of appendix MS. The Bureau did not receive comment on these proposed provisions and is adopting them in the final rule.

Current § 1024.21(d)(i) exempts certain transactions from the requirement to provide the notice of transfer (if there is no change in the payee, address to which payment must be delivered, account number, or amount of payment due): Transfers between affiliates, transfers resulting from mergers or acquisitions of servicers or subservicers, and transfers between master servicers where the subservicer remains the same. The Bureau did not receive comment on these proposed provisions and is adopting them in the final rule.

Current § 1024.21(d)(ii) exempts the FHA from the requirement to provide a transfer notice where a mortgage insured under the National Housing Act

[82] The disclosure preparation instructions in current § 1024.21(b)(2) refer to ''table funding mortgage broker.'' In implementing these instructions through comment 33(a)–3, the Bureau has replaced that phrase with the phrase ''mortgage broker who anticipates using table funding'' to better conform to the language in § 1024.33(a).

[83] For example, the Bureau changed ''consumer inquiry address,'' under § 1024.21(d)(3)(ii) to an address ''that can be contacted by the borrower to obtain answers to servicing transfer inquiries,'' under § 1024.33(b)(4)(ii). The Bureau also changed the provision in § 1024.21(d)(3)(v) regarding ''[i]nformation concerning any effect the transfer may have'' on the terms of the continued availability of mortgage life or disability insurance, to a requirement in § 1024.33(d)(3)(v) to include information ''[w]hether the transfer will affect'' the terms or the continued availability of mortgage life or disability insurance.

[84] As noted in the section-by-section analysis of § 1024.33(a), the Bureau is finalizing the servicing disclosure statement requirement for first-lien mortgage loans, including forward and reverse mortgage loans.

is assigned to the FHA. The Bureau proposed to move this provisions to new § 1024.33(b)(2)(i)(ii). HUD initially implemented this exemption in reliance on its authority under section 19(a) of RESPA; [85] the Bureau relies on the same authority to maintain the current exemption. The Bureau did not receive comment on this proposed provision and is adopting it in the final rule.

33(b)(3) Time of the Notice

33(b)(3)(i) In General

Timing of the Transferor and Transferee Notices

RESPA section 6(b)(2)(A) requires that the transferor's notice be provided not less than 15 days before the effective date of transfer of servicing, except as provided in RESPA section 6(b)(2)(B) and (C), which provides that the notice may be provided under different timeframes in certain cases. 12 U.S.C. 2605(b)(2)(A). RESPA section 6(c)(2)(A) requires that the transferee's notice be provided not more than 15 days after the effective date of transfer, except as provided in RESPA section 6(c)(2)(B) and (C). 12 U.S.C. 2605(c)(2)(A). Current § 1024.21(d)(2)(i) implements these requirements and provides that, except as provided in paragraph (d)(1)(i) or (d)(2)(ii), the notice of transfer must be provided by the transferor not less than 15 days before the effective date of the transfer and by the transferee not more than 15 days after the effective date of the transfer. The Bureau proposed to move these requirements to new § 1024.33(b)(3)(i).

Several individual consumers suggested that a 15-day timeframe was too short a period for borrowers to make adjustments with respect to whom they should direct their mortgage payments. They recommended that transferees should be required to provide the transfer notice 30 to 45 days in advance of the effective date of transfer. In its final rule, the Bureau is not adjusting the exiting timing requirements. The 15-day time period was established by Congress, which reasonably concluded that this time period provides borrowers with sufficient time to make adjustments to any automated payment systems. In addition, the Bureau believes that there is minimal risk to borrowers who may be unable to send payments to the proper servicer after a transfer. Pursuant to § 1024.33(c)(1), servicers generally may not treat a payment as late for 60 days after a transfer if a borrower makes a timely but misdirected payment to the transferee servicer.

[85] *See* 59 FR 65442, 65443 (1994).

Delivery. Subparagraphs (b)(1) and (c)(1) of RESPA section 6 require that the transferor and transferee servicer notify ''the borrower'' of any assignment, sale, or transfer of servicing. Current § 1024.21(d)(1)(i) implements these requirements by requiring that notices be delivered to ''the borrower.'' However, unlike as set forth in current § 1024.21(c) with respect to the servicing disclosure statement, current § 1024.21(d) does not contain specific delivery instructions for delivering servicing transfer notice under § 1024.21(d) to multiple borrowers. The Bureau proposed comment 33(b)(3)–2 to clarify that a notice of transfer should be delivered to the mailing address listed by the borrower in the mortgage loan documents, unless the borrower has notified the servicer of a new address pursuant to the servicer's requirements for receiving a notice of a change of address. Proposed comment 33(b)(3)–2 further clarified that when a mortgage loan has more than one borrower, the notice of transfer need only be given to one borrower, but must be given to the primary borrower when one is readily apparent.

The Bureau did not receive comment on the language in proposed comment 33(b)(3)–2 clarifying that a servicer deliver the notice of transfer to the mailing address listed by the borrower in the mortgage loan documents unless the borrower has notified the servicer of a new address pursuant to the servicer's requirements for receiving a notice of a change in address. However, the Bureau did receive comment on the proposed language clarifying that servicers may provide the transfer notice to the ''primary'' borrower. Industry commenters supported the proposed limitation to provide the transfer notice only to the primary borrower. One industry commenter indicated, however, that servicers generally will not know who the primary borrower is, noting that servicers would likely rely on the owner's or a prior servicer's designation in servicer transfer instructions, or the party that is listed first on the note. The industry commenter recommended that the Bureau permit such reliance.

Two consumer advocacy groups recommended that the Bureau omit this comment. These commenters were concerned that providing notice to only one party would not ensure that multiple obligors, or even the party who is actually making payments on the mortgage, would receive it. For example, in the event of a divorce or separation, a ''primary'' borrower could be a spouse who is no longer living at home but who has submitted a change-of-address notice to the servicer. In another scenario, a borrower not living at home could be under a family court order to make mortgage payments even though the borrower is not a ''primary'' borrower. In these types of cases, the consumer groups were concerned that borrowers not considered ''primary'' would not receive the transfer notice. The consumer groups also raised concern about the lack of a definition of ''primary'' borrower and observed that, even if a definition were provided, a servicer's original designation of ''primary'' may become inaccurate over time if the obligors' relationship changes or other changed circumstances arise. The consumer groups also noted that sending two notices is not costly, would simplify compliance, and would reduce the risk that an interested borrower would not receive the notice.

In light of comments received, the Bureau is not adopting the proposed comment 33(b)(3)–2 regarding delivery to ''primary'' borrowers. The Bureau recognizes that a party who may be ''primary'' at application could change over time without the servicer's knowledge, which could be problematic for borrowers responsible for making ongoing payments to their servicer. The Bureau believes that servicers should be responsible for providing a notice to the address listed by the borrower in the mortgage loan documents or different addresses they have received through their own procedures, consistent with § 1024.11 [86] and applicable case law.[87] The Bureau has otherwise retained proposed comment 33(b)(3)–2 substantially as proposed. The Bureau has omitted the comment limiting delivery to ''primary'' borrowers, added parenthetical language about providing the notice to ''addresses,'' and has renumbered the comment as 33(b)(3)–1 because of the deletion of proposed comment 33(b)(3)–1 discussed above. Comment 33(b)(3)–1 explains that a servicer mailing the notice of transfer

[86] Section 1024.11 provides that ''the provisions of [part 1024] requiring or permitting mailing of documents shall be deemed to be satisfied by placing the document in the mail (whether or not received by the addressee) addressed to the addresses stated in the loan application or in the other information submitted to or obtained by the lender at the time of loan application or submitted or obtained by the lender or settlement agent, except that a revised address shall be used where the lender or settlement agent has been expressly informed in writing of a change in address.''

[87] *See Rodriguez* v. *Countrywide Homes* et al., 668 F. Supp. 2d 1239, 1245 (E.D. Ca. 2009) (''Countrywide submits, and the Court agrees, that RESPA requires a lender to send a Good Bye letter to the Mailing Address listed by the borrower in the loan documents. When the borrower submits an express change of mailing address, the lender is required to send the Good Bye letter to the new address.'').

must deliver the notice to the mailing address (or addresses) listed by the borrower in the mortgage loan documents, unless the borrower has notified the servicer of a new address (or addresses) pursuant to the servicer's requirements for receiving a notice of a change in address.

33(b)(3)(ii) Extended Time

RESPA section (b)(2)(B) and (c)(2)(B) contains exemptions from the general requirements that the transferor notice be provided not less than 15 days before the effective date of transfer and that the transferee notice be provided not more than 15 days after the effective date of transfer. 12 U.S.C. 2605(b)(2)(B) and (c)(2)(B). Paragraphs (b)(2)(B) and (c)(2)(B) permit these notices to be provided not more than 30 days after the effective date of assignment, sale, or transfer that is preceded by the termination of a servicing contract for cause, a servicer's bankruptcy, or the commencement of proceedings by the FDIC for conservatorship or receivership of the servicer. These exemptions to the general timing requirements are currently set forth in § 1024.21(d)(2)(ii).

The Bureau had proposed to adopt the existing exemptions and add § 1024.33(b)(3)(ii)(D), which would extend the current 30-day exemption to situations in which the transfer of servicing is preceded by commencement of proceedings by the NCUA for appointment of a conservator or liquidating agent of the servicer or an entity that owns or controls the servicer. The Bureau did not receive comment on this aspect of the proposal and is adopting new § 1024.33(b)(3)(ii)(D) as proposed.

As is evident by RESPA section 6(b)(2)(B) and (c)(2)(B), one of the purposes of RESPA is to provide exemptions from the general transfer notice timing requirements for servicing transfers occurring in the context of troubled institutions involving the appointment of an agent by a Federal agency, such as those in which a servicing transfer is preceded by the commencement of proceedings by the FDIC for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled). The Bureau does not believe that the timing for providing a servicing transfer disclosure should differ for an insured credit union in the process of conservatorship of liquidation by the NCUA compared to an insured depository institution in the process of conservatorship or receivership by the FDIC. Thus, because the Bureau believes institutions for which the NCUA has commenced proceedings to appoint a conservator or liquidating agent should be treated similarly to those for which the FDIC has commenced proceedings to appoint a conservator or receiver, the Bureau believes § 1024.33(b)(3)(ii)(D) is necessary to achieve the purposes of RESPA. Accordingly, the Bureau exercises its authority under RESPA section 19(a) to grant reasonable exemptions for classes of transactions necessary to achieve the purposes of RESPA.

33(b)(3)(iii) Notice Provided at Settlement

RESPA section 6(b)(2)(C) and (c)(2)(C) generally provides that the timing requirements of the transferor and transferee notices at RESPA section 6(b)(2)(A) and (B), and (c)(2)(A) and (B) do not apply if the person making the loan provides a transfer notice to the borrower at settlement. Current § 1024.21(d)(2)(iii) implements these provisions and provides that notices of transfer delivered at settlement by the transferor servicer and transferee servicer, whether as separate notices or as a combined notice, satisfy the timing requirements of § 1024.21(d)(2). The Bureau proposed to move this provision to new comment 33(b)(3)–1 substantially as in the original.[88] The Bureau did not receive comment on this aspect of the proposal. The Bureau is adopting the substance of the language in the proposed commentary but is placing the language in new § 1024.33(b)(3)(iii) instead of official commentary to more closely track the requirements of the statute.

33(b)(4) Contents of Notice

Overview

RESPA section 6(b)(3) sets forth content requirements for the transferor notice, and RESPA section 6(c)(3) requires that the transferee notice contain the same content required by RESPA section 6(b)(3). 12 U.S.C. 2605(b)(3) and (c)(3). RESPA section 6(b)(3)(A) through (G) requires that the transferor and transferee notice contain the effective date of transfer, contact information for the transferee servicer, the name of an individual or department of the transferor and transferee servicer who may be contacted for borrower inquiries, the date on which the transferor will stop accepting payments and the date on which the transferee servicers will begin accepting payments, any information about the effect of the transfer on the availability of insurance, and a statement that the transfer will not affect any term or condition of the mortgage loan, other than servicing. These requirements are currently implemented by § 1024.21(d)(3)(i) through (vi). Section 1024.21(d)(3)(vii) also requires servicers to include a statement of the borrower's rights in connection with complaint resolution, including the information set forth in § 1024.21(e), as illustrated by current appendix MS–2.

The Bureau proposed to adopt most of the existing content requirements from current § 1024.21(d)(3), with the exception of the complaint resolution statement in § 1024.21(d)(3)(viii) and certain other changes discussed in more detail below. Except as otherwise discussed below, the Bureau is adopting § 1024.33(b)(4) as proposed. Accordingly, § 1024.34(b)(4) sets forth content requirements for the transfer notice, including the effective date of the servicing transfer; the name, address, and telephone number for the transferor and transferee servicers to answer inquiries related to the transfer of servicing; the date on which the transferor will stop accepting payments and the date the transferee will begin accepting payments, as well as the address for the transferee servicer to which borrower payments should be sent; information about whether the transfer will affect the terms or availability of insurance coverage; and a statement indicating that the transfer does not affect any of the mortgage loan terms other than servicing.

Information about loan status. Two consumer advocacy groups also requested that the Bureau require that transfer notices provide information about the default status of the loan and include a full payment history. The groups explained that many servicing problems occur at or near the time of transferring servicing records and that errors involving one or two payments can spiral into a threatened foreclosure despite borrower efforts to prove that payments were in fact made. Thus, the consumer groups recommended that the transfer notices should advise if the homeowner is current and whether there are any unpaid fees, and the status of loss mitigation options being considered. They also recommended that a full payment history, including allocation of the payments to interest, principal, late fees, and other fees should be included by both the old and the new servicer, so that the homeowner may promptly ascertain if there is a discrepancy in the records. These commenters also requested that the

[88] Whereas § 1024.21(d)(2)(iii) describes a notice of transfer ''delivered'' at settlement, § 1024.33(b)(3)(iii) describes a notice of transfer ''provided'' at settlement. The Bureau has made this change to conform to the language of RESPA section 6(b)(2)(C) and (c)(2)(C) and other similar technical amendments throughout Regulation X.

Bureau require that fees not listed in a payment history provided at the transfer of servicing be waived.

The Bureau recognizes the problems that can arise when servicing is transferred, especially in the case of a borrower who is not current at the time of transfer. However, requiring individualized information about each borrower's loan could significantly affect the time required to produce the notice as well as the cost. Moreover, the Bureau believes that other new provisions being finalized in Regulation X and Regulation Z will adequately address borrowers' interests in ensuring the accuracy of transferred records concerning their payment history. First, borrowers will be able to obtain information about their current payment status on a monthly basis on the periodic statement required under the Regulation Z provision that the Bureau is finalizing in the 2013 TILA Mortgage Servicing Final Rule. That statement will show, among other things, the payment amount due, the amount of any late payment fee, the total sum of any fees or charges imposed since the last statement, the total of all payments received since the last statement, the total of all payments received since the beginning of the current calendar year, transaction activity since the last statement, the outstanding principal balance, the borrower's delinquency status, amounts past due from previous billing cycles, and the total payment amount needed to bring the account current. As a result, if there are discrepancies between the last statement provided by the prior servicer and the first statement provided by the new servicer, those discrepancies will be apparent on the face of the statements. Second, borrowers will also be able to assert errors and request information about their payment history and current status through the new error resolution and information request provisions of Regulation X §§ 1024.35 and 1024.36; and new § 1024.38(b)(1)(iii) requires servicers to maintain policies and procedures reasonably designed to ensure that the servicer can provide a borrower with accurate and timely information and documents in response to the borrower's requests for information with respect to the servicing of the borrower's mortgage loan account. Third, new § 1024.38(b)(4) generally requires servicers to maintain policies and procedures reasonably designed to ensure (as a transferor servicer) the timely transfer of all information and documents in a manner that ensures the accuracy of information and documents transferred, and (as a transferee servicer) identify necessary documents or information that may not have been transferred by a transferor servicer and obtain such documents from the transferor servicer. Fourth, new § 1024.38(c)(2) generally requires, among other things, that servicers maintain a schedule of all transactions credited or debited to the mortgage loan account, including any escrow account defined in § 1024.17(b) and any suspense account and data in a manner that facilitates compiling such documents and data into a servicing file within five days. In light of these provisions, the Bureau does not believe that the cost of providing the default status of the loan or a full payment history with the servicing transfer notice for all borrowers would be justified.

Statement of borrower's rights in connection with the complaint resolution process. Although not specifically required by RESPA section 6(b)(3), current § 1024.21(d)(3)(vii) requires that the transfer notice include a statement of the borrower's rights in connection with the complaint resolution process. The Bureau proposed to remove this requirement from the servicing transfer notice in new § 1024.33(b)(4). Two consumer advocacy groups requested that the Bureau retain the current requirement, noting that borrowers would benefit from being informed of their rights related to errors and information requests. They asserted that retaining an existing disclosure would not add new burden. Further, they asserted that omitting the disclosure would not significantly reduce burden because the language in the proposed revised model notice (without the complaint resolution statement) at appendix MS–2 would likely only comprise one page, and that adding a paragraph about the error resolution and information rights might at most extend some of the information to the back side of the notice, but would not require an additional page or increased postage.

After considering the comments received, the Bureau has decided to adopt § 1024.33(b)(4) without a requirement to provide information about complaint resolution, as proposed. The Bureau believes that borrowers are best served by providing a notice that clearly and concisely explains that the servicing of their mortgage is being transferred, and that detailed information about the error resolution and information request process may not always be optimally located in the transfer notice. Additionally, as a result of amendments to the error resolution and information request procedures that the Bureau is finalizing in this rule, the existing disclosure in current appendix MS–2 would no longer be completely accurate.

The Bureau agrees that borrowers should be notified of their rights in connection with errors and inquiries, but the Bureau believes that borrowers should be informed of the error resolution and information request process through mechanisms that do not necessarily depend on the transfer of servicing. To address this, the Bureau is adding a requirement in § 1024.38(b)(5) that servicers maintain policies and procedures reasonably designed to ensure that servicers inform borrowers of procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36. New comment 38(b)(5)–1 explains, among other things, that a servicer may comply with § 1024.38(b)(5) by including in the periodic statement required pursuant to § 1026.41 a brief statement informing borrowers that borrowers have certain rights under Federal law related to resolving errors and requesting information about their account, and that they may learn more about their rights by contacting the servicer, and a statement directing borrowers to a Web site that provides the information about the procedures set forth in §§ 1024.35 and 1024.36.[89]

The Bureau believes that a requirement to establish policies and procedures to achieve the objective of notifying borrowers of the written error resolution and information request procedures set forth in §§ 1024.35 and 36 will provide servicers with more flexibility to the time and in a manner in which to notify borrowers about the written error resolution and information request procedures. Specifically, the Bureau expects that servicers may decide to inform borrowers about these procedures at a time and in a manner that borrowers are more likely to find beneficial than at the time of servicing transfer. Further, as described in more detail in the section-by-section analysis of § 1024.40, pursuant to § 1024.40(b)(4), servicers must have policies and procedures reasonably designed to ensure that continuity of contact personnel assigned to assist delinquent borrowers provide such borrowers with information about the procedures for

[89] During the fourth round of consumer testing in Philadelphia, Pennsylvania, the Bureau tested a brief statement informing borrowers that they have rights associated with resolving errors. While participants generally understood the meaning of the clause, the Bureau is not finalizing model language for a statement informing borrowers of their rights to resolve errors and request information.

submitting a notice of error pursuant to § 1024.35 or an information request pursuant to § 1024.36.

Finally, the Bureau believes borrowers are most likely to raise questions and complaints with servicers outside of the formal process outlined in §§ 1024.35 and 36. To ensure that servicers have systems in place for responding to errors and information requests through informal means, the Bureau believes servicers should have reasonable policies and procedures in place for responding to errors and information requests that fall outside of the required error resolution and information request procedures set forth in §§ 1024.35 and 36. Accordingly, as discussed in more detail in the section-by-section analysis of § 1024.38(b)(1), the Bureau is adopting § 1024.38(b)(1)(ii) and (iii), which generally requires that servicers maintain policies and procedures that are reasonably designed to ensure that the servicer can investigate, respond to, and, as appropriate, make corrections in response to borrower complaints, and provide accurate and timely information and documents in response to borrower information requests. Therefore, for the reasons discussed above, the Bureau is adopting the proposal to remove the requirement that the servicing transfer notice describe the complaint resolution statement currently set forth in § 1024.21(d)(3)(vii).

33(b)(4)(ii) and (b)(4)(iii)

RESPA section 6(b)(3)(C) and (D) requires that the transferor and transferee notices include the name and a toll-free or collect call telephone number for an individual employee or the department of the transferor and transferee servicers that can be contacted by the borrower to answer inquiries relating to the transfer of servicing. 12 U.S.C. 2605(b)(3)(C) and (D). The Bureau proposed to implement these requirements, currently in § 1024.21(d)(3)(ii) and (iii), through new § 1024.33(b)(4)(ii) and (iii).

The Bureau's proposal would have retained the requirement to provide contact information for ''an employee or department'' of the transferor and transferee servicers. The Bureau had also proposed in § 1024.33(b)(4)(ii) and (iii) to remove the requirement that the transferor and transferee servicers provide collect call telephone numbers, but to retain the requirement to provide toll-free telephone numbers. Accordingly, proposed § 1024.33(b)(4)(ii) and (iii) would have required that servicers provide only a toll-free telephone number for an employee or department of the transferee servicer that can be contacted by the borrower to obtain answers to servicing transfer inquiries. The Bureau's proposal also would have required that the transferor notice include the address for an employee or department of the transferor servicer that can be contacted by the borrower to obtain answers to servicing transfer inquiries. Current § 1024.21(d)(3)(iii) requires only that the notice list telephone contact information to reach an employee or department of the transferor servicer.

One industry commenter indicated that providing an individual employee name may not be appropriate in all cases because individuals can change roles within a servicer's organization. The commenter requested that only contact information for a servicing department be required. One individual consumer recommended requiring that the notice of transfer identify the owner or assignee of the loan, without contact information, in addition to contact information for the transferor and transferee servicers. Another individual consumer also recommended that the transfer notice include a plain language explanation of what ''owning'' and ''servicing'' a loan mean.

The Bureau is adopting the requirements in proposed § 1024.33(b)(4)(ii) and (iii) substantially as proposed. However, the Bureau is retaining the option to include a collect call number because, upon further consideration, the Bureau believes some servicers may continue to use collect call numbers. The Bureau is also retaining the requirement to provide contact information for either an employee or department in the final rule. Neither the statute nor the regulatory provision requires servicers to list specific employees but instead gives servicers the option of listing personnel or a department contact number. The Bureau believes servicers should be able to determine the most appropriate point of contact within their organizations. While the Bureau recognizes that servicer personnel may change over time, the Bureau does not believe that there is significant risk from the potential that contact information may be inaccurate because servicers are required under § 1024.38 to have policies and procedures in place to achieve the objective of providing accurate information to borrowers. Servicers may choose to provide department-level contacts to ease their own compliance. The Bureau believes borrowers would likely benefit from the disclosure of specific employees to the extent the servicer decides to list them.

The Bureau has considered the recommendation to require that the servicing transfer notice identify the owner or assignee of the loan in addition to contact information for the transferor and transferee servicer but is not adopting such a requirement in the final rule. First, the Bureau notes that the servicing disclosure statement provided at application pursuant to § 1024.33(a) already provides information about whether the lender, mortgage broker who anticipates using table funding, or dealer may assign, sell, or transfer the mortgage servicing to any other person at any time. Additionally, the Bureau believes the language in the model form at appendix MS–2, explaining that a new servicer will be collecting the borrower's mortgage loan payments and that nothing else about the borrower's mortgage loan will change, will avoid potential confusion about what the transfer of servicing means for a borrower's loan. Additionally, as explained above, the Bureau believes that borrowers are best served by a transfer notice that sets forth the most relevant information related to the transfer of servicing of their loan and who should receive their payments requiring additional information in the notice about the owner or the loan may be confusing. Finally, the servicing transfer notice will include contact information for the transferor and transferee servicer that the borrower may contact with any questions.[90]

33(b)(4)(iv)

RESPA section 6(b)(3)(E) requires that the transferor and transferee notices provide the date on which the transferor will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments. 12 U.S.C. 2605(b)(3)(E). This requirement is currently in § 1024.21(d)(3)(iv), which the Bureau proposed to implement through proposed § 1024.33(b)(4)(iv).

Several individual consumers indicated that the transfer notice could provide clearer instructions for how borrowers should submit payments after the effective date of transfer date. One individual consumer recommended that the notice should list the Web site address for transferee servicer and the proper address to submit electronic payments. Other consumers recommended that the notice explain which servicer is responsible for making payments from any escrow account for

[90] Pursuant to § 1024.36(d)(2)(i)(A), a servicer generally must respond within 10 days to borrower requests for information about the identify or, and address or relevant contact information for, the owner or assignee of the borrower's mortgage loan.

property taxes and insurance and the effective date of such payments.

Current § 1024.21(d)(3)(i) requires and the current model form in appendix MS–2 include a statement directing borrowers to send all payments due on or after the effective date of transfer to the new servicer.[91] The Bureau's proposed amendments to the model notice contained similar language but included space for the transferee servicer's payment address.[92] The Bureau is adopting this change to the model form in the final rule. *See* appendix MS–2. The Bureau believes this change to the model form will provide clear instructions to borrowers for the submission of future payments to the transferee.

The Bureau does not believe it is necessary to amend the regulatory text of § 1024.33(b)(4)(iv) because the Bureau believes servicers have an incentive to instruct borrowers where to send future payments, and the Bureau is concerned that a regulatory requirement to identify payment instructions, including electronic payment instructions, could be overly prescriptive. Moreover, § 1024.33(b)(ii) and (iii) requires transferor and transferee servicers to provide the contact information for borrowers to obtain answers to inquiries about the transfer; the Bureau believes that borrowers requiring further instruction about submitting payments would make use of this contact information.

33(c) Borrower Payments During Transfer of Servicing

33(c)(1) Payments Not Considered Late

RESPA section 6(d) provides that, during the 60-day period beginning on the effective date of transfer of servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive the payment) before the due date applicable to such payment. This provision is implemented through § 1024.21(d)(5). The Bureau proposed to retain that general requirement in new § 1024.33(c) by making a clarifying revision to the regulatory text—*i.e.,* that such misdirected payment may not be treated as late ''for any purpose.''

The Bureau also proposed to add a qualification to that general prohibition to conform new § 1024.33(c)(1) with the requirements in new § 1024.39 by clarifying that a borrower's account may be considered late for purposes of contacting the borrower for early intervention. Proposed § 1024.39 would have required servicers to provide oral and written notices to borrowers about the availability of loss mitigation options within 30 and 40 days after a missed payment, respectively.

The Bureau did not receive comment on this aspect of the proposal and is adopting § 1024.33(c)(1) substantially as proposed, except with respect to the statement referencing § 1024.39. The Bureau is adding new comment 33(c)(1)–1, to clarify that the prohibition on treating a payment as late for any purpose in § 1024.33(c)(1) includes a prohibition on imposing a late fee on the borrower with respect to any payment on the mortgage loan, with a cross-reference to RESPA section 6(d) in order to clarify that the statutory prohibition on charging late fees remains in effect notwithstanding the change to the language of the regulatory provision.

In the final rule, the Bureau is not adopting the proposed qualifying language regarding § 1024.39 as regulatory text, but instead is adopting this language as new comment 33(c)(1)–2. New comment 33(c)(1)–2 clarifies that a transferee servicer's compliance with 1024.39 during the 60-day period beginning on the effective date of a servicing transfer does not constitute treating a payment as late for purposes of § 1024.33(c)(1). The Bureau believes this provision is more appropriately located as commentary than regulatory text because it is an interpretation of the prohibition on treating a payment as late.

The early intervention rules are new requirements designed to inform delinquent borrowers about loss mitigation options. While a borrower who has made a timely but misdirected payment is not likely to benefit from information about early intervention, transferee servicers may not know the reasons for a missed payment if they are unable to establish live contact with borrowers pursuant to § 1024.39(a) (requiring that servicers establish live contact or make good faith efforts to do so by the 36th day of a borrower's delinquency). In the face of this uncertainty, transferee servicers may decide the best course of action is to comply with § 1024.39, as applicable. In these situations, the Bureau does not believe a servicer complying with § 1024.39 is treating a borrower as late within the meaning of RESPA section 6(d).

33(c)(2) Treatment of Payments

The Bureau also proposed to add a requirement in proposed § 1024.33(c)(2) that, in connection with a servicing transfer, a transferor servicer shall promptly either transfer a payment it has received incorrectly to the transferee servicer for application to a borrower's mortgage loan account or return the payment to the person that made the payment to the transferor servicer. The Bureau explained that many servicers already transfer misdirected payments to the appropriate servicer in connection with a servicing transfer, and the Bureau requested comment regarding whether the option to return the payment to the borrower should be eliminated.

One industry commenter supported the proposed provision, but two consumer advocacy groups and a number of individual consumers requested that the Bureau require the transferring servicer to forward all payments received from borrowers after the transfer date to the appropriate servicer. Consumer groups and individual consumers were concerned that returning misdirected payments to the borrower would lead to confusion, defaults, unnecessary fees, and potentially more foreclosures. Consumer groups believed that the transferor servicer could easily pass payments on to the transferee servicer, reducing the opportunity for unnecessary harm to borrowers. Similarly, one individual consumer suggested that the borrower should be permitted to make payments to the transferor servicer during the 60 days after the transfer date. Another individual consumer recommended that the transferee servicer should be responsible for collecting payments from the transferor servicer. Another consumer recommended that transferee servicer should be required to take steps to remind the borrower to send payments to the new servicer.

After consideration of the comments received, the Bureau has decided to adopt § 1024.33(c)(2) substantially as proposed. As discussed in more detail below, the Bureau believes that this requirement is necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring the avoidance of unnecessary and unwarranted charges and the provision of accurate information to borrowers. Accordingly, the provision is authorized under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA.

[91] Appendix MS–2 currently states, ''Send all payments due on or after that date to your new servicer.''

[92] The Bureau proposed to amend appendix MS–2 to state, ''Send all payments due on or after [Date] to [Name of new servicer] at this address: [New servicer address].''

The Bureau has added clarifying language to § 1024.33(c)(2) and has made conforming edits to § 1024.33(c)(2)(i) and (ii) to clarify the circumstances under which the transferor servicer must take action with respect to misdirected payments. Section 1024.33(c)(2) now provides that, beginning on the effective date of transfer of the servicing of any mortgage loan, with respect to payments received incorrectly by the transferor servicer (rather than the transferee servicer that should properly receive the payment on the loan), the transferor servicer shall promptly take action described in either paragraph (c)(2)(i) or (c)(2)(ii). The Bureau has modeled this language on the language of § 1024.33(c)(1) (payments not considered late). The Bureau does not intend any substantive difference from proposed § 1024.33(c)(2).

The Bureau has also added language to § 1024.33(c)(2)(ii) to provide that if a servicer does not transfer a misdirected payment to the transferee servicer, the servicer must return the payment to the person that made the payment to the transferor servicer and notify the payor of the proper recipient of the payment. The Bureau believes § 1024.33(c)(2) will ensure that transferor servicers take some action with respect to misdirected payments; otherwise, transferor servicers may claim that they had no obligation with respect to misdirected payments. The Bureau also believes it is reasonable to permit transferors to either return a misdirected payment to the payor or transmit the payment to the transferee servicer because there may be circumstances in which a borrower would want to be notified that the payment had been mailed to the wrong servicer, recoup the misdirected payment, and forward it to the correct servicer. In addition, there may be situations in which a transferor servicer receives a payment from a party it does not recognize as the borrower associated with the mortgage loan account. In such situations, the Bureau believes servicers may reasonably determine the best course of action is to return such a payment to the payor. Moreover, the Bureau does not believe there is significant potential for borrower harm associated with § 1024.33(c)(2) because § 1024.33(c)(1) permits a 60-day grace period in which timely but misdirected payments to the transferor servicer may not be considered late for any purpose. In addition, § 1024.33(c)(2) requires the transferor servicer to take action with respect to the misdirected payment ''promptly.'' The Bureau does not agree with individual consumers who suggest that borrowers should be permitted to make payments to the transferor during the 60 days after the transfer date, or that the transferee servicer should collect payments from the transferor. While § 1024.33(c)(1) would prevent timely but misdirected payments from being treated as late, the transferor servicer's contractual right to collect payments from the borrower would likely end after a servicing transfer.

In the final rule, the Bureau has added language to § 1024.33(c)(2)(ii) to require the transferor servicer to notify the payor of the proper recipient of payment. Although the servicing transfer notice will provide some notice to the borrower of a transfer, there may be situations in which the payor may be a different party than the borrower who received the transfer notice. In addition, the fact that the payment was sent to the transferor servicer would suggest that the transfer notice sent pursuant to § 1024.33(b) did not achieve its intended purpose. Thus, the Bureau believes it is appropriate to instruct the payor of the proper recipient of the payment and that borrowers will be better served by this requirement than by requiring the transferor to redirect the payment to the transferee.

33(d) Preemption of State Laws

RESPA section 6(h) generally provides that a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under RESPA section 6 regarding timing, content, and procedures for notification of the borrower. 12 U.S.C. 2605(h). Current § 1024.21(h) implements RESPA section 6(h) and was finalized as part of a HUD's 1994 final rule implementing RESPA section 6, which was added by section 921 of the Cranston-Gonzalez National Affordable Housing Act.[93]

Current § 1024.21(h) provides that a lender who makes a mortgage servicing loan or a servicer shall be considered to have complied with any State law or regulation requiring notice to a borrower at the time of application or transfer of servicing if the lender or servicer complies with the requirements of § 1024.21. The provision further states that any State law requiring notice to the borrower at application or transfer of servicing is preempted and that lenders and servicers shall have no other disclosure requirements. Finally, § 1024.21(h) provides that provisions of State law, such as those requiring additional notices to insurance companies or taxing authorities, are not preempted by RESPA section 6 or § 1024.21 and that this additional information may be added to a notice provided under § 1024.33 if permitted under State law.

The Bureau proposed to move § 1024.21(h) to new § 1024.33(d), along with several non-substantive amendments. The language of the Bureau's proposed preemption provision is substantially similar to the existing preemption provision with respect to the types of provisions of State laws or regulations preempted—*i.e.,* those requiring notices to the borrower at application or transfer of servicing where the servicer or lender complies with the Bureau's servicing transfer notice provisions. The Bureau notes, however, that consistent with the discussion above, the Bureau's proposal would have expanded the coverage of the preemption provision to cover subordinate-lien mortgage loans by replacing the term ''mortgage servicing loan'' in the current language with references to the term ''mortgage loans.'' The Bureau notes that expanded coverage of the preemption provision to subordinate-lien loans is consistent with the scope of statutory preemption provision in RESPA section 6(h), which applies to ''person who makes a federally related mortgage loan or a servicer.'' As discussed above, the term ''federally related mortgage loan'' includes subordinate-lien loans. 12 U.S.C. 2602(1)(A).

The Bureau received one comment from an organization of State bank regulators that requested that the Bureau omit § 1024.33(d). The organization asserted that proposed § 1024.33(d) is broader than the statutory preemption provision in RESPA section 6(h) because the proposed rule would have invalidated State laws rather than having provided that any State requirements were fulfilled by compliance with the Federal regime. The organization explained it believes RESPA section 6(h) is sufficient to address the issue of duplicative or conflicting State laws, without promulgation of implementing regulations.

Specifically, the organization objected to language in proposed § 1024.33(d) stating that State laws requiring notices to borrowers were preempted, ''and there shall be no additional borrower disclosure requirements.'' The commenter asserted that RESPA section 6(h) provides State notice laws are

[93] *See* 59 FR 65442, 65443 (1994).

considered satisfied if the RESPA timing, content, and notice procedure requirements are met—not that State laws are invalidated. The commenter asserted that RESPA section 6(h) allows State laws to apply where the or servicer has not satisfied the RESPA requirements, and that State examination processes would be hampered by an interpretation that simply invalidates State law requirements.

The Bureau is finalizing § 1024.33(d) as proposed. The Bureau has considered these objections but disagrees that the language of § 1024.33(d) as proposed is broader than the language of RESPA section 6(h) or will introduce new difficulties for State bank examiners. By adopting § 1024.33(d), the Bureau is maintaining substantially all of the language of § 1024.21(h), which was originally adopted by HUD through its final rule implementing RESPA section 6(h). By implementing RESPA section 6(h) through § 1024.33(d), the Bureau intends to maintain the current coverage of § 1024.21(h) as it has existed for many years. Accordingly, the Bureau disagrees that § 1024.33(d) will introduce any new complications into the State examination process.

The commenter was also concerned that, by implementing RESPA section 6(h) through language similar but not identical to the statutory provision, proposed § 1024.33(d) would broaden the classes of State laws that are subject to RESPA section 6(h). The commenter focused on the omission in proposed § 1024.33(d) of the word ''such'' from the statutory phrase ''complied with the provisions of any such State law''; and the omission of the phrase limiting the scope of RESPA section 6(h) to the ''timing, content, and procedures'' for notification to the borrower under RESPA section 6.[94]

The Bureau disagrees with the commenter's assertion that, by eliminating ''such'' from the statutory provision of ''complied with the provisions of any *such* State law'' (emphasis added), the Bureau has broadened the scope of the preemption from specific State laws requiring notice to broad classes of law. Section 1024.33(d) makes clear that the State laws at issue are those requiring notice to borrower at the time of application for a loan or transfer of servicing of a loan, which the Bureau believes is consistent with the types of notices identified in RESPA section 6(h). The Bureau also disagrees with the commenter's assertion that, by eliminating the statutory phrase, ''regarding timing, content, and procedures for notification of the borrower'' from the description of the requirements under section 6 with which a servicer must comply to trigger preemption, the Bureau has broadened the preemption provision. Section 1024.33(d) indicates that State laws and regulations are considered to be complied with if the lender or servicer complies with the requirements of ''this section,'' which refers to the regulatory section (1024.33) containing requirements regarding timing, content, and procedures for notifying borrowers about servicing transfers. Accordingly, the omission of the phrase regarding timing, content, and procedures does not substantively alter the meaning of section 6(h) of RESPA.

Finally, the commenter suggested there may be tension between § 1024.33(d) and § 1024.32(b), which provides that servicers can combine disclosures required by other laws or the terms of an agreement with a Federal or State regulatory agency with the disclosures required by subpart C. The Bureau does not believe these provisions are in conflict. Paragraph 33(d) applies by its terms only to notification provisions in § 1024.33. To the extent § 1024.32(b) generally provides that servicers can combine disclosures required by other laws or the terms of an agreement with a Federal or State regulatory agency with the disclosures required by subpart C, the Bureau believes that servicers would understand that the more specific rule overrides the general rule with regard to servicing transfer disclosures.

Section 1024.34 Timely Escrow Payments and Treatment of Escrow Account Balances In General

In the 2012 RESPA Mortgage Servicing Proposal, the Bureau proposed to move the substance of current § 1024.21(g) to new § 1024.34(a) to require a servicer to pay amounts owed for taxes, insurance premiums, and other charges from an escrow account in a timely manner, pursuant to the requirements of current § 1024.17(k). The Bureau also proposed in new § 1024.34(a) to make certain non-substantive amendments to the language of current § 1024.21(g). Further, the Bureau proposed to add new § 1024.34(b) to implement Dodd-Frank Act amendments to section 6(g) of RESPA. The Bureau is adopting § 1024.34 substantially as proposed, except as where noted in the section-by-section analysis below.

34(a) Timely Escrow Disbursements Required

RESPA section 6(g) provides that, if the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due. 12 U.S.C. 2605(g). Current § 1024.21(g) implements this provision by replicating the statutory nearly verbatim. Current § 1024.21(g) uses the term ''mortgage servicing loan'' in place of the statutory term ''federally related mortgage loan'' and includes a cross-reference to § 1024.17(k), which sets forth more detailed requirements for how escrow payments are made in a timely manner.

The Bureau proposed to incorporate the substance of current § 1024.21(g) into new § 1024.34(a) to provide that, if the terms of a mortgage loan require the borrower to make payments to the servicer of the mortgage loan for deposit into an escrow account to pay taxes, insurance premiums, and other charges for the mortgaged property, the servicer shall make payments from the escrow account in a timely manner, that is, on or before the deadline to avoid a penalty, as governed by the requirements in § 1024.17(k).

As discussed above, the Bureau proposed to expand the scope of current § 1024.21(g); proposed § 1024.34(a) would have replaced the term ''mortgage servicing loan'' with the term ''mortgage loan,'' which includes subordinate-lien loans. Other than this change in scope, the Bureau proposed several non-substantive technical revisions to the current provision. One commenter indicated that subordinate-lien, closed-end loans typically do not have escrow accounts. The commenter asked that the Bureau clarify whether these rules would apply to subordinate-lien loans to avoid confusion.

[94] RESPA section 6(h) provides, in full: ''Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of *any such State law or regulation* requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section *regarding timing, content, and procedures for notification to the borrower''* (emphasis added). Section 1024.33(d) provides, in relevant part: ''A lender who makes a mortgage loan or a servicer shall be considered to have complied with the provisions of any State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of servicing of a loan if the lender or servicer complies with the requirements of this section.''

The Bureau is adopting this provision as proposed. RESPA section 6(g), and both current § 1024.21(g) and new § 1024.34(a), limit the applicability of the provision, among other things, to loans whose terms require the borrower to make payments to the servicer of the loan for deposit into an escrow account to pay taxes, insurance premiums, and other charges for the mortgaged property. Thus, if a subordinate-lien mortgage loan does not require borrowers to make payments into an escrow account, § 1024.34(a) would not apply.

34(b) Refunds of Escrow Balance

34(b)(1) In General

As noted above, RESPA section 6(g) generally requires a servicer to make payments from an escrow account in a timely manner as payments become due. 12 U.S.C. 2605(g). Section 1463(d) of the Dodd-Frank Act amended RESPA section 6(g) by adding a provision requiring that any balance in any such account that is within the servicer's control at the time the loan is paid off be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the ''same lender.'' The Bureau proposed to add § 1024.34(b)(1) through (2) to implement this amendment to RESPA section 6(g).

Proposed § 1024.34(b)(1) would have provided that, within 20 days (excluding legal public holidays, Saturdays, and Sundays) of a borrower's payment of a mortgage loan in full, any amounts remaining in the escrow account shall be returned to the borrower. The Bureau explained in its proposal that the Bureau interprets the 20-day allowance in RESPA section 6(g) to apply only if the servicer refunds the escrow account balance to the borrower (and not if the servicer credits a new account with the same lender, as provided in proposed § 1024.34(b)(2)).

Several industry associations and a community bank commenter recommended that the Bureau permit servicers to net escrow funds against the payoff amount. These commenters noted that community banks frequently net escrow funds against a payoff balance, and they observed that requiring servicer to obtain a full payoff and then refund the escrow is costly and does not provide a benefit to the borrower. Another industry association commenter requested that the Bureau clarify that the borrower may direct how the escrow account funds should be applied.

Based on these comments and upon further consideration, the Bureau has decided to revise the proposed regulatory text and commentary. To clarify the relationship between § 1024.33(b)(1) and (b)(2), the Bureau has amended § 1024.34(b)(1) to provide that, ''[e]xcept as provided in paragraph (b)(2),'' a servicer shall return escrow funds to the borrower. Paragraph (b)(2) continues to give the servicer the option of applying the escrow account to the new loan in specified circumstances. Accordingly, servicers shall generally refund escrow amounts to the borrower, unless the servicer applies the escrow balance to a new account, as permitted under § 1024.33(b)(2). In addition, the Bureau has added language referring to amounts remaining in an escrow account ''that is within the servicer's control'' to replicate language appearing in the statutory provision. The Bureau has also made minor technical wording clarifications, but is otherwise adopting the text of § 1024.34(b)(1) as proposed.

The Bureau has also included comment 34(b)(1)–1 to clarify that § 1024.34(b)(1) does not prohibit a servicer from netting any remaining funds in an escrow account against the outstanding balance of the borrower's mortgage loan. The Bureau interprets RESPA section 6(g), as amended by the Dodd-Frank Act, as only requiring servicers to return escrow balances or credit a new account after the mortgage loan is paid off. The Bureau does not believe the Dodd-Frank Act amendment to RESPA section 6(g) was intended to affect the manner in which the loan is paid off. Accordingly, the Bureau has added comment 34(b)(1)–1 to clarify that servicers are not prohibited under § 1024.34(b)(1) from netting any remaining funds in an escrow account against the borrower's outstanding loan balance.

34(b)(2) Servicer May Credit Funds to a New Escrow Account

As amended by the Dodd-Frank Act, RESPA section 6(g) permits a servicer to credit the escrow account balance to an escrow account for a new mortgage loan to the borrower with the same lender if the servicer does not return the balance to the borrower within 20 business days. 12 U.S.C. 2605(g). To implement this provision, the Bureau proposed to add new § 1024.34(b)(2) to provide that a servicer may credit funds in an escrow account balance to an escrow account for a new mortgage loan as of the date of the settlement of the new mortgage loan if the new mortgage loan is provided to the borrower by a lender that: (i) Was also the lender to whom the prior mortgage loan was initially payable; (ii) is the owner or assignee of the prior mortgage loan; or (iii) uses the same servicer that serviced the prior mortgage loan to service the new mortgage loan.[95] Thus, if the servicer credits the funds in the escrow account to an escrow account for a new mortgage loan, the credit should occur as of the settlement of the new mortgage loan. The Bureau proposed to add comment 34(b)(2)–1 to clarify that a servicer is not required to credit an escrow account balance to a new mortgage loan in any circumstance in which it would be permitted to do so. Thus, a servicer would have been permitted, in all circumstances, to return funds in an escrow account to the borrower pursuant to proposed § 1024.34(a).

Several industry commenters supported proposed comment 34(b)(2)–1. However, several industry associations requested that the rule include an option for the borrower to direct how the escrow account funds should be applied. One industry trade association expressed concern that RESPA section 6(g) and proposed § 1024.34 contained an ambiguity regarding the ability of a servicer to transfer funds retained in the escrow account to a new lender with the borrower's consent. This commenter noted that, while neither RESPA section 6(g) nor § 1024.34 explicitly prohibits this practice, the use of the term ''same lender'' in the statute and proposed § 1024.34 creates uncertainty over whether a servicer may credit any excess escrow account balances to a new escrow account for a new mortgage loan with a *new lender* with the borrower's consent.

Section 1024.34(b)(2) provides that, notwithstanding § 1024.34(b)(1), if the borrower agrees, a servicer may credit any amounts remaining in an escrow account that is within the servicer's control to an escrow account for a new mortgage loan as of the date of the settlement of the new mortgage loan if the new mortgage loan is provided to the borrower by a lender specified in § 1024.34(b)(2)(i) through (iii). As in the proposal, these lenders are (i) the lender to whom the prior mortgage loan was initially payable; (ii) the lender that is the owner or assignee of the prior mortgage loan; or (iii) the lender that uses the same servicer that serviced the

[95] As the Bureau explained in its proposal, the Bureau interprets the language ''account with the same lender'' consistent with secondary market practices. In addition, ''lender'' is defined in Regulation X to mean, generally, the secured creditor or creditors named in the debt obligation and document creating the lien. For loans originated by a mortgage broker that closes a federally related mortgage loan in its own name in a table funding transaction, the lender is the party to whom the obligation is initially assigned at or after settlement.

prior mortgage loan to service the new mortgage loan.

The Bureau has considered commenters' recommendations to revise § 1024.34 to permit servicers to credit escrow accounts for loans with a new lender with the borrower's consent, but the Bureau declines to further amend proposed § 1024.34(b)(2) to expand the types of lenders with whom a borrower's new mortgage loan may be credited. The Dodd-Frank Act amended RESPA section 6(g) to require that servicers either return remaining escrow account balances to the borrower within 20 days or credit a new escrow account for a new mortgage loan with the ''same lender,'' which the Bureau has interpreted to be (i) the lender to whom the prior mortgage loan was initially payable; (ii) the lender that is the owner or assignee of the prior mortgage loan; or (iii) the lender that uses the same servicer that serviced the prior mortgage loan to service the new mortgage loan. The Bureau believes an additional exception to permit servicers to apply remaining escrow balances to lenders who are not the ''same lender'' within the meaning of RESPA section 6(g) would subsume the statutory provision. Moreover, the Bureau believes that the provision in § 1024.34(b)(1) (generally requiring servicers to return remaining escrow balances to borrowers within 20 days of loan payoff) provides borrowers with sufficient flexibility to apply their funds as they wish.

In addition, the Bureau has revised proposed § 1024.34(b)(2) to add the phrase ''if the borrower agrees'' to require servicers to obtain the borrower's consent before crediting an escrow balance to a new escrow account for a new mortgage loan. The Bureau has added this language to ensure borrowers are informed of and agree to a servicer's actions with respect to any remaining escrow balances if the servicer does not return the balance within 20 days under § 1024.34(b)(1). Moreover, unlike the 20-day period in which the servicer must otherwise refund escrow balances in § 1024.34(b)(1), § 1024.34(b)(2) does not require that funds be credited within a particular time frame; the Bureau believes it is appropriate to include a requirement in § 1024.34(b)(2) that the borrower agrees before the servicer takes an action that could delay the disposition of the borrower's escrow account balance. The Bureau also believes it is appropriate to include a requirement that borrowers agree to servicer actions under § 1024.34(b)(2) to avoid potential borrower confusion that might otherwise arise if a servicer did not refund an escrow balance within 20 days, as required under § 1024.34(b)(1). Accordingly, the Bureau believes that the addition of the requirement that a borrower must agree under § 1024.34(b)(2) is necessary and appropriate to achieve the consumer protection purposes of RESPA, including to achieve the purposes of RESPA section 6(g) and to ensure responsiveness to borrower requests. This change is therefore authorized under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA. The Bureau has also made technical revisions to proposed § 1024.34(b)(2) to clarify its relationship to § 1024.34(b)(1), in light of the Bureau's revision to § 1024.34(b)(1) in this final rule.[96]

To ensure servicers can easily credit funds to a new account, the Bureau has added comment 34(b)(2)–2, which explains that a borrower may provide consent either orally or in writing. The Bureau has also added language to § 1024.34(b)(2), referring to amounts remaining in an escrow account ''that is within the servicer's control,'' to replicate language appearing in the statutory provision. Finally, the Bureau is adopting comment 34(b)(2)–1 substantially as proposed to clarify that a servicer is not required to credit funds in an escrow account to an escrow account for a new mortgage loan and may, in all circumstances, comply with the requirements of § 1024.34 by refunding the funds in the escrow account to the borrower pursuant to § 1024.34(b)(1).[97]

Section 1024.35 Error Resolution Procedures

Section 6(e) of RESPA requires servicers to respond to borrowers' ''qualified written requests'' that relate to the servicing of a loan, and § 6(k)(1)(B) of RESPA, added by the Dodd-Frank Act, separately prohibits servicers from charging fees for responding to valid qualified written requests. Section 1463(a) of the Dodd-Frank Act amended RESPA to add new servicer prohibitions regarding borrowers' assertions of error and requests for information. Specifically, section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(C) to RESPA, which states that a servicer shall not ''fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties.'' In addition, section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(D) to RESPA which states that a servicer shall not fail to provide information regarding the owner or assignee of a borrower's loan within ten business days of a borrower's request. Neither Dodd-Frank Act provision suggests that a borrower request to correct an error or for information regarding the owner or assignee of the borrower's loan must be in the form of a ''qualified written request'' to trigger the new servicer prohibitions.

As explained in the proposal, the Bureau believed that both borrowers and servicers would be best served if the Bureau were to clearly define a servicer's obligation to correct errors or respond to information requests as required by RESPA sections 6(k)(1)(C) and (D) and the RESPA provisions regarding qualified written requests. Thus, the Bureau proposed to establish comprehensive, parallel requirements for servicers to respond to specified notices of error and information requests. The Bureau proposed § 1024.35 to set forth the error resolution requirements that servicers would be required to follow to respond to errors asserted by borrowers. The Bureau proposed § 1024.36 to set forth the information request requirements that servicers would be required to follow to respond to requests for information from borrowers. In doing so, the Bureau intended to establish servicer procedural requirements for error resolution and information requests that are consistent with the requirements applicable to a ''qualified written request'' that relates to the servicing of a loan under RESPA. Rather than create overlapping regimes that might confuse and frustrate both borrowers and servicers alike, the Bureau intended to create a uniform regulatory regime by subsuming the qualified written request rules in the new regime established and authorized by the Dodd-Frank Act for notices of error and requests for information more generally. The Bureau believed such a single regulatory regime would reduce the burden on both borrowers and servicers who otherwise would expend wasteful resources navigating between two separate regulatory regimes and parsing form requirements applicable to qualified written requests. To that end, the Bureau proposed to delete current § 1024.21(e), the existing regulations concerning qualified written requests, and provide instead that a qualified written request asserting an error or

[96] The Bureau has added the following language to § 1024.34(b)(2): ''Notwithstanding paragraph (b)(1) of this section * * *''

[97] The Bureau has made a technical correction to comment 34(b)(2)–1 to replace the proposed comment's reference to ''§ 1024.34(a)'' with a corrected reference to ''§ 1024.34(b)(1).''

requesting information regarding the servicing of a mortgage loan would be subject to the new provisions governing notices of error and information requests, as applicable.[98]

Because the Bureau understands that the majority of borrower complaints are submitted orally, the Bureau proposed that both written and oral notices of error would be subject to the error resolution provisions. At the same time, the Bureau recognized that permitting oral error notices would significantly expand servicers' responsibility to respond to notices of error. To enable servicers to allocate resources to respond to errors in a manner that would benefit borrowers, the Bureau proposed a limited list of errors to which the error resolution provisions would apply. As discussed in more detail below, industry commenters were unanimously opposed to applying error resolution requirements under proposed § 1024.35 to errors asserted orally. Consumer advocacy group commenters expressed support for applying the requirements under § 1024.35 to oral error notices, but were strongly opposed to the proposal to limit those errors subject to error resolution procedures under proposed § 1024.35 to a finite list. Industry commenters supported inclusion of a limited list. Based on the Bureau's consideration of these comments and the analysis below, the final rule does not require servicers to comply with error resolution procedures under § 1024.35 for oral notices of error. At the same time, the final rule includes a catch-all provision that defines as an error subject to the error resolution procedures under § 1024.35 errors relating to the servicing of a borrower's mortgage loan. Moreover, the final rule provides that a servicer's policies and procedures should be reasonably designed to provide information to borrowers who are not satisfied with the resolution of a complaint or request for information submitted orally of the procedures for submitting written notices of error and information requests.

Some credit unions, community banks and their trade associations asserted that the Bureau should exempt small servicers from error resolution requirements under § 1024.35 and information request requirements under § 1024.36. Commenters argued that small servicers effectively communicate with borrowers regarding complaints and information requests, and especially disfavored the proposed requirement that small servicers respond to oral notices of error and information requests. In contrast, a consumer advocacy group commenter asserted that exempting small servicers would be inappropriate, as all servicers should be capable of complying with error resolution and information request requirements. Having carefully considered these comments, the Bureau declines to exempt small servicers from error resolution procedures under § 1024.35 and information request procedures under § 1024.36. As discussed above, §§ 1024.35 and 1024.36, as finalized, do not require servicers to comply with such procedures for oral submissions by borrowers. In light of this adjustment, final §§ 1024.35 and 1024.36 primarily provide clarification as to existing obligations under RESPA and Regulation X. Moreover, the burden on all servicers is significantly mitigated. For these reasons, and the reasons discussed below, the Bureau declines to exempt small servicers from error resolution and information request procedures.

Legal Authority

Section 1024.35 implements section 6(k)(1)(C) of RESPA, and to the extent the requirements are also applicable to qualified written requests, sections 6(e) and 6(k)(1)(B) of RESPA. Pursuant to the Bureau's authorities under sections 6(j), 6(k)(1)(E), and 19(a) of RESPA, the Bureau is also adopting certain additions and certain exemptions to these provisions. As explained in more detail below, these additions and exemptions are necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to consumer requests and complaints and the provision and maintenance of accurate and relevant information.

35(a) Notice of Error

Section 6(k)(1)(C) of RESPA, as added by section 1463(a) of the Dodd-Frank Act, prohibits servicers from failing to take timely action to respond to requests of borrowers to correct certain errors. However, unlike section 6(e) of RESPA, which sets forth specific rules for submission of and response to ''qualified written requests,'' section 6(k)(1)(C) of RESPA does not specify that borrowers' requests to correct errors must be submitted in any particular format to trigger the new prohibition.

Proposed § 1024.35(a) stated that a servicer must comply with the requirements of § 1024.35 for a notice of error made either orally or in writing and that included the name of the borrower, information that enabled a servicer to identify the borrower's mortgage loan account, and the error the borrower believed had occurred. Section 1024.35(a) was intended to implement RESPA section 6(k)(1)(C), with respect to borrower requests to assert errors generally, and RESPA section 6(e), with respect to qualified written requests by borrowers to correct errors, by defining what constituted a proper borrower request within the meaning of these provisions. The Bureau received comment on proposed § 1024.35(a) and is finalizing it with changes as discussed below.

Substance Over Form

The proposal included proposed comment 35(a)–2, which would have clarified that the substance of the notice of error would determine the servicer's obligation to comply with the error resolution requirements, information request requirements, or both, as applicable. Proposed comment 35(a)–2 stated that no particular language (such as ''qualified written request'' or ''notice of error'') is necessary to set forth a notice of error. The Bureau did not receive comment regarding proposed comment 35(a)–2 and is adopting it as proposed.

Qualified Written Requests

Proposed § 1024.35(a) would have required a servicer to treat a qualified written request that asserts an error relating to the servicing of a loan as a notice of error subject to the requirements of § 1024.35. The Bureau intended to propose servicer obligations applicable to qualified written requests that were the same as requirements applicable to other notices of error that met the requirements for assertions of error under § 1024.35(a). One consumer group commenter expressed support for the proposal because it dispensed with technicalities about whether an assertion of error constituted a valid qualified written request. A trade association commenter said the Bureau failed to define a valid qualified written request and said that proposed § 1024.35 does not fully integrate section 6(e) of RESPA into the proposed error resolution procedures. Another trade association of private mortgage lenders said the proposal did not make clear what constitutes a qualified written request and to what extent servicers must continue to comply with existing law regarding qualified written requests. Having considered these comments, the Bureau notes that final § 1024.31 defines the term ''qualified written request.'' In addition, as

[98] Notably, a notice of error may also constitute a direct dispute under Regulation V, which implements the Fair Credit Reporting Act, if it complies with the requirements in 12 CFR 1022.43.

discussed above, the Bureau has added new comment 31 (qualified written request)-2, which clarifies that the error resolution and information request requirements in §§ 1024.35 and 1024.36 apply as set forth in those sections irrespective of whether the servicer receives a qualified written request. Finally, the Bureau has revised proposed § 1024.35(a) to make clear in the final rule that a qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error for purposes of § 1024.35 for which a servicer must comply with all requirements applicable to a notice of error.

Oral Notices of Error

The Bureau proposed to require servicers to comply with the requirements under § 1024.35 for errors asserted by a borrower either orally or in writing. The Bureau believed this approach was warranted because, based on its discussions with consumers, consumer advocates, servicers, and industry trade associations during outreach, the Bureau learned that the vast majority of borrower complaints are asserted orally rather than in writing. The proposal solicited comment regarding whether servicers should be required to comply with the error resolution requirements under § 1024.35 for notices of error received orally.

The Bureau received a number of comments from both consumer groups and various industry members on this question. Consumer advocacy group commenters reiterated their support for applying the requirements under § 1024.35 to notices of error made orally, noting that consumers most often assert errors and request information orally rather than in writing. In contrast, consumer commenters on Regulation Room disfavored the proposal's application of the error resolution requirements under § 1024.35 to notices of error received orally. Consumer commenters, citing their negative experiences attempting to request information from servicers orally, were concerned that encouraging an oral process would weaken consumer protections. Industry commenters also opposed the proposal's application of the error resolution requirements under § 1024.35 to oral notices of error, albeit for different reasons. Industry commenters asserted that applying error resolution requirements to oral notices of error would create new burdens for servicers regarding tracking the notices of error and monitoring borrowers' receipt of written acknowledgements and responses. Industry commenters further stressed that a written process would provide more clarity and certainty as to the nature of the error the borrower asserted and the communications from the servicer to the borrower during the conversation. Further, industry commenters asserted, written notices of error would help avoid situations in which the borrower and servicer have differing recollections as to the content of the borrower's notice of error and the servicer's response during the conversation. Absent a written record, commenters said, servicers would need to record conversations with borrowers to minimize the significant litigation risk. The commenters asserted that recording conversations could be especially costly for small servicers and would require the borrower's consent in many jurisdictions. Some industry commenters also noted their belief that RESPA requires that borrowers assert errors in writing.

Many of the concerns articulated by industry commenters were consistent with those expressed by small entity representatives with whom the Small Business Review Panel conducted outreach in advance of the proposal. The Small Business Review Panel recommended that the Bureau consider requiring small servicers to comply with the error resolution procedures under § 1024.35 only when borrowers asserted errors in writing.[99] The Small Business Review Panel also recommended that the Bureau consider adopting a more flexible process for tracking errors and demonstrating compliance that could be used by small servicers.[100]

The Bureau had anticipated many of these comments and had proposed to delimit the category of issues that could be raised through the error process to mitigate the challenges of identifying oral assertions of error. Nonetheless, after consideration of these comments and the comments received with respect to the Bureau's definition of error as discussed below, the Bureau is amending proposed § 1024.35(a) to apply the error resolution requirements under § 1024.35 solely to notices of error received in writing, and the Bureau is broadening the definition of error as well. While borrowers may continue to assert errors orally, servicers will not be required to comply with the formal error resolution requirements outlined in § 1024.35 for such assertions of errors. Instead, the Bureau has added § 1024.38(b)(1)(ii), which generally requires that servicers maintain policies and procedures that are reasonably designed to ensure that the servicer can investigate, respond to, and, as appropriate, make corrections in response to complaints, whether written or oral, asserted by borrowers. In addition, the Bureau has added a requirement in § 1024.38(b)(5) that servicers establish policies and procedures reasonably designed to achieve the objective of informing borrowers of the procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36.

The Bureau believes that imposing the formal requirements under § 1024.35 only to written notices of error and addressing oral notices of error instead through the policies and procedures requirements under § 1024.38 strikes the appropriate balance between ensuring responsiveness to consumer requests and complaints and mitigating the burden on servicers of following and demonstrating compliance with specific procedures with respect to oral notices of error. The Bureau believes that the need to provide additional flexibility to servicers with respect to responding to oral notices of error is particularly necessary in light of the Bureau's further decision, as discussed below, to expand the list of covered errors under § 1024.35 to include a catch-all provision for errors relating to the servicing of mortgage loans. On the one hand, the Bureau is persuaded, for the reasons discussed further below, that it should not delimit the set of issues that consumers should be able to raise within the error resolution process. On the other hand, the Bureau also is persuaded that determining from a telephone call from a borrower to a servicer whether the borrower is asserting an error rather than simply, for example, posing a question can be challenging. Drawing this line—and triggering the investigation and response requirement with respect to errors—would be exponentially more difficult if any concern relating to the servicing of the borrower's mortgage loan could constitute an error.

The final rule will thus require servicers to maintain policies and procedures reasonably designed to ensure that servicers investigate, respond to and, as appropriate, resolve oral complaints on a more informal basis, without having to follow the formal error resolution requirements, so long as the servicer has policies and procedures reasonably designed to

[99] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* 30 (Jun, 11, 2012).

[100] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* 30 (Jun, 11, 2012).

ensure that borrowers are informed of the written error resolution procedures. At the same time, the final rule will provide a broader definition of errors subject to the requirements of § 1024.35.

Borrower's Representative

Proposed comment 35(a)–1 would have clarified that a notice of error submitted by an agent of the borrower is considered a notice of error submitted by the borrower. Proposed comment 35(a)–1 would have further permitted servicers to undertake reasonable procedures to determine if a person who claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf. Several industry commenters said it would be costly and burdensome to determine whether a third party has authority to act on a borrower's behalf. Many requested clarification as to what the Bureau believes constitutes acting on the borrower's behalf. Further, some industry commenters expressed concern about potential liability for the improper release of information, including the risk of violating State or Federal privacy laws, as well as what commenters perceived to be increased risk of identity theft and fraud. Finally, a few industry commenters took the position that only the borrower, but not the borrower's agent, should be permitted to assert notices of error.

Section 6(e)(1)(A) of RESPA states that a qualified written request may be provided by a ''borrower (or an agent of the borrower).'' Thus, one consumer advocacy group commenter noted that the proposal to permit borrowers' agents to submit notices of error is consistent with the statutory requirement. Consumer groups also requested that the Bureau clarify that the timelines for error resolution will not toll during the period in which the servicer attempts to validate through reasonable policies and procedures that a third party purporting to act on a borrower's behalf is, in fact, an agent of the borrower.

Having considered these comments, the Bureau is amending proposed comment 35(a)–1 to address servicers' concerns about potential liability for the improper release of information. The final comment clarifies that servicers may have reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring purported agents to provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. Upon receipt of such documentation, the servicer shall treat a notice of error as having been submitted by the borrower. The Bureau acknowledges that requiring servicers to respond to error notices submitted by borrowers' agents is more costly than limiting the requirement to borrowers' notices, but notes that this approach is consistent with section 6(e)(1)(A) of RESPA with respect to a qualified written request. The Bureau believes that it is necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to borrower requests and complaints, to apply this requirement to all written notices of error, especially since borrowers who are experiencing difficulty in making their mortgage payments or in dealing with their servicer may turn, for example, to a housing counselor or other knowledgeable persons to assist them in addressing such issues. The Bureau declines to define further the term ''agent.'' The concept of agency has historically been defined under State or other applicable law. Thus, it is appropriate for the definition to defer to applicable State law regarding agents.

35(b) Scope of Error Resolution

Section 6(e) of RESPA requires servicers to respond to ''qualified written requests'' asserting errors or requesting information relating to the servicing of a federally-related mortgage loan. Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(C), which states that a servicer shall not ''fail to take timely action to respond to a borrower's request to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties.'' The Bureau believes that standard servicer duties are those typically undertaken by servicers in the ordinary course of business. Such duties include not only the obligations that are specifically identified in section 6(k)(1)(C) of RESPA, but also those duties that are defined as ''servicing'' by RESPA, as implemented by this rule, as well as duties customarily undertaken by servicers to investors and consumers in connection with the servicing of a mortgage loan. These standard servicer duties are not limited to duties that constitute ''servicing,'' as defined in this rule, and include, for example, duties to comply with investor agreements and servicing program guides, to advance payments to investors, to process and pursue mortgage insurance claims, to monitor coverage for insurance (*e.g.,* hazard insurance), to monitor tax delinquencies, to respond to borrowers regarding mortgage loan problems, to report data on loan performance to investors and guarantors, and to work with investors and borrowers on options to mitigate losses for defaulted mortgage loans.[101]

Limited List

The Bureau proposed § 1024.35(b) to implement section 6(k)(1)(C) of RESPA. Proposed § 1024.35(b) set forth a limited list of errors to which the error resolution provisions would apply. The Bureau proposed a limited list because it believed such a list would provide certainty to both borrowers and servicers regarding the types of errors that are subject to the error resolution process. Further, as discussed above, the Bureau believed a limited list would enable servicers to allocate resources to respond to errors in a manner that would ultimately benefit borrowers. The Bureau also considered that it was proposing to require servicers to respond to both oral and written error notices and information requests in compressed time periods. Finally, the Bureau considered the feedback the Small Business Review Panel received from small entity representatives regarding whether the error resolution procedures should include a catch-all provision to the enumerated list of errors. In general, small entity representatives commented favorably on the Bureau's proposal to delimit the list of errors.

The Bureau solicited comment regarding whether the list of errors to which error resolution procedures would apply should include a catch-all provision or be limited to an enumerated list. Industry commenters supported the establishment of a limited list of errors, noting certainty, clarity, and notice as its primary benefits. Consumer group commenters generally opposed limiting notices of error to an enumerated list. Consumer advocates asserted that the proposal was a departure from and offered fewer consumer protections than the existing qualified written request process under section 6 of RESPA, which incorporates a catch-all provision for errors relating to the servicing of a borrower's mortgage loan. Some consumer advocates noted the reference in section 6(k)(1)(C) of RESPA to ''standard servicer's duties,'' and argued that the catch-all provision should likewise cover all errors relating to ''standard servicer's duties.'' In addition, some consumer group commenters noted the fluid nature of

[101] In providing these examples, the Bureau is making no judgment regarding whether they fall within the meaning of ''servicing'' as defined in this rule.

mortgage servicing and cautioned that a limited list of covered errors lacks the flexibility necessary to ensure that consumers will be adequately protected as servicing practices evolve.

After consideration of these comments, and as discussed further below, the Bureau has decided to revise proposed § 1024.35(b) to include a catch-all that includes as an error errors relating to the servicing of a borrower's mortgage loan. In addition, as discussed below, final § 1024.35(b) substantively retains the enumerated errors listed in the proposal. The Bureau believes revising proposed § 1024.35(b) in this manner is necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to consumer requests and complaints in light of the fluidity of the mortgage market and the inability to anticipate in advance and delineate all types of errors related to servicing that borrowers may encounter, and which should be subject to the error resolution process under § 1024.35 to prevent borrower harm. At the same time, the Bureau believes that the costs and burdens created by having a more expansive definition of the term error are significantly mitigated because, as discussed above, the final rule applies error resolution requirements under § 1024.35 only to written assertions of error. Moreover, the final rule implements an error resolution process that is consistent with the existing process for responding to qualified written requests under RESPA section 6, which includes a catch-all for servicing-related errors.

Covered Errors

The Bureau proposed comment 35(b)–1, which would have clarified that a servicer would not be required to comply with the requirements of proposed § 1024.35(d) and (e) if a notice related to something other than one of the types of errors in proposed § 1024.35(b). The proposed comment provided examples of categories of excluded errors that would not be considered covered errors pursuant to proposed § 1024.35(b). These included matters relating to the origination or underwriting of a mortgage loan, matters relating to a subsequent sale or securitization of a mortgage loan, and matters relating to a determination to sell, assign, or transfer the servicing of a mortgage loan.

Industry commenters supported the proposed exclusion, noting that the categories the Bureau proposed to exclude are unrelated to servicing and largely beyond servicers' knowledge. Some consumer group commenters objected that the proposed exclusions were overly broad. The Bureau believes that a mortgage servicer is generally not in a position to investigate or resolve borrower complaints regarding potential errors that may have occurred during an origination, underwriting, sale, or securitization process. Accordingly, the Bureau is adopting comment 35(b)–1 substantially as proposed. The final comment clarifies that, in addition to § 1024.35(d) and (e), servicers need not comply with § 1024.35(i) with respect to a borrower's assertion of an error that is not defined as an error in § 1024.35(b). Final comment 35(b)–1 also includes a clarification that the failure to transfer accurately and timely information relating to a borrower's loan account to a transferee servicer is an error for purposes of § 1024.35, while matters relating to an initial determination to transfer servicing are not.

A trade association of reverse mortgage lenders also commented regarding the scope of the error resolution procedures, urging the Bureau to exclude reverse mortgages from the scope of covered error. Having considered this comment, the Bureau notes that servicers of reverse mortgage transactions are already subject to the qualified written request procedures set forth in section 6(e) of RESPA and § 1024.21(e) of Regulation X. Likewise, pursuant to final § 1024.30, the error resolution requirements under § 1024.35 apply to reverse mortgage transactions that are mortgage loans, as that term is defined in final § 1024.31. Accordingly, to the extent that a borrower asserts an error under § 1024.35 that is applicable to such a reverse mortgage, the servicer shall comply with error resolution procedures as to the error. For example, because § 1024.30 generally excludes servicers of reverse mortgage transactions from § 1024.41, errors asserted under § 1024.35(b)(9) and (10), discussed below, are not applicable to reverse mortgage transactions.

35(b)(1)

Proposed § 1024.35(b)(1) would have included as a covered error a servicer's failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments. The Bureau proposed § 1024.35(b)(1) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to allocation of payments for a borrower's account and ''other standard servicer's duties.''

A failure to accept a proper payment will necessarily have implications for the correct application of borrower payments. The Bureau further believes that proper acceptance of payments is a standard servicer duty. Moreover, proper acceptance of payments is, by definition, servicing, and already subject to the qualified written request procedure set forth in section 6(e) of RESPA and current § 1024.21(e) of Regulation X. The Bureau did not receive comment regarding proposed § 1024.35(b)(1) and is adopting it as proposed.

35(b)(2)

Proposed § 1024.35(b)(2) would have included as an error a servicer's failure to apply an accepted payment to the amounts due for principal, interest, escrow, or other items pursuant to the terms of the mortgage loan and applicable law. The Bureau proposed § 1024.35(b)(2) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to the allocation of payments for a borrower's account and other standard servicer duties. Proper allocation of payments is also, by definition, servicing, and already subject to the qualified written request procedures set forth in section 6(e) of RESPA and current § 1024.21(e) of Regulation X. The Bureau did not receive comment regarding proposed § 1024.35(b)(2) and is adopting it as proposed.

35(b)(3)

Proposed § 1024.35(b)(3) would have included as an error a servicer's failure to credit a payment to a borrower's mortgage loan account as of the date of receipt, where such failure results in a charge to the consumer or the furnishing of negative information to a consumer reporting agency. The Bureau proposed § 1024.35(b)(3) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to the allocation of payments for a borrower's account and other standard servicer duties. A failure to credit a payment as of the date of receipt may have implications for the correct application of borrower payments. A servicer's failure to credit a payment promptly may cause the servicer to report to a borrower improper information regarding the amounts owed by the borrower and may cause a servicer to misapply other payments received by the borrower. Further, a servicer's failure to credit borrower payments promptly may generate improper late fees and other charges. The Bureau further believes that prompt crediting of borrower payments is a standard servicer duty as set forth in section 6(k)(1)(C) of RESPA. The Bureau also observes that prompt crediting of borrower payments is, by definition,

servicing and, therefore, is subject to the qualified written request procedure set forth in section 6(e) of RESPA.

As the Bureau noted in the 2012 RESPA Servicing Proposal, prompt crediting of payments to consumers is required by section 129F of TILA, which was added by section 1464 of the Dodd-Frank Act and will be implemented by § 1026.36(c)(1) in the 2013 TILA Servicing Final Rule. For a mortgage loan secured by a principal dwelling, TILA section 129F mandates that servicers shall not fail to credit a payment to a 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 furnishing of negative information to a consumer reporting agency. *See* 15 U.S.C. 1639f. TILA section 129F provides a specific exception for payments that do not conform to a servicer's written requirements, but nonetheless are accepted by the servicer, in which case the servicer shall credit the payment as of five days after receipt. *See* 15 U.S.C. 1639f(b). Servicers of mortgage loans covered by TILA section 129F have a duty to comply with that provision.

A credit union and a non-bank servicer commented on proposed § 1024.35(b)(3). The credit union requested greater flexibility as to payments received outside of the servicer's operating hours or at the end of the business day. The non-bank servicing company requested clarification that the proposal was not intended to impact servicers' ability as to scheduled interest loans to credit an account as of the receipt date and apply payment as of the scheduled due date. The Bureau believes § 1024.35(b)(3) as proposed would have provided servicers sufficient flexibility to credit payments, as it would have limited errors to where the failure to credit a payment as of the date of receipt results in a charge to consumers or furnishing of negative information to a credit reporting agency. Nevertheless, the Bureau recognizes that there would be little consumer benefit to subjecting servicers to potentially overlapping standards as to prompt crediting of borrowers' accounts. At the same time, for those loans that are not subject to TILA section 129F, the Bureau believes that it would be inappropriate to extend the requirements of that provision beyond the scope mandated by Congress, as implemented by § 1026.36(c)(1) of the 2013 TILA Servicing Final Rule. Accordingly, the Bureau is revising the proposed language in final § 1024.35(b)(3) to make clear that a servicer's failure to credit a payment to a borrower's mortgage loan account as of the date of receipt is an error only in those circumstances in which the failure to credit as of the date of receipt would contravene § 1026.36(c)(1). Final § 1024.35(b)(3) defines as an error the failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 CFR 1026.36(c)(1). Because servicers will already be required to comply with § 1026.36(c)(1) with respect to certain mortgage loans they service, the Bureau does not believe that defining their failure to do so as an error imposes additional burden on servicers.

35(b)(4)

Proposed § 1024.35(b)(4) would have included as an error a servicer's failure to make disbursements from an escrow account for taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, as required by current § 1024.17(k) and proposed § 1024.34(a), or to refund an escrow account balance in a timely manner as required by proposed § 1024.34(b). The Bureau proposed § 1024.35(b)(4) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to the allocation of payments for a borrower's account and other standard servicer duties.

In the normal course of business, servicers typically engage in collecting payments from borrowers to fund escrow accounts and disburse payments from escrow accounts to pay borrower obligations for taxes, insurance premiums, and other charges. Servicers typically undertake this obligation on behalf of investors because a borrower's maintenance of an escrow account reduces risk for investors that unpaid taxes may generate tax liens that are higher in priority than a lender's mortgage lien and that unpaid insurance may cause lapses in insurance coverage that present risk for investors in the event of a loss. Servicers are required to make disbursements from escrow accounts in a timely manner pursuant to section 6(g) of RESPA and are required to account for the funds credited to an escrow account pursuant to section 10 of RESPA. In addition, the proper disbursement of escrow funds is, by definition, servicing and, therefore, is currently subject to the qualified written request procedure set forth in section 6(e) of RESPA and current § 1024.21(e) of Regulation X. A credit union commenter agreed that proposed § 1024.35(b)(4) should constitute an error. For the reasons set forth above and in the proposal, the Bureau is adopting § 1024.35(b)(4) as proposed.

35(b)(5)

Proposed § 1024.35(b)(5) would have included as an error a servicer's imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower. The Bureau proposed § 1024.35(b)(5) to implement, in part, section 6(k)(1)(C) of RESPA with respect to standard servicer duties. The Bureau believes that it is a typical servicer duty, both to the borrower and to the servicer's principal, to ensure that the servicer has a reasonable basis to impose a charge on a borrower.

The Bureau believes that servicers should not impose fees on borrowers that are not bona fide—that is, fees that a servicer does not have a reasonable basis to impose upon a borrower. Examples of non-bona fide charges include such common sense errors as late fees for payments that were not late, default property management fees for borrowers that are not in a delinquency status that would justify the charge, charges from service providers for services that were not actually rendered with respect to a borrower's mortgage loan account, and charges for force-placed insurance in circumstances not permitted by final rule § 1024.37.

Improper fees harm both mortgage loan borrowers and the investors that are mortgage servicers' principals. Improper and uncorrected fees harm borrowers by taking funds that may otherwise be used to keep a mortgage loan current. Further, improper fees reduce recovery values available to investors from foreclosures or loss mitigation activities. Servicers that operate in good faith in the normal course of business refrain from imposing charges on borrowers that the servicer does not have a reasonable basis to impose and correct errors relating to those fees when they arise.

Industry commenters asserted that the term ''reasonable basis'' is open to interpretation and thus urged the Bureau to further define the term or to otherwise provide additional clarification. One credit union trade association suggested that the Bureau prohibit fees for which the servicer lacks a legal basis. Having considered these comments, the Bureau believes it is appropriate to provide more clarity as to what constitutes a fee for which a servicer lacks a reasonable basis. Accordingly, the Bureau has added new comment 35(b)–2, which provides examples of fees that a servicer lacks a reasonable basis to impose. The Bureau

is otherwise adopting § 1024.35(b)(5) as proposed.

35(b)(6)

Proposed § 1024.35(b)(6) would have included as an error a servicer's failure to provide an accurate payoff balance to a borrower upon request pursuant to 12 CFR 1026.36(c)(3). The Bureau intended through this provision to implement TILA section 129G, which was added by section 1464 of the Dodd-Frank Act and which requires that a creditor or servicer of a home loan send an accurate payoff balance amount to the borrower within a reasonable time, but in no case more than seven business days after the receipt of a written request for such balance from or on behalf of a borrower. The Bureau proposed § 1024.35(b)(6) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to a final balance for purposes of paying off a mortgage loan and standard servicer duties.

Servicers already have an obligation to comply with the timing requirements of section 129G of TILA with respect to any mortgage loan that constitutes a ''home loan'' as used in section 129G of TILA.[102] The Bureau proposed § 1024.35(b)(6) because it believed, consistent with TILA section 129G, that borrowers require accurate payoff statements to manage their mortgage loan obligations. A payoff statement is necessary any time a borrower repays a mortgage loan, and servicers routinely provide payoff statements for borrowers to refinance or pay in full their mortgage loan obligations. However, consumer advocates have indicated that servicers have failed, or refused, to provide payoff statements to certain borrowers or have required borrowers to make a payment on a mortgage loan as a condition of fulfilling the borrower's request for a payoff statement.[103] Any such conduct has the perverse effect of impeding a borrower's ability to pay a mortgage loan obligation in full.

The Bureau did not receive comment regarding proposed § 1024.35(b)(6) but is revising the proposed language in the final rule to make clear that the failure to provide a payoff balance is an error only in those circumstances in which TILA section 129G, as implemented by § 1026.36(c)(3) of the 2013 TILA Servicing Final Rule, applies. The Bureau recognizes that there would be little consumer benefit to subjecting servicers to potentially overlapping standards under TILA and RESPA as to the provision of a payoff statement. At the same time, for those loans that are not subject to TILA section 129G, the Bureau believes that it would be inappropriate to extend the requirements of the provision beyond the scope mandated by Congress, as implemented by § 1026.36(c)(3).

Final § 1024.35(b)(6) defines as an error the failure to provide an accurate payoff balance amount upon a borrower's request in violation of section § 1026.36(c)(3). Because servicers will already be required to comply with the timeframes set forth in § 1026.36(c)(3) with respect to certain mortgage loans they service, the Bureau does not believe that defining their failure to do so as an error imposes additional burden on servicers.

35(b)(7)

Proposed § 1024.35(b)(7) would have included as an error a servicer's failure to provide accurate information to a borrower with respect to loss mitigation options available to the borrower and foreclosure timelines that may be applicable to the borrower's mortgage loan account, as required by proposed §§ 1024.39 and 1024.40. The Bureau proposed § 1024.35(b)(7) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to avoiding foreclosure, as well as errors relating to standard servicer duties.

In order to pursue loss mitigation options that may benefit both the borrower and the owner or assignee of the borrower's mortgage loan, a borrower requires accurate information about the loss mitigation options available to the borrower, the requirements for receiving an evaluation for any such loss mitigation option, and the applicable timelines relating to both the evaluation of the borrower for the loss mitigation options and any potential foreclosure process.

The Bureau believes that borrowers may benefit from asserting errors with respect to a servicer's failure to provide information regarding loss mitigation options that may be available to the borrower but for which the servicer has not provided information to the borrower. By correcting such errors and providing the borrower with accurate information regarding such loss mitigation options, a servicer can help a borrower receive an evaluation for available loss mitigation options pursuant to § 1024.41 and to potentially receive an offer of such an option, which may be mutually beneficial to the borrower and the owner or assignee of the borrower's mortgage loan.

Further, the Bureau believes that the National Mortgage Settlement, servicer participation in Home Affordable Modification Program (HAMP) sponsored by the U.S. Department of the Treasury (Treasury) and HUD, and servicer participation in other loss mitigation programs required by Fannie Mae and Freddie Mac demonstrate that, at present, servicers typically provide borrowers with information regarding loss mitigation options and foreclosure and that providing such information to borrowers is a standard servicer duty.

One non-bank servicer and one credit union commented on proposed § 1024.35(b)(7). Both advocated against inclusion of a servicer's failure to provide information regarding loss mitigation options as an error subject to error resolution procedures under § 1024.35. The credit union asserted that lenders are incentivized to provide accurate loss mitigation information, as they try to avoid foreclosing upon properties.

The Bureau believes it is critical for borrowers to have information regarding available loss mitigation options and requiring that a servicer comply with error resolution procedures as to a borrower assertion that a servicer failed to provide such information is important to ensure that borrowers receive this information. The Bureau does not believe there is significant risk that the rule will result in servicers limiting options offered to consumers, as investors and guarantors dictate the loss mitigation options available to borrowers. Further, the Bureau notes that the failure of a servicer to provide accurate information will create liability under this section only if the servicer fails to correct the error when called to its attention. Accordingly, the Bureau is adopting § 1024.35(b)(7) as proposed, except that the Bureau has removed the reference to § 1024.40 in light of other changes to the proposed rule.

35(b)(8)

Proposed § 1024.35(b)(8) would have included as an error a servicer's failure to accurately and timely transfer information relating to a borrower's mortgage loan account to a transferee servicer. The Bureau proposed § 1024.35(b)(8) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to standard servicer duties.

[102] In the Bureau's 2013 TILA Servicing Final Rule, the Bureau interpreted the use of the term ''home loans'' to include consumer credit transactions secured by a consumer's dwelling.

[103] *See, e.g., Mortgage Servicing: An Examination of the Role of Federal Regulators in Settlement Negotiations and the Future of Mortgage Servicing Standards: Joint Hearing Before the Subcomm. on Fin. Inst. & Consumer Credit & Subcomm. on Oversight & Investigations of the Hous. Fin. Serv. Comm.,* 112th Cong. 76 (July 7, 2011) (statement of Mike Calhoun, President, Center for Responsible Lending).

The Bureau believes that the accurate and timely transfer of information relating to a borrower's mortgage account is a standard servicer duty. In the normal course of business, servicers typically anticipate that they will be required to transfer servicing for some mortgage loans they service. Owners or assignees of mortgage loans typically have rights to transfer servicing for a mortgage loan pursuant to the requirements set forth in mortgage servicing agreements. Servicers generally are required to develop capacity for transferring information to transferee servicers in order to comply with such obligations to owners or assignees of mortgage loans. Further, servicers generally are required to develop capacity to download data for transferred mortgage loans onto the servicer's servicing platform. Borrowers may be harmed, however, if information that is transferred to transferee servicers is not accurate, current, or is not properly captured by a transferee servicer. In certain circumstances, such failure may cause errors to occur relating to allocating payments, calculating final balances for purposes of paying off a mortgage loan, or avoiding foreclosure.

Accordingly, the 2013 RESPA Servicing Final Rule requires servicers to maintain policies and procedures reasonably designed to achieve the objective of facilitating servicing transfers. Specifically, § 1024.38(b)(4)(i) provides that as a transferor servicer, a servicer must maintain policies and procedures reasonably designed to ensure the timely transfer of all information and documents in the possession or control of the servicer relating to a transferred mortgage loan to a transferee servicer in a form and manner that ensures the accuracy of the information and enables a transferee servicer to comply with its obligations to the owner or assignee of the mortgage loan and applicable law.

Under proposed § 1024.35(b)(8), a servicer's failure to accurately and timely transfer information relating to a borrower's mortgage loan account to a transferee servicer would constitute an error. The Bureau believes that by defining an error in this way, a borrower will have a remedy to ensure that a transferor servicer provides information to a transferee servicer that accurately reflects the borrower's account consistent with the obligations applicable to a servicer's general servicing policies and procedures. The Bureau did not receive comment regarding § 1024.35(b)(8) and is adopting it as proposed.

35(b)(9) and 35(b)(10)

Proposed § 1024.35(b)(9) would have included as an error a servicer's failure to suspend a foreclosure sale in the circumstances described in proposed § 1024.41(g). The Bureau proposed § 1024.35(b)(9) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to avoiding foreclosure and other standard servicer duties.

Proposed § 1024.41(g) provided that a servicer that offers loss mitigation options to borrowers in the ordinary course of business would be prohibited from proceeding with a foreclosure sale when a borrower has submitted a complete application for a loss mitigation option by a specified date unless the servicer denies the borrower's application for a loss mitigation option (including any appeal thereof), the borrower rejects the servicer's offer of a loss mitigation option, or the borrower fails to perform on a loss mitigation agreement. These requirements are discussed in more detail in the section-by-section analysis for § 1024.41 below.

A credit union commenter asserted that failure to suspend a foreclosure sale in the circumstances described in proposed § 1024.41(g) should not be considered an error subject to the error resolution requirements under § 1024.35 because, the commenter reasoned, a lender will delay foreclosure when there is a legitimate need to do so. Having considered the comment, and as explained with respect to § 1024.41, the Bureau continues to believe it is appropriate to prohibit a servicer from completing the foreclosure process until after a borrower has had a reasonable opportunity to submit an application for a loss mitigation option and the servicer has completed the evaluation of the borrower for a loss mitigation option, and that a borrower should be able to assert an error where a servicer fails to comply with these procedures.

The Bureau, however, is revising proposed § 1024.35(b)(9) in light of changes to proposed § 1024.41. Final § 1024.35(b)(9) defines as an error subject to error resolution requirements under § 1024.35 making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j). The Bureau has also added new § 1024.35(b)(10) which defines as an error moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).

35(b)(11)

New § 1024.35(b)(11) includes a catch-all that applies error resolution procedures to errors relating to the servicing of a borrower's mortgage loan. As discussed above, the Bureau solicited comment regarding whether the list of covered errors should include a catch-all provision. The Bureau also requested comment as to whether to add additional specific errors to the list of errors under § 1024.35. In particular, the Bureau solicited comment regarding whether to include as an error a servicer's failure to correctly evaluate a borrower for a loss mitigation option.

Industry commenters supported the inclusion of a limited list of errors, citing certainty, clarity, and notice as its primary benefits. Consumer group commenters generally opposed limiting notices of error to a finite list. Consumer advocates asserted that the proposal was a departure from and offered fewer consumer protections than the existing qualified written request process under section 6 of RESPA, which applies to all errors relating to servicing. In addition, some consumer group commenters noted the fluid nature of mortgage servicing and cautioned that a finite list lacks the flexibility necessary to ensure that consumers will be adequately protected as servicing practices evolve.

As to whether the Bureau should add additional specific errors to the list of covered errors, some consumer groups suggested the addition of specific errors, including errors relating to escrow accounts, servicing transfer, disclosures, and loss mitigation, while also reiterating their support for a broad catch-all provision. While most industry commenters said the proposed list of covered errors was adequate, a credit union commenter suggested that the Bureau add requests to cancel liens once accounts have been paid in full. Both consumer groups and industry commented regarding whether to include a servicer's failure to correctly evaluate a borrower for a loss mitigation option as an error. One consumer group urged the Bureau to do so, asserting that because the Dodd-Frank Act requires servicers to take timely action to correct errors relating to avoiding foreclosure, the plain language of the statute suggests that borrowers should be able to assert errors related to loss mitigation before they get to the point of a foreclosure sale. The commenter further contended that the appeals process set forth in proposed § 1024.41(h) will not hold servicers sufficiently accountable for uncorrected errors. The commenter said that borrowers need a statutory remedy for uncorrected errors. Another

consumer group advocated for a catch-all sufficiently broad to capture the array of servicer loss mitigation duties. An industry association took the opposing view, citing concerns about the inability to objectively measure whether a servicer evaluated a borrower for an option correctly. The industry commenter requested that should the Bureau add this category as a covered error, the Bureau also clarify that a servicer who complies with § 1024.41 has not committed the error.

As noted in the proposal, the Bureau believes that the appeals process set forth in § 1024.41(h) provides an effective procedural means for borrowers to address issues relating to a servicer's evaluation of a borrower for a loan modification program. For this reason, and the reasons stated below with respect to loss mitigation practices, the Bureau declines to add a servicer's failure to correctly evaluate a borrower for a loss mitigation option as a covered error in the final rule.

The Bureau is, however, adding new § 1024.35(b)(11), which includes a catch-all that defines as an error subject to the requirements of § 1024.35 errors relating to the servicing of a borrower's mortgage loan. The Bureau believes that any error related to the servicing of a borrower's mortgage loan also relates to standard servicer duties. The Bureau also agrees with consumer advocacy commenters that the mortgage market is fluid and constantly changing and that it is impossible to anticipate with certainty the precise nature of the issues that borrowers will encounter. The Bureau, therefore, believes that it is necessary and appropriate to achieve the purposes of RESPA to craft error resolution procedures that are sufficiently flexible to adapt to changes in the mortgage market and to encompass the myriad and diverse types of errors that borrowers may encounter with respect to their mortgage loans. At the same time, the Bureau believes the costs and burdens created by having a more expansive definition of error are significantly mitigated because, as discussed above, under the final rule the requirements under § 1024.35 apply only to written notices of error. Moreover, the final rule adopts a process that is consistent with the existing process for responding to qualified written requests under RESPA section 6, which likewise includes a catch-all for servicing-related errors. The Bureau declines to add additional covered errors beyond the catch-all.

35(c) Contact Information for Borrowers To Assert Errors

The Bureau proposed § 1024.35(c), which would have permitted a servicer to establish an exclusive telephone number and address that a borrower must use to assert an error. If a servicer chose to establish a separate telephone number and address for receiving errors, the proposal would have required the servicer to provide the borrower a notice that states that the borrower may assert an error at the telephone number and address established by the servicer for that purpose. Proposed comment 35(c)–1 would have clarified that if a servicer has not designated a telephone number and address that a borrower must use to assert an error, then the servicer will be required to comply with the error resolution requirements for any notice of error received by any office of the servicer. Proposed comment 35(c)–2 would have further clarified that the written notice to the borrower may be set forth in another written notice provided to the borrower, such as a notice of transfer, periodic statement, or coupon book. Proposed comment 35(c)–2 would have further clarified that if a servicer establishes a telephone number and address for receipt of notices of error, the servicer must provide that telephone number and address in any communication in which the servicer provides the borrower with contact information for assistance from the servicer.

The Bureau proposed to allow servicers to establish a telephone number and address that a borrower must use to assert an error in order to allow servicers to direct oral and written errors to appropriate personnel that have been trained to ensure that the servicer responds appropriately. As the proposal noted, at larger servicers with other consumer financial service affiliates, many personnel simply do not typically deal with mortgage servicing-related issues. For instance, at a major bank servicer, a borrower might assert an error to local bank branch staff, who likely would not have access to the information necessary to address their error. Thus, the Bureau reasoned, if a servicer establishes a telephone number and address that a borrower must use, a servicer would not be required to comply with the error resolution requirements for errors that may be received by the servicer through a different method.

Most industry commenters favored allowing servicers to designate an address and telephone number to which borrowers must direct error notices. At the same time, such commenters asserted that creating an exclusive intake portal was not sufficient to offset the burdens inherent in permitting oral error notices to which error resolution requirements apply. Some commenters said that designating telephone lines for error notices could be especially costly for small servicers. Thus, one community bank trade association argued that the proposal favored large institutions. Two industry commenters requested clarification regarding how servicers must treat error notices sent to the wrong address. Finally, one credit union commenter asserted that servicers should only be required to include designated telephone numbers and addresses in regular forms of communication to borrowers, such as the periodic statement. In contrast, consumer group commenters suggested that to the extent a servicer designates a telephone line or address, the servicer should be required to post such information on its Web site and to include it in mailed notices.

Because the final rule removes the requirement that servicers comply with error resolution requirements under § 1024.35 for oral notices of error, the Bureau believes that it is no longer necessary to regulate the circumstances under which servicers may direct oral errors to an exclusive telephone number that a borrower must use to assert an error. However, for written error notices, the Bureau continues to believe that it is reasonable to permit servicers to designate a specific address for the intake of notices of error. Allowing a servicer to designate a specific address is consistent with current requirements of Regulation X with respect to qualified written requests. Current § 1024.21(e)(1) permits a servicer to designate a ''separate and exclusive office and address for the receipt and handling of qualified written requests.'' Moreover, the Bureau believes that identifying a specific address for receiving errors and information requests will benefit consumers. By providing a specific address, servicers will identify to consumers the office capable of addressing errors identified by consumers.

The Bureau believes it is critical for servicers to publicize any designated address to ensure that borrowers know how properly to assert an error and to avoid evasion by servicers of error resolution procedures. This is especially important because, as noted in the proposal, servicers who designate a specific address for receipt of error notices are not required to comply with error resolution procedures for notices sent to the wrong address. Accordingly, final § 1024.35(c) requires servicers that

designate an address for receipt of notices of error to post the designated address on any Web site maintained by the servicer if the Web site lists any contact address for the servicer. In addition, final comment 35(c)–2 retains the clarification that servicers that establish an address that a borrower must use to assert an error, must provide the address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance. The Bureau is otherwise adopting § 1024.35(c) and comments 35(c)–1 and 35(c)–2 as proposed, except that the Bureau has revised the provisions permitting servicers to designate a telephone number that a borrower must use to assert an error and clarified that the notice to the borrower must be written.

Multiple Offices

Proposed § 1024.35(c) also included language that would have required a servicer to use the same telephone number and address it designates for receiving notices of error for receiving information requests pursuant to proposed § 1024.36(b), and vice versa. Further, the Bureau proposed comment 35(c)–3, which would have clarified that any telephone numbers or address designated by a servicer for any borrower may be used by any other borrower to submit a notice of error. For instance, if a servicer set up regional call centers, it would have had to assist any borrowers who called in to a particular center to complain about an error, regardless of whether the borrower called the correct region.

One non-bank servicer expressed concern about the proposal's requirement to designate the same address and telephone number for notices of error and information requests. The commenter explained that it assigns separate teams to address information requests and error notices. Thus, the commenter asserted, proposed § 1024.35(c) would negatively impact customer service. Having considered this comment, the Bureau notes that it proposed § 1024.35(c) because it was concerned that designating separate telephone numbers and addresses for notices of error and information requests could impede borrower attempts to submit notices of error and information requests to servicers due to debates over whether a particular communication constituted a notice of error or an information request. For the reasons set forth above and in the proposal, final § 1024.35(c) maintains the requirement that servicers designate the same address for receipt of notices of error and information requests. In addition, the Bureau is adopting comment 35(c)–3 as substantially as proposed, except that the Bureau has removed references to error notices received by telephone.

The Bureau proposed comment 35(c)–5 to further clarify that a servicer may use automated systems, such as an interactive voice response system, to manage the intake of borrower calls. The proposal provided that prompts for asserting errors must be clear and provide the borrower the option to connect to a live representative. Because the final rule does not require servicers to comply with error resolution procedures for oral error notices, the Bureau is withdrawing proposed comment 35(c)–5 from the final rule.

Internet Intake of Notices of Error

The Bureau proposed comment 35(c)–4 to clarify that a servicer would not be required to establish a process for receiving notices of error through email, Web site form, or other online methods. Proposed comment 35(c)–4 was intended to further clarify that if a servicer establishes a process for receiving notices of error through online methods, the servicer can designate it as the only online intake process that a borrower can use to assert an error. A servicer would not be required to provide a written notice to a borrower in order to gain the benefit of the online process being considered the exclusive online process for receiving notices of error. Proposed comment 35(c)–4 would have further clarified that a servicer's decision to accept notices of error through an online intake method shall be in addition to, not in place of, any processes for receiving error notices by phone or mail.

One consumer group commenter advocated requiring servicers to establish on online process for receipt of error notices. The Bureau agrees that online processes have significant promise to facilitate faster, cheaper communications between borrowers and servicers. However, the Bureau believes that this suggestion raises a broader issue around the use of electronic media for communications between servicers (and other financial service providers) and borrowers (and other consumers). The Bureau believes it would be most effective to address this issue in that larger context after study and outreach to enable the Bureau to develop principles or standards that would be appropriate on an industry-wide basis. The Bureau is therefore, at this time, finalizing language to permit, but not require, servicers to elect whether to adopt such a process. The Bureau intends to conduct broader analyses of electronic communications' potential for disclosure, error resolution, and information requests after the rule is released. Accordingly, the Bureau is adopting comment 35(c)–4 as proposed, with minor technical amendments, and the Bureau has removed references to error notices received by telephone.

35(d) Acknowledgment of Receipt

The Bureau proposed § 1024.35(d), which would have required a servicer to provide a borrower an acknowledgement of a notice of error within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving a notice of error. Proposed § 1024.35(d) would have implemented section 1463(c) of the Dodd-Frank Act, which amended the current acknowledgement deadline of 20 days for qualified written requests to five days. Proposed § 1024.35(d) would have further implemented the language in section 6(k)(1)(C) of RESPA prohibiting the failure to take timely action to respond to requests to correct errors by applying the same timeline applicable to a qualified written request to any notice of error.

Industry commenters, including multiple credit union associations, requested that the Bureau lengthen the acknowledgment time period, asserting that five days is unreasonable, especially for smaller institutions. A nonprofit mortgage servicer said the timeframe is insufficient for its small volunteer staff. An industry trade association commenter argued that the acknowledgment requirement creates unnecessary paperwork and should be removed from the final rule altogether. In contrast, consumer group commenters were generally supportive of the acknowledgment requirement, noting that the timeline in the proposal was consistent with that in the Dodd-Frank Act for qualified written requests.

The Bureau believes that acknowledgment within five days is appropriate given that the Dodd-Frank Act expressly adopts that requirement for qualified written requests and differentiating between the two regimes would increase operational complexity. Moreover, the burden on servicers is significantly mitigated by the fact that the error resolution procedures are only applicable to written notices of error. The Bureau further notes that the contents of the acknowledgment are minimal. In addition, servicers need not provide an acknowledgment if the servicer corrects the error identified by the borrower and notifies the borrower of that correction in writing within five days of receiving the error notice.

Accordingly, the Bureau is adopting § 1024.35(d) substantially as proposed, except that the Bureau has revised the provision to clarify that the acknowledgment must be written.

35(e) Response to Notice of Error

The Bureau proposed § 1024.35(e) to set forth requirements on servicers for responding to notices of error. As discussed in more detail below, proposed § 1024.35(e) would have implemented the response requirement in section 6(e)(2) of RESPA applicable to a qualified written request, including section 1463(c) of the Dodd-Frank Act, which changed the deadline for responding to qualified written requests from 60 days to 30 days. Proposed § 1024.35(e) would have further implemented section 6(k)(1)(C) of RESPA by applying the same requirements and timeline applicable to a qualified written request to any notice of error.

35(e)(1) Investigation and Response Requirements

Proposed § 1024.35(e)(1) would have required a servicer to correct an error within 30 days unless the servicer concluded after a reasonable investigation that no error occurred and notified the borrower of that finding. As discussed below, the Bureau maintains the 30-day timeline in the final rule.

Notices to Borrower

Proposed § 1024.35(e)(1)(i)(A) would have required a servicer that does not determine after a reasonable investigation that no error occurred as set forth under § 1024.35(e)(1)(i)(B), to correct the error identified by the borrower, and provide the borrower with notification that indicates that the error was corrected, the date of the correction, and contact information the borrower can use to get further information. One industry commenter asserted that RESPA does not require that servicers provide correction dates and questioned the utility of such a requirement. The commenter further requested clarification as to whether the date of correction was equivalent to the effective date of the correction.

The Bureau did not intend the reference to the date of correction in § 1024.35(e)(1)(i)(A) to refer to the date the correction was made by the servicer, but rather to the date the correction is made effective. Accordingly, the Bureau is amending proposed § 1024.35(e)(1)(i)(A) to add the word ''effective'' to the final rule in order to clarify that the date servicers must provide is the effective date of the correction. The Bureau believes that providing the effective date of the correction is meaningful information for a borrower to assess whether the servicer has satisfactorily corrected the error, particularly in cases involving changes to the balance of the borrower's account. Commenters did not comment on other aspects of proposed § 1024.35(e)(1)(i)(A), and the Bureau is adopting § 1024.35(e)(1)(i)(A) as proposed, except that the Bureau has revised the final rule to clarify that the notification must be provided in writing and the servicer's contact information must include a telephone number.

Proposed § 1024.35(e)(1)(i)(B) would have required a servicer that determines after conducting a reasonable investigation that no error occurred to provide the borrower a notice stating that the servicer has determined that no error has occurred, the reason(s) the servicer believes that no error has occurred, and contact information for servicer personnel that can provide further assistance. The proposal would have also required the servicer to inform the borrower in the notice that the borrower may request documents relied on by the servicer in reaching its determination and how the borrower can request such documents. In contrast, proposed § 1024.35(e)(1)(i)(A) would not have required a servicer who determines that an error has occurred and corrects the error to provide a statement in the notice to the borrower about requesting documents that were the basis for that determination.

One consumer group commenter requested that the Bureau amend the proposed rule to address situations in which servicers make inaccurate determinations that no error occurred. The Bureau believes that, as proposed, the rule adequately addresses such scenarios by requiring disclosures about borrowers' rights to request the information on which the servicer relied, so as to facilitate the borrower's opportunity to review and consider further action as appropriate. The Bureau believes that the rule will facilitate the timely correction of errors and that borrowers are less likely to need documents and information when errors are corrected per the borrower's requests. Accordingly, the Bureau is adopting § 1024.35(e)(1)(i)(B) as proposed, except that the Bureau has revised the provision to clarify that the notification must be written and the servicer's contact information must include a telephone number.

Multiple Responses

The Bureau proposed comment 35(e)(1)(i)–1 to clarify that if a notice of error asserts multiple errors, a servicer may respond to those errors through a single or separate written responses that address the alleged errors. The Bureau believes that the purpose of the rule, which is to require timely resolution of errors, is facilitated by allowing a servicer to respond to multiple errors set forth in a single notice of error through separate communications. For example, a servicer could correct one error and send a notice regarding the correction of that error, while an investigation is in process regarding another error that is the subject of the same notice of error. The Bureau did not receive any comments regarding proposed comment 35(e)(1)(i)–1 and is adopting it as proposed.

Different or Additional Error

The Bureau proposed § 1024.35(e)(1)(ii), which provided that if a servicer, during the course of a reasonable investigation, determines that a different or additional error has occurred, the servicer is required to correct that different or additional error and to provide a borrower a written notice about the error, the corrective action taken, the effective date of the corrective action, and contact information for further assistance. Because the servicer would be correcting an error, a servicer would not be required to provide a notice to the borrower about requesting documents that were the basis for that determination for the reasons discussed above. Proposed comment 35(e)(1)(ii)–1 would have clarified that a servicer may provide the response required by § 1024.35(e)(1)(ii) in the same notice that responds to errors asserted by the borrower pursuant to § 1024.35(e)(1)(i) or in a separate response that addresses the different or additional errors identified by the servicer. The Bureau did not receive any comments regarding proposed § 1024.35(e)(1)(ii) and comment 35(e)(1)(ii)–1 and is adopting both substantially as proposed.

As discussed above, the Bureau believes that a consumer protection purpose of RESPA is to facilitate the timely correction of errors. Where a servicer discovers an actual error, this purpose is best served by requiring the servicer to correct that error subject to the same procedures that would have applied had the borrower asserted the same error through a qualified written request or notice of error. Accordingly, the Bureau finds that § 1024.35(e)(1)(ii) is necessary and appropriate to achieve the consumer protection purposes of RESPA, including of facilitating the timely correction of errors.

35(e)(2) Requesting Information From Borrower

Proposed § 1024.35(e)(2) would have permitted a servicer to request that a borrower provide documentation if needed to investigate an error but would not have permitted a servicer to require the borrower to provide such documentation as a condition of investigating the asserted error. Further, proposed § 1024.35(e)(2) would have prohibited a servicer from determining that no error occurred simply because the borrower failed to provide the requested documentation. The Bureau proposed § 1024.35(e)(2) to allow servicers to obtain information that may assist in resolving notices of error.

Several industry commenters stressed the importance of permitting reasonable requests for information from borrowers. Commenters said that limiting servicers' access could impede the early resolution of errors. One industry commenter asked that the Bureau clarify that servicers may request documents so long as they do not condition investigation on the receipt of documents. Other commenters requested clarification that requiring a borrower to provide specific information about what the borrower is requesting does not constitute requiring a borrower to provide information as a condition of conducting the investigation.

Having considered these comments, the Bureau believes the proposed rule strikes the right balance by permitting servicers to request documents from borrowers so long as the servicer's investigation and conclusion that no error occurred is not dependent on the receipt of documents. As stated in the proposal, the Bureau believes that the process for servicers to obtain information from borrowers should not prejudice the ability of the borrower to seek the resolution of the error. Accordingly, the Bureau is adopting § 1024.35(e)(2) as proposed with minor technical amendments.

35(e)(3) Time Limits

35(e)(3)(i)

The Bureau proposed § 1024.35(e)(3)(i), which would have required a servicer to respond to a notice of error not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the borrower notifies the servicer of the asserted error, with two exceptions: Errors relating to accurate payoff balances and errors relating to failure to suspend a foreclosure sale where a borrower has submitted a complete application for a loss mitigation option. As discussed further below, the proposal would have required servicers to respond to errors relating to payoff balances within five days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the notice of error. The Bureau believed this shortened timeframe was appropriate because a servicer's failure to correct such an error may prevent a borrowing from pursuing options in the interim, such as a refinancing transaction. The proposal would have also required servicers to respond to errors relating to the failure to suspend a foreclosure sale where a borrower has submitted a complete application the earlier of within 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the error notice or prior to the foreclosure sale. The Bureau believed the shorter timeline was appropriate because delaying the response and investigation until after the foreclosure sale could cause irreparable harm to the borrower.

While several industry commenters asserted that 30 days was insufficient for error notices, one credit union stated that the timeline was reasonable. Similarly, a consumer group commenter noted that the timeline was consistent with the time period for qualified written requests required by the Dodd-Frank Act. Consumer commenters on Regulation Room asserted that the timelines were too generous. The Bureau believes that the 30-day timeframe proposed is appropriate given that the Dodd-Frank Act expressly changed the timeframe for qualified written requests from 60 days to 30 days and differentiating between two regimes would increase operational complexity as well as burden on borrowers and servicers. Accordingly, the final rule adopts the 30-day timeline as proposed.

Shortened Time Limit To Correct Errors Relating to Payoff Balances

Proposed § 1024.35(e)(3)(i)(A) would have provided that if a borrower submits a notice of error asserting that a servicer has failed to provide an accurate payoff balance as set forth in proposed § 1024.35(b)(6), a servicer must respond to the notice of error not later than five days (excluding legal public holidays, Saturdays, and Sundays) after the borrower notifies the borrower of the alleged error. The Bureau proposed the accelerated timeframe because it believed that a 30-day deadline for responding to this type of notice of error would not provide adequate protection for borrowers because the servicer's failure to correct the error promptly may prevent a borrower from pursuing options in the interim such as a refinancing transaction. Moreover, discussions with servicers during outreach suggested that a five day timeframe would be reasonable for a servicer to correct an error with respect to calculating a payoff balance.

Industry commenters noted the complexity involved in calculating payoff balances, especially where servicers need to collect information from third parties, such as fee information from vendors or prior servicers. In light of the complexity involved, industry commenters asserted that the timeframe was insufficient.

While the Bureau continues to believe it is important to have an accelerated timeline for errors associated with payoff balances, the Bureau acknowledges that in some circumstances the need to collect information from third parties may pose timing challenges. Accordingly, the Bureau has revised proposed § 1024.35(e)(3)(i)(A) to provide that a servicer must respond to a borrower's notice of error asserting that a servicer has failed to provide an accurate payoff balance as set forth in § 1024.35(b)(6) not later than seven days (excluding legal public holidays, Saturdays, and Sundays) after the borrower notifies the servicer of the alleged errors. The Bureau believes that this modest increase in the timeline strikes the right balance between prompt provision of payoff information to consumers and the need for servicers to have sufficient time to access the required information. Moreover, the Bureau also notes that section 129G of TILA requires servicers to provide accurate payoff balance amounts to consumers within a reasonable time, but in no case more than seven business days. Otherwise, the Bureau is adopting § 1024.35(e)(3)(i)(A) as proposed, with minor technical amendments.

Shortened Time Limit To Correct Certain Errors Relating to Foreclosure

Proposed § 1024.35(e)(3)(i)(B) would have provided that if a borrower submits a notice of error asserting, under § 1024.35(b)(9), that a servicer has failed to suspend a foreclosure sale, a servicer would be required to investigate and respond to the notice of error by the earlier of 30 days (excluding legal public holidays, Saturdays, and Sundays) or the date of a foreclosure sale. Proposed comment 35(e)(3)(i)(B)–1 would have clarified that a servicer could maintain a 30-day timeframe to respond to the notice of error if it cancels or postpones the foreclosure sale and a subsequent sale is not

scheduled before the expiration of the 30-day deadline.

The Bureau believes the shortened timeframe is appropriate because, given the complexity of the process, servicers may mistakenly fail to suspend a foreclosure. Thus, the Bureau believes borrowers may reasonably benefit from the opportunity to have servicers investigate and respond to notices of error regarding such failures before the foreclosure sale. The Bureau believes that a timeframe that allowed a servicer to investigate and respond to the notice of error after the date of a foreclosure sale would cause irreparable harm to a borrower. Accordingly, the Bureau is adopting § 1024.35(e)(3)(i)(B) and comment 35(e)(3)(i)(B)–1 as proposed, except for minor technical amendments and that the Bureau has revised § 1024.35(e)(3)(i)(B) to reference both § 1024.35(b)(9) and (10).

Extensions of Time Limit

Proposed § 1024.35(e)(3)(ii) would have permitted, subject to certain exceptions discussed below, a servicer to extend the time period for investigating and responding to a notice of error by 15 days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the 30-day period set forth in proposed § 1024.35(e)(3)(i)(C), the servicer notifies the borrower of the extension and the reasons for the delay in responding. Proposed comment 35(e)(3)(ii)–1 would have clarified that if a notice of error asserts multiple errors, a servicer may extend the time period for investigating and responding to those errors for which extensions are permissible pursuant to proposed § 1024.35(e)(3)(ii).

While some consumer groups generally objected to the proposed extension, one industry commenter urged the Bureau to permit two automatic 15-day extensions. The Bureau does not believe that permitting a second 15-day extension would promote timely resolution of errors. Section 1463(c)(3) of the Dodd-Frank Act amended section 6(e) of RESPA to provide one 15-day extension of time with respect to qualified written requests, and the Bureau believes that differentiating between two regimes would increase operational complexity.

The Bureau did not propose to apply the extension allowance of proposed § 1024.35(e)(3)(ii) to investigate and respond to errors relating to a servicer's failure to provide an accurate payoff statement or to suspend a foreclosure sale. As discussed above, the final rule applies a shortened timeframe for responding to such errors in light of special statutory provisions and special considerations at the foreclosure stage. Permitting a 15-day extension of those timeframes would negate these shortened response periods and undermine the purposes served by shortening them. For the reasons set forth above and in the proposal, the Bureau is adopting § 1024.35(e)(3)(ii) and comment 35(e)(3)(ii)–1 substantially as proposed.

35(e)(4) Copies of Documentation

Proposed § 1024.35(e)(4) would have required that, where a servicer determines that no error occurred and a borrower requests the documents the servicer relied upon, the servicer must provide the documents within 15 days of the servicer's receipt of the borrower's request. The Bureau proposed comment 35(e)(4)–1 to clarify that a servicer would need only provide documents actually relied upon by the servicer to determine that no error occurred, not all documents reviewed by a servicer. Further, the proposed comment stated that where a servicer relies upon entries in its collection systems, a servicer may provide print-outs reflecting the information entered into the system.

Some industry commenters questioned the utility of providing documents relied upon to borrowers, noting that borrowers may not understand how to interpret the documents printed from servicers' systems. Industry commenters said providing such documents will be burdensome, and one commenter added that the Dodd-Frank Act neither requires nor contemplates such a requirement. One commenter urged the Bureau to clarify that servicers need only provide borrowers a summary of information that is stored electronically and not in a producible format. And several industry commenters urged the Bureau to limit servicers' responsibility to provide documents that reflect trade secrets or other sensitive information.

The Bureau believes the proposed rule strikes the right balance in that it does not subject servicers to undue paperwork burden but assures that borrowers will have access to underlying documentation if necessary. In certain cases, a borrower may determine that the servicer's response resolves an issue and that reviewing documents would be unnecessary. Thus, the Bureau believes that requiring a servicer to provide documents only upon a borrower's request limits burden. The Bureau understands that servicers may store information electronically and not in a readily producible format. Accordingly, the Bureau is adopting final comment 35(e)(4)–1, which clarifies that servicers may provide a printed screen capture in such situations, as proposed with minor technical amendments. In addition, the Bureau acknowledges industry commenters' concern regarding providing confidential or sensitive information to borrowers. Accordingly, the Bureau has revised proposed § 1024.35(e)(4) to provide that servicers need not produce to borrowers documents reflecting confidential, proprietary or privileged information. Final § 1024.35(e)(4) further provides that if a servicer withholds documents relied upon because such documents reflect confidential, proprietary or privileged information, the servicer must notify the borrower of its determination in writing. The Bureau is otherwise adopting § 1024.35(e)(4) as proposed.

35(f) Alternative Compliance

Proposed § 1024.35(f) provided that a servicer would not be required to comply with the timing and process requirements of paragraphs (d) and (e) of proposed § 1024.35 in two situations. First, a servicer that corrects the error identified by the borrower within five days of receiving the notice of error, and notifies the borrower of the correction in writing, would not be required to comply with the acknowledgment, notice and inspection requirements in paragraphs (d) and (e). Because such errors are corrected, an investigation would not be required. Second, a servicer that receives a notice of error for failure to suspend a foreclosure sale, pursuant to § 1024.35(b)(9), seven days or less before a scheduled foreclosure, would not be required to comply with paragraphs (d) and (e), if, within the time period set forth in paragraph (e)(3)(i)(B), the servicer responds to the borrower, orally or in writing, and corrects the error or states the reason the servicer has determined that no error has occurred.

35(f)(1) Early Correction

The Bureau proposed § 1024.35(f)(1) to permit alternative compliance as to errors resolved within the first five days. This provision is consistent with section 6(e)(1)(A) of RESPA, which requires servicers to provide written acknowledgment of a qualified written request within five days (excluding legal public holidays, Saturdays, and Sundays) ''unless the action requested is taken within such period.'' In addition, the alternative compliance mechanism in proposed § 1024.35(f)(1) was based on feedback from servicers during outreach, and especially small servicers, which indicated that the majority of

errors are addressed promptly after a borrower's communication and generally within five days. Small entity representatives communicated to the Small Business Review Panel that small servicers have a high-touch customer service model, which made it very easy for borrowers to report errors or make inquiries, and to receive real-time responses. The Bureau believed the alternative compliance method was necessary and appropriate to reduce the unwarranted burden of an acknowledgement and other response requirements on servicers, and especially small servicers, that are able to correct borrower errors within five days consistent with the Small Business Review Panel recommendation that the Bureau consider requirements that provide flexibility to small servicers.

Industry commenters supported the proposal's exemption of servicers from complying with paragraphs (d) and (e) where the servicer corrects the error identified by the borrower within five days of receiving the notice of error. However, industry commenters opposed the requirement that servicers notify borrowers of the correction in writing. Commenters reasoned that a significant number of errors are asserted and quickly resolved in a single telephone call. Accordingly, commenters argued that the requirement to advise borrowers of the correction in writing would be burdensome.

The Bureau believes that because the final rule subjects written but not oral notices to error resolution requirements under § 1024.35, the commenters' concerns regarding written notice of correction has been significantly mitigated. To the extent that a borrower asserts an error in writing which the servicer resolves within five days, the Bureau believes the borrower will benefit from receiving the written notification. For these reasons, the Bureau adopts § 1024.35(f)(1) as proposed, except that the Bureau has revised the provision to make clear that the servicer must provide such notification within five days of receiving the notice of error.

35(f)(2) Errors Asserted Before Foreclosure Sale

As explained in proposed § 1024.35(f)(2), the Bureau believes that it is appropriate to streamline acknowledgment and response requirements when servicers receive a notice of error that may impact a foreclosure sale less than seven days before a foreclosure sale. Notices of errors identified in § 1024.35(b)(9) and (10), which focus on the failure to suspend a foreclosure sale in the circumstances described in § 1024.41(f), (g), or (j), implicate this concern. Numerous entities, including other federal agencies and small entity representatives during the Small Business Review Panel outreach, expressed concern about borrower use of error resolution requirements as a procedural tool to impede proper foreclosures and promote litigation.[104]

Industry commenters reiterated concerns heard during pre-proposal outreach that borrowers could use the error resolution requirements to halt foreclosure sales, including minutes before a foreclosure sale. One industry commenter stressed that in some circumstances, whether to proceed with foreclosure will be beyond the servicer's control, as some courts will not cancel foreclosure after a certain date and Freddie Mac can override a servicer's request to postpone or cancel a sale. Thus, two commenters urged the Bureau to exempt from liability servicers required by an investor, insurer, guarantor or legal requirement to proceed with a foreclosure sale. Another industry commenter requested an exception for those borrowers who have had their claims heard by a court, asserting that servicers need finality and that extending foreclosure timelines is costly. In contrast, consumer group commenters opposed the alternative compliance option for errors asserted within seven days of a foreclosure sale. Consumer groups asserted that servicers should be required to communicate with borrowers in writing. In addition, some consumer group commenters reasoned that because proposed § 1024.35(f)(2) would exempt the servicer from the requirement to conduct an investigation or provide the borrower with the documents relied upon in reaching its determination that no error occurred, it would effectively permit servicers to ignore valid requests for postponement so long as the servicer sends a letter stating that no error occurred.

Having considered these comments, the final rule provides that for error notices submitted seven days or less before a foreclosure sale that assert an error identified in § 1024.35(b)(9) or (10), servicers are not required to comply with the requirements for acknowledgement and response to notices of error, but must make a good faith attempt to respond to borrowers, orally or in writing, and to either correct the error or state the reason the servicer has determined no error occurred. As stated in the proposal, the Bureau believes that reducing the procedural requirements for servicers to follow for such notices mitigates the concern that borrowers may use error resolution procedures to impede foreclosure, while maintaining protection for consumers. The Bureau believes that this alternative compliance method is also consistent with the Small Business Review Panel recommendation that the Bureau provide flexibility to small servicers and responds to small entity representatives' concern that error resolution procedures may be used in unwarranted litigation. Further, the Bureau understands the timing to be consistent with the GSE requirement that servicers conduct account reviews to document that all required actions have occurred at least seven days prior to a foreclosure sale. The Bureau declines to revise the proposal to require that servicers communicate with borrowers in writing, as the Bureau believes servicers require flexibility in communicating with borrowers close in time to a foreclosure sale.

35(g) Requirements Not Applicable

The Bureau proposed § 1024.35(g) to set forth the types of notices of error to which the error resolution requirements would not apply.

35(g)(1) In General

Proposed § 1024.35(g)(1) would have provided that a servicer is not required to comply with the error resolution requirements set forth in § 1024.35(d) and (e) if the servicer reasonably makes certain determinations specified in §§ 1024.35(g)(1)(i), (ii), or (iii). Specifically, subject to certain exceptions, a servicer need not comply with error resolution requirements with respect to a notice of error that asserts an error that is substantially the same as an error asserted previously by or on behalf of the borrower, that is overbroad or unduly burdensome, or that is untimely. A servicer would be liable to the borrower for its unreasonable determination that any of the listed categories apply and resulting failure to comply with proposed § 1024.35(d) and (e), however. Industry commenters generally favored the proposed exclusions, but requested that the Bureau expand the categories for which servicers would not be required to comply with error resolution requirements. Except as discussed below, the Bureau declines to do so. The Bureau has, however, revised proposed § 1024.35(g)(1) to state that, in addition to § 1024.35(d) and (e), a servicer is not required to comply with § 1024.35(i) if

[104] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* 30 (Jun, 11, 2012).

a servicer reasonably determines that §§ 1024.35(g)(i), (ii), or (iii) apply.

35(g)(1)(i)

Proposed § 1024.35(g)(1)(i) would have provided that a servicer is not required to comply with the notice of error requirements in proposed § 1024.35(d) and (e) with respect to a notice of error to the extent that the asserted error is substantially the same as an error asserted previously by or on behalf of the borrower for which the servicer had previously complied with its obligation to respond to the notice of error pursuant to § 1024.35(e)(1), unless the borrower provides new and material information. The proposed rule would have defined new and material information as information that was not reviewed by the servicer in connection with investigating the prior notice of error and was reasonably likely to change a servicer's determination with respect to the existence of an error.

As stated in the proposal, the Bureau believes that both elements of this requirement are important. First, the information must not have been reviewed by the servicer. If the information was reviewed by the servicer, then such information is not new and requiring a servicer to re-open an investigation will create unwarranted burden and delay. Second, even if the information is new, it must be material to the asserted error. A servicer may not have reviewed information because the information may not have been material to the error asserted by the borrower. The Bureau proposed § 1024.35(g)(1)(i) to ensure that a servicer is not required to expend resources conducting duplicative investigations of notices of error unless there is a reasonable basis for re-opening a prior investigation because of new and material information.

The Bureau proposed comment 35(g)(1)(i)–1 to further clarify that a dispute regarding whether a servicer previously reviewed information or whether a servicer properly determined that information reviewed was not material to its determination of the existence of an error, will not itself constitute new and material information and, consequently, does not require a servicer to re-open a prior, resolved investigation of a notice of error.

While industry commenters supported the proposed exclusion, some consumer groups expressed concern. One consumer group commenter argued that the proposal effectively requires that borrowers describe alleged errors with more specificity than is appropriate, given that borrowers often do not fully understand the nature of the alleged error. Another consumer group commenter urged the Bureau to require servicers to inform borrowers that servicers will reconsider a duplicative error notice to the extent that the borrower is able to more concisely describe an alleged error. Another commenter asserted that the proposed exclusion shields servicers from the consequences of incompletely addressing a notice of error the first time it is received. Finally, an anonymous commenter questioned the Bureau's authority to create the exclusion altogether.

Having considered these comments, the Bureau believes that § 1024.35(g)(1)(i), as proposed, strikes the appropriate balance in that it requires servicers to respond to duplicative error notices only to the extent that such notices present new and material information. The Bureau recognizes that borrowers will assert errors in lay terms, and this section is not intended to require any particular level of specificity in the errors that borrowers assert. All that this section provides is that if a borrower submits a second error claim that the servicer reasonably determines is substantially the same as a previous submission, the servicer is not obligated to go back through the investigative process unless the borrower has presented new and material information. Thus, to the extent that a borrower initially lacks sufficient information to articulate clearly an alleged error but is later privy to new and material information that enables the borrower to describe the error more clearly, proposed § 1024.35(g)(1)(i) requires a servicer to reconsider new and material information subsequently put forward by the borrower. Thus, for the reasons outlined in the proposal and set forth above, the Bureau is adopting § 1024.35(g)(1)(i) and comment 35(g)(1)(i)–1 as proposed, with minor technical amendments.

The Bureau's authority for § 1024.35 is addressed above. Moreover, the Bureau finds that § 1024.35 is necessary and appropriate to achieve the purposes of RESPA, including ensuring responsiveness to consumer requests and complaints because the Bureau believes that this purpose will best be met if servicers are not required to waste resources responding to duplicative requests that will not benefit consumers, but rather are allowed to focus their resources on responding to error requests where such responses are most likely to result in consumer benefit.

35(g)(1)(ii)

Proposed § 1024.35(g)(1)(ii) would have provided that a servicer is not required to comply with the notice of error requirements in proposed § 1024.35(d) and (e) with respect to a notice of error that is overbroad or unduly burdensome. The proposed rule would have defined ''overbroad'' and ''unduly burdensome'' for this purpose. It would have provided that a notice of error is overbroad if a servicer cannot reasonably determine from the notice of error the specific covered error that a borrower asserts has occurred on a borrower's account. The proposed rule would have provided that a notice of error is unduly burdensome if a diligent servicer could not respond to the notice of error without either exceeding the maximum timeframe permitted by § 1024.35(e)(3)(ii) or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances. The proposed rule would have further clarified that if a servicer can identify a proper assertion of a covered error in a notice of error that is otherwise overbroad or unduly burdensome, a servicer is required to respond to the covered error submissions it can identify. Finally, the Bureau proposed comment 35(g)(1)(ii)–1 to set forth characteristics that may indicate if a notice of error is overbroad or unduly burdensome.

During pre-proposal outreach, consumers, consumer advocates, servicers, and servicing industry representatives indicated to the Bureau that consumers do not typically use the current qualified written request process to resolve errors. During the Small Business Review Panel outreach, small entity representatives expressed that typically qualified written requests received from borrowers were vague forms found online or forms used by advocates as a form of pre-litigation discovery. Servicers and servicing industry representatives indicated that these types of qualified written requests are unreasonable and unduly burdensome. Small entity representatives in the Small Business Review Panel outreach requested that the Bureau consider an exclusion for abusive requests, or requests made with the intent to harass the servicer.

The Bureau requested comment regarding whether a servicer should not be required to undertake the error resolution procedures in proposed § 1024.35(d) and (e) for notices of error that are overbroad or unduly burdensome. Industry commenters supported the exclusion, but urged the Bureau to remove the requirement that servicers identify valid assertions of error in submissions that are otherwise overbroad or unduly burdensome. Industry commenters said servicers

should not be required to parse through such submissions to locate a clear assertion of error. One large trade association of mortgage servicers said that the requirement effectively subsumes the exclusion. Consumer group commenters generally disfavored the exclusion. One commenter questioned the assertion that borrowers primarily use qualified written requests to obtain prelitigation discovery. One consumer group said the exclusion gives servicers too much discretion. Another said it requires borrowers to state the basis for their alleged error with too much specificity. An anonymous consumer advocate said a request from a single borrower should not be so voluminous as to be burdensome for servicers to respond. Another consumer group commenter requested that the Bureau address situations in which the servicer erroneously determines that a submission is overbroad or unduly burdensome. Finally, one consumer group commenter said the proposed exclusion for unduly burdensome notices of error leaves borrowers unprotected as to errors that are especially egregious or complex.

In proposing § 1024.35(g)(1)(ii), the Bureau did not intend to frustrate consumers' ability to assert actual complex errors and to have such errors investigated and corrected, as appropriate, by servicers. The Bureau believes it is critical that consumers have a mechanism by which to have complex errors addressed. Accordingly, the Bureau has revised proposed § 1024.35(g)(1)(ii) and proposed comment 35(g)(1)(ii)–1 to remove references to unduly burdensome notices of error. At the same time, the Bureau proposed § 1024.35(g)(1)(ii), in part, because the Bureau believes that requiring servicers to respond to overbroad notices of error from some borrowers may cause servicers to expend fewer resources to address other errors that may be more clearly stated and more clearly require servicer attention. As discussed above, the Bureau expands the definition of errors subject to the requirements of § 1024.35 to contain a catch-all for all errors relating to the servicing of the borrower's loan. Given the breadth of the errors subject to the requirements of § 1024.35, the Bureau continues to believe that a requirement for servicers to respond to notices of error that are overbroad may harm consumers and frustrate servicers' ability to comply with the new error resolution requirements. The Bureau does not believe that the error resolution procedures are the appropriate forum for borrowers to prosecute wide-ranging complaints against mortgage servicers that are more appropriate for resolution through litigation. Accordingly, the Bureau is adopting § 1024.35(g)(1)(ii) and comment 35(g)(1)(ii)–1 substantially as proposed, except that the Bureau has revised the provisions to remove references to unduly burdensome notices of error.

35(g)(1)(iii)

Proposed § 1024.35(g)(1)(iii) would have provided that a servicer is not required to comply with the notice of error requirements in proposed § 1024.35(d) and (e) for an untimely notice of error—that is, a notice of error received by a servicer more than one year after either servicing for the mortgage loan that is the subject of the notice of error was transferred by that servicer to a transferee servicer or the mortgage loan amount was paid in full, whichever date is applicable. The Bureau proposed this provision to set a specific and clear time that a servicer may be responsible for correcting errors for a mortgage loan.

Moreover, the Bureau proposed § 1024.35(g)(1)(iii) to achieve the same goal that currently exists in Regulation X with respect to qualified written requests. Specifically, current § 1024.21(e)(2)(ii) states that ''a written request does not constitute a qualified written request if it is delivered to a servicer more than one year after either the date of transfer of servicing or the date that the mortgage servicing loan amount was paid in full, whichever date is applicable.''

One industry trade association expressed support for proposed § 1024.35(g)(1)(iii). A credit union commenter requested that the Bureau impose an additional time limitation on borrowers' ability to assert errors, noting that it often services mortgages for the life of the loan. A consumer advocacy group commenter disagreed with proposed § 1024.35(g)(1)(iii) and asserted that borrowers should be permitted to raise errors with their current servicer regardless of whether the servicer was responsible for the error. Having considered these comments, the Bureau declines to impose additional time limits on a borrower's ability to assert errors, as borrowers may discover errors long after such errors were made. In addition, the Bureau does not believe that § 1024.35(g)(1)(iii), as proposed, prohibits a borrower from raising errors with the borrower's current servicer. Thus, for the reasons set forth above, the Bureau is adopting § 1024.35(g)(1)(iii) as proposed with a minor technical amendment.

35(g)(2) Notice to Borrower

Proposed § 1024.35(g)(2) would have required that if a servicer determines that it is not required to comply with the notice of error requirements in proposed § 1024.35(d) and (e) with respect to a notice of error, the servicer must provide a notice to the borrower informing the borrower of the servicer's determination. The servicer must send the notice not later than five days (excluding legal public holidays, Saturdays, and Sundays) after its determination and the notice must set forth the basis upon which the servicer has made the determination, noting the applicable provision of proposed § 1024.35(g)(1).

One credit union trade association disfavored the proposed requirement that a servicer send a notice informing the borrower that an error falls into one of the enumerated exceptions. The commenter suggested that the Bureau permit servicers to send a standard notice informing borrowers that the servicer received the notice of error and is not required to respond.

The Bureau proposed § 1024.35(g)(2) because it believes that borrowers should be notified that a servicer does not intend to take any action on the asserted error. The Bureau also believes borrowers should know the basis for the servicer's determination. By providing borrowers with notice of the basis for the servicer's determination, a borrower will know the servicer's basis and will have the opportunity to bring a legal action to challenge that determination where appropriate. Accordingly, having considered the comment, the Bureau is adopting § 1024.35(g)(2) as proposed.

35(h) Payment Requirements Prohibited

Proposed § 1024.35(h) would have prohibited a servicer from charging a fee, or requiring a borrower to make any payment that may be owed on a borrower's account, as a condition of investigating and responding to a notice of error. Proposed comment 35(h)–1 would have clarified that § 1024.35(h) does not alter or otherwise affect a borrower's obligation to make payments owed pursuant to the terms of the mortgage loan. The Bureau proposed § 1024.35(h) for three reasons. First, section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(B) to RESPA, which prohibits a servicer from charging fees for responding to valid qualified written requests. Proposed § 1024.35(h) would implement that provision with respect to qualified written requests. Second, the Bureau believes that a

servicer's practice of charging for responding to a notice of error impedes borrowers from pursuing valid notices of error and that the prohibition is therefore necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to borrower requests and complaints. Third, the Bureau understands that, in some instances, servicer personnel have demanded that borrowers make payments before the servicer will correct errors or provide information requested by a borrower. The Bureau believes that a servicer should be required to correct errors notwithstanding the payment status of a borrower's account. A consumer advocacy group commenter noted, without elaborating, that it supported the fee prohibition reflected in proposed § 1024.35(h). For the reasons set out above, the Bureau is adopting § 1024.35(h) and comment 35(h)–1 as proposed.

35(i) Effect on Servicer Remedies

Adverse Information

Proposed § 1024.35(i)(1) would have provided that a servicer may not furnish adverse information regarding any payment that is the subject of a notice of error to any consumer reporting agency for 60 days after receipt of a notice of error. RESPA section 6(e) sets forth this prohibition on servicers with respect to a qualified written request that asserts an error. Proposed § 1024.35(i)(1) would implement section 6(e) of RESPA with respect to qualified written requests and would apply the same requirements to other notices of error.

The Bureau proposed to maintain the prohibition regarding supplying adverse information for the 60-day timeframe set forth in section 6(e)(3) of RESPA with respect to qualified written requests and to apply it to all notices of error. Even though a notice of error may be resolved by no later than 45 days after it is received pursuant to proposed § 1024.35(e)(3)(ii), the Bureau reasoned that the 60-day timeframe is appropriate in the event that there are follow-up inquiries or additional information provided to the borrower.

Industry commenters strongly objected to the 60-day reporting prohibition. Commenters said the proposal undermines the accuracy and integrity of credit reports. One commenter said the Fair Credit Reporting Act already governs credit reporting. One large bank commenter asserted that because credit reporting is a safety and soundness protection, banks have a duty to accurately report delinquencies. Several industry commenters also noted a concern that, based on prior experience, borrowers may use the reporting prohibition to manipulate the system by disputing legitimate delinquencies in order to apply for credit without derogatory marks on credit reports. The Bureau acknowledges the concerns expressed but notes that Congress specifically imposed the 60-day reporting prohibition with respect to qualified written requests in section 6(e) of RESPA. As discussed above, the Bureau believes it is necessary to achieve the consumer protection purposes of RESPA, including to ensure responsiveness to borrower requests and complaints and the provision of accurate and relevant information to borrowers, to apply the same procedures to all notices of error as applicable to qualified written requests. Otherwise, borrowers and servicers must expend wasteful resources parsing the form requirements applicable to qualified written requests and navigating between two separate regulatory regimes. As detailed above, the Bureau believes that the interests of borrowers and servicers are best served and the purposes of RESPA are best met through a single regulatory regime applicable to both qualified written requests and other notices of error. The Bureau is therefore adopting § 1024.35(i)(1) as proposed, as it is consistent with the 60-day reporting prohibition for qualified written requests required by section 6(e) of RESPA.

Ability To Pursue Foreclosure

Proposed § 1024.35(i)(2) stated that, with one exception, a servicer's obligation to comply with the requirements of proposed § 1024.35 would not prohibit a lender or servicer from pursuing any remedies, including proceeding with a foreclosure sale, permitted by the applicable mortgage loan instrument. The Bureau proposed one exception to § 1024.35(i)(2) where a borrower asserts an error under paragraph (b)(9) based on a servicer's failure to suspend a foreclosure sale in the circumstances described in proposed § 1024.41(g). The Bureau proposed § 1024.35(i)(2) to clarify that, in general, a notice of error could not be used to require a servicer to suspend a foreclosure sale.

A consumer group commenter asserted that proposed § 1024.35(i)(2) should be amended to prohibit a lender or servicer from pursuing a foreclosure sale upon receipt of any notice of error that disputes a servicers' ability to foreclose. As stated in the proposal, the Bureau believes that the purpose of RESPA of ensuring responsiveness to borrower requests and complaints would be impeded by allowing a notice of error to obstruct a lender's or servicer's ability to pursue remedies permitted by the applicable mortgage loan instrument.

The requirements in proposed § 1024.41 establish procedures that servicers must follow for reviewing loss mitigation applications. Servicers are capable of complying with the requirements prior to a foreclosure sale. Nothing in this proposed requirement affects the validity or enforceability of the mortgage loan or lien. Further, a servicer has the opportunity to retain its remedies when a borrower submits a completed application for a loss mitigation option. A servicer may establish a deadline by which a borrower must submit a completed application for a loss mitigation option, and, so long as the servicer fulfills its duty to evaluate the borrower for a loss mitigation option before the date of a foreclosure sale, a servicer may comply with the requirements of § 1024.35 without suspending the foreclosure sale. For the reasons set forth above and in the proposal, the Bureau is adopting § 1024.35(i)(2) as proposed, except that the Bureau has revised the provision to reference both paragraphs (b)(9) and (10).

Section 1024.36 Requests for Information

Section 6(e) of RESPA requires servicers to respond to ''qualified written requests'' that relate to the servicing of a loan. Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(B), which prohibits servicers from charging fees for responding to valid qualified written requests (as defined in regulations to be issued by the Bureau). In addition, section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(D), which states that a servicer shall not fail to provide information regarding the owner or assignee of a mortgage loan within ten business days of a borrower's request.

Proposed § 1024.36 set forth requirements servicers would be required to follow to respond to information requests from borrowers with respect to their mortgage loans. The Bureau proposed § 1024.36 to implement the servicer prohibitions set forth in section 6(k)(1)(B) and 6(k)(1)(D) of RESPA, as well as the requirements applicable to qualified written requests set forth in section 6(e) of RESPA. In addition, as discussed above with respect to § 1024.35, the Bureau believed that it served the interests of

borrowers and servicers alike to establish a uniform regulatory regime, parallel to that applicable to notices of error under § 1024.35, applicable to borrower requests for information relating to their mortgage loan irrespective of whether such requests were made in the form of a qualified written request. In the Bureau's view, such requirements are necessary to ensure that servicers respond to borrowers' requests and complaints and timely provide borrowers with relevant and accurate information about their mortgage loans.

Legal Authority

Section 1024.36 implements section 6(k)(1)(D) of RESPA, and to the extent the requirements are also applicable to qualified written requests, sections 6(e) and 6(k)(1)(B) of RESPA. Pursuant to the Bureau's authorities under sections 6(j), 6(k)(1)(E), and 19(a) of RESPA, the Bureau is also adopting certain additions and certain exemptions to these provisions. As explained in more detail below, these additions and exemptions are necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to consumer requests and complaints and the provision and maintenance of accurate and relevant information.

36(a) Information Requests

Proposed § 1024.36(a) would have required a servicer to comply with the requirements of proposed § 1024.36 for an information request from a borrower that includes the borrower's name, enables the servicer to identify the borrower's mortgage loan account, and states the information the borrower is requesting for the borrower's mortgage loan account. The Bureau received no comment on this aspect of proposed § 1024.36, and is finalizing these requirements as proposed. The Bureau is otherwise finalizing proposed § 1024.36 as discussed below.

Qualified Written Requests

Similar to the proposed requirements for notices of error, proposed § 1024.36(a) would have required a servicer to treat a qualified written request that requests information relating to the servicing of a loan as an information request subject to the requirements of § 1024.36. The Bureau intended to propose servicer obligations applicable to qualified written requests that were the same as requirements applicable to information requests under § 1024.36(a). One consumer group commenter expressed support for the proposal because it dispensed with technicalities about whether an information request constituted a valid qualified written request. One trade association commenter said the Bureau failed to define a valid qualified written request and said that proposed § 1024.36 does not fully integrate section 6(e) of RESPA into the proposed information request procedures. Another trade association of private mortgage lenders said the proposal did not make clear what constitutes a qualified written request and to what extent servicers must continue to comply with existing law regarding qualified written requests. Having considered these comments, the Bureau notes that final § 1024.31 defines the term ''qualified written request.'' In addition, as discussed above, the Bureau has added new comment 31 (qualified written request)-2, which clarifies that the error resolution and information request requirements in §§ 1024.35 and 1024.36 apply as set forth in those sections irrespective of whether the servicer receives a qualified written request. Finally, the Bureau has revised proposed § 1024.36(a) to make clear in the final rule that a qualified written request that requests information relating to the servicing of a mortgage loan is a request for information for purposes of § 1024.36 for which a servicer must comply with all requirements applicable to a request for information.

Oral Information Requests

The Bureau proposed to require servicers to comply with information request procedures under § 1024.36 for information requests made by borrowers orally or in writing. The Bureau believed this approach was warranted, in part, because discussions with consumers, consumer advocates, servicers, and industry trade associations during outreach suggested that the vast majority of borrowers orally request information from servicers.

As was the case for notices of error, the Bureau believed that a requirement that an information request be in writing would serve as a barrier that could unduly restrict the ability of borrowers to have errors resolved and requests fulfilled. At the same time, the Bureau recognized the burdens on servicers to ensure compliance with the proposed rule with respect to oral information requests. The Bureau believed that elements of the proposed rule would assist in mitigating servicer burden. For example, the Bureau considered that the proposal allowed servicers to designate a specific telephone number for receiving oral information requests and included an alternative compliance provision that allows a servicer to provide information orally if the information is provided within five days of the borrower's request.

In addition, the Bureau learned from pre-proposal discussions with servicers, including the small entity representatives in the Small Business Review Panel outreach, that most information requests are responded to by servicers either on the same telephone call with the borrower or within an hour of a borrower's communication. The Bureau believed that allowing servicers to respond to information requests orally would significantly reduce the burden associated with the proposed information request requirements on servicers. Further, the Bureau believed that this requirement provided flexibility for small servicers consistent with the recommendations of the Small Business Review Panel and mitigates concerns by the small entity representatives regarding compliance costs.

The Bureau solicited comment regarding whether servicers should be required to comply with information request procedures for information requests asserted orally. The Bureau received a number of comments from both consumer groups and various industry members. Consumer group commenters reiterated their support for applying the information request provisions to requests made orally, noting that consumers most often request information orally rather than in writing. Consumer commenters on Regulation Room disfavored the proposal's application of the information request procedures under § 1024.36 to information requests received orally. Consumer commenters, citing their negative experiences attempting to request information from servicers orally, were concerned that encouraging an oral process would weaken consumer protections. Industry commenters also opposed the proposal's application of the information request requirements to oral information requests. Commenters said doing so would create new burdens for servicers regarding tracking the information requests and monitoring that a borrower receives written acknowledgements and responses. Industry commenters further stressed that a written process would provide more clarity and certainty as to the nature of the request and what the servicer communicated to the borrower during the conversation. Further, industry commenters asserted, requiring written information requests would help avoid situations in which the borrower

and servicer have differing recollections as to the borrower's request and the servicer's response during the conversation. Absent a written record, commenters said, servicers would need to record conversations with borrowers to minimize the significant litigation risk. The commenters asserted that recording conversations could be especially costly for small servicers and would require the borrower's consent in many jurisdictions.

After consideration of these comments, the Bureau is amending proposed § 1024.36(a) to require servicers to comply with § 1024.36 solely with respect to written requests for information. While borrowers may continue to raise information requests orally, servicers will not be required to comply with the formal requirements outlined in § 1024.36 for such requests. Instead, the Bureau has added to the final rule § 1024.38(b)(1)(iii), which generally requires that servicers maintain policies and procedures that are reasonably designed to ensure that servicers provide borrowers with accurate and timely information and documents in response to borrowers' requests for information. In addition, the Bureau has added a requirement in § 1024.38(b)(5) that servicers establish policies and procedures reasonably designed to achieve the objective of informing borrowers about the availability of procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36.

The Bureau believes that eliminating the requirement under proposed § 1024.36(a) for servicers to comply with the requirements under § 1024.36 with respect to oral requests for information from borrowers and instead requiring servicers to develop policies and procedures to ensure responsiveness to such oral requests and inform borrowers about the availability of the written process, strikes the appropriate balance between providing prompt responses to borrower requests and mitigating servicer burden. The final rule will thus require servicers to maintain policies and procedures reasonably designed to assure that the servicers respond to oral information requests on a more informal basis, without having to comply with all of the required steps for a formal information request under § 1024.36. As discussed more fully below, because only written information requests will be subject to the procedures outlined in § 1024.36, the Bureau believes it is logical and appropriate to require servicers to respond to such written requests in writing.

Borrower's Representative

Section 6(e)(1)(A) of RESPA states that a qualified written request may be provided by a ''borrower (or an agent of the borrower).'' *See* RESPA section 6(e)(1)(A). The Bureau proposed comment 36(a)–1 to clarify that this standard applies to all information requests, irrespective of whether they are qualified written requests. Specifically, proposed comment 36(a)–1 would have clarified that a servicer should treat an information request submitted by a person acting as an agent of the borrower as if it received the request directly from the borrower. Further, proposed comment 36(a)–1 stated that servicers may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf.

Several industry commenters said it would be costly and burdensome to determine whether a third party has authority to act on a borrower's behalf. Many requested clarification as to what the Bureau believes constitutes acting on the borrower's behalf. Further, some industry commenters expressed concern about potential liability for the improper release of information, including the risk of violating State or Federal privacy laws, as well as what commenters perceived to be increased risk of identity theft and fraud. Finally, a few industry commenters took the position that only the borrower, but not the borrower's agent, should be permitted to request information pursuant to § 1024.36.

One consumer advocacy group noted that the proposal to permit borrowers' agents to submit information requests is consistent with the statutory language. Consumer groups also requested that the Bureau clarify that the timelines will not toll during the period in which the servicer attempts to validate through reasonable policies and procedures that a third party purporting to act on a borrower's behalf is, in fact, an agent of the borrower.

Having considered these comments, the Bureau is amending proposed comment 36(a)–1 to address servicers' concerns about potential liability for the improper release of information. The final comment clarifies that servicers may have reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring that purported agents provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. Upon receipt of such documentation, the servicer shall treat a request for information as having been submitted by the borrower. The Bureau acknowledges that requiring servicers to respond to information requests submitted by borrowers' agents is more costly than limiting the requirement to borrowers' requests, but notes that this approach is consistent with section 6(e)(1)(A) of RESPA with respect to a qualified written request. The Bureau finds that it is necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to borrower requests and complaints, to apply this requirement to all written information requests, especially since borrowers who are experiencing difficulty in making their mortgage payments or dealing with their servicer may turn, for example, to a housing counselor or other knowledgeable persons to assist them in addressing such issues. The Bureau declines to further define the term ''agent.'' The concept of agency has historically been defined in State and other applicable law. Thus, it is appropriate for the definition to defer to applicable State law regarding agents.

Information Subject to Information Request Procedures

Section 6(e)(1)(A) of RESPA requires servicers to respond to qualified written requests that request information relating to the servicing of a loan. Proposed § 1024.36(a) would have provided that any information requested by a borrower with respect to the borrower's mortgage loan is subject to the information request requirements in proposed § 1024.36 other than as provided in proposed § 1024.36(f), which defined specific circumstances in which a servicer is not obligated to comply with information request procedures.

One industry commenter expressed concern that borrowers or their attorneys may abuse the information request process. The commenter said that borrowers may request information that should already be in the borrower's possession, such as information received at closing. The commenter also urged the Bureau not to require that servicers produce the servicing file in response to a borrower's information request. The commenter said that such information will be of limited utility to borrowers and often reflects privileged communications. Having considered these comments, the Bureau notes that final § 1024.36, like the proposal, has mechanisms in place to limit abuse and to protect confidential communications. Specifically, as discussed more fully

below, § 1024.36(f) lists circumstances under which servicers need not comply with information request requirements under § 1024.36. To the extent that a borrower requests a servicing file, the servicer shall provide the borrower with a copy of the information contained in the file subject to the limitations set forth in § 1024.36(f).

Another commenter requested clarification as to whether consumers may use the information request process to request payoff statements. The Bureau is amending proposed § 1024.36(a) to make clear that servicers need not treat borrowers' requests for payoff balances as requests for information for which servicers must comply with the information request procedures set forth in § 1024.36. The Bureau believes that this revision is appropriate, as borrowers already have a mechanism by which to request payoff balances under section 129G of TILA with respect to home loans. For those loans that are not subject to section 129G of TILA, the Bureau believes that it would be inappropriate to extend the requirements of that provision beyond the scope mandated by Congress, as implemented by § 1026.36(c)(3) of the 2013 TILA Servicing Final Rule.

Owner or Assignee

Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(D), which states that a servicer shall not fail to provide information regarding the owner or assignee of a mortgage loan within ten business days of a borrower's request. Proposed comment 36(a)–2 would have clarified that if a borrower requests information regarding the owner or assignee of a mortgage loan, a servicer complies with its obligations to identify the owner or assignee of the mortgage loan by identifying the entity that holds the legal obligation to receive payments from a mortgage loan. Proposed comments 36(a)–2.i and 36(a)–2.ii would have provided examples of which party is the owner or assignee of a mortgage loan for different forms of mortgage loan ownership. These include situations when a mortgage loan is held in portfolio by an affiliate of a servicer, when a mortgage loan is owned by a trust in connection with a private label securitization transaction, and when a mortgage loan is held in connection with a GSE or Ginnie Mae guaranteed securitization transaction. The Bureau believes that it would not provide additional consumer protection to impose an obligation on a servicer to identify entities that may have an interest in a borrower's mortgage loan other than the owner or assignee of the mortgage loan, as such information would be of limited utility.

During outreach, servicers generally did not express concerns to the Bureau regarding the obligation to provide borrowers with the type of information subject to the information request requirements. Specifically, in the Small Business Review Panel outreach, small entity representatives indicated that they felt fairly comfortable with the types of information that would be subject to the requirements, indicating that this information was generally in the borrower's mortgage loan file.

The small entity representatives did express concern regarding the obligation to provide information regarding the owner or assignee of a mortgage loan. The small entity representatives stated that servicers may not have contact information for owners or assignees of mortgage loans, that such owners or assignees are not prepared to handle calls from borrowers, and that a typical servicer duty is to handle customer complaints so that owners or assignees of mortgage loans do not have to handle that responsibility. Certain owners, assignees, and guarantors of mortgage loans, including other federal agencies, have expressed similar concerns to the Bureau.

Industry commenters expressed similar concerns in response to the proposal. One industry trade association suggested that the Bureau amend proposed comment 36(a)–2 to require that servicers identify the name of the trustee rather than the name of the legal entity that holds the legal right to receive payments. The commenter argued that the information that the Bureau proposes servicers provide would not be meaningful to borrowers, as the trust itself cannot act. Moreover, the commenter asserted that servicers do not typically track the trust name with the account, as such information is rarely used. One large bank commenter urged the Bureau to amend the comment to replace the reference to ''obligation'' with ''right'' as the commenter asserted the former is not technically accurate.

As outlined in the proposal, the Bureau understands the concerns asserted by servicers, owners, assignees, guarantors, and other federal agencies that requiring servicers to provide the proposed information to borrowers may confuse borrowers and lead to attempts to communicate with owners or assignees that are unprepared or unwilling to engage in such communications. The requirement that servicers identify to the borrower the owner or assignee of a mortgage loan was added as section 6(k)(1)(D) of RESPA by the Dodd-Frank Act. Section 6(k)(1)(D) requires that information regarding the owner or assignee of a mortgage loan must be provided to borrowers. The Bureau believes that the benefit to borrowers of obtaining the information, which was required by Congress, justifies any concerns about the potential for confusion. As to commenters' concern that trustee information is more relevant than trust information, the Bureau notes that proposed comment 36(a)–2 provided that where a trust is the owner or assignee of a loan, a servicer must provide the name of both the trustee and the trust. Also, for clarification purposes, the Bureau is revising proposed comment 36(a)–2 to state that when a borrower requests information regarding the owner or assignee of a mortgage loan, a servicer complies by identifying the person on whose behalf the servicer receives payments from the borrower. Otherwise, the Bureau is adopting comment 36(a)–2 substantially as proposed.

36(b) Contact Information for Borrowers To Request Information

The Bureau proposed § 1024.36(b), which would have permitted a servicer to establish an exclusive telephone number and address that a borrower must use to request information in accordance with the procedures in § 1024.36. If a servicer chose to establish a separate telephone number and address for information requests, the proposal would have required the servicer to provide the borrower a notice that states that the borrower may request information using the telephone number and address established by the servicer for that purpose. Proposed comment 36(b)–1 would have clarified that if a servicer has not designated a telephone number and address that a borrower must use to request information, then the servicer will be required to respond to an information request received at any office of the servicer. Proposed comment 36(b)–2 would have further clarified that the written notice to the borrower may be set forth in another written notice provided to the borrower, such as a notice of transfer, periodic statement, or coupon book. Proposed comment 36(b)–2 would have further clarified that if a servicer establishes a telephone number and address for receipt of information requests, the servicer must provide that telephone number and address in any communication in which the servicer provides the borrower with contact information for assistance from the servicer.

The Bureau proposed to allow servicers to establish a telephone number and address that a borrower must use to request information in order to allow servicers to direct oral and written requests to appropriate personnel that have been trained to ensure that the servicer responds appropriately. As the proposal noted, at larger servicers with other consumer financial service affiliates, many personnel simply do not typically deal with mortgage servicing-related issues. For instance, at a major bank servicer, a borrower might request information from a local bank branch staff, who likely would not have access to the information necessary to respond to the request. Thus, the Bureau reasoned, if a servicer establishes a telephone number and address that a borrower must use, a servicer would not be required to comply with the information request requirements set forth in § 1024.36 for requests that may be received by the servicer through a different method.

Most industry commenters favored allowing servicers to designate an address and telephone number to which borrowers must direct information requests. At the same time, such commenters asserted that the proposal constituted an insufficient remedy to the burdens inherent in permitting oral information requests. Some commenters said that designating telephone lines for information requests could be especially costly for small servicers. Thus, one community bank trade association argued that the proposal favored large institutions. Two industry commenters requested clarification regarding how servicers must handle information requests sent to the wrong address. Finally, one credit union commenter asserted that servicers should only be required to include designated telephone numbers and addresses in regular forms of communication to borrowers, such as the periodic statement. In contrast, consumer group commenters suggested that to the extent a servicer designates a telephone line or address, the servicer should be required to post such information on its Web site and to include it in mailed notices.

Because the final rule removes the requirement that servicers comply with information request requirements under § 1024.36 for oral information requests, the Bureau believes that it is no longer necessary to regulate the circumstances under which servicers may direct oral information requests to an exclusive telephone number that a borrower must use to request information. However, for written information requests, the Bureau continues to believe that it is reasonable to permit servicers to designate a specific address for the intake of information requests. Allowing a servicer to designate a specific address is consistent with current requirements of Regulation X with respect to qualified written requests. Current § 1024.21(e)(1) permits a servicer to designate a ''separate and exclusive office and address for the receipt and handling of qualified written requests.'' Moreover, the Bureau believes that identifying a specific address for receiving information requests will benefit consumers. By providing a specific address, servicers will identify to consumers the office capable of addressing requests made by consumers.

The Bureau believes it is critical for servicers to publicize any designated address to ensure that borrowers know how properly to request information and to avoid evasion by servicers of information request procedures. This is especially important because, as noted in the proposal, servicers who designate a specific address for receipt of information requests are not required to comply with information request procedures for notices sent to the wrong address. Accordingly, final § 1024.36(b) requires servicers that designate addresses for receipt of requests for information to post the designated address on any Web site maintained by the servicer if the servicer lists any contact address for the servicer. In addition, final comment 36(b)–2 retains the clarification that servicers that establish an address that a borrower must use to request information, must provide the address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance. The Bureau is otherwise adopting § 1024.36(b) and comments 36(b)–1 and 36(b)–2 as proposed, except that it has revised the provisions permitting servicers to designate a telephone number that a borrower must use to request information and clarified that the notice must be written.

Multiple Offices

Proposed § 1024.36(b), similar to proposed § 1024.35(c) for notices of error, would have required a servicer to use the same telephone number and address it designates for receiving notices of error for receiving information requests pursuant to proposed § 1024.36(b), and vice versa. Further, proposed comment 36(b)–3 would have clarified that any telephone numbers or addresses designated by a servicer for any borrower may be used by any other borrower to submit an information request. This clarifies that a servicer may not determine that an information request is invalid if it was received at any telephone number or address designated by the servicer for receipt of information requests just because it was not received by the specific phone number or address identified to a specific borrower.

One non-bank servicer expressed concern about the proposal's requirement to designate the same address and telephone number for notices of error and information requests. The commenter explained that it assigns separate teams to address information requests and error notices. Thus, the commenter asserted, proposed § 1024.36(b) would negatively impact customer service. Having considered this comment, the Bureau notes that it proposed § 1024.36(b) because it was concerned that designating separate telephone numbers and addresses for notices of error and information requests could impede borrower attempts to submit notices of error and information requests to servicers due to debates over whether a particular communication constituted a notice of error or an information request. For the reasons set forth above and in the proposal, final § 1024.36(b) retains the requirement that servicers designate the same address for receipt of information requests and notices of error. In addition, the Bureau is adopting comment 36(b)–3 substantially as proposed, except that the Bureau has removed references to information requests received by telephone.

Proposed comment 36(b)–5 would have further clarified that a servicer may use automated systems, such as an interactive voice response system, to manage the intake of borrower calls. The proposal provided that prompts for requesting information must be clear and provide the borrower the option to connect to a live representative. Because the final rule does not require servicers to comply with information request procedures for oral requests, the Bureau is withdrawing proposed comment 36(b)–5 from the final rule.

Internet Intake of Information Requests

The Bureau proposed comment 36(b)–4 to clarify that a servicer would not be required to establish a process for receiving information requests through email, Web site form, or other online methods. Proposed comment 36(b)–4 was intended to further clarify that if a servicer establishes a process for receiving information requests through online methods, the servicer can designate it as the only online intake process that a borrower can use to request information. A servicer would not be required to provide a written

notice to a borrower in order to gain the benefit of the online process being considered the exclusive online process for receiving information requests. Proposed comment 36(b)–4 would have further clarified that a servicer's decision to accept requests for information through an online intake method shall be in addition to, not in place of, any processes for receiving information requests by phone or mail.

One consumer group commenter advocated requiring servicers to establish an online process for receipt of information requests. The Bureau agrees that online processes have significant promise to facilitate faster, cheaper communications between borrowers and servicers. However, the Bureau believes that this suggestion raises a broader issue around the use of electronic media for communications between servicers (and other financial services providers) and borrowers (and other consumers). The Bureau believes it would be most effective to address this issue in that larger context after study and outreach to enable the Bureau to develop principles or standards that would be appropriate on an industry-wide basis. The Bureau is therefore, at this time, finalizing language to permit, but not require, servicers to elect whether to adopt such a process. The Bureau intends to conduct broader analyses of electronic communications' potential for disclosure, error resolution, and information requests after the rule is released. Accordingly, the Bureau is adopting comment 36(b)–4 as proposed, with minor technical amendments, and having removed references to information requests received by telephone.

36(c) Acknowledgment of Receipt

Proposed § 1024.36(c) would have required a servicer to provide a borrower an acknowledgement of an information request within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving an information request. Proposed § 1024.36(c) would have implemented section 1463(c) of the Dodd-Frank Act, which amended the current acknowledgement deadline of 20 days for qualified written requests to five days. Proposed § 1024.36(c) would have further applied the same timeline applicable to a qualified written request to any information request.

Industry commenters, including multiple credit union trade associations, requested that the Bureau lengthen the acknowledgment time period, asserting that five days was unreasonable, especially for smaller institutions. A nonprofit mortgage servicer said the timeframe was insufficient for its small volunteer staff. An industry trade association commenter argued that the acknowledgment requirement creates unnecessary paperwork and should be removed from the final rule altogether. In contrast, consumer group commenters were generally supportive of the acknowledgment requirement, noting that the timeline in the proposal was consistent with that in the Dodd-Frank Act for qualified written requests.

The Bureau believes acknowledgment within five days is appropriate given that the Dodd-Frank Act expressly adopts that requirement for qualified written requests and differentiating between two regimes would increase operational complexity. Moreover, the burden on servicers is significantly mitigated by the fact that the information request procedures are only applicable to written requests. The Bureau further notes that the contents of the acknowledgment are minimal. Moreover, servicers need not provide an acknowledgment if the servicer provides the information requested within five days. Accordingly, the Bureau is adopting § 1024.36(c) as proposed.

36(d) Response to Information Request

The Bureau proposed § 1024.36(d) to set forth requirements on servicers for responding to information requests. As discussed in more detail below, proposed § 1024.36(d) would have implemented the response requirement in section 6(e)(2) of RESPA applicable to a qualified written request, including section 1463(c) of the Dodd-Frank Act, which amended certain deadlines for responses to qualified written requests. Proposed § 1024.36(d) would have further implemented the ten business day timeline in section 6(k)(1)(D) of RESPA by applying the timeline to requests for information about the owner or assignee of the loan.

36(d)(1) Investigation and Response Requirements

Proposed § 1024.36(d)(1) would have required a servicer to respond to an information request within 30 days by either (i) providing the borrower with the requested information and contact information for further assistance, or (ii) conducting a reasonable search for the requested information and providing the borrower with a written notification that states that the servicer has determined that the requested information is not available or cannot reasonably be obtained by the servicer, as appropriate, the basis for the servicer's determination, and contact information for further assistance. The proposal would have only required a servicer to provide a written notice to the borrower in response to the information request if the information requested by the borrower is not available or cannot reasonably be obtained by the servicer. The proposal would have permitted a servicer to respond either orally or in writing to the borrower if the servicer is providing the information requested by the borrower. The Bureau proposed to allow servicers to respond orally because it believed that the goal of providing information to borrowers would be furthered by allowing servicers to respond orally. Additionally, the Bureau believed that allowing the servicer to respond orally would reduce the burden on servicers.

One consumer advocacy group commenter urged the Bureau to require that servicers respond to information requests in writing. The commenter argued that servicers regularly provide borrowers inconsistent and inaccurate information, which necessitates a written response. Because, as discussed above, the final rule requires borrowers to submit information requests in writing in order to gain the benefit of the information request procedures set forth in § 1024.36, the Bureau now believes it is appropriate and effectuates the consumer protection purposes of RESPA to require that servicers respond to borrowers' information requests in writing. Doing so will help ensure that there is a written record of both the borrower's request and the servicer's response, which the Bureau believes will reduce confusion regarding the accuracy of the information provided. For these reasons, the Bureau is adopting § 1024.36(d)(1) substantially as proposed, except that it has removed references to a servicer's oral response and clarified that the servicer's contact information must include a telephone number.

Information Not Available

Proposed comment 36(d)(1)(ii)–1 would have clarified that information should not be considered as available to a servicer if the information is not in the servicer's possession or control or the servicer cannot retrieve the information in the ordinary course of business through reasonable efforts.

The purpose of the information request requirements is to provide an efficient means for borrowers to obtain information regarding their mortgage loan accounts and the Bureau believes that imposing obligations on servicers to provide information in response to an information request is an efficient means of achieving the goal of providing a borrower with access to requested information. However, the Bureau

proposed comment 36(d)(1)(ii)–1 because it believes that burden for information requests will increase greatly if a servicer is required to undertake an investigation for documents that are not in a servicer's possession or control. The same inefficiency exists even if information is in a servicer's possession or control but, for appropriate business reasons, is stored in a medium that is not accessible by a servicer in the ordinary course of business. The Bureau believes that the marginal benefit of having additional information available to borrowers is not justified by the significant burdens that such investigations may incur. Moreover, the Bureau believes that it would frustrate the consumer protection purposes of RESPA to require that servicers devote considerable resources, which could otherwise be spent on responding to information requests that would benefit borrowers, to locating inaccessible information.

One mortgage servicer commented on proposed comment 36(d)(1)(ii)–1. The commenter requested that the Bureau provide examples in the commentary of what it considers to be unavailable information. Proposed comment 36(d)(1)(ii)–2 provides examples of when documents should and should not be considered to be available to a servicer in response to an information request, and such examples are reflected in the final comment as well. For the reasons discussed in the proposal and above, the Bureau is adopting comments 36(d)(1)(ii)–1 and 36(d)(1)(ii)–2 substantially as proposed.

36(d)(2) Time Limits

36(d)(2)(i)

Section 1463(b) of the Dodd-Frank Act amended section 6(e)(2) of RESPA to require a servicer to investigate and respond to a qualified written request within 30 days (excluding legal public holidays, Saturdays, and Sundays). Prior to the Dodd-Frank Act, servicers had 60 days to investigate and respond to a borrower's qualified written request. The Bureau proposed § 1024.36(d)(2)(i) to implement section 6(e)(2) of RESPA with respect to qualified written requests, and to impose the same timeframe on other requests for information from borrowers. Specifically, proposed § 1024.36(d)(2)(i) would have required a servicer to respond to an information request not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the information request, with one exception discussed below.

While several industry commenters asserted that 30 days was insufficient, one credit union opined that the timeline was reasonable. Similarly, a consumer group commenter noted that the timeline was consistent with the time period for qualified written requests required by the Dodd-Frank Act. Consumer commenters on Regulation Room asserted that the timeline was too generous. The Bureau believes that the 30-day timeframe proposed is appropriate given that the Dodd-Frank Act expressly changed the timeframe for qualified written requests from 60 days to 30 days and differentiating between two regimes would increase operational complexity as well as burden on borrowers and servicers. Accordingly, the Bureau is adopting the 30-day timeline as proposed.

Shortened Time Limit To Provide Information Regarding the Identity of the Owner or Assignee

Section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(D) to RESPA, which sets forth a ten business day limitation on a servicer to respond to a borrower's request for information regarding the owner or assignee of a mortgage loan. The Bureau proposed § 1024.36(d)(2)(i)(A) to implement this provision of RESPA. Proposed § 1024.36(d)(2)(i)(A) would have provided that if a borrower submits a request for information regarding the identity of, and address or relevant contact information for, the owner or assignee of a mortgage loan, a servicer shall respond to the information request with ten days (excluding legal public holidays, Saturdays, and Sundays). Proposed § 1024.36(d)(2)(i)(A) would have required a servicer to provide the requested information within ten days (excluding legal public holidays, Saturdays, and Sundays) instead of ''10 business days,'' as the Bureau interprets the ''10 business day'' requirement in section 6(k)(1)(D) of RESPA to mean ten calendar days with an exclusion for intervening legal public holidays, Saturdays, and Sundays, and proposes to implement that interpretation in proposed § 1024.36(d)(2)(i)(A).

Two non-bank servicers commented that ten days is insufficient for those circumstances in which a servicer needs to obtain documentation confirming ownership, such as information contained in the collateral file. The Bureau acknowledges the concerns expressed but, as discussed in the proposal, the Bureau does not believe that the burden of obtaining this information for any borrower will be significant enough to justify additional time beyond the ten days (excluding legal public holidays, Saturdays, and Sundays) established by Congress for responding to borrower requests for information regarding the owner or assignee of the loan. Servicers generally have access to the identification of investors as that information is necessary to determine where to direct mortgage loan payments and reports with respect to the performance of serviced assets. The benefit to the borrower of obtaining the information, which Congress required, justifies the costs to servicers of complying within ten days (excluding legal public holidays, Saturdays, and Sundays). Accordingly, the Bureau is adopting § 1024.36(d)(2)(i)(A) as proposed.

Extensions of Time Limits

Section 1463(c)(3) of the Dodd-Frank Act amended section 6(e) of RESPA to permit servicers to extend the time for responding to a qualified written request by 15 days if, before the end of the 30-day period, the servicer notifies the borrower of the reasons for the extension. The Bureau proposed § 1024.36(d)(2)(ii) to implement this provision with respect to qualified written requests, and to impose the same timeframe with respect to other requests for information. Proposed § 1024.36(d)(2)(ii) would have permitted a servicer to extend the time period for responding to an information request by 15 days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the 30-day period set forth in proposed § 1024.36(d)(2)(i)(B), the servicer notifies the borrower of the extension and the reasons for the delay in responding. For the reasons discussed above, the Bureau did not propose to apply the extension allowance of proposed § 1024.36(d)(2)(ii) to information requests with respect to the owner or assignee of a mortgage loan. Permitting a 15-day extension of that timeframe would negate the shortened response period and undermine the purpose served by shortening it. While some consumer groups disfavored the extension, for the reasons discussed above and in the proposal, the Bureau is adopting § 1024.36(d)(2)(ii) as proposed with minor technical amendments.

36(e) Alternative Compliance

Proposed § 1024.36(e) would have provided that a servicer is not required to comply with the requirements of paragraphs (c) and (d) of proposed § 1024.36 if the information requested by a borrower is provided to the borrower within five days along with

contact information the borrower can use for further assistance. This provision was consistent with section 6(e)(1)(A) of RESPA, which requires servicers to provide written acknowledgment of a qualified written request within five days (excluding legal public holidays, Saturdays, and Sundays) ''unless the action requested is taken within such period.'' Proposed § 1024.36(e) would have permitted a servicer to provide the information requested either orally or in writing. Proposed comment 36(e)–1 would have permitted servicers that provide information orally to demonstrate compliance by, among other things, including a notation in the servicing file that the information requested was provided or maintaining a copy of a recorded telephone conversation.

Because, as discussed above, the final rule requires borrowers to submit information requests in writing in order to gain the benefit of the information request procedures set forth in § 1024.36, the Bureau now believes it is appropriate and consistent with the consumer protection purposes of RESPA to require that servicers respond to borrowers' information requests in writing. Doing so will help ensure that there is a written record of both the borrower's request and the servicer's response, which the Bureau believes will reduce confusion regarding the accuracy of the information provided. The Bureau did not receive comment regarding proposed § 1024.36(e) and, for the reasons set forth above, is adopting § 1024.36(e) substantially as proposed, except that it no longer permits servicers to respond orally and clarifies that the contact information must include a telephone number. The Bureau is removing proposed comment 36(e)–1 from the final rule.

36(f) Requirements not Applicable

The Bureau proposed § 1024.36(f) to set forth the types of information requests to which the information request requirements would not apply.

36(f)(1) In General

Proposed § 1024.36(f)(1) would have provided that a servicer is not required to comply with the information request requirements set forth in § 1024.36(c) and (d) if the servicer reasonably makes certain determinations specified in §§ 1024.36(f)(1)(i), (ii), (iii), (iv) or (v). Specifically, subject to certain exceptions, a servicer would not be required to comply with information request requirements under § 1024.36 as to information requests that are duplicative, overbroad or unduly burdensome, or untimely, as well as requests for confidential, proprietary, general corporate or irrelevant information. A servicer would be liable to the borrower for its unreasonable determination that any of the listed categories apply and resulting failure to comply with proposed § 1024.36(c) and (d).

36(f)(1)(i)

Proposed § 1024.36(f)(1)(i) would have provided that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to an information request that requests information that is substantially the same as information previously requested by or on behalf of the borrower, and for which the servicer has previously complied with its obligation to respond to the information request. Proposed comment 36(f)(1)(i)–1 would have clarified that a borrower's request for a type of information that can change over time should not be considered substantially the same as a previous request for the same type of information. The Bureau proposed § 1024.36(f)(1)(i) to ensure that a servicer is not required to expend resources conducting duplicative searches for documents, as such a requirement could divert resources from responding to other requests.

One anonymous commenter urged the Bureau to withdraw proposed § 1024.36(f)(1)(i), claiming that the Bureau lacked authority to narrow the requirements listed in RESPA. The Bureau's authority for § 1024.36 is discussed above. In addition, the Bureau believes that it would frustrate the consumer protection purposes of RESPA to require that servicers devote resources, which could otherwise be spent on responding to information requests that would benefit consumers, to respond to duplicative information requests. The Bureau therefore believes that § 1024.36(f)(1)(i) is necessary to achieve the purposes of RESPA, including of ensuring responsiveness to consumer requests and complaints and the provision and maintenance of accurate and relevant information. Accordingly, for the reasons set forth in the proposal and above, the Bureau is adopting § 1024.36(f)(1)(i) and comment 36(f)(1)(i)–1 substantially as proposed.

36(f)(1)(ii)

Proposed § 1024.36(f)(1)(ii) would have provided that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to an information request that requests confidential, proprietary, or general corporate information of a servicer. The Bureau proposed § 1024.36(f)(1)(ii) because it believed that the purpose of providing borrowers with a means to request information regarding a borrower's mortgage loan account would be frustrated by permitting borrowers to request confidential, proprietary, or general corporation information of a servicer. Proposed comment 36(f)(1)(ii)–1 would have provided examples of confidential, proprietary, or general corporate information. These include information requests regarding: management and profitability of a servicer; other mortgage loans than the borrower's; investor reports; compensation, bonuses, and personnel actions for servicer personnel; the servicer's training programs; investor agreements; the evaluation or exercise of any owner or assignee remedy; the servicer's servicing program guide; investor instructions or requirements regarding loss mitigation options, examination reports, compliance audits or other investigative materials.

Industry commenters expressed support for proposed § 1024.36(f)(1)(ii), but urged the Bureau to make clear that servicers need not turn over privileged documents. Multiple industry commenters said that servicers should not be required to produce pooling and servicing agreements, as such agreements are confidential, proprietary and also costly to mail. In contrast, one consumer advocate commenter said that such agreements are not typically confidential or proprietary, yet important because servicers rely on such documents to make erroneous claims that they are not authorized to offer certain loan modifications. Consumer advocacy groups also asserted that proposed § 1024.36(f)(1)(ii), as a whole, gives servicers too much discretion which may increase servicers' nonresponsiveness. An anonymous commenter said it was unclear which information falls into proposed § 1024.36(f)(1)(ii) and also questioned the Bureau's authority to narrow the requirements of RESPA.

Having considered these comments, the Bureau is amending proposed § 1024.36(f)(1)(ii) to provide that servicers need not provide borrowers with information that is confidential, proprietary or privileged, as the Bureau believes that permitting information requests for such information could impede the ability of servicers to operate effectively. In addition, the Bureau believes that it would frustrate the consumer protection purposes of RESPA to require that servicers devote

resources, which could otherwise be spent responding to information requests that would benefit consumers, to determining how to respond to information requests for confidential, proprietary, or privileged information that generally would not directly benefit the borrower, but might pose considerable disclosure risk to the servicer.

The final rule further removes the reference to general corporate information, and references to such information have been removed from the examples listed in final comment 36(f)(1)(ii)–1 as well. For example, because the Bureau does not believe that pooling and servicing agreements are typically kept confidential, final comment 36(f)(1)(ii)–1 no longer lists such agreements as examples. However, the Bureau notes that to the extent that a borrower requests such agreements, a servicer is not required to comply with the requirements of § 1024.36(c) or (d) if the servicer reasonably determines that any of the exclusions set forth in § 1024.36(f) apply. The Bureau's authority for § 1024.36 is addressed above.

36(f)(1)(iii)

Proposed § 1024.36(f)(1)(iii) would have provided that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to information requests that are not directly related to the borrower's mortgage loan account. The Bureau proposed § 1024.36(f)(1)(iii) because it believes the protection in it is appropriate to fulfill the purpose of the proposed rule, which is to provide a means for borrowers to obtain information from servicers regarding their own mortgage loan accounts.

A consumer group commenter argued that the proposal requires that borrowers state the information requested with too much specificity, arguing that a general request for information about the status of the borrower's loan should suffice. An anonymous commenter asserted that the Bureau proposes to improperly narrow the scope of information requests. The commenter reasoned that section 6(e)(1)(B) of RESPA requires servicers to respond to qualified written requests for information relating to the servicing of the loan. The commenter argued that the Bureau proposes to narrow that definition by adding the requirement that such requests must ''directly'' relate to the ''mortgage loan account'' for the loan.

By relieving servicers of the duty to respond to requests for information that are not directly related to the borrower's mortgage loan account, the Bureau does not intend to impose an obligation on borrowers to identify with specificity the precise document or data point the borrower is seeking. Rather, the point of this section is to assure that servicers' resources are focused on securing relevant information for borrowers by excluding requests for information that are not relevant to the borrower's account. For the reasons discussed above, the Bureau finds that § 1024.36(f)(1)(iii) is necessary to achieve the purposes of RESPA by ensuring that servicer resources that could be devoted to responding to information requests that benefit borrowers are not diverted to responding to information requests that would not result in consumer benefit. Accordingly, for the reasons set forth in the proposal and above, the Bureau is adopting § 1024.36(f)(1)(iii) as proposed. The Bureau is also adopting new comment 36(f)(1)(iii)–1, which includes examples of information that is not directly related to a borrower's loan account.

36(f)(1)(iv)

Proposed § 1024.36(f)(1)(iv) would have provided that a servicer is not required to comply with the request for information requirements in proposed § 1024.36(c) and (d) with respect to a request for information that is overbroad or unduly burdensome. The proposed rule would have defined ''overbroad'' and ''unduly burdensome'' for this purpose. It would have provided that an information request is overbroad if a borrower requests a servicer provide an unreasonable volume of documents or information to a borrower. The proposed rule stated that an information request is unduly burdensome if a diligent servicer could not respond to the request without either exceeding the maximum timeframe permitted by § 1024.36(d)(2)(ii) or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances. The proposed rule would have further clarified that if a servicer can identify a valid information request in a submission that is otherwise overbroad or unduly burdensome, the servicer is required to respond to the information request that it can identify. Finally, the Bureau proposed comment 36(f)(1)(iv)–1 to set forth characteristics that may indicate if an information request is overbroad or unduly burdensome.

As discussed above for proposed § 1024.35(g)(1)(ii), during pre-proposal outreach, consumers, consumer advocates, servicers, and servicing industry representatives indicated to the Bureau that consumers do not typically use the current qualified written request process to request information. During the Small Business Review Panel outreach, small entity representatives expressed that typically qualified written requests received from borrowers were vague forms found online or forms used by advocates as a form of pre-litigation discovery. Servicers and servicing industry representatives indicated that these types of qualified written requests are unreasonable and unduly burdensome. Small entity representatives in the Small Business Review Panel outreach requested that the Bureau consider an exclusion for abusive requests, or requests made with the intent to harass the servicer.

The Bureau requested comment regarding whether a servicer should not be required to undertake the information request requirements in proposed § 1024.36(c) and (d) for information requests that are overbroad or unduly burdensome. Industry commenters supported the exclusion, but urged the Bureau to remove the requirement that servicers identify valid information requests in submissions that are otherwise overbroad or unduly burdensome. Industry commenters said servicers should not be required to parse through such submissions to locate a clear information request. One large trade association of mortgage servicers said that the requirement effectively subsumes the exclusion. Consumer group commenters generally disfavored the exclusion. One commenter questioned the assertion that borrowers primarily use qualified written requests to obtain prelitigation discovery. One consumer group said the exclusion gives servicers too much discretion. Another said it requires borrowers to state their information requests with too much specificity. An anonymous consumer advocate said a request from a single borrower should not be so voluminous as to be burdensome for servicers to respond. Another consumer group commenter requested that the Bureau address situations in which the servicer erroneously determines that a submission is overbroad or unduly burdensome.

The Bureau proposed § 1024.36(f)(1)(iv), in part, because the Bureau believes that requiring servicers to respond to overbroad or unduly burdensome information requests from some borrowers may cause servicers to expend fewer resources to address requests that may be more clearly stated and more clearly require servicer attention. The Bureau was especially

concerned about this in light of the proposed rule's requirement that servicers respond to an expanded universe of information requests, including requests for information that do not specifically relate to ''servicing'' as defined in RESPA, as implemented by this rule, as well as information requests asserted orally. While the final rule does not require that servicers undertake the information request procedures in § 1024.36(c) and (d) for oral submissions, it does not limit information requests to those related to servicing. Thus, the Bureau continues to believe that a requirement for servicers to respond to information requests that are overbroad or unduly burdensome may harm consumers and frustrate servicers' ability to comply with the new information request requirements. Finally, as stated in the proposal, the Bureau does not believe that the information request procedures should replace or supplant civil litigation document requests and should not be used as a forum for pre-litigation discovery. Accordingly, the Bureau is adopting § 1024.36(f)(1)(iv) and comment 36(f)(1)(iv)–1 substantially as proposed.

36(f)(1)(v)

Proposed § 1024.36(f)(1)(v) would have provided that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) for an untimely information request—that is, an information request delivered to the servicer more than one year after either servicing for the mortgage loan that is the subject of the request was transferred by that servicer to a transferee servicer or the mortgage loan amount was paid in full, whichever date is applicable. The Bureau proposed this provision to set a specific and clear time that a servicer may be responsible for responding to information requests for a mortgage loan.

Moreover, the Bureau proposed § 1024.36(f)(1)(v) to achieve the same goal that currently exists in Regulation X with respect to qualified written requests. Specifically, current § 1024.21(e)(2)(ii) states that ''a written request does not constitute a qualified written request if it is delivered to a servicer more than one year after either the date of transfer of servicing or the date that the mortgage servicing loan amount was paid in full, whichever date is applicable.''

One industry trade association expressed support for proposed § 1024.36(f)(1)(v). Consumer advocacy groups did not comment on proposed § 1024.36(f)(1)(v). For the reasons set forth above, the Bureau is adopting § 1024.36(f)(1)(v) as proposed with a minor technical amendment.

36(f)(2) Notice to Borrower

Proposed § 1024.36(f)(2) would have required that if a servicer determines that it is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to an information request, the servicer must provide a notice to the borrower informing the borrower of the servicer's determination. The servicer must send the notice not later than five days (excluding legal public holidays, Saturdays, and Sundays) after its determination and the notice must set forth the basis upon which the servicer has made the determination, noting the applicable provision of proposed § 1024.36(f)(1).

One credit union trade association disfavored the proposed requirement that a servicer send a notice informing the borrower that an information request falls into one of the enumerated exclusions. The commenter suggested that the Bureau permit servicers to send a standard notice informing borrowers that the servicer received the information request and is not required to respond.

The Bureau proposed § 1024.36(f)(2) because it believes that borrowers should be notified that a servicer does not intend to take any action on the information request. The Bureau also believes borrowers should know the basis for the servicer's determination. By providing borrowers with notice of the basis for the servicer's determination, a borrower will know the servicer's basis and will have the opportunity to bring a legal action to challenge that determination where appropriate. Accordingly, having considered the comment, the Bureau is adopting § 1024.36(f)(2) as proposed.

36(g) Payment Requirement Limitations

Proposed § 1024.36(g)(1) would have prohibited a servicer from charging a fee, or requiring a borrower to make any payment that may be owed on a borrower's account as a condition of responding to an information request. Proposed § 1024.36(g)(2) would have, however, permitted fees for providing payoff statements or beneficiary notices under applicable law. The Bureau proposed § 1024.36(g)(1) and (2) for three reasons. First, section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(B) to RESPA, which prohibits a servicer from charging fees for responding to valid qualified written requests. Proposed § 1024.36(g) would have implemented that provision with respect to qualified written requests for information relating to the servicing of a mortgage loan. Second, the Bureau believes that a servicer practice of charging for responding to an information request impedes borrowers from pursuing valid information requests, and that the prohibition is therefore necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to borrower requests and complaints. Third, the Bureau learned from outreach with consumer advocates that, in some instances, servicers have demanded that borrowers make payments before the servicer will provide a borrower with information requested by the borrower or will correct errors identified by a borrower. The Bureau believes that a servicer is required to provide a borrower with information about the borrower's mortgage loan account notwithstanding the payment status of a borrower's account.

Some consumer advocacy group commenters expressed support for the fee prohibition, stating that the prohibition is statutorily required. In contrast, a large credit union trade association opposed the prohibition, noting that it bars fees for items for which credit unions routinely charge, such as fees for copies of cancelled checks and periodic statements. The trade association argued that the proposed rule should take the fact that a fee is legally permissible into account. A law firm that represents servicers argued that it would be unfair and economically burdensome to prohibit servicers from charging fees for duplicate statements, such as year-end statements and tax forms.

Having considered these comments, for the reasons stated above and in the proposal, the Bureau is adopting § 1024.36(g) as proposed, except that § 1024.36(g)(2) no longer references payoff statements. The Bureau has removed the reference to payoff statements, as the final rule excludes such statements from information request requirements under § 1024.36 altogether.

36(h) Servicer Remedies

Proposed § 1024.36(h) would have provided that the existence of an outstanding information request does not prohibit a servicer from furnishing adverse information to any consumer reporting agency or from pursuing any remedies, including proceeding with a foreclosure sale, permitted by the applicable mortgage loan instrument. The proposed requirement is consistent with section 6(e)(3) of RESPA which

prohibits servicers from furnishing adverse information only as to qualified written requests that assert an error with respect to the borrower's payments, but not to a qualified written request that requests information. Moreover, the Bureau does not believe that the consumer protection purposes of RESPA would be furthered by permitting borrowers to evade consumer reporting by submitting an information request. The Bureau did not receive comment regarding proposed § 1024.36(h) and is adopting it as proposed.

Section 1024.37 Force-Placed Insurance

Section 1463(a) of the Dodd-Frank Act amended section 6 of RESPA to establish new servicer duties with respect to servicers' purchase of force-placed insurance on a property securing a federally related mortgage loan. The statute generally defines ''force-placed insurance'' as hazard insurance coverage obtained by a servicer of a federally related mortgage loan when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage loan. New § 6(k)(1)(A) of RESPA states that a servicer shall not obtain force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. New section 6(*l*) of RESPA further states that servicers must: (1) provide two written notices to a borrower over a notification period lasting at least 45 days before imposing a charge for force-placed insurance on the borrower; (2) accept any reasonable form of written confirmation from a borrower of existing insurance coverage; and (3) within 15 days of the receipt of confirmation of a borrower's existing insurance coverage, terminate force-placed insurance and refund all force-placed insurance premiums paid by the borrower during any period during which the borrower's insurance coverage and the force-placed insurance coverage were both in effect, as well as any related fees charged to the borrower's account with respect to force-placed insurance during such period. Section 6(*l*) of RESPA additionally states that no provisions of section 6(*l*) shall be construed as prohibiting a servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to section 102(e) of the Flood Disaster Protection Act of 1973. Section 6(m) of RESPA states that all charges related to force-placed insurance imposed on a borrower by or through a servicer, other than charges subject to State regulation as the business of insurance, must be bona fide and reasonable.

The Bureau proposed § 1024.37 to implement the new servicer duties established by section 1463(a) of the Dodd-Frank Act in section 6(k) through (m) of RESPA. Force-placed insurance was created by the insurance industry to provide mortgage loan owners and investors with a hazard insurance product that would protect the value of their investment by insuring properties securing mortgage loans when hazard insurance obtained by a borrower lapsed. In recent years, however, force-placed insurance has become a consumer protection concern and has attracted the attention of lawmakers, enforcement officials, and Federal and State regulators.[105] First, a force-placed insurance policy typically provides less coverage than the typical homeowners' insurance policy because force-placed insurance has been designed to provide coverage limited to protecting the value of the dwelling, but not personal property, personal liabilities for injuries on site, and other types of loss included in the scope of coverage of a typical homeowners' insurance policy. Second, although a force-placed insurance policy generally provides less coverage than a homeowners' insurance policy, force-placed insurance policy premiums are generally substantially more expensive than homeowners' insurance policy premiums. One large force-placed insurance provider estimates that the force-placed policies it writes cost, on average, 1.5 to 2 times more than the prior hazard insurance purchased by a borrower.[106] But at the same time, it has been reported that an individual force-placed policy could cost 10 times as much as a homeowners' insurance policy.[107] Explanations for the cost of force-placed insurance differ. Industry stakeholders generally attribute the substantially higher cost of force-placed insurance (relative to homeowners' insurance) to the fact that force-placed insurance: (1) Can be purchased for every mortgage loan in a servicer's portfolio (including vacant properties and other properties that homeowners' insurance providers will not insure); (2) ensures continuous coverage as of the date a homeowners' insurance policy lapses or is canceled; and (3) can be canceled by a servicer at any time, with a full refund back to the date of placement.

Consumer groups, however, assert that the higher cost of force-placed insurance can be largely explained by market mechanisms that drive force-placed insurance providers to compete for business from servicers. Consumer groups argue that the cost of force-placed insurance is inflated by incentives like commissions to servicers (or their affiliates) that are licensed to engage in insurance transactions, no-cost or below-cost insurance tracking and monitoring services to servicers because the actual cost is passed on to borrowers in the force-placed insurance premium charge a force-placed insurance provider assesses on a borrower through the servicer, and payments for entering into reinsurance arrangements with servicers (or their affiliates) that are licensed to engage in insurance transactions. Consumer groups and mortgage investors have alleged that servicers have frequently improperly placed force-placed insurance, in some instances to receive lucrative commissions or reinsurance fees, or other consideration.[108] In some

[105] *See e.g.,* H.R. Rep. 111–94, at 55 (calling the force-placement of insurance without a reasonable basis a problematic method used by some servicers to increase revenue); *see also further,* Compl., *United States of America* et al. v. *Bank of America Corp.,* et al. at ¶ 51 (alleging that the defendant servicers engaged in unfair and deceptive practices in the discharge of their loan servicing activities by imposing force-placed insurance without properly notifying the borrowers and when borrowers already had adequate coverage) (filed on March 14, 2012); *see further, N.Y. Orders 'Force-Placed' Insurers to Submit New Lower Rate Proposals,* Ins. J., June 13, 2012 (describing that New York State's Department of Financial Services ordered three force-placed insurance providers to submit new force-placed insurance premium rates after determining that the insurers overcharged New York homeowners).

[104] *See* Assurant Specialty Property, Lender-Placed Insurance, available at *http://newsroom.assurant.com/releasedetail.cfm?ReleaseID=645046&ReleaseType=Featured%20News.*

[106] *See* Assurant Specialty Property, Lender-Placed Insurance, available at *http://newsroom.assurant.com/releasedetail.cfm?ReleaseID=645046&ReleaseType=Featured%20News.*

[107] *See* Jeff Horowitz, *Ties to Insurers Could Land Mortgage Servicers in More Trouble,* Am. Banker (Nov. 9, 2010.)

[108] *See e.g., The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Hous., Transp., & Comm. Affairs of the Senate Comm. on Banking and Urban Affairs,* 112th Cong. 126 (2011)(statement of Laurie Goodman, Amherst Securities) (testifying that incentives to obtain force-placed insurance are such that it would be ''unrealistic to expect a servicer to make an unbiased decision on when to buy [force-placed insurance],'' and hence, national servicing standards should be established to require servicers to maintain a borrower's hazard insurance ''as long as possible.''); *see also,* N.Y. State Dep't of Fin. Services, *Public Hearings on Force-Placed Insurance* (2012) (statement of Alexis Iwanisziw, Neighborhood Economic Development Advocacy Project) (testifying that problems like mortgage servicers imposing force-placed insurance when homeowners have voluntary market policies persist because mortgage servicers receive commissions, reinsurance contracts, free insurance tracking and other kickbacks when they purchase force-placed insurance); *see further,* Compl., *United States of America* et al v. *Bank of America Corp.,* et al at ¶ 51 (alleging that the defendant servicers engaged in

cases, consumer groups have asserted that the higher cost of force-placed insurance can drive borrowers, particularly those already facing financial hardship, into default.

As discussed above, RESPA is a remedial consumer protection statute and imposes obligations upon the servicing of federally related mortgage loans that are intended to protect borrowers. The Bureau believes that the obligations the Dodd-Frank Act established with respect to servicers' purchase of force-placed insurance were intended to impose, at minimum, (1) a duty to help borrowers avoid unwarranted and unnecessary charges related to force-placed insurance through both direct limitations on certain charges and several procedural safeguards; and (2) a duty to provide borrowers with reasonably accurate information about servicers' grounds for purchasing force-placed insurance and the financial impact that such purchase could have on the borrowers, in order to encourage borrowers to take appropriate steps to maintain their hazard insurance policies.

Legal Authority

Section 1024.37 implements section 6(k)(1)(A), 6(k)(2), 6(*l*), and 6(m) of RESPA. Pursuant to the Bureau's authorities under sections 6(j), 6(k)(1)(E), and 19(a) of RESPA, the Bureau is also adopting certain additions and certain exemptions to these provisions. As explained in more detail below, these additions and exemptions are necessary and appropriate to achieve the consumer protection purposes of RESPA, including the avoidance of unnecessary and unwarranted charges and fees and the provision to borrowers of accurate and relevant information.

37(a) Definition of Force-Placed Insurance

37(a)(1) In General

As added by the Dodd-Frank Act, section 6(k)(2) of RESPA states that for purposes of section 6(k) through (m) of RESPA, force-placed insurance means hazard insurance coverage obtained by a servicer of a federally related mortgage loan when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage. The Bureau proposed § 1024.37(a)(1) to implement section 6(k)(2) of RESPA. The proposed provision stated that in general, for purposes of § 1024.37, the term ''force-placed insurance'' means hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan on a property securing such loan.

Proposed § 1024.37(a)(1) did not incorporate language from the statute referring to a borrower's failure to maintain or renew hazard insurance as required under the terms of the mortgage. As explained in the proposal, the Bureau was concerned that adopting that language might raise questions whether the Dodd-Frank Act protections applied to situations in which a borrower did, in fact, have hazard insurance in place but the borrower's servicer obtained force-placed insurance anyway. The Bureau noted that borrowers in such a situation are most in need of protection from unwarranted and unnecessary charges related to force-placed insurance. Indeed, in other respects, the force-placed insurance provisions added to RESPA by the Dodd-Frank Act expressly contemplate that the protections apply in circumstances where a borrower, in fact, has hazard insurance in place. For example, the notice to the borrower required under RESPA section 6(*l*)(1)(A) is required to include a statement of the procedures by which the borrower may demonstrate insurance coverage, and under RESPA section 6(*l*)(3), which provides that upon receipt by a servicer of confirmation that a borrower has hazard insurance in place, a servicer must terminate force-placed insurance and refund to the borrower all force-placed premiums and related charges for periods of overlapping coverage. Thus, notwithstanding the phrase ''when the borrower has failed to maintain or renew hazard insurance,'' the Bureau interprets the definition of force-placed insurance to include situations in which a servicer obtains hazard insurance coverage on a property where the borrower has in fact maintained the borrower's own hazard insurance. The Bureau also proposed to add language to the definition of the term ''force-placed insurance'' in proposed § 1024.37(a)(i) to describe the insurance as being obtained by a servicer ''on behalf of the owner or assignee of a mortgage loan on a property securing such loan.'' This language was intended to distinguish force-placed insurance from situations in which a servicer renews borrowers' own hazard insurance policies as described in § 1024.17 or otherwise. The Bureau observes that a servicer is simply renewing a borrower's own hazard insurance under these circumstances and does not interpret such insurance as hazard insurance ''obtained'' by a servicer within the statutory definition of ''force-placed insurance'' set forth in section 6(k)(2) of RESPA. The Bureau did not receive comments on the proposed definition of the term ''force-placed insurance'' set forth in proposed § 1024.37(a)(1). Accordingly, the Bureau is adopting § 1024.37(a)(1) as proposed.

37(a)(2) Types of Insurance Not Considered Force-Placed Insurance

37(a)(2)(i)

Proposed § 1024.37(a)(2)(i) would have provided that hazard insurance to protect against flood loss obtained by a servicer as required by the Flood Disaster Protection Act of 1973 is not force-placed insurance for the purposes of § 1024.37. The Bureau proposed to exclude flood insurance that is required under the Flood Disaster Protection Act of 1973 (FDPA) from the definition of the term ''force-placed insurance,'' because, as discussed above in the section-by-section analysis of the defined term ''Hazard insurance,'' the Bureau believed and continues to believe that the Bureau's force-placed insurance regulations should not apply to servicers when they are required by the FDPA to purchase flood insurance. As discussed above, the FDPA provides an extensive set of restrictions on a servicers' purchase of flood insurance required by the FDPA, and the Bureau was concerned that subjecting servicers to overlapping regulatory restrictions would be unduly burdensome and might result in consumer confusion.

Several consumer groups suggested that the Bureau should only exempt servicers from the Bureau's force-placed insurance regulations to the extent they purchase force-placed flood policies from the National Flood Insurance Program (NFIP) because the FDPA can reasonably be interpreted to require servicers to purchase force-placed flood insurance through the NFIP. The consumer groups further asserted that it was important to ensure that RESPA's consumer protections with respect to force-placed insurance apply when servicers force-place private flood insurance because private force-placed insurance policies are more expensive than the NFIP flood policies. As discussed above, industry commenters generally said that the proposed exclusion of hazard insurance to protect against flood loss obtained by a servicer as required by the FDPA from the definition of the term ''force-placed

unfair and deceptive practices in the discharge of their loan servicing activities by imposing force-placed insurance without properly notifying the borrowers and when borrowers already had adequate coverage) (filed on March 14, 2012).

insurance'' was workable and adequately mitigated the risk of a servicer having to comply with both regulations under the FDPA and the Bureau's force-placed insurance regulations.

The Bureau has carefully considered these comments and is adopting proposed § 1024.37(a)(2)(i) as proposed. The Bureau does not administer the FDPA, and accordingly declines to opine on whether the FDPA requires servicers to purchase flood insurance policies from the NFIP. The Bureau, however, observes that there is existing guidance from Federal agencies that administer the FPDA that suggests that a servicer may reasonably interpret the FDPA to permit servicers to satisfy their obligations under the statute through the purchase of private flood insurance.[109]

Moreover, the consumer groups did not suggest that the consumer protections in the FDPA do not apply to a servicer's purchase of private flood insurance, and the Bureau has no reason to believe that they do not. Accordingly, the Bureau believes that if the Bureau were to adopt the consumer groups' suggestion to exclude from the definition of the term ''force-placed insurance'' only policies purchased under the NFIP, a servicer who purchased private flood insurance to comply with its obligations under the FDPA would have to comply with both the Bureau's regulations and regulations under the FDPA. As discussed above, this result would impose unnecessary compliance burdens and frustrate the consumer protection purposes of RESPA's force-placed insurance provisions. For the reasons discussed above, § 1024.37(a)(2)(i) is necessary and appropriate to avoid undermining the consumer protection purposes of RESPA's force-placed provisions and is thus authorized under sections 6(k)(1)(E), 6(j)(3), and 19(a) of RESPA.

37(a)(2)(ii) and (iii)

The Bureau proposed § 1024.37(a)(2)(ii) to clarify that hazard insurance obtained by a borrower but renewed by the borrower's servicer as required by § 1024.17(k)(1), (2), or (5) is not force-placed insurance for purposes of § 1024.37. The Bureau proposed § 1024.37(a)(2)(iii) to clarify that hazard insurance renewed by the servicer at its discretion if the servicer is not required to renew the borrower's hazard insurance as required by § 1024.17(k)(1), (2), or (5) is also not force-placed insurance for purposes of § 1024.37. As discussed above, the Bureau observes that a servicer is simply renewing a borrower's own hazard insurance under these circumstances and does not interpret such insurance as hazard insurance ''obtained'' by a servicer within the statutory definition of ''force-placed insurance'' set forth in section 6(k)(2) of RESPA. Other than a large bank servicer commending the Bureau for the exclusion from the definition of ''force-placed insurance'' of hazard insurance renewed at the servicer's discretion for non-escrowed borrowers, the Bureau did not receive comments on either proposed § 1024.37(a)(2)(ii) or (iii). Accordingly, proposed § 1024.37(a)(2)(ii) and (iii) are adopted as proposed, except the Bureau has made technical revisions to proposed § 1024.37(a)(2)(ii) consistent with changes to the language of § 1024.17(k)(5), and adopts § 1024.37(a)(2)(iii) with the clarification that § 1024.37(a)(2)(iii) applies to the extent the borrower agrees. The Bureau believes it is appropriate to create incentives for servicers to work with non-escrowed borrowers to renew hazard insurance originally obtained by these borrowers, but not for servicers to renew such insurance without borrower consent.

One state housing finance agency commenter suggested that the Bureau should allow collateral protection plans as an acceptable alternative to force-placed insurance for subordinate liens. The Bureau's force-placed insurance regulations are not intended to regulate the type of hazard insurance a servicer obtains on behalf of the owner or assignee of a mortgage loan to insure the property securing such loan. But if a servicer attempts to seek payment from a borrower for such insurance, the Bureau's force-placed regulations will apply.

37(b) Basis for Charging a Borrower for Force-Placed Insurance

Section 6(k)(1)(A) of RESPA states that a servicer of a federally related mortgage loan shall not obtain force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. The Bureau proposed § 1024.37(b) to implement section 6(k)(1)(A) of RESPA. Proposed § 1024.37(b) stated that a servicer may not obtain force-placed insurance unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance.

The Bureau also proposed related commentary to provide illustrative examples of ''a reasonable basis to believe'' that a borrower has failed to maintain hazard insurance. Proposed comment 37(b)–1 would have provided two examples in the context of a borrower with an escrow account established to pay for hazard insurance premiums. Proposed comment 37(b)–2 would have provided an example of a borrower who has not established an escrow account to pay for hazard insurance premiums. During pre-proposal outreach, servicers and force-placed insurance providers told the Bureau that their process of verifying the existence of insurance coverage before obtaining force-placed insurance for borrowers with escrow and borrowers without escrow was different. Accordingly, the Bureau believed that it was appropriate to provide different examples based on whether the borrower had escrowed for hazard insurance.

Several consumer groups and a number of industry commenters suggested that the Bureau make changes to proposed § 1024.37(b). Consumer group commenters expressed the concern that proposed § 1024.37(b) would be too weak to motivate servicers to change their practices with respect to the purchase of force-placed insurance. Several consumer groups recommended that that the Bureau replace the proposed commentary to 1024.37(b) with a collective standard that would determine whether the servicer had a reasonable basis for obtaining force-placed insurance based on whether the percentage of cases in which borrowers receive a full refund for force-placed insurance charges exceed five percent per calendar year.

In contrast, a number of industry commenters suggested that proposed § 1024.37(b) was too limiting and might unduly chill servicer's use of force-placed insurance to protect a lender's collateral. A number of industry commenters requested that the Bureau change proposed § 1024.37(b) so that the reasonable basis standard in § 1024.37(b) would be defined solely by compliance with the procedural requirements enumerated in section 6(*l*) of RESPA and § 1024.37(c) and (d)[110]

[109] *See* Interagency Questions and Answers Regarding Flood Insurance, 74 FR 35914, 35944 (July 21, 2009) (question 63 & 64 provide guidance on the circumstances under which lenders could rely on private flood insurance policies to meet their obligations to maintain adequate flood insurance coverage); *see also,* Fed. Emergency Mgmt. Agency, *Mandatory Purchase of Flood Insurance Guidelines* 42 (September 2007)(stating that a lender has the option of force placing flood insurance through a private (non-NFIP) insurer).

[110] Section 6(*l*) provides that a servicer of a federally related mortgage shall not be construed as having a reasonable basis for obtaining force-placed

or, in the alternative, would provide a safe harbor for servicers that meet such requirements. One large force-placed insurance provider and one large bank servicer said that if the Bureau did not change proposed § 1024.37(b), then the Bureau should expressly state in commentary to § 1024.37(b) that the examples are illustrative and do not provide the only situations in which a servicer has a reasonable basis to believe that the borrower's hazard insurance has lapsed. One national trade association representing federal credit unions suggested that the Bureau provide a safe harbor for servicers acting in good faith when they obtained force-placed insurance.

After careful review of these comments and further consideration, the Bureau is adopting § 1024.37(b) with changes. First, the Bureau has concluded that when a servicer purchases force-placed insurance but does not charge a borrower for such insurance, the servicer does not ''obtain'' force-placed insurance within the meaning of section 6(k)(1)(A) of RESPA. The Bureau arrived at this conclusion after re-evaluating the connection between section 6(k)(1)(A) and (*l*). As described above, section 6(k)(1)(A) establishes that a servicer of a federally related mortgage loan shall not obtain force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. Section 6(*l*) establishes that a servicer of a federally related mortgage loan shall not be construed as having a reasonable basis for obtaining force-placed insurance unless the requirements of section 6(*l*) have been met. But one of the requirements is that a servicer must terminate force-placed insurance within 15 days of the servicer receiving confirmation of a borrower's existing insurance coverage. The Bureau believes that this provision expressly contemplates that a servicer may purchase force-placed insurance before meeting the requirements of section 6(*l*). Accordingly, where ''obtaining'' is used in section 6(*l*), the Bureau interprets the statute to mean ''charging.'' Because ''obtain'' appears in section 6(k)(1)(A) and 6(*l*), the Bureau has changed § 1024.37(b) to reflect more clearly the statutory prohibition against ''charging.'' Accordingly, as finalized, § 1024.37(b) provides that a servicer may not assess on a borrower a premium charge or fee related to force-placed insurance unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance.

The Bureau has also changed commentary intended to explain the circumstances that provide a servicer with a ''reasonable basis to believe'' for purposes of § 1024.37(b). The Bureau has decided not to provide specific examples of ''a reasonable basis to believe.'' Instead, as adopted, comment 37(b)–1 provides that information about a borrower's hazard insurance received by a servicer from a borrower, the borrower's insurance provider or insurance agent, may provide a servicer with a reasonable basis to believe that the borrower has failed to comply with the loan contract's requirement to maintain hazard insurance. The Bureau believed that sometimes the absence of information may provide a servicer with a reasonable basis to believe that the borrower has failed to comply with the loan contract's requirement to maintain hazard insurance. Accordingly, proposed comment 37(b)–1 would have clarified that a servicer had a reasonable basis to believe that a borrower with an escrow account established for hazard insurance has failed to maintain hazard insurance if the servicer had not received a renewal bill within a reasonable time prior to the expiration date of the borrower's hazard insurance. Upon further consideration, the Bureau believes that the comment may convey that the absence of information would provide a servicer with a safe harbor. The Bureau believes that a safe harbor based on the absence of information would not adequately ensure that borrowers are protected from unwarranted and unnecessary charges related to force-placed insurance. Accordingly, the Bureau is adopting commentary to provide that in the absence of receiving information about a borrower's hazard insurance, a servicer may satisfy the reasonable basis to believe standard if a servicer acts with reasonable diligence to ascertain a borrower's hazard insurance status, and does not receive, from the borrower or otherwise have evidence of insurance coverage as provided in § 1024.37(c)(1)(iii).

The Bureau has concluded that a servicer following the notification procedure established by section 6(*l*) of RESPA has acted with reasonable diligence to ascertain a borrower's hazard insurance status, but compliance with those procedural elements alone are not sufficient to provide a safe harbor. The statute prohibits a servicer from imposing any charge on a borrower for force-placed insurance if the servicer has received demonstration of hazard insurance coverage by the end of the notification process. Accordingly, comment 37(b)–1, as adopted, explains that an example of acting with reasonable diligence is one in which a servicer complies with the notification requirements set forth in § 1024.37(c)(1)(i) and (ii), and if after complying with such requirements, the servicer does not receive, from the borrower or otherwise, evidence of insurance coverage as provided in § 1024.37(c)(1)(iii).

The Bureau does not believe that it is necessary to provide a separate safe harbor for servicers acting in good faith because the Bureau believes the standard set forth in § 1024.37(b) provides sufficient flexibility for servicers to balance their obligations to owners and assignees of mortgage loans to ensure that a property is adequately insured and to protect borrowers from unwarranted and unnecessary charges and fees. The Bureau also declines to adopt a collective standard to evaluate whether a servicer's purchase of force-placed insurance is proper. The Bureau believes that the percentage of cases in which a borrower receives a full refund for force-placed insurance charges may be relevant in assessing whether a servicer is maintaining reasonable policies and procedures to ensure that a servicer is maintaining accurate information about a borrower's mortgage loan. But the Bureau believes that section 6(k)(1)(A) of RESPA established a loan-level standard. Using a collective standard to evaluate whether a servicer has satisfied the reasonable basis to believe requirement in section 6(k)(1)(A) would not be appropriate because the standard would be overbroad and might discourage a servicer from obtaining force-placed insurance even though a servicer has actual information that a borrower has failed to comply with the loan contract's requirements to maintain property insurance.

A state trade association representing banks and one of its member banks urged the Bureau to eliminate proposed § 1024.37(b). They expressed concern that the reasonable basis standard, in combination with the prohibition on charging a borrower for insurance in proposed § 1024.37(c)(1) for at least 45 days, would increase the likelihood that homes go uninsured for a significant period of time. The Bureau declines to eliminate § 1024.37(b) because the Bureau believes the provision is necessary to implement RESPA's force-placed provisions. In addition, the Bureau believes that the commenters' concern is unwarranted, in particular, because § 1024.37(b) has been revised to

insurance unless the requirements of section 6(*l*) of RESPA have been met.

reframe the prohibition as one on charging the borrower for, rather than purchasing, force-placed insurance.

Lastly, a state trade association representing banks and thrifts expressed concern that servicers may rely on information from an insurance provider that later turns out to be incorrect about the status of a borrower's hazard insurance coverage to purchase force-placed insurance. For example, the commenter said that insurance providers may send notices of cancellation to servicers before a borrower's insurance actually lapses. The Bureau recognizes that servicers may sometimes wrongly conclude that there is a reasonable basis to charge borrowers for force-placed insurance, even after complying with the procedures steps in § 1024.37(c)(1). But whether § 1024.37(b) is violated turns on whether or not a servicer had a reasonable basis to reach its conclusion based on the information the servicer has at the time the servicer charges a borrower for force-placed insurance.

37(c) Requirements for Charging Borrower Force-Placed Insurance

37(c)(1) In General

Section 6(*l*)(1) of RESPA, added by section 1463(a) of the Dodd-Frank Act, states that a servicer may not impose any charge on a borrower for force-placed insurance with respect to any property securing a federally related mortgage unless the servicer (1) sends a written notice by first-class mail to a borrower that contains disclosures about a borrower's obligation to maintain hazard insurance, a servicer's lack of evidence that a borrower has such insurance, a clear and conspicuous statement of how the borrower may demonstrate coverage, and a statement that a servicer may obtain insurance coverage at a borrower's expense if the borrower does not provide demonstration of coverage in a timely manner (*see* section 6(*1*)(1)(A)(i) through (iv)); (2) sends a second written notice by first-class mail containing the same disclosures to a borrower at least 30 days after mailing the first written notice (*see* section 6(*l*)(1)(B)); and (3) does not receive any demonstration of hazard insurance coverage by the end of the 15-day period beginning on the date the second written notice was sent to the borrower (*see* section 6(*l*)(1)(C)).

The Bureau proposed § 1024.37(c)(1) to implement section 6(*l*)(1). Proposed § 1024.37(c)(1) would have provided that a servicer may not charge a borrower for force-placed insurance unless: (1) A servicer delivers to the borrower or places in the mail a written notice with the disclosures set forth in § 1024.37(c)(2) at least 45 days before the premium charge or any fee is assessed; (2) it delivers to such borrower or places in the mail a written notice in accordance with § 1024.37(d)(1), which would have prohibited a servicer from delivering or placing in the mail this second notice until 30 days have passed after the servicer has delivered or placed in the mail the first written notice required by § 1024.37(c)(1)(i); and (3) during the 45-day notice period, the servicer has not received verification that such borrower has hazard insurance in place continuously. Proposed § 1024.37(c)(1)(iii) also stated that determining whether the borrower has hazard insurance in place continuously, the servicer shall take account of any grace period provided under State or other applicable law. The Bureau proposed to permit a servicer to choose between delivering the written notice to the borrower or mailing the written notices established by section 6(*l*)(1)(A) and (B) of RESPA because the Bureau believed it was necessary and proper to achieve the purposes of RESPA to provide servicers with flexibility to either deliver or mail the required notices, since delivery will often be faster than transmittal by mail.

Proposed comment 37(c)(1)–1 would have clarified the minimum length of the notice period. It stated that notice period set forth in § 1024.37(c)(1) begins on the day that the servicer delivers or mails the notice to the borrower and expires 45 days later, and that the servicer may assess the premium charge and any fees for force-placed insurance beginning on the 46th day if the servicer has fulfilled the requirements of § 1024.37(c) and (d). The comment further stated that if not prohibited by State or other applicable law, the servicer may retroactively charge a borrower for force-placed insurance obtained during the 45-day notice period. Proposed comment 37(c)(1)(iii)–1 would have provided examples of borrowers having hazard insurance in place continuously.

Two non-bank servicers stated that they supported proposed § 1024.37(c)(1) and related commentary. One of the commenters observed that the Bureau's proposal reflects its current practice. This is consistent with feedback from small servicers with whom the Small Business Review Panel conducted outreach in advance of the proposal. One participant stated that it currently provides two notices that are very similar to the ones that would be required, and another participant stated that it currently exceeds the number of notices that would be required.

The Bureau received comments on various aspects of proposed § 1024.37(c)(1). Except as discussed below, the majority of industry commenters did not raise concerns with the notification aspect of proposed § 1024.37(c)(1). The majority of industry commenters only sought clarification. First, they requested the Bureau clarify that a servicer may retroactively charge a borrower for force-placed insurance back to the date that a borrower's hazard insurance lapsed, even if the servicer sends the first notice after the date of lapse. Second, a number of industry commenters requested that the Bureau clarify how a servicer should account for grace periods when determining whether a borrower has hazard insurance in place continuously. They observed that a grace period under a typical hazard insurance policy extends a policyholder's insurance coverage past the expiration date only if the policyholder pays the past-due premium during such period. A bank servicer requested the Bureau clarify that ''grace period'' used in proposed § 1024.37 refer to grace periods applicable to the borrower's hazard insurance, and not grace periods applicable to the borrower's loan during which the borrower pays the mortgage payment after the due date without incurring a late charge. One large bank servicer sought clarification of whether the notice period could exceed 45 days.

A minority of industry commenters opposed the notification aspect of proposed § 1024.37(c)(1). One credit union contended that the proposed notices would be duplicative, unnecessary, and add to the overall cost of lending because borrowers already receive multiple notices from their insurers prior to cancellation. A trade association representing retail banks asserted that if a borrower's hazard insurance coverage lapses before the second notice is provided, then a servicer should be able to obtain force-placed insurance without having to send the second notice. A bank servicer argued that rather than requiring a servicer to send a second notice at least 15 days prior to charging a borrower for force-placed insurance, the Bureau should instead permit a servicer to simply provide a notice within five days of purchasing force-placed insurance. One state credit union league expressed concern about the aggregate notice burden servicers would be required to bear if the mortgage servicing rules are finalized as proposed and suggested that the burden could be reduced if the Bureau combines the first and second written notice into a single notice. One

credit union asserted that the Bureau should allow a servicer to include the proposed force-placed insurance notices with the periodic statement because multiple documents mailed to the borrower could decrease the probability of the borrower actually paying attention to the information.

Several industry commenters urged the Bureau to reconsider the aspect of the proposal that would have required servicers to wait at least 45 days to charge a borrower for force-placed insurance. The commenters contended that servicers, especially small servicers, would incur significant costs because servicers would have to advance force-placed insurance charges for borrowers. One state credit union trade association urged the Bureau to exercise its exception authority to exempt small servicers from the requirements of § 1024.37(c). In addition to the cost of advancement, the commenter also asserted that it would be costly for small servicers to send the notices. One non-bank servicer suggested the Bureau shorten the notice period to 30 days, while a bank servicer urged the Bureau to shorten the notice period to 10 days. One bank servicer also requested the Bureau to preempt Texas law that addresses notification requirements that apply to creditors' purchase of force-placed insurance for residential mortgages.

One bank servicer commented that a rule requiring servicers to provide notices like the proposed periodic statement or force-placed insurance notices to borrowers would be a waste of servicer resources without a corresponding benefit to consumers in situations involving a borrower whom the servicer has referred to foreclosure, a borrower who has declared bankruptcy, or a borrower who has made no payment or contacted the servicer for more than six months and whom the servicer has determined to have vacated the property. It sought an exemption from compliance with any force-placed insurance notification requirements with regard to those three categories of borrowers. One national trade association representing credit unions and a credit union commenter expressed concern that credit union members may believe that they should only be charged from the date that they received the first notice. Lastly, some industry commenters stated that a servicer should not be subject to a waiting period of 45 days to obtain force-placed insurance because it leaves collateral exposed and increases the risk to the borrower.

In contrast, one consumer advocacy group urged the Bureau to strengthen the notification requirement so that a servicer would be required to provide the first notice within 15 days of placing force-placed insurance. It further asserted that it would be unreasonable to permit a servicer to retroactively charge a borrower for more than 60 days of force-placed insurance because it is a servicer's responsibility to identify lapses in insurance and notify borrowers of such lapses in a timely fashion.

Lastly, several industry commenters requested the Bureau clarify what ''verification'' means because they were concerned that the proposal would have required servicers to accept any insurance information they received from borrowers. The commenters noted that the traditional means of establishing proof of insurance is by requiring a borrower to provide a copy of an insurance policy declaration page, a certificate of insurance, or the insurance policy. The commenters expressed concern that without any of these, servicers may might potentially not be able to provide mortgage investors with the proof such investors require as evidence of coverage.

After careful consideration of these comments and further consideration, the Bureau is adopting § 1024.37(c)(1) with several adjustments. With respect to the notification aspect of § 1024.37(c)(1), the Bureau notes that RESPA establishes a very detailed scheme for any servicer (without consideration of the servicer's size) to follow before a servicer imposes a charge on any borrower for force-placed insurance. The Bureau believes that the prescriptive nature of the statutory scheme suggests that Congress believed that each step was necessary to achieve the consumer protection purpose of RESPA's force-placed insurance provisions. The notification procedures the Bureau proposed in § 1024.37(c)(1) mirror the prescriptive statutory scheme because they were necessary to achieve the intent of Congress. The Bureau declines to adopt suggestions received from commenters, which ranged from creating exemptions for small servicers and unresponsive borrowers to changing various aspects of the notification requirements, because they would make § 1024.37(c)(1) depart from the statutory scheme Congress established.

The Bureau has also worked to craft effective notices through consumer testing, and the results of those tests suggest that borrowers will in fact welcome and respond to the notices. The Bureau further believes that some of the commenters' concerns are addressed by the fact that the Bureau is interpreting the statutory language to allow charges to be assessed retroactively for any period in which coverage was not maintained continuously once the procedural and substantive statutory criteria are met. Moreover, the Bureau believes that it is unnecessary to set limitations on a servicer's right to assess on borrowers charges retroactively because the statute establishes that a borrower has an unconditional right to a full refund of force-placed insurance premium charges and related fees the borrower has paid for any period in which the borrower's hazard insurance and the force-placed insurance were both in place.

With respect to the request for preemption, the Bureau observes that based on the way in which the commenter described Texas law, it does not appear that compliance with Texas law would prevent a servicer from complying with the Bureau's force-placed insurance notification requirements. Accordingly, the Bureau believes preemption is not appropriate based on the information provided.

The Bureau is making several changes to § 1024.37(c)(1) for clarification purposes. The Bureau is adopting new comment § 1024.37(c)(1)(i) to clarify that a servicer may charge a borrower for force-placed insurance a servicer purchased, retroactive to the first day of any period in which the borrower did not have hazard insurance in place. The Bureau is clarifying the role of a grace period under applicable law in determining whether a borrower has hazard insurance in place continuously in new comment 37(c)(1)(iii)–1. The Bureau is adopting § 1024.37(c)(1)(iii) to clarify what ''receiving verification'' means by replacing the phrase ''received verification that the borrower has hazard insurance in place continuously'' in proposed § 1024.37(c)(1)(iii) with the phrase ''received, from the borrower or otherwise, evidence demonstrating that the borrower has had in place continuously hazard insurance coverage that complies with the loan contract's requirements to maintain hazard insurance.''

The Bureau has concluded that putting the responsibility entirely on a servicer to verify a borrower's hazard insurance coverage by requiring a servicer to accept any written information from a borrower as long as it contains the insurance policy number, and the name, mailing address and phone number of the borrower's insurance company or the borrower's insurance agency as evidence of insurance would impose too large of a burden on a servicer to determine whether the property is in fact insured

in accordance with the terms and conditions of a borrower's loan contract. Accordingly, in new comment 1024.37(c)(1)(iii)–2, the Bureau is explaining that as evidence of continuous hazard insurance coverage that complies with the loan contract's requirements to maintain hazard insurance, a servicer may require a copy of the borrower's hazard insurance policy declaration page, the borrower's insurance certificate, the borrower's insurance policy, or other similar forms of written confirmation because the Bureau interprets the statutory language ''reasonable form of written confirmation of existing insurance coverage'' in section 6(*l*)(2) of RESPA to mean documents servicers typically require borrowers to provide to establish proof of coverage. Further, comment 37(c)(1)(iii)–2 provides that a servicer may reject evidence of hazard insurance coverage submitted by the borrower if neither the borrower's insurance provider nor insurance agent provides confirmation of the insurance information submitted by the borrower, or if the terms and conditions of the borrower's hazard insurance policy do not comply with the borrower's loan contract requirements because the Bureau interprets section 6(*l*)(3) of RESPA to permit a servicer to separately confirm insurance information that a borrower has proffered to establish proof of coverage and the statutory language in section 6(k)(1)(A) to permit a servicer to charge a borrower force-placed insurance when the servicer has a reasonable basis to believe that the borrower has failed to comply with the loan contract's requirements to maintain property insurance.

With respect to the request to clarify that the 45-day notification period set forth in proposed § 1024.37(c)(1) establishes the minimum amount of time that must lapse between the time a servicer sends a borrower the first written notice required by section 6(*l*)(1) and the time a servicer imposes a premium charge or fee related to force-placed insurance, the Bureau believes that the fact that the Bureau intended the 45 days to be the minimum amount of time was clear in the proposal and thus, does not believe additional clarification in the final rule is necessary.

37(c)(2) Content of Notice

As discussed in the section-by-section analysis of § 1024.37(c)(1), section 6(*l*)(1)(A)(i) through (iv) of RESPA establishes the disclosures that a servicer of a federally related mortgage loan must provide in the written notices it sends to borrowers. The Bureau proposed § 1027.37(c)(2) to implement section 6(*l*)(1)(A)(i) through (iv). Proposed § 1024.37(c)(2) would have required a servicer to set forth, in the notice that would have been required under proposed § 1024.37(c)(1)(i), certain information about force-placed insurance. Specifically, proposed § 1024.37(c)(2)(i) through (iv) would have required a servicer to disclose the following information: (1) The date of the notice; (2) the servicer's name and mailing address; (3) the borrower's name and mailing address; and (4) a statement that requests the borrower to provide hazard insurance information for the borrower's property and identifies the property by its address. Proposed § 1024.37(c)(2)(v) would have required that a servicer provide a statement that the borrower's hazard insurance is expiring or expired, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date. For a borrower that has more than one type of hazard insurance on the property, the servicer must identify the type of hazard insurance for which the servicer lacks evidence of coverage. Proposed comment 37(c)(2)(v)–1 would have explained that if a borrower has purchased a homeowners' insurance policy and a separate hazard insurance policy to insure loss against hazards not covered under his or her homeowners' insurance policy, the servicer must disclose whether it is the borrower's homeowners' insurance policy or the separate hazard insurance policy for which it lacks evidence of coverage to comply with § 1024.37(c)(2)(v). Proposed § 1024.37(c)(2)(vi) would have required that a servicer provide a statement that hazard insurance is required on the borrower's property and that the servicer has obtained or will obtain, as applicable, insurance at the borrower's expense.

Proposed § 1024.37(c)(2)(vii) would have required that the initial notice to the borrower contain a statement requesting the borrower to promptly provide the servicer with the insurance policy number and the name, mailing address and phone number of the borrower's insurance company or the borrower's insurance agent. Proposed § 1024.37(c)(2)(viii) would have required the notice to contain a description of how the borrower may provide the information requested pursuant to § 1024.37(c)(2)(vii).

Finally, § 1024.37(c)(2)(ix) and (x) would have required information regarding the relative costs and scope of coverage of force-placed insurance versus hazard insurance obtained by the borrower, specifically: (1) The cost of the force-placed insurance, stated as an annual premium, or as a good faith estimate if actual pricing is not available; and (2) a statement that insurance the servicer obtains may cost significantly more than hazard insurance obtained by the borrower and may not provide as much coverage as hazard insurance obtained by the borrower. Proposed § 1024.37(c)(2)(xi) would have required that a servicer provide the servicer's telephone number for borrower questions.

The disclosures regarding the potential cost and scope of coverage for force-placed insurance were not specifically required under the Dodd-Frank Act, but the Bureau believed that it was appropriate to propose them pursuant to the Bureau's RESPA section 6(k)(1)(E) authority in order to provide borrowers with critical information about the benefits, costs, and risks of the insurance that would be imposed if they failed to act. The Bureau noted in the proposal that the Bureau tested the force-placed insurance disclosures established by the Dodd-Frank Act in three rounds of consumer testing. Participant response in consumer testing suggested that knowing about higher cost of force-placed insurance could motivate borrowers to act promptly and thus avoid being charged for force-placed insurance. All participants said upon receipt of the notice, they would immediately contact their insurance provider to find out whether or not their hazard insurance had expired or purchase new hazard insurance because they would not want to pay for the higher cost of force-placed insurance.

The Bureau proposed comment 37(c)(2)(ix)–1 to clarify that the good faith estimate of the cost of the force-placed insurance the servicer may obtain should be consistent with the best information reasonably available to the servicer at the time the disclosure is provided. The proposed comment stated that differences between the amount of the estimated cost disclosed under § 1024.37(c)(2)(ix) and the actual cost do not necessarily constitute a lack of good faith, so long as the estimated cost was based on the best information reasonably available to the servicer at the time the disclosure was provided. The Bureau believed that its proposed good faith standard would provide significant safeguards against the risk that some servicers might intentionally underestimate the cost of force-placed insurance while providing sufficient flexibility to account for the fact that costs may change due to legitimate reasons between the time the disclosure

is made and the time the borrower is charged.

Several consumer groups applauded the content requirements the Bureau proposed, but with one caveat. They expressed concern that the proposed disclosure concerning the fact that force-placed insurance may not provide as much coverage as borrower-obtained hazard insurance was too generic, and thus would not provide information meaningful enough to alert the borrower to the risks of force-placed insurance and prompt the borrower to act. They suggested adding additional disclosures that force-placed insurance would not cover damage to the borrower's personal property, personal liability for injuries to others while they are on the borrower's property, or living expenses while the borrower's home is under repair. The Bureau has considered the consumer groups' concern but is reluctant to add further information without consumer testing in light of the risk that information overload could adversely impact the effectiveness of the notice. The Bureau also notes that results of the testing of the model forms suggest that the existing disclosures will prompt recipients of the force-placed insurance notices to act promptly. As summarized by Macro in its report on the consumer testing of mortgage servicing disclosures during the pre-proposal stage, all subjects who were shown samples of force-placed insurance notices said they would act immediately in response to receiving such notices, even though the samples did not contain detailed description of potential coverage differences.

One consumer group suggested that a statement informing a borrower of the availability of State-created hazard insurance programs should be a required disclosure because these programs are designed to make hazard insurance available to borrowers who have trouble qualifying for insurance from traditional sources. Again, the Bureau has considered the issue but is reluctant to add further information without consumer testing in light of the risks of information overload. The Bureau is also concerned that a completely generic notice that State programs ''may'' be available without contact information would not be very useful to consumers, and that tailoring the notices to particular States would be burdensome to servicers. Accordingly, the Bureau declines to implement the comment. The commenter also urged the Bureau to require servicers to include force-placed insurance charges in regular invoice statements that are sent to a borrower so that a borrower is constantly reminded of how much of the borrower's payments are going toward paying for such insurance. Another consumer group submitted similar comments recommending that the Bureau require servicers to identify force-placed insurance charges specifically in proposed periodic statements so that borrowers could easily recognize when force-placed insurance has been obtained. The Bureau notes that servicers will be required to list force-placed insurance charges like any other charge, in the periodic statement that the Bureau is finalizing in the 2012 TILA Servicing Final Rule.

Consumer advocates and some industry commenters praised the proposal to require actual cost information or estimated costs in the mandatory disclosures. A force-placed insurance commenter, for instance, stated that it currently provides its borrowers with such estimates and that it has proven successful in convincing borrowers of the benefit of obtaining their own coverage. Some industry commenters, however, opposed the proposed disclosure as unnecessary because the Bureau separately proposed to require servicers to inform borrowers that force-placed insurance may cost significantly more than borrower-obtained hazard insurance. One force-placed insurance provider further observed that the existing practice of most servicers is to provide a binder of the force-placed insurance coverage with the second notice to make borrowers aware of the cost of such insurance. These commenters and a large bank servicer further noted that the National Mortgage Settlement did not include a required disclosure about the cost of force-placed insurance and urged the Bureau to refrain from requiring more disclosures than required by the settlement.

Commenters also asserted that a servicer might not have enough information to provide an estimate of force-placed insurance costs because the first notice would be provided to a borrower at a point where a servicer might not have obtained the premium information. Estimates are also complicated by the fact that the cost of insurance is determined by factors not within the servicer's control (*e.g.,* insurers' pricing formulas, the number of days a borrower is delinquent on the mortgage loan). Two national trade associations representing the mortgage industry asserted that if a servicer does not rely on a third party to track a borrower's hazard insurance, the servicer would not have the information necessary to make good faith estimates of insurance premiums until the force-placed insurance is actually issued. One of the commenters asserted that this problem is likely to be most acute for small servicers because they often do not hire third parties to track a borrower's hazard insurance. The two commenters also questioned whether a servicer could be held liable for differences between an estimate and the actual cost under a theory that the differences were caused by unfair, deceptive, or abusive practices. They also questioned whether a servicer would have the authority to provide the estimate because for an estimate to be binding, an insurance binder from a licensed insurance agent or provider is required. The two commenters and a force-placed insurance provider also expressed concern that the potential inaccuracies with estimate costs may lead to customer confusion and complaints. Lastly, several industry commenters expressed concern with the use of the phrase ''good faith estimate'' because the phrase is a defined term in existing Regulation X with a different meaning than the meaning set forth in proposed comment 37(c)(2)(ix)–1.

After considering these comments, the Bureau is withdrawing the requirement to provide the cost of force-placed insurance (or a good faith estimate of the cost) in the notice required by § 1024.37(c)(1)(i), but keeping the requirement for purposes of the reminder notice required by § 1024.37(c)(1)(ii). The Bureau believes that this will reduce compliance burden concerns while continuing to assure that borrowers receive specific prices or estimates that are likely to provide strong motivation to renew their homeowners' insurance policies. Additionally, the regulatory text is changed to refer to a ''reasonable estimate'' rather than a ''good faith estimate,'' and the commentary is changed to clarify what a ''reasonable estimate'' means.

A number of industry commenters recommended that the Bureau allow servicers to provide a borrower with additional information about force-placed insurance. They stated that servicers currently provide a number of disclosures in addition to the information the Bureau has proposed in response to State disclosure requirements, class action litigation, and industry best practices. Commenters expressed concern that the failure by servicers to include additional information may subject servicers to further litigation and extensive potential liability. Some commenters suggested that the Bureau permit servicers to include additional information and the required information in one document.

One large bank servicer suggested an alternative approach where a servicer would be permitted to include additional information in the same transmittal that is used to provide notices containing the required information.

The Bureau believes that providing additional information in the same notice as the required information could obscure the most important information or tend to create information overload. For instance, one industry commenter provided a list of additional information that included 10 specific pieces of information and a catch-all category for disclosures related to force-placed insurance imposed by other State or Federal law. The Bureau believes it would be better if servicers have latitude to provide the additional information on separate pieces of paper in the same transmittal. Accordingly, the Bureau is adopting new § 1024.37(c)(4) to provide that a servicer may not include any information other than information required by § 1024.37(c)(2) in the written notice required by § 1024.37(c)(1)(i), but that a servicer may provide such additional information to a borrower in the same transmittal as the transmittal used to provide the notice required by § 1024.37(c)(1)(i) but on separate pieces of paper. The Bureau is adopting parallel provisions in § 1024.37(d) and (e), numbered as § 1024.37(d)(4) and (e)(4), respectively. The Bureau has also revised § 1024.37(c)(2) to permit the notice required by § 1024.37(c)(1)(i) to include, if applicable, a statement advising a borrower to review additional information provided in the same transmittal. The Bureau has adopted parallel provisions in § 1024.37(d) and (e).

37(c)(3) Format

As previously discussed, section 6(*l*)(1) of RESPA establishes that a servicer must provide a borrower with two written notices before charging a borrower for force-placed insurance. To implement this provision, the Bureau proposed § 1024.37(c)(3) and (d)(3) in parallel. Proposed 1024.37(c)(3) stated that disclosures set forth in proposed § 1024.37(c)(2) must be in a format substantially similar to form MS–3(A), set forth in appendix MS–3. Disclosures made pursuant to § 1024.37(c)(2)(vi) and (c)(2)(ix) must be in bold text. Disclosure made pursuant to § 1024.37(c)(2)(iv) must be in bold text, except that the physical address of the borrower's property may be in regular text. The Bureau believed the use of bold text to bring attention to important information would make it easier for borrowers to identify promptly the purpose of the notice and to find the information quickly and efficiently. Additionally, the Bureau stated in the proposal that the Bureau believed that it was important to bring attention to the cost of force-placed insurance so borrowers have a clear understanding of the cost to them of the service that servicers provide in obtaining force-placed insurance. The Bureau further noted that it believed that it was important for borrowers to understand that the servicer's purchase of force-placed insurance arises from the borrower's obligation to maintain hazard insurance. Although the notice contains additional information that is important, the Bureau believes the usefulness of highlighting in focusing a borrower's attention on important information decreases if highlighting is used unsparingly.

One large bank servicer commended the Bureau for the model forms the Bureau proposed. It observed that the forms were thoughtfully designed and should be readily understandable to consumers. Another large bank servicer agreed with the Bureau's rationale that model forms facilitate compliance with the new Dodd-Frank Act requirements concerning force-placed insurance disclosures and the Bureau's proposed supplemental disclosures, but sought clarification that servicers may use the model forms as guidance but are not required to demonstrate strict adherence to the language of the forms. One non-bank servicer argued that disclosure forms should generally be open-ended to allow the servicer to provide all the content required by the Bureau while allowing the servicer to tailor the form to its needs; however, the commenter stated that it did not have concerns with the model force-placed insurance forms the Bureau proposed.

In consideration of the comments received and based on further consideration, the Bureau is changing § 1024.37(c)(3) to no longer require a servicer to provide the information required by § 1024.37(c)(2) in a form ''substantially similar'' to form MS–3A, as set forth in appendix MS–3. As adopted, § 1024.37(c)(3) provides that a servicer may use form MS–3A in appendix MS–3 to comply with the requirements of § 1024.37(c)(1)(i) and (2). However, the Bureau is adopting a final § 1024.37(c)(3) that generally contains the highlighting requirements set forth in the proposal.

37(d) Reminder Notice

37(d)(1) In General

As discussed above, section 6(*l*)(1) of RESPA, added by section 1463(a) of the Dodd-Frank Act, states that a servicer must send two written notices to the borrower prior to charging the borrower for force-placed insurance. Specifically, RESPA section 6(*l*)(1)(B) requires servicers to use first-class mail to send a second written notice to the borrower, at least 30 days after mailing initial the notice required by RESPA section 6(*l*)(1)(A), that contains all the information described in section 6(*l*)(1)(A)(i) through (iv) of RESPA.

The Bureau proposed § 1024.37(d)(1) to implement section 6(*l*)(B) of RESPA. Proposed § 1024.37(d)(1) stated that one written notice in addition to the written notice required pursuant to § 1024.37(c)(1)(i) must be delivered to the borrower or placed in the mail prior to a servicer charging a borrower for force-placed insurance. It further stated that the servicer may not deliver or place this second written notice under § 1024.37(d)(1) in the mail until 30 days after delivering to the borrower or placing in the mail the first written notice under § 1024.37(c)(1)(i). Proposed § 1024.37(d)(1) would also have mandated that a servicer that receives no insurance information after delivering or placing in the mail the written notice required pursuant to in § 1024.37(c)(1)(i) must provide the disclosures set forth in § 1024.37(d)(2)(i), while a servicer that does receive insurance information but is unable to verify that the borrower has hazard insurance coverage continuously must provide the disclosures set forth in § 1024.37(d)(2)(ii).

Proposed comment 37(d)(1)–1 would have explained the content of the reminder notice will vary depending on the insurance information the servicer has received from the borrower. Two national trade associations representing the mortgage industry urged the Bureau to permit servicers to use the same letter they sent to a borrower to comply with the first written notice requirement to comply with the second written notice requirement.

As the Bureau noted in the proposal, section 6(k)(1)(B) of RESPA can be read to require a servicer to provide the same disclosures a borrower has previously received. However, where a borrower responds to the first notice by providing insurance information, the Bureau believed that the reminder notice would be more useful if it contained an acknowledgement of the information these borrowers provided in response to the first notice and informed these

borrowers that the information provided was not sufficient for a servicer to verify that they had continuous coverage in place. The Bureau observed in the proposal that simply repeating the same content as the first notice might cause borrowers to become frustrated and confused by the fact that they are receiving another notice asking for insurance information when they thought they had already provided such information.

As discussed above in the section-by-section analysis of § 1024.37(c)(1), some industry commenters urged the Bureau to withdraw the requirement that a servicer send a borrower a second notice before charging a borrower for force-placed insurance. As the Bureau observed in the section-by-section analysis of § 1024.37(c)(1), Congress specifically required that two notices be provided before a servicer charges a borrower for force-placed insurance. For reasons discussed above, the Bureau does not believe that varying from this statutory scheme is appropriate. Further, comments from two large force-placed insurance providers suggest that at least by the time of the second notice, servicers will be able to provide borrowers with a reasonable estimate of the cost of the force-placed insurance, so that the second notice will complement the first.[111] Accordingly, the Bureau is adopting § 1024.37(d)(1) as proposed with an adjustment to emphasize that a servicer may not charge a borrower for force-placed insurance unless it has delivered or mailed the second written notice at least 15 days prior to imposing such charge.

37(d)(2) Content of Reminder Notice

The Bureau proposed § 1024.37(d)(2) to address the content of the second required notice. Proposed § 1024.37(d)(2)(i) would have set forth the information that a servicer must provide in the written notice established by section 6(*l*)(1)(B) of RESPA to a borrower from whom the servicer has not received any insurance information. Proposed § 1024.37(d)(2)(ii) would have set forth the information required where the servicer received insurance information from the borrower within 30 days after delivering to the borrower or placing in the mail the written notice set forth § 1024.37(c)(1)(i), but not was not able to verify that the borrower has hazard insurance in place continuously.

Proposed § 1024.37(d)(2)(i) would have required that if a servicer that has not received any insurance information from the borrower within 30 days after delivering or placing in the mail the notice required pursuant to § 1024.37(c)(1)(i), the servicer must provide a reminder notice that contains the disclosures forth in § 1024.37(c)(2)(ii) to (c)(2)(xi), the date of the notice, and a statement that the notice is the second and final notice. The Bureau explained in the proposal that it believes that the date of the notice and a statement that the notice is the second and final notice helps to distinguish the notice from the notice required pursuant to § 1024.37(c)(1)(i). Moreover, because the servicer would not have received any insurance information, the Bureau believed it would be appropriate to require the servicer to provide the disclosures set forth in § 1024.37(c)(2)(ii) to (c)(2)(xi) in the second written notice sent to a borrower who has not sent the servicer any insurance information in response to the first written notice.

Proposed § 1024.37(d)(2)(ii) would have required that if a servicer has received insurance information from the borrower within 30 days after delivering to the borrower or placing in the mail the written notice set forth in § 1024.37(c)(1)(i), but has not been able to verify that the borrower has hazard insurance in place continuously, then the servicer must deliver or place in the mail a written notice that contains the following: (1) The date of the notice; (2) a statement that the notice is the second and final notice; (3) the disclosures set forth in § 1024.37(c)(2)(ii), (c)(2)(iii), (c)(2)(iv), and (c)(2)(xi); (4) a statement that the servicer has received the hazard insurance information that the borrower provided; (5) a statement that indicates to the borrower that the servicer is unable to verify that the borrower has hazard insurance in place continuously; and (6) a statement that the borrower will be charged for insurance the servicer obtains for the period of time where the servicer is unable to verify hazard insurance coverage unless the borrower provides the servicer with hazard insurance information for such period.

As described above in the section-by-section analysis of § 1024.37(c)(2), a number of industry commenters requested the Bureau to withdraw the requirement to provide the cost of force-placed insurance (or a good faith estimate of the cost) and to permit servicers to include additional information in the force-placed insurance notices the Bureau proposed. For reasons discussed above, the Bureau is keeping the requirement to provide the cost of force-placed insurance (revised to refer to a ''reasonable estimate'' rather than a ''good faith estimate'') in the second notice and not permitting a servicer to include additional information in a second reminder notice. The Bureau has also added new comment 37(d)(2)(i)(D)–1 to clarify what a ''reasonable estimate'' means.

37(d)(3) Format

As previously discussed, the Bureau proposed new §§ 1024.37(c)(3) and (d)(3) in parallel to implement section 6(*l*)(1). Proposed § 1024.37(d)(3) would have provided that the disclosures set forth in proposed § 1024.37(d)(2)(i) must be in a format substantially similar to form MS–3(B), and the disclosures set forth in § 1024.37(d)(2)(ii) must be in a format be substantially similar to form MS–3(C). Proposed § 1024.37(d)(3) would have provided that disclosures required by § 1024.37(d)(2)(i)(B), (d)(2)(ii)(B), and (d)(2)(ii)(F) must be in bold text. The Bureau observed in the proposal that the reasons the Bureau provided for requiring the use of highlighting (bold text) for purposes of § 1024.37(c)(3) also applied to § 1024.37(e)(3). As discussed above, the Bureau has made changes to § 1024.37(c)(3) in adopting § 1024.37(c)(3), and the Bureau is making conforming changes to § 1024.37(d)(3).

37(d)(4) Updating Notice With Borrower Information

The Bureau proposed § 1024.37(d)(4) to provide that if a servicer receives hazard insurance information from a borrower after the second written notice required pursuant to § 1024.37(d)(1) has been put into production, the servicer is not required to update the notice so long as the notice was put into production within a reasonable time prior to the servicer delivering the notice to the borrower or placing the notice in the mail. The Bureau proposed related commentary, comment 37(d)(4)–1, that would have provided that five days prior to the delivery or mailing of the second notice is a reasonable time and invited comments on whether, in certain circumstances, a longer time frame is reasonable.

As discussed above, the Bureau observes that one of the minimum consumer protection purposes Congress intended to establish by creating new servicer duties with respect to a servicer's purchase of force-placed insurance is to provide a borrower with reasonably accurate information about a servicer's grounds for purchasing force-placed insurance. The Bureau believes that a servicer has a duty to ensure that

[111] The commenters suggested that if the Bureau was going to adopt the requirement that servicers must provide the actual cost (or good faith estimate of the cost) of force-placed insurance, the requirement should be limited to the second notice.

the second notice contains reasonably accurate information about an individual borrower's hazard insurance status. Therefore, the Bureau believes that a servicer has a duty to update the second notice if it receives new insurance information about a borrower after sending the first written notice to the borrower. The Bureau, however, observed in the proposal that a servicer might have to prepare the written notice in advance of sending it. Accordingly, the Bureau explained that it believed that it was appropriate to create a safe harbor of five days to protect a servicer acting diligently from exposure to potential litigation if the information the servicer provided in the second notice turns out to be, in fact, inaccurate, due to information about a borrower's hazard insurance it receives subsequent to putting the second notice into production.

One force-placed insurance provider and two national trade associations representing the mortgage industry recommended the Bureau withdraw proposed § 1024.37(d)(4) or, in the alternative, expand the safe harbor to 10 days, excluding legal holidays, Saturdays and Sundays, because some servicers use third-party service providers to prepare force-placed insurance notices and need a period of longer than 5 days to prepare the notices. The force-placed insurance provider contended that servicers are going to update the second notice or not send the second notice at all if they have received verification of a borrower's hazard insurance because they would not want to send their customers unnecessary notices. Two other force-placed insurance providers also recommended that the safe harbor be expanded to 10 days from the date that a borrower's insurance is verified, but did not indicate whether 10 days should exclude legal holidays, Saturdays, and Sundays.

The Bureau observes that as discussed above, the intent of § 1024.37(d)(4) is to create a safe harbor to protect servicers who are diligent in ensuring that borrowers receive reasonably accurate information from potential litigation risk. Accordingly, the Bureau is concerned that a 10-day safe harbor, even one that includes legal public holidays, Saturdays and Sundays, would be overbroad and give the benefit of the safe harbor to servicers who are not diligent in ensuring that borrowers receive accurate information. But the Bureau has concluded that servicers that use third-party service providers to prepare force-placed insurance notices could reasonably require more than 5 days to prepare the second written notice in a timely manner, especially a five-day period that includes a legal public holiday, Saturday, or Sunday. Accordingly, the Bureau is adopting proposed comment 37(d)(4)–1 with a change to clarify that the 5-day period excludes legal public holidays, Saturdays, and Sundays. The Bureau believes this adjustment strikes the right balance between achieving the consumer protection of providing a borrower with accurate information about a servicer's grounds for purchasing force-placed insurance and providing diligent servicers with a safe harbor from potential litigation risk.

37(e) Renewal or Replacement of Force-Placed Insurance

The Bureau proposed § 1024.37(e) to prohibit a servicer from charging a borrower for the replacement or renewal of an existing force-placed insurance policy unless certain procedural requirements are followed as specified in proposed § 1024.37(e). The Bureau proposed the requirements because pre-proposal outreach suggested that there is no widespread industry standard that applies to renewal procedures for force-placed insurance. Moreover, commissions and reinsurance agreements may create strong incentives at renewal as well as at original placement. The Bureau believes that the renewal notice is authorized under RESPA section 6(*l*), which provides that a servicer does not have a reasonable basis to obtain force-placed insurance unless certain notice requirements are met, and does not limit such requirements to the first time a servicer obtains and charges a borrower for force-placed insurance. The Bureau has, however, made certain adjustments to the notice and procedure requirements set forth in RESPA section 6(*l*), as described below, to account for the fact that in the case of the renewal of forced-placed insurance, the borrower already will have received at least two prior force-placed insurance notices. Section 1024.37(e) is further authorized under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA as necessary and appropriate to achieve the consumer protection purposes of RESPA, including avoiding unwarranted charges and fees and ensuring the provision to borrowers of accurate and relevant information. As discussed below, the Bureau is adopting proposed § 1024.37(e) generally as proposed with a few changes to address issues that were raised in comments.

37(e)(1) In general

The Bureau proposed § 1024.37(e)(1) to provide that that a servicer may not charge a borrower for renewing or replacing existing force-placed insurance unless: (1) The servicer delivers or places in the mail a written notice to the borrower with the disclosures set forth in § 1024.37(e)(2) at least 45 days before the premium charge or any fee is assessed; and (2) during the 45-day notice period, the servicer has not received evidence that the borrower has obtained hazard insurance. The Bureau stated in the proposal that it believed that the procedures it proposed concerning renewal and replacement would provide advance notice to allow a borrower the time the borrower may need to buy hazard insurance before being charged again for the cost of force-placed insurance at renewal or replacement.

The Bureau did not believe a servicer should have to wait until the end of the notice period before charging a borrower for the cost of renewing the force-placed insurance if a borrower has confirmed that there was a gap in coverage with respect to a borrower who obtains hazard insurance after receiving the renewal notice. Accordingly, the Bureau proposed § 1024.37(e)(1)(iii) to permit a servicer who has renewed or replaced existing force-placed insurance during the notice period to charge a borrower for such renewal or replacement promptly after a servicer receives verification that the hazard insurance obtained by a borrower did not provide a borrower with insurance coverage for any period of time following the expiration of the existing force-placed insurance, notwithstanding § 1024.37(e)(1)(i) and (e)(1)(ii). The Bureau proposed comment 37(e)(1)(iii)–1 to provide an example of what this means.

Two national trade associations representing the mortgage industry observed that it is common industry practice for a servicer to send renewal notice to borrowers but urged that the Bureau permit servicers to charge a borrower for the renewal of existing force-placed insurance at the time of purchase because a servicer should not have to incur the burden of not being able to impose a charge on a borrower related to force-placed insurance at the time of renewal or replacement. The Bureau declines to modify the proposal because the Bureau believes imposing a notice period during which a servicer is prohibited from charging a borrower for force-placed insurance is appropriate and necessary to help a borrower avoid the cost associated with the borrower's servicer renewing or replacing the borrower's hazard insurance. The Bureau further notes that a servicer can provide the 45-day notice in advance of the expiration of the current forced

place coverage, and accordingly, disagrees that § 1024.37(e)(1) would invariably prohibit a servicer from imposing a charge on a borrower related to force-placed insurance at the time of renewal or replacement. Accordingly, the Bureau is adopting § 1024.37(e)(1) as proposed, except technical changes to clarify what evidence of borrower's coverage means for § 1024.37(e)(1). New comment 37(e)(1)–1 clarifies that a servicer may require a borrower to provide a form of written confirmation as described in comment 37(c)(1)(iii)–3 and may reject evidence of coverage submitted by the borrower for the reasons described in comment 37(c)(1)(iii)–2. Comment 37(e)(1)(iii) is adopted as proposed.

37(e)(2) Content of Renewal Notice

Proposed § 1024.37(e)(2) would have required a servicer to provide a number of the disclosures set forth in in proposed § 1024.37(c)(2) in the renewal notice. The Bureau explained in the proposal that the main differences between the disclosures set forth in proposed § 1024.37(c)(2) and proposed § 1024.37(e)(2) are that in proposed § 1024.37(e)(2), servicers must provide a statement that: (1) The servicer previously obtained insurance on the borrower's property and assessed the cost of the insurance to the borrower because the servicer did not have evidence that the borrower had hazard insurance coverage for the property; and (2) the servicer has the right to maintain insurance by renewing or replacing the insurance it previously obtained because insurance is required. The Bureau believes the differences are necessary to distinguish the notice required pursuant to proposed § 1024.37(e)(1) from the notice required pursuant to proposed § 1024.37(c)(1). The proposed requirement in § 1024.37(c)(2)(ix) concerning provision of the cost of the force-placed insurance, stated as an annual premium, or a good faith estimate of such cost, would have been replicated in proposed § 1024.37(e)(2)(vii), with related commentary that would have explained that the good faith requirement set forth in § 1024.37(e)(2)(vii) is the same good faith requirement set forth in § 1024.37(c)(2)(ix).

The comments the Bureau received with respect to the content of the force-placed insurance notices under § 1024.37(c)(2) (*i.e.,* comments about the requirement to provide a good-faith estimate and requests to be allowed to provide additional information) also apply to proposed § 1024.37(e)(2). The Bureau believes that the burden of providing a good faith estimate is lower for purposes of § 1024.37(e)(2) than for purposes of providing such an estimate for purposes of § 1024.37(c)(2) because a servicer can provide such an estimate based on the amount of current premiums. Accordingly, the Bureau is adopting this requirement in the final rule (revised to refer to a ''reasonable estimate'') and made technical changes in related commentary to reflect this revision. For reasons discussed above, the Bureau is not permitting a servicer to include additional information in the notice required by § 1024.37(e)(1). But, as discussed above, the Bureau is adopting new § 1024.37(e)(4) to permit servicers to provide additional information in the same transmittal the servicer uses to provide the replacement or renewal notice.

37(e)(3) Format

Proposed § 1024.37(e)(3) would have provided that that the disclosures set forth in § 1024.37(e)(2) must be in a format substantially similar to form MS–3(D), set forth in appendix MS–3. It also stated that disclosures made pursuant to § 1024.37(e)(2)(vi)(B) and 37(e)(2)(vii) must be in bold text, and disclosures made pursuant to § 1024.37(e)(2)(iv) must be in bold text, except that the physical address of the property may be in regular text. Because proposed § 1024.37(e)(3) paralleled proposed §§ 1024.37(c)(3) and (d)(3), the Bureau is adopting § 1024.37(e)(3) with change to conform to changes made in § 1024.37(c)(3) and (d)(3).

37(e)(4) Compliance

Proposed § 1024.37(e)(4) would have provided that before the first anniversary of a servicer obtaining force-placed insurance on a borrower's property, the servicer shall deliver to the borrower or place in the mail the notice required by § 1024.37(e)(1). Further, proposed § 1024.37(e)(4) would have provided that a servicer is not required to comply with § 1024.37(e)(1) before charging a borrower for renewing or replacing existing force-placed insurance more than once every 12 months.

The Bureau explained that the Bureau did not believe receiving more than one renewal or replacement notice in a 12-month period was necessary because borrowers should be able to retain the first notice under proposed § 1024.37(e)(1), including the cost or estimate information, for future reference. The Bureau also noted that some small servicers who participated in the Small Business Review Panel expressed concerns about the cost of sending renewal notices over a 12-month period because unlike large servicers, a number of small servicers purchase force-placed insurance policies that would have to be renewed monthly. The Bureau, however, solicited comments on whether providing the renewal or replacement notice once during a 12-month period would adequately inform borrowers about the costs, benefits, and risks associated with servicers' renewal or replacement of existing force-placed insurance.

One large force-placed insurance provider commented that one notice per year is sufficient to remind borrowers without overly burdening the servicer or potentially inundating borrowers with multiple and repetitive notices. In contrast, a state consumer group asserted that one notice over a 12-month period may not be enough to adequately inform borrowers of the costs, benefits, and risks of servicer's renewal or replacement of force-placed insurance and urged the Bureau to require a servicer to provide at least two renewal notices over a 12-month period to inform borrowers of the force-placed insurance premium they would be charged.

The Bureau has further considered the issue but continues to believe for the reasons stated in the proposal that one annual renewal notice will adequately inform borrowers of the costs, benefits, and risks of servicer's renewal or replacement of force-placed insurance. Additionally, the Bureau notes that in conjunction with the Bureau's periodic statement rule, most borrowers whose servicers are charging them for force-placed insurance will be made aware of that fact because a servicer will be required to list force-placed insurance charges on periodic statements. Accordingly, the Bureau is adopting proposed § 1024.37(e)(4) as proposed, renumbered as § 1024.37(e)(5) in the final rule.

37(f) Mailing the Notices

Section 6(*l*)(1) of RESPA, discussed previously, establishes that servicers must use first-class mail to send the notices established by section 6(*l*)(1)(A) and (B) of RESPA. The Bureau proposed to implement this aspect of section 6(*l*)(1) of RESPA by adding new § 1024.37(f) to provide that if a servicer mails a notice required pursuant to § 1024.37(c)(1)(i), (d)(1), or (e)(1) of this section, a servicer must use a class of mail not less than first-class mail.

As discussed above, the Bureau believes that it is necessary and appropriate to achieve the purposes of RESPA to allow servicers to transmit the force-placed notices required under § 1024.37 by a class of mail better than

first. The Bureau observed in the proposal that although the notice required by proposed § 1024.37(e)(1) is not required by RESPA, applying the same mailing requirements to all notices under § 1024.37 would facilitate compliance by promoting consistency. The Bureau did not receive any comments on proposed § 1024.37(f) and is adopting § 1024.37(f) as proposed.

37(g) Cancellation of Force-Placed Insurance

Section 1463(a) added new section 6(*l*)(3) to RESPA, which states that within 15 days of receipt by a servicer of confirmation of a borrower's existing insurance coverage, the servicer must: (1) Terminate the force-placed insurance; and (2) refund to the borrower all force-placed insurance premium charges and related fees paid by the borrower during any period in which the borrower's insurance and the force-placed insurance were both in effect. The Bureau proposed § 1024.37(g)(1) and (2) to implement section 6(*l*)(3) of RESPA. Section 1024.37(g)(1) and (2) would have provided that within 15 days of receiving verification that the borrower has hazard insurance in place, a servicer must cancel force-placed insurance obtained for a borrower's property and for any period during which the borrower's hazard insurance was in place, refund to the borrower all force-placed insurance premium charges and related fees paid by the borrower for such period. Proposed § 1024.37(g)(2) would have also required a servicer to remove all force-placed insurance charges and related fees that the servicer has assessed to the borrower for any period during which the borrower's hazard insurance was in place from the borrower's account. The Bureau believes that Congress, by establishing the duty to provide a full refund of the force-placed insurance premium and related charges paid by a borrower for any period of time during which the borrower's hazard insurance coverage and the force-placed insurance coverage were both in effect, also intended to establish the duty to remove a premium charge or fee related to force-placed insurance for such period. Accordingly, the Bureau interprets the statutory duty to provide such refund to include the duty to remove all force-placed insurance premium charges and related fees charged to a borrower's account for any period during which the borrower's hazard insurance coverage and the force-placed insurance coverage were both in effect.

Several industry commenters asserted that a borrower should not have an unconditional right to receive a refund for all force-placed insurance premium charges and related fees paid by the borrower during any period of overlapping coverage. They asserted that it would not be reasonable for a servicer to absorb the cost of the refund if a borrower does not provide evidence of insurance in a timely manner or if a servicer had a reasonable basis to purchase force-placed insurance. Some commenters asserted that an unconditional right to a refund would encourage borrowers to act irresponsibly by not providing evidence of insurance in a timely manner. One state housing finance agency and a force-placed insurance provider suggested that servicers needed 15 business days to cancel force-placed insurance and provide a borrower with refunds in an orderly manner and asked the Bureau to adjust the timelines accordingly.

The Bureau is finalizing § 1024.37(g) as proposed, with adjustments to the regulatory language for clarity. While a number of commenters indicated that they understood ''receiving verification that the borrower has hazard insurance in place'' meant receiving evidence of insurance coverage, just as the Bureau has adjusted the text of §§ 1024.37(c)(1)(iii), (d)(2)(ii), and (e)(1)(iii), to clarify what ''receiving verification'' means, the Bureau has made similar revisions to enhance the clarity of § 1024.37(g).

Additionally, in finalizing § 1024.37(g)(2), the Bureau has replaced the proposed phrase ''for any period during which the borrower's hazard insurance was in place'' with the phrase ''for any period of overlapping insurance coverage'' because the Bureau believes the language ''periods of overlapping coverage'' more closely aligns with the statutory language ''any period during which the borrower's insurance coverage and the force-placed insurance coverage were each in effect'' in RESPA section 6(*l*)(3). The Bureau is adopting new comment 37(g)(2)–1 to explain what ''period of overlapping insurance coverage'' means for purposes of § 1024.37(g)(2). The Bureau, however, is not adopting proposed comment 37(g)–1 because upon further consideration, the Bureau believes that further elaboration on what a servicer must do to comply with § 1024.37(g) is not required.

With respect to commenters asserting that a borrower should not have an unconditional right to a full refund of force-placed insurance premiums and related fees paid by the borrower, the Bureau notes that section 6(*l*)(3) of RESPA expressly establishes that a borrower's right to a full refund for any period during which the borrower's hazard insurance and the force-placed insurance were both in effect is an unconditional one. Moreover, based on consumer testing and other outreach, the Bureau is skeptical that the statutory regime will cause borrowers to be less diligent in responding to notices from their servicers asking them to provide evidence demonstrating insurance coverage and result in servicers having to absorb significant costs.

As discussed above, across all rounds of testing, participants uniformly understood the timeliness of their response upon the receipt of force-placed insurance notices affected whether or not they would have to pay for force-placed insurance. All participants said they would take immediate action because they did not want to bear the expense of force-placed insurance.[112] The uniformity of the responses supports the Bureau's belief that the substantially higher cost of force-placed insurance provides borrowers with a natural incentive to provide their servicers with evidence of insurance coverage in a timely manner.

Further, based on outreach the Bureau has done with force-placed insurance providers and servicers, as well as based on public statements made by these entities and comment letters the Bureau has received from industry, the Bureau observes that the typical force-placed insurance on the market provides for flat cancellation (*i.e.,* the force-placed insurance provider provides a full refund of force-placed insurance premiums paid by the borrower for any period of time where the force-placed insurance and the borrower's hazard insurance coverage were both in effect).[113] Accordingly, the Bureau does

[112] ICF Int'l, Inc., *Summary of Findings: Design and Testing of Mortgage Servicing Disclosures* 24–29 (Aug. 2012) (''Macro Report''), *available at http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0003.*

[113] *See e.g.,* N.Y. State Dep't of Fin. Services, *Testimony of John Frobose, President of American Security Insurance Company (ASIC)* 6 (describing that if ASIC receives proof that there was no gap in hazard insurance coverage on a borrower's property, ASIC refunds all force-placed insurance premiums paid); *see also,* N.Y. State Dep't of Fin. Services, *Written Testimony of Nicholas Pastor and Matthew Freeman on behalf of QBE Insurance Corporation and QBE FIRST Insurance Agency* 15 (stating that if the borrower provides proof of voluntary insurance such that there was no lapse in the voluntary coverage, all premiums paid by a borrower or deducted from a borrower's escrow account are refunded, regardless of when the borrower provided the proof of voluntary coverage): *See further,* N.Y. State Dep't of Fin. Services, *Written Testimony of Justin Crowley on behalf of Select Portfolio Servicing, Inc, Pelatis Insurance Agency Corp. and Pelatis Insurance Limited* 5 (stating that it provides a full refund equal to the total amount of force-placed insurance premiums charged to the borrower's account for any period

not believe that servicers will have to absorb significant costs.

The Bureau further declines to adjust the timeline a servicer must follow to cancel fore-placed insurance and refund force-place premium charges and related fees paid by the borrower. As discussed above in the section-by-section analysis of the defined term ''Day'' in § 1024.31, the Bureau believes that Congress intended the term ''day'' by itself to mean a calendar day for purposes of RESPA. The 15-day timeline for cancellation and refund is expressly established by section 6(*l*)(3) of RESPA.

Further, based on the Bureau's outreach and public statements made by force-placed insurance providers and servicers, the Bureau understands that servicers' purchase of force-placed insurance is generally a rare occurrence. If the volume of force-placement is small to begin with, then the Bureau is skeptical that requiring servicers to follow the statutorily-prescribed timeline would overwhelm a servicer or otherwise impose too large of a burden. Accordingly, the Bureau does not believe it is appropriate to deviate from the statutory-determined timeline set forth in section 6(*l*)(3).

A large force-placed insurance provider, a state trade association representing mortgage lenders, and a bank servicer expressed concern that § 1024.37(g), as proposed, would be construed as requiring a servicer to cancel force-placed insurance and provide a full refund even if a borrower's hazard insurance policy does not meet the loan contract's requirements. Although the Bureau does not believe that it was reasonable to construe proposed § 1024.37(g) to require a servicer to cancel force-placed insurance and provide a full refund even if a borrower's hazard insurance policy does not meet the loan contract's requirements, the Bureau believes that in any event, the commenters' concern is adequately addressed by § 1024.37(g), which, as adopted, clarifies that ''receiving verification'' in proposed § 1024.37(g) means receiving evidence demonstrating that the borrower has had hazard insurance in place that complies the loan contract's requirements to maintain hazard insurance.

Lastly, one large bank servicer expressed concern that the obligation to refund a borrower for force-placed insurance premiums and related fees paid by the borrower triggers a subsequent escrow analysis disclosure set forth in current § 1024.17(c)(3), which requires a servicer to perform an escrow account analysis at the completion of the escrow account computation year, which is defined in current § 1024.17(b) as ''a 12-month period that a servicer establishes for the escrow account beginning with the borrower's initial payment date.'' Providing a refund to a borrower in accordance with § 1024.37(g), by itself, does not trigger the obligation to perform an escrow account analysis required by current § 1024.17(c)(3).

37(h) Limitation on Force-Placed Insurance Charges

Section 1463(a) of the Dodd-Frank Act amended RESPA section 6 by adding new section 6(m) to RESPA, which states that apart from charges subject to State regulation as the business of insurance, all charges related to force-placed insurance imposed on the borrower by or through the servicer must be bona fide and reasonable. Proposed § 1024.37(h)(1) generally mirrored the statutory language by providing that except for charges subject to State regulation as the business of insurance and charges authorized by the Flood Disaster Protection Act of 1973, all charges related to force-placed insurance assessed to a borrower by or through the servicer must be bona fide and reasonable. Proposed § 1024.37(h)(2) would have provided that a bona fide and reasonable charge is a charge for a service actually performed that bears a reasonable relationship to the servicer's cost of providing the service, and is not otherwise prohibited by applicable law.

The Bureau noted in the proposal that the Flood Disaster Protection Act of 1973 establishes that notwithstanding any Federal or State law, any servicer for a loan ''secured by improved real estate or a mobile home'' may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard zone. *See* 42 U.S.C. 4012a(h). As discussed in the proposal and explained above, the Bureau was concerned about issuing regulations that would overlap with regulations issued pursuant to the FDPA, and believed that borrowers would be confused by receiving overlapping notices under the two regimes with respect to the same flood insurance policy. Accordingly, as discussed above, the Bureau used its authority under section 19(a) of RESPA to exempt hazard insurance to protect against flood loss obtained by a servicer as required by the FDPA from the definition of force-placed insurance. Consistent with this exemption and for the same reasons, the Bureau believed that it was necessary to achieve the purposes of RESPA's force-placed insurance provisions to use it authority under section 19(a) of RESPA to exempt charges authorized by the FDPA from proposed § 1024.37(h). The Bureau received no comments on the exemption and is adopting this aspect of § 1024.37(h)(1) as proposed.

With respect to proposed § 1024.37(h)(2), which would have set forth the Bureau's proposed definition of ''bona fide and reasonable charge,'' the Bureau noted in the proposal that the Bureau believed it was important that servicers do not try to inflate the already-high cost of force-placed insurance by assessing charges to borrowers that are not for services actually performed, do not bear a reasonable relationship to the servicer's cost of providing the service, or are prohibited by applicable law.

One non-bank servicer commended the proposed definition of ''bona fide and reasonable charge'' and predicted that the Bureau's proposal would stop many of the abusive servicer practices that have damaged the industry's reputation over the past few years. But a national trade association representing the consumer credit industry contended that the proposed definition would create an ambiguous standard that would expose lenders to class action lawsuits and infringe on state insurance departments' sole authority to regulate insurance rates.

Other comments received from a national trade association representing realtors and several consumer groups urged the Bureau to go further in regulating charges related to force-placed insurance that a servicer imposes on a borrower. The realtors association urged the Bureau to mandate affordable force-placed insurance premiums. One consumer group urged the Bureau to ban servicers or their affiliates from receiving any fee, commission, kickback, reinsurance contract, or any other thing of value for a force-placed insurance provider in exchange for purchasing force-placed insurance, and to prohibit a servicer from obtaining an amount of force-placed insurance coverage greater than the replacement cost value of the borrower's property. Two national consumer groups suggested that the Bureau should expressly exclude unreasonable costs and other costs unrelated to the provision of force-placed insurance. Two other national consumer groups asserted that the Bureau should expressly exclude commissions or other

during which the borrower maintained his or her own homeowners' coverage) (copies of the aforementioned testimonies are available at *http://www.dfs.ny.gov/insurance/hearing/fp_052012_testimony.htm*).

compensation paid by a force-placed insurance provider or its agent to a servicer or any affiliate of the servicer, costs associated with insurance tracking, cost for activities for which a servicer is being reimbursed by the owner of the mortgage, costs associated with the administration of reinsurance programs, cost to subsidize unrelated servicer activities, and any cost that is not directly related to the provision of force-placed insurance. They also urged the Bureau to provide guidance about prohibited fees that is consistent with Fannie Mae's proposed changes to its servicing guidelines on force-placed insurance.[114] These commenters further asserted that State insurance regulators have no authority over a charge that a servicer imposes on a borrower for force-placed insurance because a servicer is not an entity regulated by state insurance regulators.

After consideration of the comments submitted, the Bureau believes it is appropriate to finalize § 1024.37(h)(2) as proposed. The Bureau believes § 1024.37(h) appropriately implements RESPA 6(m)'s ''bona fide and reasonable'' requirement in a way that does not overlap with state insurance departments' authority to regulation insurance rates. Further, the Bureau believes § 1024.37(h) provides clear guidance for servicers by unambiguously prohibiting a servicer from charging a borrower for a service it did not perform, or charging a borrower a fee that does not bear a reasonable relationship to the servicer's cost of providing the service, or that would be otherwise prohibited by applicable law.

With respect to the request that the Bureau should revise the definition of ''bona fide and reasonable charges'' to exclude unreasonable costs, other costs unrelated to the provision of force-placed insurance, and cost to subsidize servicing activities unrelated to the provision of force-placed insurance, the Bureau believes that the proposed and final definition already exclude such charges.

With respect to requests that the Bureau mandate affordable force-placed insurance premiums, prohibit servicers from receiving commission or similar fees or things of value, prohibit fees associated with the cost of administration of reinsurance programs or insurance tracking, the Bureau recognizes the concerns, but believes the provisions of § 1024.37 provide adequate safeguards to borrowers and consistent with the regulatory scheme mandated by Congress.

With respect to the request that the Bureau prohibit servicers from charging borrowers for costs that could be reimbursed by the owner of the mortgage loan, the Bureau believes that where a servicer charges a borrower for first-placed insurance in accordance with the requirements under § 1024.37, it is reasonable for the borrower, rather than the owner or assignee of the mortgage loan, to bear the costs of such insurance. With respect to the request that the Bureau exclude costs not directly related to force-placed insurance from the definition of ''bona fide and reasonable charges,'' the Bureau believes that the bona fide and reasonable standard provides adequate protection to borrowers without distinguishing between whether a charge is ''directly'' or ''indirectly'' related to force-placed insurance. Such a standard would thus inject addition complexity without concomitant consumer benefit.

With respect to the request that the Bureau provide guidance about prohibited fees that is consistent with Fannie Mae's proposed changes to its servicing guidelines, the Bureau carefully reviewed Fannie Mae's servicing announcement and concluded that it would not be appropriate to provide similar guidance. The draft guidance simply informs servicers that Fannie Mae no longer plans to reimburse a servicer for certain servicer expenses related to servicer's purchase of force-placed insurance and importantly, it offers no guidance on the charges a servicer may impose on a borrower with respect to a servicer's purchase of force-placed insurance. Additionally, the Bureau believes that the prohibitions and requirements with respect to force-placed insurance under § 1024.37 provide adequate protection to borrowers and that there is no reason to depart from the scheme established by Congress to regulate force-placed insurance by importing Fannie Mae's guidance regarding prohibited fees into the final rule.

Lastly, with regard to the argument that no charge imposed by a servicer is subject to State regulation as the business of insurance because a servicer is not regulated by State insurance regulators, the Bureau believes the language of section 6(m) of RESPA clearly contemplates that servicers may pass through charges that are subject to State regulation as the business of insurance to a borrower, and the fact that such charge is passed through by the servicer does not mean that such charge is no longer subject to State regulation as the business of insurance. For the foregoing reasons, the Bureau is adopting § 1024.37(h)(2) as proposed.

37(i) Relationship to Flood Disaster Protection Act of 1973

Section 1463 of the Dodd-Frank Act amended section 6 of RESPA to add new section 6(*l*)(4) to provide that the new Dodd-Frank Act requirements concerning force-placed insurance do not prohibit servicers from sending a simultaneous or concurrent notice of a lack of flood insurance pursuant to section 102(e) of the Flood Disaster Protection Act (FDPA). The Bureau proposed § 1024.37(i) to provide that if permitted by regulation under section 102(e) of the Flood Disaster Protection Act of 1973, a servicer subject to the requirements of § 1024.37 may deliver to the borrower or place in the mail any notice required by § 1024.37 together with the notice required by section 102(e) of the Flood Disaster Protection Act of 1973.

One national trade association representing banks and insurance providers urged the Bureau to permit servicers to combine the notice required pursuant to the FDPA with any notice required pursuant to § 1024.37. One state consumer group expressed concern that a borrower might be confused if it receives a notice required pursuant to § 1024.37 and a notice required pursuant to the FDPA at the same time. The commenter observed that the notices should be distinguishable from each other and should state that there is a difference between the two notices.

Congress vested other Federal regulators with the authority to issue regulations under the FDPA, and thus, the Bureau cannot revise the content of notices required under the FDPA. With respect to potential confusion caused by receiving concurrent notices, the Bureau notes that it has excluded insurance required under the FDPA from the definition of force-placed insurance so that borrowers will not receive overlapping notices under § 1024.37 and the FDPA with respect to the same insurance policy. To the extent

[114] Fannie Mae issued a servicing announcement stating that any servicer requesting reimbursement of force-placed insurance premiums must exclude any lender-placed insurance commission earned on that policy by the servicer or any related entity, costs associated with insurance tracking or administration, or any other costs beyond the actual cost of the lender-placed insurance policy premium. *See* Fannie Mae, *Updates to Lender-Placed Property Insurance and Hazard Insurance Claims Processing* (Mar. 14, 2012), *available at https://www.fanniemae.com/content/announcement/svc1204.pdf.* The Bureau observes that Fannie Mae followed up in May of 2012 with a public statement announcing that it has postponed the implementation date of these guidelines until further notice. Fannie Mae, *Effective Date for Lender-Placed Property Insurance Requirements, available at https://www.fanniemae.com/content/announcement/ntce052312.pdf.*

borrowers receive separate notices under § 1024.37 and the FDPA with respect to separate insurance policies, the Bureau further believes that borrowers will be able to distinguish the notices under the two regulatory schemes based on their content. The Bureau also observes that it has addressed compliance burden by permitting under final § 1024.37(i) that notices under the FDPA and § 1024.37 could be provided to borrowers in the same transmittal. Accordingly, the Bureau is adopting § 1024.37(i) as proposed, except with adjustment just described. As adopted, § 1024.37(i) states if permitted by regulation under section 102(e) of the Flood Disaster Protection Act of 1973, a servicer subject to the requirements of § 1024.37 may deliver to the borrower or place in the mail any notice required by § 1024.37 and the notice required by section 102(e) of the Flood Disaster Protection Act of 1973 on separate pieces of paper in the same transmittal.

Section 1024.38 General Servicing Policies, Procedures, and Requirements

Background. As discussed above, the Bureau proposed rules that would amend Regulation X to implement the Dodd-Frank Act amendments to TILA and RESPA, with respect to among other things, error resolution and information requests. The Bureau also proposed to use its section 19(a) authority to require servicers to establish and to implement reasonable policies and procedures to manage information and documents, to evaluate and respond to loss mitigation applications, and to achieve other important objectives.

As described more fully above, the Bureau's proposal sought to address pervasive consumer protection problems across major segments of the mortgage servicing industry that came to light during the recent financial crisis and that underlie many consumer complaints and recent regulatory and enforcement actions. In the 2012 RESPA Servicing Proposal, the Bureau stated that it believed that many servicers simply had not made the investments in resources and infrastructure necessary to service large numbers of delinquent loans. The Bureau noted that recent evaluations of mortgage servicer practices have indicated that borrowers have been harmed as a result of many servicers' lacking adequate policies and procedures to provide servicer personnel with appropriate borrower information. Federal regulatory agencies reviewing mortgage servicing practices have found that certain servicers demonstrated ''significant weaknesses in risk-management, quality control, audit, and compliance practices.'' [115]

Further, the Bureau noted that major servicers demonstrated systemic failures to document and verify, in accordance with applicable law, information relating to borrower mortgage loan accounts in connection with foreclosure proceedings. Examinations by prudential regulators found ''critical deficiencies in foreclosure governance processes, document preparation processes, and oversight and monitoring of third parties * * * [a]ll servicers [examined] exhibited similar deficiencies, although the number, nature, and severity of deficiencies varied by servicer.'' [116]

As the Bureau explained in the 2012 RESPA Servicing Proposal, a servicer's obligation to maintain accurate and timely information regarding a mortgage loan account and to be able to provide accurate and timely information to its own employees and to borrowers, owners, assignees, subsequent servicers, and courts, among others, is one of the most basic servicer duties. A servicer cannot comply with its myriad obligations to investors and applicable law, unless it maintains sound systems to manage the servicing of mortgage loan accounts, including information systems that maintain accurate and timely information with respect to mortgage loan accounts. To address those critical concerns, the Bureau decided to use RESPA section 19(a) authority to propose a rule to address servicers' information management and other general servicing policies and procedures across the industry.

The Bureau received general comments about whether it was appropriate for the Bureau to regulate servicers' practices related to information management and other servicer policies and procedures identified in the 2012 RESPA Servicing Proposal. Consumer group comments generally demonstrated support for the proposal. Industry comments, on the other hand, expressed skepticism about whether it is necessary for the Bureau to regulate servicers' information management and other operational practices. Some industry comments suggested that recent State and Federal remediation efforts, such as the National Mortgage Settlement, and other existing regulations obviated the need for any regulation by the Bureau. Some servicers also urged the Bureau to delay adopting the proposed rule. The Bureau also received a small number of comments about the scope of the rule, including whether the proposed rule would apply to mortgages other than federally regulated mortgages or to reverse mortgages.

In light of the potential harm to borrowers due to the deficiencies in servicer practices highlighted in the proposal, the Bureau continues to believe that servicers should achieve certain critical general servicing objectives and requirements. The Bureau declines to adopt the commenters' suggestions that regulation of these practices is not necessary at this time, and is adopting § 1024.38, as proposed with the modifications discussed in detail below. Through enforcement and supervision of § 1024.38, the Bureau will evaluate whether servicers are achieving the objectives and requirements set forth in § 1024.38. The Bureau also expects that servicers will measure their own ability to achieve the objectives and requirements set forth in § 1024.38. In addition, the Bureau expects that servicers' policies and procedures will address the core functions that they need to achieve those objectives and requirements, including providing adequate staffing and meaningful oversight of the resources engaged in achieving those important objectives and requirements, including servicer staff, service providers, and vendors.

As explained above, the Bureau believes that the general servicing policies, procedures, and requirements set forth in § 1024.38 are necessary and appropriate to achieve the consumer protective purposes of RESPA, including to avoid unwarranted or unnecessary costs and fees, to ensure that servicers are responsive to consumer requests and complaints, to ensure that servicers provide and maintain accurate and relevant information about the mortgage loan accounts that they service, and to facilitate the review of borrowers for foreclosure avoidance options. Moreover, as discussed in detail below in part VII, the Bureau believes that the burden imposed on servicers under the final rule is reasonable in light of the countervailing benefits of the provisions.

[115] *Problems in Mortg. Servicing From Modification to Foreclosure: Hearings Before the Senate Comm. on Banking, Hous. & Urban Affairs,* 111th Cong. 4 (2010) (statement of Daniel K. Tarullo, Board of Governors, Federal Reserve System), *available at http://www.federalreserve.gov/newsevents/testimony/tarullo20101201a.htm.*

[116] *Failure to Recover: The State of Hous. Mkts., Mortg. Servicing Practices and Foreclosures: Hearings Before the House Comm. on Oversight and Gov't Reform,* 112th Cong. 4 (2012) (statement of Morris Morgan, Office of the Comptroller of the Currency), *available at http://www.occ.gov/news-issuances/congressional-testimony/2012/pub-test-2012–47-written.pdf.*

As discussed in detail above in the section-by-section analysis of § 1024.30, § 1024.38 applies only to the servicing of federally related mortgage loans, as defined in § 1024.2, and does not apply to the servicing of reverse mortgages, as defined in § 1024.31, or with respect to any mortgage loan for which a servicer is subject to regulation by the Farm Credit Administration as a ''qualified lender,'' as defined in 12 CFR 617.7000. In addition, § 1024.38 does not apply to small servicers, as defined in 12 CFR 1026.41(e)(4). The Bureau has also modified the final rule to clarify that the policies, procedures, and requirements set forth in § 1024.38 are broader than information management and encompass general servicing policies, procedures, and requirements.

Legal Authority

In proposing § 1024.38, the Bureau relied on a number of authorities, including section 6(k)(1)(E) of RESPA. That provision, which was added by § 1463 of the Dodd-Frank Act as part of a broader set of servicing-related requirements, authorizes the Bureau to promulgate regulations ''appropriate to carry out the consumer protection purposes of [RESPA].'' In the proposal, the Bureau noted that § 1024.38 was further authorized under section 6(j)(3) of RESPA, as necessary to carry out section 6 of RESPA, and under section 19(a) of RESPA, as necessary to achieve the purposes of RESPA. Because rules issued under section 6 of RESPA, including under sections 6(k)(1) and 6(j)(3), are enforceable through private rights of action, the Bureau proposed § 1024.38(a)(2), which set forth a safe harbor under which a servicer would not violate proposed § 1024.38 unless it engaged in a pattern or practice of failing to achieve any of the objectives set forth in § 1024.38. The Bureau believed that creating a pattern or practice threshold would significantly improve industry practices but not subject servicers to lawsuits with respect to, for example, a single lost document or filing error.

The Bureau received many comments on the private liability suggested by the Bureau's reliance on its authority under section 6 of RESPA to propose § 1024.38. Numerous industry commenters expressed concern that authorizing § 1024.38 under section 6 of RESPA would create a private cause of action to enforce the provisions of the section. These commenters noted that the litigation risk created by the proposed rule would complicate compliance due to the potential for inconsistent judicial interpretations of the rule. In light of this concern, industry commenters asked the Bureau to provide detailed, specific guidance on how to comply with the objectives set forth in proposed § 1024.38. In addition, servicers argued that the Bureau and prudential regulators are better positioned to assess and supervise servicers' internal policies and procedures than courts through civil litigation. Industry commenters also stressed that the private litigation that would likely ensue under proposed § 1024.38 would increase the cost of servicing and thereby decrease the availability of credit.

Consumer group commenters generally supported the allowance of private rights of action to enforce § 1024.38 but expressed dissatisfaction with the proposed safe harbor, which they argued should be eliminated or revised to reduce the barriers to successful civil actions and to ensure sufficient protection for borrowers. They commented that the safe harbor definition would make it difficult for consumers to bring successful civil suits, and urged the Bureau to eliminate or to revise the safe harbor to provide relief for more borrowers. Consumer advocates argued that borrowers need strong protections because borrowers cannot select their servicers.

As stated in the proposal, the Bureau is concerned that a servicer's failure to achieve each of the objectives and standard requirements set forth in § 1024.38 creates the potential for adverse consequences harmful to borrowers. These may include imposing improper fees on borrowers, inability reasonably to evaluate borrowers for loss mitigation options that may benefit borrowers and owners or assignees of mortgage loans, unwarranted costs to borrowers, and the potential for fraud upon courts through inaccurate or unverifiable legal pleadings.

The Bureau sought to balance the need for consumer protections with the costs created by command-and-control regulation by proposing objectives-based policies and procedures that allowed servicers flexibility to set policies and procedures reasonably designed to achieve certain defined objectives. Because a single failure to achieve a desired objective or requirement is not necessarily indicative of a servicer's failure to implement appropriate policies and procedures and in light of the potential costs of civil litigation, the Bureau proposed a safe harbor under which servicers would be liable only for systemic violations of § 1024.38. Upon consideration of the comments and further consideration, however, the Bureau has concluded that the proposed formulation would not have adequately balanced the countervailing concerns of borrowers and industry. Requiring a showing of a pattern or practice could make it difficult for borrowers or regulators to obtain remedies until a servicer had inflicted widespread harm among its borrowers. At the same time, the prospect that many individual suits could be filed could threaten to undermine the basic goal of an objectives-based system, if servicers felt pressured to adopt models to reduce risk that were not in fact appropriately tailored to their particular operations.

Ultimately, the Bureau agrees with the commenters that allowing a private right of action for the provisions that set forth general servicing policies, procedures, and requirements would create significant litigation risk. As the commenters noted, courts potentially would interpret the proposed flexible objectives-based standards inconsistently, which would have created compliance challenges for servicers. To address such challenges, the Bureau believes that it would have needed to issue more prescriptive standards in the final rule. The Bureau continues to believe, however, for the reasons discussed above, that flexible objectives-based standards are best suited to address the information management and other servicing challenges faced by different servicers that the Bureau identified in the proposal. Policies and procedures best suited to achieve the desired objectives are often highly dependent on the facts and circumstances of an individual servicer, such as the number and type of loans being serviced, and the technology that the servicer has deployed.

The Bureau believes that supervision and enforcement by the Bureau and other Federal regulators for compliance with and violations of § 1024.38 respectively, would provide robust consumer protection without subjecting servicers to the same litigation risk and concomitant compliance costs as civil liability for asserted violations of § 1024.38. Indeed, the Bureau believes that the Bureau and other Federal regulators have the experience and judgment necessary to evaluate a servicer's compliance with § 1024.38 and to take action against servicers whose operational systems are not reasonably designed to achieve the stated objectives without waiting for evidence of a pattern or practice of undesirable outcomes. Prior to the enactment of the Dodd-Frank Act, there was no comprehensive Federal supervisory authority over non-bank mortgage servicers. The Dodd-Frank Act

created a comprehensive regime of federal regulation over both bank and non-bank mortgage servicers. Under this new regime, the Bureau and other federal regulators can calibrate supervision to focus on practices that present the greatest risk to borrowers and work with servicers to assure that servicers have implemented effective systems that protect consumers and manage servicing portfolios. At the same time, the new comprehensive regulatory regime will allow the Bureau and other regulators to take prompt and effective action where a servicer's policies and procedures are deficient without waiting for proof of a pattern or practice of abuse.

Therefore, the Bureau is restructuring the final rule so that it neither provides private liability for violations of § 1024.38 nor contains a safe harbor limiting liability to situations where there is a pattern or practice of violations. As discussed in more detail below, the Bureau has also revised some of the proposed objectives and added new requirements that the Bureau believes can be appropriately overseen by supervisory agencies but that would have been difficult for the courts to administer on a case-by-case basis. The Bureau believes that this approach more appropriately balances the need for robust consumer protections with respect to the general servicing policies, procedures, and requirements set forth in § 1024.38 through supervision and enforcement by the Bureau and other agencies with the flexibility for industry to define how to achieve the important objectives set forth in § 1024.38.

Thus, the Bureau no longer relies on its authorities under section 6 of RESPA to issue § 1024.38. Instead, the Bureau is adopting § 1024.38 pursuant to its authority under section 19(a) of RESPA. As explained in more detail below, the Bureau believes that the servicing policies, procedures, and requirements set forth in § 1024.38 are necessary to achieve the purposes of RESPA, including to avoid unwarranted or unnecessary costs and fees, to ensure that servicers are responsive to consumer requests and complaints, to ensure that servicers provide and maintain accurate and relevant information about the mortgage loan accounts that they service, and to facilitate the review of borrowers for foreclosure avoidance options. The Bureau believes that without sound operational policies and procedures and without achieving certain standard requirements, servicers will not be able to achieve those purposes. The Bureau is also adopting § 1024.38 pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws. Specifically, the Bureau believes that § 1024.38 is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

38(a) Reasonable Policies and Procedures

Proposed § 1024.38(a)(1) would have required servicers to establish reasonable policies and procedures for achieving certain objectives relating to borrower mortgage loan accounts. Proposed § 1024.38(a)(1) provided that a servicer meets this requirement if the servicer's policies and procedures are reasonably designed to achieve certain objectives, which are set forth in proposed § 1024.38(b), and are reasonably designed to ensure compliance with certain specific requirements in proposed § 1024.38(c).

Proposed comment 38(a)–1 would have clarified that the proposed rule permits servicers to determine the specific methods by which they will implement reasonable policies and procedures to achieve the required objectives. The proposed comment also explained that servicers have flexibility to design the operations that are reasonable in light of the size, nature, and scope of the servicer's operations, including, for example, the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints. The Bureau noted in the proposal that it intended that this clarification would provide servicers flexibility to design policies and procedures that are appropriate for their servicing businesses.

The Bureau received a handful of comments on the structure of the requirements. Industry commenters, especially credit unions, were generally supportive of framing the requirements as objectives-based standards. A trade association expressed support for the flexibility included in the rule, but noted concern that examiners may not view servicers' programs flexibly and instead may ask servicers to change existing programs based on unpublished rules. A consumer group commented that framing the requirements as objectives-based standards would lead to inconsistent practices throughout the mortgage servicing industry.

The Bureau is adopting § 1024.38(a), which is re-numbered from proposed § 1024.38(a)(1), as proposed with non-substantive modifications. The Bureau believes that, due to diversity of servicer size, infrastructure, and work practices, flexible objectives-based standards are best-suited to manage servicers' operational practices. The Bureau understands as the commenters suggest that framing the requirements as objectives-based standards will lead to differences between how servicers implement the objectives, but believes that objectives-based standards best balance the burden on the industry with the protections for consumers.

The Bureau is adopting comment 38(a)–1, as proposed with non-substantive modifications to explain that a servicer may determine the specific policies and procedures it will adopt and the methods by which it will implement those policies and procedures so long as they are reasonably designed to achieve the objectives set forth in § 1024.38(b). A servicer has flexibility to determine such policies and procedures and methods in light of the size, nature, and scope of the servicer's operations, including, for example, the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints. Comment 38(a)–1 clarifies that servicers may retain existing procedures or design policies and procedures that are appropriately tailored to their operations, as long as the procedures are reasonably designed to achieve the important objectives set forth in § 1024.38(b). The Bureau is also adopting new comment 38(a)–2 to clarify the meaning of the term procedures. As stated in the comment, the term ''procedures'' refers to the actual practices followed by a servicer for achieving the objectives set forth in § 1024.38(b). This comment clarifies

that the Bureau expects that servicers' policies and procedures will be reasonably designed to measure their ability to achieve the objectives set forth in § 1024.38 and to make ongoing improvements to their policies and procedures to address any deficiencies.

Safe harbor. As discussed above, the Bureau proposed § 1024.38(a)(2) to provide a safe harbor for servicers for non-systemic violations of § 1024.38 to manage the costs that would arise from the contemplated litigation risk created by the contemplated civil liability for violations of § 1024.38. Proposed § 1024.38(a)(2) stated that a servicer satisfies the requirement in proposed § 1024.38(a)(1) if the servicer does not engage in a pattern or practice of failing to achieve any of the objectives set forth in proposed § 1024.38(b) and did not engage in a pattern or practice of failing to comply with any of the standard requirements in proposed § 1024.38(c). Proposed comment 38(a)(1)–1 would have provided examples of potential pattern or practice failures by servicers. Proposed comment 38(a)(2)–1 would have provided further clarification about the operation of the safe harbor.

Comments received by the Bureau expressed uniform dissatisfaction with the proposed safe harbor definition. Industry commenters in general expressed the concern that the proposed safe harbor would not sufficiently insulate them from the large costs that they said that they would bear due to the litigation risk they saw embedded in the proposal as a result of civil liability, as discussed above in the section-by-section discussion of the legal authority for § 1024.38. In addition, some industry commenters stated that the safe harbor provision, which is based on the lack of a pattern or practice, would lead to costly discovery because servicers would be required to produce large volumes of documents to establish the absence of a pattern or practice.

Consumer group commenters also expressed opposition to the proposed safe harbor. They commented that the safe harbor definition would make it difficult for borrowers to bring successful civil suits, and urged the Bureau to eliminate or to revise the safe harbor to provide relief for more borrowers. Consumer advocates argued that borrowers need strong protections because borrowers cannot select their servicers.

As discussed above, the Bureau is adopting final general servicing policies, procedures, and requirements that are not enforceable through a private right of action. As violations of this § 1024.38 no longer carry potential civil liability, the Bureau does not believe that the proposed safe harbor is appropriate to include in the final rule. The Bureau is adopting a final rule that does not include proposed § 1024.38(a)(2) or proposed comments 38(a)(1)–1 and 38(a)(2)–1. This revision will also allow the Bureau to protect borrowers through robust supervision and enforcement of the servicing policies, procedures, and requirements set forth in § 1024.38 without having to demonstrate a pattern or practice of violations.

38(b) Objectives

38(b)(1) Accessing and Providing Timely and Accurate Information

38(b)(1)(i)

Proposed § 1024.38(b)(1)(i) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of providing accurate and timely disclosures to borrowers. As stated in the proposal, the Bureau believed that this was an important objective to protect borrowers by making sure that servicers provide borrowers with accurate and timely information about their mortgage loan accounts. Having received no comments on this provision, the Bureau is adopting § 1024.38(b)(1)(i), as proposed.

38(b)(1)(ii)

Proposed § 1024.38(b)(1)(ii) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to investigate, respond to, and, as appropriate, correct errors asserted by borrowers, in accordance with the procedures set forth in § 1024.35, including errors resulting from actions of service providers. A servicer's ability to investigate promptly and respond appropriately to an assertion of error is necessarily dependent upon the accuracy of the servicer's records and on the ability of the servicer's employees to access those records readily. As a result, the Bureau believed that including this objective as one of the objectives for a servicer's policies and procedures was an important supplement to the Dodd-Frank Act error resolution requirements that are implemented in § 1024.35.

The Bureau received one comment on proposed § 1024.38(b)(1)(ii). A trade association urged the Bureau to limit the applicability of § 1024.38(b)(1)(ii) to errors submitted pursuant to § 1024.35. The Bureau declines to adopt the commenter's suggestion. In light of the Bureau's decision to limit the applicability of § 1024.35 to notices of error submitted in writing, as discussed above in the section-by-section analysis of § 1024.35, the Bureau has decided to modify proposed § 1024.38(b)(1)(ii) to clarify that a servicer must have policies and procedures reasonably designed to respond to complaints asserted by borrowers, including those complaints that are not subject to the procedures set forth in § 1024.35. In particular, the Bureau believes that the modification is necessary and appropriate to ensure that consumers receive prompt and appropriate responses to oral complaints even though such complaints will not trigger the formal processes under § 1024.35.

The Bureau also is removing the reference to the actions of service providers from the text of the rule, and, instead, is adopting new comment 38(b)(1)(ii)–1 to clarify that policies and procedures to comply with § 1024.38(b)(1)(ii) must be reasonably designed to provide for promptly obtaining information from service providers to facilitate achieving the objective of correcting errors resulting from actions of service providers, including obligations arising pursuant to § 1024.35.

38(b)(1)(iii)

Proposed § 1024.38(b)(1)(iii) would have required servicers to develop policies and procedures reasonably designed to provide borrowers with accurate and timely information and documents in response to borrower requests for information or documents related to their mortgage loan accounts in accordance with the procedures set forth in § 1024.36. The Bureau believed that the proposed provision was an important supplement to the Dodd-Frank Act information request requirements that are implemented in § 1024.36 because the maintenance of accurate information regarding mortgage loan accounts is necessary for a servicer to respond to requests for information made by borrowers.

The Bureau received no comments on § 1024.38(b)(1)(iii). However, in light of the Bureau's decision to limit the applicability of § 1024.36 to requests for information submitted in writing, as discussed above in the section-by-section analysis of § 1024.36, the Bureau has decided to modify proposed § 1024.38(b)(1)(iii) to clarify that a servicer must have policies and procedures to provide a borrower with accurate and timely information and documents in response to the borrower's requests for information with respect to the borrower's mortgage loans, including those requests that are not asserted in accordance with the procedures set forth in § 1024.36. In particular, the Bureau continues to believe that servicers must have the capacity to respond to borrowers'

requests for information reported to servicers orally, but the Bureau believes that it is appropriate to allow servicers to design policies and procedures best suited to their operations to achieve this objective. Accordingly, the Bureau is adopting § 1024.38(b)(1)(iii) with modifications from the proposal to broaden the scope of the objective to include borrower requests for information or documents with respect to the borrower's mortgage loan that are not encompassed by the written information request process set forth in § 1024.36.

38(b)(1)(iv)

Proposed § 1024.38(b)(1)(iv) would have required servicers to establish policies and procedures reasonably designed to achieve the objective of providing owners or assignees of mortgage loans with accurate and current information and documents about any mortgage loans that they own. As stated in the proposal, the Bureau believes that to protect borrowers, it is necessary for owners and assignees to receive accurate and timely information about the mortgage loans they own. As the Bureau stated, owners and assignees can play an important role in ensuring that servicers comply with the requirements of the owner or assignee which may inure to the benefit of borrowers.

The Bureau received a comment on this proposed provision from an investor, providing types of information that would benefit investors regarding loss mitigation evaluations conducted, and loss mitigation agreements entered into, by servicers. Having received no comments on the substance of the proposed rule, the Bureau is adopting § 1024.38(b)(1)(iv), as proposed. The Bureau is also adopting new comment 38(b)(1)(iv)–1 to clarify the information and documents contemplated by this section. Comment 38(b)(1)(iv)–1 provides that the relevant and current information to owners or assignees of mortgage loans includes, among other things, information about a servicer's evaluation of borrowers for loss mitigation options and a servicer's agreements with borrowers on loss mitigation options, including loan modifications. Such information includes, for example, information regarding the date, terms, and features of loan modifications, the components of any capitalized arrears, the amount of any servicer advances, and any assumptions regarding the value of a property used in evaluating any loss mitigation options.

38(b)(1)(v)

Proposed § 1024.38(b)(1)(v) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to submit documents or filings required for a foreclosure process, including documents or filings required by a court of competent jurisdiction, that reflect accurate and current information and that comply with applicable law. The Bureau believes that it is necessary and appropriate to protect borrowers from harms resulting from servicers' failure to submit accurate, current, and compliant documents in foreclosure proceedings. In issuing the proposed rule, the Bureau pointed to findings by the Office of the Comptroller of the Currency that major servicers demonstrated failures to document and verify, in accordance with applicable law, information relating to borrower mortgage loan accounts in connection with foreclosure proceedings.[117]

The Bureau received a number of comments on proposed § 1024.38(b)(1)(v). State attorneys general commented that the Bureau should adopt stricter standards to ensure the accuracy and validity of foreclosure documentation, such as the standards included in the recent National Mortgage Settlement. In addition, consumer groups urged the Bureau to require servicers who are initiating a foreclosure to provide documentation to borrowers of the right of the party initiating the action to foreclose, including providing evidence of an enforceable security interest and verification of supporting statements.

After consideration of the comments, the Bureau has concluded that the proposed language already appropriately addresses the concerns raised. Section 1024.38(b)(1)(v), as proposed, requires servicers to develop policies and procedures reasonably designed to achieve the objective of ensuring the accuracy of any documents filed in foreclosure proceedings, which would include affidavits or security instruments, and, therefore, is broad enough to cover the specific documents identified in the National Mortgage Settlement. Specifying particular documents which must be submitted accurately, or regulating the particulars of how documents are prepared and validated by servicers, would be inconsistent with the rule's broad objectives-based standards, which, as discussed above, are designed to provide flexibility for a wide range of servicers to develop policies and procedures that are appropriate to their business and that will achieve the stated objectives. Accordingly, the Bureau declines to adopt a final rule containing the specific details included in the National Mortgage Settlement. The Bureau expects that the court filings of servicers whose operational and information management policies and procedures are reasonably designed to achieve the objective of § 1024.38(b)(1)(v) will be accurate and authorized by the underlying security documents.

Second, the Bureau believes that the information request process defined in proposed § 1024.36 provides borrowers in foreclosure with access to the documentation described by consumer groups. Specifically, § 1024.36, as proposed, requires servicers to provide to borrowers upon their request information about their mortgage loan accounts, including their servicing files, which includes a complete payment history, a copy of their security instrument, collection notes, and other valuable information about their accounts. Accordingly, the Bureau does not believe that it is necessary to revise the proposed language to provide this protection. For the reasons discussed above, the Bureau is adopting § 1024.38(b)(1)(v), as proposed.

38(b)(1)(vi)

The Bureau's proposed servicing operational policies and procedures did not specifically address a servicer's obligations related to successors in interest upon the death of a borrower. The Bureau received information about difficulties faced by surviving spouses, children, or other relatives who succeed in the interest of a deceased borrower to a property that they also occupied as a principal residence, when that property is secured by a mortgage loan account solely in the name of the deceased borrower. In particular, the Bureau understands that successors in interest may encounter challenges in communicating with mortgage servicers about a deceased borrower's mortgage loan account. The Bureau believes that it is essential that servicers' policies and procedures are reasonably designed to facilitate communication with successors in interest regarding a deceased borrower's mortgage loan accounts. Therefore, the Bureau is adopting § 1024.38(b)(1)(vi) to clarify that servicers should maintain policies and procedures that are reasonably

[117] *Failure to Recover: The State of Hous. Mkts., Mortg. Servicing Practices and Foreclosures: Hearings Before the House Comm. on Oversight and Gov't Reform,* 112th Cong. 4 (2012) (statement of Morris Morgan, Office of the Comptroller of the Currency).

designed to, upon notification of the death of a borrower, identify promptly and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower's mortgage loan.

38(b)(2) Properly Evaluating Loss Mitigation Applications

Proposed § 1024.38(b)(2) would have established a number of objectives designed specifically to support servicers' loss mitigation activities and to facilitate compliance with various requirements under proposed § 1024.41. Specifically, proposed § 1024.38(b)(2) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to (i) provide accurate information to borrowers regarding loss mitigation options; (ii) identify all loss mitigation options for which a borrower may be eligible; (iii) provide servicer personnel with prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option; (iv) enable servicer personnel to identify documents and information that a borrower is required to submit to make a loss mitigation application complete; and (v) enable servicer personnel to evaluate borrower applications properly, and any appeals, as appropriate.

In the proposal, the Bureau expressed its belief that requiring servicers to have reasonable policies and procedures to maintain and manage information and operations that are designed to enable the servicer to evaluate borrowers for loss mitigation options facilitates compliance with proposed § 1024.41. Further, such policies and procedures are likely to protect consumers by requiring servicers to consider, in advance of the potential delinquency of a particular mortgage loan, the loss mitigation options that are generally available to borrowers.

While acknowledging that servicers generally have begun to alter the manner in which they invest in infrastructure and are changing their approach to default management, the Bureau stated in the 2012 RESPA Servicing Proposal that it believes that a requirement to develop reasonable policies and procedures to enable a servicer to evaluate loss mitigation applications imposes a reasonable burden on servicers that will benefit delinquent borrowers once the rule takes effect and will protect borrowers in future years as servicers transition from reacting to the current financial crisis to a more steady market more likely to be punctuated by regional spikes in delinquencies and foreclosures. Absent regulation, servicers that have not yet invested in improving loss mitigation functions may find less incentive to do so as housing markets recover, leading to continued inadequate infrastructure during future regional or national housing downturns, which may lead to future borrower harm. The Bureau requested comment regarding whether the Bureau had identified the appropriate objectives with respect to proposed § 1024.38(b)(2) and whether objectives should be removed, or other objectives included, in the requirements.

Loss mitigation information. Proposed § 1024.38(b)(2) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to (i) provide accurate information to borrowers regarding loss mitigation options; (ii) identify all loss mitigation options for which a borrower may be eligible; (iii) provide servicer personnel with prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option; (iv) enable servicer personnel to identify documents and information that a borrower is required to submit to make a loss mitigation application complete.[118]

The Bureau received a small number of comments on § 1024.38(b)(2). Consumer advocates supported proposed § 1024.38(b)(2), and urged the Bureau to specify that servicers are required to provide borrowers with a list of available loss mitigation options. Trade associations urged the Bureau to clarify servicers' obligations in this section, in particular whether servicers could limit the information provided to borrowers to only the loss mitigation programs that the servicer offers. The Bureau also received many comments about the servicers' obligations to offer loss mitigation options to borrowers, which are discussed in detail in the section-by-section analysis of § 1024.41.

For the reasons discussed above, the Bureau is adopting §§ 1024.38(b)(2)(i) through (b)(2)(iv), as proposed with slight modifications for clarification. Section 1024.38(b)(2)(ii) clarifies that the rule envisions that servicers will develop policies and procedures reasonably designed to identify with specificity all loss mitigation options available for mortgage loans currently serviced by a mortgage servicer and that the mortgage servicer may service in the future. The Bureau is also adopting new comment 38(b)(2)(ii)–1, which explains that servicers must develop policies and procedures reasonably designed to enable servicer personnel to identify all loss mitigation options available for mortgage loans currently serviced by the mortgage servicer. For example, a servicer's policies and procedures must be reasonably designed to address how a servicer specifically identifies, with respect to each owner or assignee, all of the loss mitigation options that the servicer may consider when evaluating any borrower for a loss mitigation option and the criteria that should be applied by a servicer when evaluating a borrower for such options. In addition, a servicer's policies and procedures must be reasonably designed to address how the servicer will apply any specific thresholds for eligibility for a particular loss mitigation option established by an owner or assignee of a mortgage loan (*e.g.,* if the owner or assignee requires that a servicer only make a particular loss mitigation option available to a certain percentage of the loans that the servicer services for that owner or assignee, then the servicer's policies and procedures must be reasonably designed to determine in advance how the servicer will apply that threshold to those mortgage loans). A servicer's policies and procedures must also be reasonably designed to ensure that such information is readily accessible to the servicer personnel involved with loss mitigation, including personnel made available to the borrower as described in § 1024.40.

To meet the objectives of § 1024.38(b)(2)(ii), a servicer will have to establish policies and procedures that are reasonably designed to provide servicer personnel with the ability to determine, on a loan by loan basis, which loss mitigation options made available by the servicer are available to particular borrowers and to provide that information to such borrowers. This objective requires that servicers have access to accurate information about the available loss mitigation options for particular types of loans. The Bureau anticipates that for servicers that service mortgage loans held by the servicer or an affiliate in portfolio, providing access to the latter category of information will not present significant burdens with respect to such mortgage loans as any such policies likely will be uniformly set forth by the servicer or affiliate. Similarly, the Bureau anticipates that servicers that service mortgage loans that are included in securitizations guaranteed by Fannie Mae, Freddie

[118] Proposed § 1024.38(b)(2)(v), discussed above, would have required servicers to establish reasonable policies and procedures that enable servicer personnel to properly evaluate borrower applications, and any appeals, as appropriate.

Mac, or Ginnie Mae, or insured by FHA or other government sponsored insurance programs, will be familiar with policies that will be set forth by those entities regarding the requirements for loss mitigation options and will be able to make that information available to servicer personnel and borrowers. Servicers that service mortgage loans that are securitized through private label securities may need to undertake more detailed discussions with investors to identify which, if any, loss mitigation programs made available by the servicer are available to borrowers whose mortgage loans are owned by the securitization trust pursuant to the terms of any particular servicing agreement. However, the Bureau believes the burden is still reasonable and will abate over time as the industry does a better job of clarifying such issues at the time that the servicing agreements are first drafted.

The Bureau believes that the final rule will increase protection for borrowers by requiring servicers to adopt policies and procedures reasonably designed to ensure that servicers consider, in advance of the potential delinquency of a particular mortgage loan, the loss mitigation options that are generally available to borrowers. Further, the final rule provides a basis for Bureau supervision and enforcement regarding whether servicers are unjustifiably asserting investor limitations as a basis for avoiding the work of processing loss mitigation applications.

Proper evaluation of loss mitigation applications. Proposed § 1024.38(b)(2)(v) would have defined as an objective of a servicer's policies and procedures, the proper evaluation of loss mitigation applications, and any appeals, pursuant to the requirements of proposed § 1024.41. As explained in the proposal, borrowers who are struggling to pay their mortgage have a vital interest in being properly considered for all available loss mitigation options, and the ability of servicers to do so is largely dependent upon servicers establishing and implementing policies and procedures that are reasonably designed to assure that servicer personnel have prompt and complete access to all relevant information, including documents and information submitted by the borrowers. Proposed § 1024.41, as discussed below, in turn defined procedures for evaluating loss mitigation applications.

Most of the comments received by the Bureau regarding proposed § 1024.38(b)(2)(v) focused on the procedures set forth in proposed § 1024.41. However, in light of the comments received, the Bureau is adopting § 1024.38(b)(2)(v), with modifications from the proposal to make clear that the objective of proper evaluation of a borrower's application for a loss mitigation option, or any appeal, extends to all loss mitigation options that are potentially available to the borrower pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. As explained below in the section-by-section analysis of § 1024.41, this objective is not inconsistent with the use of a waterfall of loss mitigation options that an investor or assignee may establish.

The Bureau is also adopting new comment 38(b)(2)(v)–1 to clarify that a servicer is required pursuant to § 1024.38(b)(2)(v) to maintain policies and procedures reasonably designed to evaluate a borrower for a loss mitigation option consistent with any owner or assignee requirements, even where the requirements of § 1024.41 may be inapplicable. For example, an owner or assignee may require that a servicer implement certain procedures to review a loss mitigation application submitted by a borrower less than 37 days before a foreclosure sale. Further, an owner or assignee may require that a servicer implement certain procedures to re-evaluate a borrower who has demonstrated a material change in the borrower's financial circumstances for a loss mitigation option after the servicer's initial evaluation. A servicer must maintain policies and procedures reasonably designed to implement these requirements even if such loss mitigation evaluations may not be required pursuant to § 1024.41. The Bureau believes that the final rule will provide borrowers with greater access to loss mitigation options and more transparency into the evaluation process.

38(b)(3) Facilitating Oversight of, and Compliance by, Service Providers

Proposed § 1024.38(b)(3) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to provide appropriate servicer personnel with accurate and current information reflecting actions performed by service providers, facilitating periodic reviews of service providers, and facilitating the sharing of accurate and current information among servicer personnel and service providers.

The Bureau explained that proposed § 1024.38(b)(3) was designed to address recent evaluations of mortgage servicer practices that had found that some major servicers ''did not properly structure, carefully conduct, or prudently manage their third-party vendor relationships.'' [119] For example, certain servicers supervised by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency were found by those agencies to have failed to monitor third-party vendor foreclosure law firms' compliance with the servicer's standards or to retain copies of documents maintained by third-party law firms.[120] Similar failures were found to be present in connection with servicer relationships with default management service providers and Mortgage Electronic Registration Systems, Inc. (MERS).[121] The Bureau noted in the proposal that these failures likely resulted in significant harms for borrowers, including imposing unwarranted fees on borrowers and harms relating to so-called ''dual tracking'' from miscommunications between service providers and servicer loss mitigation personnel.

The Bureau requested comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements. The Bureau received a small number of comments proposed § 1024.38(b)(3), all of which were submitted by industry. Commenters sought clarification about the scope of proposed § 1024.38(b)(3), including whether the provision would apply to vendors used for non-mortgage loan related tasks and whether the provision would create an independent obligation for service providers to comply with § 1024.38. Servicers also sought guidance on how to comply with the periodic review requirements of proposed § 1024.38(b)(3)(ii), including whether compliance with the recent National Mortgage Settlement or participation in shared assessment programs would satisfy a servicer's obligations under the proposed rule.

Proposed § 1024.38(b)(3) would have imposed obligations on servicers with respect to maintaining and providing access to information about service providers, as defined by § 1024.31,

[119] Fed. Reserve Sys., Office of the Comptroller of the Currency & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* 9 (2011), available at *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011–47a.pdf.*

[120] Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* 9 (2011).

[121] Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* 10 (2011).

discussed above in the section-by-section analysis of that section, which includes any party retained by a servicer that interacts with a borrower or provides a service to a servicer for which a borrower may incur a fee. The proposed provision would therefore not have created obligations with respect to vendors who do not meet this definition.

The Bureau is adopting § 1024.38(b)(3), as proposed. The Bureau remains concerned about servicers' inadequate oversight of service providers, and believes that proposed § 1024.38(b)(3) appropriately addresses this concern by requiring servicers to maintain reasonable policies and procedures, which will provide servicer personnel with information about actions of service providers and facilitate review of service providers. The Bureau expects that servicers seeking to demonstrate that their policies and procedures are reasonably designed to achieve these objectives will demonstrate that, in fact, the servicer has been able to use its information to oversee its service providers effectively, such as through a shared assessment program of the type set forth in the National Mortgage Settlement.

38(b)(4) Facilitating Transfer of Information During Servicing Transfers

Proposed § 1024.38(b)(4) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of ensuring the timely transfer of all information and documents relating to a transferred mortgage loan to a transferee servicer in a form and manner that enables the transferee servicer to comply with the requirements of subpart C and the terms of the transferee servicer's contractual obligations to owners or assignees of the mortgage loans. Further, proposed § 1024.38(b)(4) would have provided an objective that a transferee servicer shall have documents and information regarding the status of discussions with a borrower regarding loss mitigation options, any agreements with a borrower for a loss mitigation option, and any analysis with respect to potential recovery from a non-performing mortgage loan, as appropriate (typically called a final recovery determination).

In proposing § 1024.38(b)(4), the Bureau expressed concern that servicing transfers could give rise to potential harms to consumers. Transferee servicers may experience problems relating to inaccurate transfer of past payment information, failures of the transferor servicer to transfer documents provided to it by a borrower or others, and inaccurate transfer of information relating to loss mitigation discussions with borrowers. Borrowers engaged in loss mitigation efforts may be transferred to transferee servicers that have no knowledge of the existence or status of the loss mitigation efforts.

The Bureau explained in the proposal that it believed it is a typical servicer duty for servicers to be able to effectuate sales, assignments, and transfers of mortgage servicing in a manner that does not adversely impact borrowers. Servicers generally should expect that servicing may be sold, assigned, or transferred for certain loans they service. Servicers may owe a duty to investors to ensure that mortgage servicing can be transferred without adversely impacting the value of the investor's asset. The Bureau stated that it believes it is appropriate for servicers to establish policies and procedures reasonably designed to achieve the objective of ensuring that in the event of any such transfer, documents and information regarding mortgage loan accounts are identified and transferred to a transferee servicer in a manner that permits the transferee servicer to continue providing appropriate service to the borrower.

The Bureau requested comments regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements. The Bureau received a small number of comments on proposed § 1024.38(b)(4). Consumer advocates and some industry expressed support for the proposal. Other commenters asked for clarification about what the proposal would require, including whether transferor servicers must transfer all of the servicing file elements and whether the rule would require transferor servicers to obtain documents outside of the transferor servicers' possession or control. Servicers also asked for clarification about whether the rule would allow servicers to transfer files electronically.

In addition, the Bureau has received information that consumers often face difficulty enforcing a loss mitigation agreement reached with a transferor servicer prior to transfer with the transferee servicer. The Bureau has learned that transferee servicers often fail to request complete information about loss mitigation agreements from transferor servicers, and instead require borrowers to provide that documentation.

The Bureau is adopting § 1024.38(b)(4)(i), renumbered from proposed § 1024.38(b)(4), with modifications to address those comments. The Bureau has revised the proposal to add language to clarify that a transferor servicer's objectives regarding facilitating transfer relate only to documents within the transferor servicer's possession or control and that the transfer of information and documents must be in a form and manner that enables a transferee servicer to comply with obligations both under the terms of the mortgage loan and with applicable law. The Bureau is also removing the language concerning the transfer of information regarding loss mitigation discussions with borrowers from the text of proposed § 1024.38(b)(4) and, instead, is including new comment 38(b)(4)(i)–2, which clarifies the transferor servicer's obligation under § 1024.38(b)(4)(i) to establish policies and procedures reasonably designed to ensure that the transfer includes any information reflecting the current status of discussions with a borrower regarding loss mitigation options, any agreements entered into with a borrower on a loss mitigation option, and any analysis by a servicer with respect to potential recovery from a non-performing mortgage loan, as appropriate.

To address industry's comments about the manner in which transferor servicers may effectuate the transfer of documents and information, the Bureau is adopting new comment 38(b)(4)(i)–1, which clarifies that a transferor servicer's policies and procedures may provide for transferring documents and information electronically provided that the transfer is conducted in a manner that is reasonably designed to ensure the accuracy of the information and documents transferred and that enables a transferee servicer to comply with its obligations to the owner or assignee of the loan and with applicable law. For example, transferor servicers must have policies and procedures for ensuring that data can be properly and promptly boarded by a transferee servicer's electronic systems and that all necessary documents and information are available to, and can be appropriately identified by, a transferee servicer.

The Bureau is also adopting § 1024.38(b)(4)(ii) to more clearly define objectives for transferee servicers. Section 1024.38(b)(4)(ii) defines as an objective of a transferee servicer's reasonable policies and procedures identifying necessary documents or information that may not have been transferred by a transferor servicer and obtaining such documents from the transferor servicer. Comment 38(b)(4)(ii)–1 explains that a transferee servicer must have policies and procedures reasonably designed to

ensure, in connection with a servicing transfer, that the servicer receives information regarding any loss mitigation discussions with a borrower, including any copies of loss mitigation agreements. Further, the comment clarifies that the transferee servicer's policies and procedures must address obtaining any such missing information or documents from a transferor servicer before attempting to obtain such information from a borrower.

The Bureau is also adopting § 1024.38(b)(4)(iii) to clarify that the obligations set forth in § 1024.38(b)(4) apply to circumstances when the performance of servicing of a mortgage loan is transferred, but the right to perform servicing of a mortgage loan is not transferred, such as a transfer between a master servicer and a subservicer or between subservicers.

38(b)(5) Informing Borrowers of Written Error Resolution and Information Request Procedures

As discussed above in the section-by-section analysis of § 1024.33, the Bureau is adopting a requirement for the servicing transfer notice that no longer requires a statement informing borrowers of the error resolution procedures required by existing § 1024.21(d)(3)(vii). To address concerns raised by commenters about the proposed revision of the transfer servicing notice, as discussed above, the Bureau is adopting § 1024.38(b)(5) to require servicers to maintain policies and procedures reasonably designed to achieve the objective of informing borrowers about the procedures for submitting written notices of error set forth in § 1024.35 and written requests for information set forth in § 1024.36.

The Bureau is also adopting new comment 38(b)(5)–1 to clarify the manner in which a servicer may inform borrowers about the procedures for submitting written notices of errors set forth in § 1024.35 and for submitting written requests for information set forth in § 1024.36. The Bureau is also adopting new comment 38(b)(5)–2 to clarify that a servicer's policies and procedures required by § 1024.38(b)(5) must be reasonably designed to provide information to borrowers who are not satisfied with the resolution of a complaint or request for information submitted orally about the procedures for submitting written notices of error set forth in § 1024.35 and for submitting written requests for information set forth in § 1024.36.

38(c) Standard Requirements

38(c)(1) Record Retention

Proposed § 1024.38(c)(1) would have required a servicer to retain records that document actions taken with respect to a borrower's mortgage loan account until one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. When issuing the proposed rule, the Bureau observed that proposed §§ 1024.35 and 1024.36 would have required servicers to respond to notices of error and information requests provided up to one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. The Bureau also noted that it believes that the record retention requirement was necessary for servicer compliance with obligations set forth in §§ 1024.35 and 1024.36. The Bureau also proposed to eliminate the systems of record keeping set forth in current § 1024.17(*l*), which required servicers to retain copies of documents related to borrower's escrow accounts for five years after the servicer last serviced the escrow account, which is likely to be close in time to when a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. Further, the Bureau observed that servicers will require accurate information for the life of the mortgage loan to provide accurate payoff balances to borrowers or to exercise a right to foreclose. The Bureau requested comment regarding whether servicers should be required to retain documents and information relating to a mortgage file until one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer and the potential burden of this requirement.

The Bureau received a handful of comments on proposed § 1024.38(c)(1). Consumer advocates urged the Bureau to extend the retention period from one year to five years to ensure that documents were available for discovery in civil litigation. Two servicers argued that the one year retention period would impose too great a cost on servicers. Another servicer commented that it agreed with the proposed one year retention period. A trade association also urged the Bureau to clarify that contractual rights to access records possessed by another entity would satisfy the servicer's requirements under this provision.

The Bureau is adopting § 1024.38(c)(1), as proposed. The Bureau believes that servicers should retain records that document actions taken by the servicer with respect to a borrower's mortgage loan account until one year after the date the mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer. As the Bureau stated in the proposal, the Bureau believes that the record retention requirement is necessary for servicer compliance with obligations set forth in §§ 1024.35 and 1024.36. Further, the Bureau believes that servicers require accurate information for the life of the mortgage loan to provide accurate payoff balances to borrowers or to exercise a right to foreclose. Requiring servicers to retain records until one year after the transfer or payoff of a mortgage loan may impose some marginal increase in the servicer's compliance burden in the form of incremental storage costs, but the Bureau believes that this burden is reasonable in light of the considerable benefits to borrowers. Moreover, the retention period is necessary to ensure that the Bureau and other regulators have an opportunity to supervise servicers' compliance with applicable laws effectively. The Bureau declines to adopt the longer period suggested by commenters. The Bureau believes that the final rule adequately addresses the commenters' concerns about the availability of documents for discovery by requiring retention of documents throughout the life of the loan and for one year following the payoff or transfer of servicing.

To clarify the methods that servicers may utilize to retain records, the Bureau is adopting new comment 38(c)(1)–1 that explains that retaining records that document actions taken with respect to a borrower's mortgage loan account does not necessarily mean actual paper copies of documents. The records may be retained by any method that reproduces the records accurately (including computer programs) and that ensures that the servicer can easily access the records (including a contractual right to access records possessed by another entity).

38(c)(2) Servicing File

Proposed § 1024.38(c)(2) would have required servicers to create a single servicing file for each mortgage loan account containing (1) a schedule of all payments credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account; (2) a copy of the borrower's security instrument; (3) any collection notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account; (4) a report of any data fields relating to a borrower's mortgage loan account

created by a servicer's electronic systems in connection with collection practices, including records of automatically or manually dialed telephonic communications; and (5) copies of any information or documents provided by a borrower to a servicer in accordance with the procedures set forth in §§ 1024.35 or 1024.41. The proposal also would have required that servicers provide borrowers with copies of the servicing file in accordance with the procedures set forth in § 1024.36.

In the proposal, the Bureau expressed concern that many large servicers maintained documents and information related to a borrower's mortgage loan account in disparate systems and that this practice has led servicers to have difficulty identifying all necessary information regarding a borrower's mortgage loan account, including collector's notes, payment histories, note and deed of trust documents, and account debit and credit information, including escrow account information. Proposed § 1024.38(c)(2) would have required servicers to aggregate into a single system a servicing file for each mortgage loan account, containing the specific information described above. The Bureau solicited comment regarding whether servicers should be required to provide copies of a defined servicing file to a borrower upon request and on the burden of adopting this requirement. Further, the Bureau requested comment regarding whether the Bureau had identified the appropriate components of a servicing file and whether certain categories of documents and information should be included or removed from the proposed requirement. The comments that the Bureau received are described in detail below.

Providing copies of the servicing file to borrowers upon request. Proposed § 1024.38(c)(2) would have required servicers to provide a borrower with a copy of a servicing file, containing specifically listed elements, for the borrower's mortgage loan account, in accordance with the procedures set forth in § 1024.36. The Bureau received a large number of comments on that aspect of the proposal.

The majority of the comments on proposed § 1024.38(c)(2) came from industry, and demonstrated confusion about the proposed provision. Industry commenters generally misunderstood the proposed provision as a requirement to provide borrowers with copies of their servicing files not subject to the procedures for information requests set forth in § 1024.36. Some servicers explicitly urged the Bureau to subject requests for servicing files to the procedural requirements of the information requests defined in § 1024.36. In addition, given this misunderstanding, industry comments urged the Bureau to adopt limits on borrowers' requests for servicing files to protect servicers from burdensome or duplicative requests. Servicers also suggested that the Bureau eliminate certain elements of the servicing file, such as payment histories, collection notes, and data fields, because they claimed that those elements would be too voluminous to provide to borrowers. A large servicer also urged the Bureau to allow flexibility in how servicers provide the information to borrowers, such as allowing borrowers to access the servicing file via a Web site.

Servicers also expressed concern that the proposed provision might require them to disclose privileged or proprietary information to borrowers. In particular, many commenters pointed to collection notes and data fields as elements potentially containing privileged or proprietary information.

Some comments also focused on a perceived litigation risk from providing copies of the servicing file to borrowers. Two comments cautioned that borrowers and their attorneys could use the request for the servicing file to obtain information normally only available to borrowers through court-ordered discovery in litigation. Commenters also stated that collection notes and data fields were created for strictly internal purposes, and would confuse borrowers, which might lead to litigation.

Consumer groups expressed support for providing borrowers with copies of their servicing files upon request. Consumer advocates noted that they specifically supported providing borrowers with a copy of a record of all payments credited to the account upon request and the data fields identifying the owner or assignee of the mortgage loan account. Also, one consumer advocate noted that the schedule of payments should include all payments made during the life of the loan and not just payments made to the current servicer.

To address the commenters' confusion about the relationship between proposed §§ 1024.38(c)(2) and 1024.36, the Bureau has removed the requirement to provide borrowers with copies of their servicing file from the language of proposed § 1024.38(c)(2). Instead, the Bureau is adopting new comment 38(c)(2)–2 that clarifies that § 1024.38(c)(2) does not confer upon any borrower an independent right to access information contained in the servicing file and that upon receipt of a borrower's request for a servicing file, a servicer shall provide the borrower with a copy of the information contained in the servicing file for the borrower's mortgage loan, subject to the procedures and limitations set forth in § 1024.36. This revision does not alter the substance of proposed § 1024.38(c)(2).

Aggregation of servicing file. Proposed § 1024.38(c)(2) would have required that servicers provide a defined set of information and data, *i.e.* a serving file, to borrowers upon request. Commenters interpreted this provision to require that servicers aggregate the elements of the servicing file defined in this section into a single file or information management system. Industry commenters, especially community banks, and credit unions, expressed concern about the potential implementation burden of aggregating the information regarding each borrower into a single system. Some of these commenters explained that their existing information systems stored some of the elements of the servicing file in separate systems. Some of these commenters also stated that their existing systems had not led to problems identified in the proposal, and urged the Bureau not to mandate that servicers with sound existing information management systems rebuild those systems to satisfy the technical details in the regulation.

The intent of the servicing file requirement in proposed § 1024.38(c)(2) was to prevent harm to borrowers and to investors by requiring servicers to have the capacity to access key information about a mortgage loan quickly. However, the Bureau recognizes that there are multiple ways to achieve this objective. The Bureau also does not want needlessly to require servicers with existing systems that work well to dismantle those systems by adopting an overly prescriptive regulatory framework. In light of the comments that the Bureau received, the Bureau is adopting § 1024.38(c)(2) with modifications to allow flexibility for the manner in which a servicer maintains a servicing file. Under the final rule, § 1024.38(c)(2) requires servicers to maintain a specific defined set of documents and data on each mortgage loan account serviced by the servicer in a manner that facilitates compiling such documents and data into a servicing file within five days. The Bureau believes that the final rule appropriately balances the benefits to borrowers and to investors by ensuring that servicers have ready access to all of the information necessary to service mortgage loan accounts with the flexibility required to enable servicers to design information management

systems that correspond to the servicers' existing information management practices.

Content of servicing file. Proposed § 1024.38(c)(2) would have required servicers to create a single servicing file for each mortgage loan account containing, (i) a schedule of all payments credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account; (ii) a copy of the borrower's security instrument; (iii) any collection notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account; (iv) a report of any data fields relating to a borrower's mortgage loan account created by a servicer's electronic systems in connection with collection practices, including records of automatically or manually dialed telephonic communications; and (v) copies of any information or documents provided by a borrower to a servicer in accordance with the procedures set forth in §§ 1024.35 or 1024.41.

The Bureau received several comments on this aspect of the proposal. Consumer advocates highlighted their support for the requirement that servicers maintain a servicing file that includes a copy of the security instrument and the complete payment history. Some servicers commented that the Bureau should limit the payment history requirement due to the costs associated with maintaining a payment history for the life of the mortgage loan, especially with respect to partial payments. A large servicer urged the Bureau to delay implementation of this proposed provision to allow the Bureau to test what fields should be contained in a servicing file. Industry comments also noted that some servicers' existing files do not contain all of the required elements.

Some servicers also asked for clarification about the requirements for certain elements of the servicing file. A few servicers also asked for clarification about what type of communications with borrowers must be recorded in the collection notes, and in particular, whether a servicer must record communications with borrowers unrelated to mortgage loans. A few industry commenters asked the Bureau to clarify the data fields the servicer must maintain, described in proposed § 1024.38(c)(2)(iv).

As described above, the Bureau believes the interests of borrowers are best served if servicers are quickly able to access certain key information regarding a borrower's mortgage loan account, including a schedule of all transactions credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account, a copy of the security instrument that establishes the lien securing the mortgage loan, any notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account, data fields as defined by § 1024.38(c)(2)(iv), and copies of any information or documents provided by the borrower to the servicers in accordance with the procedures set forth in §§ 1024.35 or 1024.41. Therefore, the Bureau declines to remove any of the proposed elements from the servicing file definition. Also, the flexibility added to the final rule for servicers to determine how best to store the elements of the servicing file reduces the implementation burden on servicers. Therefore, for the reasons discussed above, the Bureau is adopting the elements of the servicing file in § 1024.38(c)(2), with minor technical adjustments, as proposed.

To address commenters' confusion about the information described in proposed § 1024.38(c)(iv), the Bureau is adopting new comment 38(c)(2)(iv)–1. Comment 38(c)(2)(iv)–1 clarifies that a report of the data fields relating to the borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices means a report listing the relevant data fields by name, populated with any specific data relating to the borrower's mortgage loan account. Comment 38(c)(2)(iv)–1 also provides examples of data fields relating to a borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices including fields used to identify the terms of the borrower's mortgage loan, fields used to identify the occurrence of automated or manual collection calls, fields reflecting the evaluation of a borrower for a loss mitigation option, fields used to identify the owner or assignee of a mortgage loan, and any credit reporting history. Also, § 1024.38(c)(2)(iii) only requires servicers to maintain any notes created by servicer personnel reflecting communications with a borrower about the mortgage loan account.

The Bureau also is adopting comment 38(c)(2)–1 to address commenters' confusion about the applicability of the servicing file requirements to existing servicer documents and information. Comment 38(c)(2)–1 explains that a servicer complies with § 1024.38(c)(2) if it maintains information in a manner that facilitates compliance with § 1024.38(c)(2) beginning on or after January 10, 2014. A servicer is not required to comply with § 1024.38(c)(2) with respect to information created prior to January 10, 2014.

Section 1024.39 Early Intervention Requirements for Certain Borrowers

Background

Proposed § 1024.39 would have required servicers to provide delinquent borrowers with two notices. First, proposed § 1024.39(a), would have required servicers to notify or make good faith efforts to notify a borrower orally that the borrower's payment is late and that loss mitigation options may be available, if applicable. Servicers would have been required to take this action not later than 30 days after the payment due date, unless the borrower satisfied the payment during that period. Second, proposed § 1024.39(b) would have required servicers to provide a written notice with information about the foreclosure process, housing counselors and the borrower's State housing finance authority, and, if applicable, information about loss mitigation options that may be available to the borrower. Servicers would have been required to provide the written notice not later than 40 days after the payment due date, unless the borrower satisfied the payment during that period. These two notices were designed primarily to encourage delinquent borrowers to work with their servicer to identify their options for avoiding foreclosure.

While a number of industry commenters supported the overall objective of encouraging communication between servicers and delinquent borrowers, many commenters, particularly small servicers, requested that the Bureau not issue regulations that are not required by the express provisions of the Dodd-Frank Act, citing compliance burden and the potential for overwhelming and confusing borrowers. Some industry commenters were concerned that the breadth of the definition of ''Loss mitigation options'' would require servicers to offer options or take actions inconsistent with investor or guarantor requirements. One industry commenter suggested, as an alternative to early intervention, that all borrowers be required to receive education about mortgages earlier in the process, before they become delinquent. Another stated that the Bureau's early intervention requirements would be ineffective because borrowers would not open mail or respond to phone calls.

Consumer advocacy groups were uniformly in favor of both an oral and

written notice requirement. One consumer advocacy group explained that an oral and written notice requirement would help homeowners identify late payments quickly and engage in loss mitigation earlier to avoid foreclosure. Several consumer advocacy groups who submitted a joint comment stated that the Bureau was justified in proposing early intervention, explaining that early intervention is already an industry norm under GSE guidelines, the National Mortgage Settlement, and HAMP, which have standards for multiple phone calls and written notices at the early stages of a delinquency. These commenters also cited research that showed borrowers have a lower re-default rate the earlier they are reached in their delinquency.

However, most consumer advocacy groups requested that the Bureau require servicers to provide more information about the foreclosure process and loss mitigation options than the Bureau had proposed to require. Many consumer advocacy groups recommended that the Bureau require servicers to provide information about all loss mitigation options potentially available to borrowers through the proposed oral and written notices. One mortgage investor commenter supported the Bureau's policy goal of requiring servicers to engage more actively with delinquent borrowers about loss mitigation options. This commenter also recommended that the final rule require that servicers maintain adequate staffing levels with respect to delinquent loans, maintain frequent contact with borrowers to remind borrowers of available options, review them for such options, and provide a user-friendly and up-to-date Web site on which borrowers could locate servicer contact information.

Industry commenters questioned whether the Bureau's rules were necessary in light of recent State and Federal remediation efforts, such as the National Mortgage Settlement and various consent agreements with bank regulators. One credit union trade association believed that the Bureau's proposed requirements were too rigid and would be ineffective, while another indicated that the early intervention requirements would not present issues because many of its affiliated members would be able to modify their current procedures without much difficulty. However, other industry trade associations and a nonprofit servicer indicated that, while most servicers already perform some form of early intervention, their programs are not identical to the Bureau's proposal, and that compliance would require adjustments to or formalization of servicer policies and procedures that may not necessarily be suited to a borrower's particular circumstances. Several industry commenters expressed concern that the Bureau's rules overlap and could conflict with existing State and Federal law.[122] With respect to addressing potential conflicts between the Bureau's rules and existing State and Federal law as well as existing industry practice, commenters identified a variety of ways the Bureau could provide relief, including by not adopting rules that exceed or otherwise conflict with existing requirements, providing safe harbors (such as by clarifying that compliance with existing laws and agreements satisfies 1024.39), adopting more flexible standards, providing exemptions, including a mechanism in the rule to resolve compliance conflicts, or broadly preempting State laws.

Trade associations, smaller servicers, credit unions, and rural creditors subject to Farm Credit Administration rules generally requested exemptions from the early intervention requirements, citing a ''high-touch'' customer service model, problems with internalizing compliance costs relative to larger servicers, and potential conflicts arising from complying with conflicting sets of rules. Small servicers and credit unions expressed concern that higher compliance costs would make it difficult to maintain high levels of customer service.[123] A reverse mortgage trade association requested an exemption from the early intervention requirements because of the unique nature of reverse mortgage products and because the majority of reverse mortgages made in the current market are FHA Home Equity Conversion Mortgages already subject to specific requirements.

The Bureau has considered the comments submitted but continues to believe that rules governing early intervention are warranted. As the Bureau explained in its proposal, the Bureau believes that a servicer's delinquency management plays a significant role in whether the borrower cures the delinquency or ends up in foreclosure.[124] For a variety of reasons, at least among the larger players, servicers have not been consistent in managing delinquent accounts to provide borrowers with an opportunity to avoid foreclosure. In addition, incentives remain that may discourage these larger servicers from addressing a delinquency quickly as servicers may profit from late fees.[125] The Bureau also explained that delinquent borrowers may not make contact with servicers to discuss their options because they may be unaware that they have options[126] or that their servicer is able to assist them.[127] There is risk to borrowers who do not make contact with servicers and remain delinquent; the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure.[128] By requiring early

[122] For example, one credit union trade association identified a Michigan law that generally requires that, before a foreclosing party proceeds to foreclosure, it must provide borrowers with a notice containing information about foreclosure avoidance options and housing counselors. *See* Mich. Comp. Laws 600.3205a.

[123] One nonprofit servicer requested that the Bureau clarify how the early intervention requirements would apply if, as the Bureau proposed, small servicers are exempt from the periodic statement requirement in Regulation Z.

[124] *See* Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755, 768 (2011); Kristopher Gerardi & Wenli Li, *Mortgage Foreclosure Prevention Efforts,* 95 Fed. Reserve Bank of Atlanta Econ. Rev., 1, 8–9 (2010); Michael A. Stegman *et al., Preventative Servicing is Good for Business and Affordable Homeownership Policy,* 18 Housing Policy Debate 243, 274 (2007). *See also* part VII of the final rule.

[125] *See, e.g., The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Hous., Transp., & Comm. Affairs of the Senate Comm. on Banking and Urban Affairs,* 112th Cong. 72–73 (2011) (statement of Diane Thompson); *see generally* Diane Thompson, Foreclolsing Modifications, 86 Wash. L. Rev. 755 (2011). The Bureau is aware that the GSEs and other programs, such as HAMP, align servicer incentives to encourage early intervention. *See, e.g.,* Fannie Mae, *Single-Family Servicing Guide,* Part VII § 602.04.05 (2012); Freddie Mac, *Single-Family Seller/Servicer Guide,* Volume 2, Ch. 65.42 (2012); U.S. Dep't of Treasury & U.S. Dep't of Hous. & Urban Dev., *Making Home Affordable Program Handbook,*106 (December 15, 2011). Through this rulemaking, the Bureau intends to make early intervention a uniform minimum national standard and part of established servicer practice.

[126] *See, e.g., Are There Government Barriers to the Housing Recovery? Hearing Before the Subcomm. on Ins., Hous., and Comm. Opportunity of the House Comm. on Fin. Services,* 112th Cong. 50–51 (2011) (statement of Phyllis Caldwell, Chief, Homeownership Preservation Office, U.S. Dep't. of the Treasury); Freddie Mac, *Foreclosure Avoidance Research II: A Follow-Up to the 2005 Benchmark Study* 8 (2008), *available at http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2007.pdf*; Freddie Mac, *Foreclosure Avoidance Research* (2005), *available at http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2005.pdf.*

[127] *See* Office of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers,* Insights (June 2007), *available at http://www.occ.gov/topics/communityaffairs/publications/insights/insights-foreclosure-prevention.pdf.*

[128] *See, e.g.,* John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007), *available at http://www.occ.gov/news-issuances/speeches/2007/pub-speech-2007-61.pdf*; Laurie S. Goodman *et al.,* Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*

intervention with delinquent borrowers, the Bureau has sought to correct impediments to borrower-servicer communication so that borrowers have a reasonable opportunity to avoid foreclosure at the early stages of a delinquency. As the Bureau recognized in its proposal, not all delinquent borrowers may respond to servicer outreach or pursue available loss mitigation options. However, the Bureau believes that the notices will ensure, at a minimum, that covered borrowers have an opportunity to do so at the early stages of a delinquency.

The Bureau notes that the 2013 HOEPA Final Rule implements, among other things, RESPA section 5(c) requiring lenders to provide applicants of federally related mortgage loans with a list of homeownership counseling providers. Thus, borrowers will receive information to access counseling services at the time of application. In addition, the 2013 HOEPA Final Rule requires that applicants for ''high cost'' mortgages receive counseling prior to obtaining credit. While pre-mortgage counseling will help ensure borrowers understand the costs involved in obtaining a mortgage, borrowers who become delinquent may not know that they have options for avoiding foreclosure unless the servicer notifies them.

The Bureau understands that private lenders and investors, Fannie Mae and Freddie Mac, and Federal agencies, such as FHA and VA, already have early intervention servicing standards in place for delinquent borrowers.[129] However, servicers may vary as to how forthcoming they are in providing borrowers who are behind on their mortgage payments with options other than to pay only what is owed. The Bureau's goal with respect to its early intervention requirements is to identify consumer protection standards that are now best practices but were not consistently applied during the recent financial crisis and to apply these across the market, subject to exemptions identified in § 1024.30(b) and the scope limitation of § 1024.30(c)(2), to ensure that servicers are providing delinquent borrowers with a meaningful opportunity to avoid foreclosure.

In light of comments received on the proposal, the Bureau has revised the proposed early intervention requirements to provide servicers with additional flexibility. Proposed § 1024.39(a) would have required servicers to notify, or make good faith efforts to notify, delinquent borrowers orally that loss mitigation options, if applicable, may be available by the 30th day of their delinquency. Under the proposal, servicers that make loss mitigation options available to borrowers would generally have been required to notify delinquent borrowers of the availability of such options not later than the 30th day of their delinquency.

The final rule does not require servicers to provide this notice to all borrowers and does not require servicers to inform borrowers of options that are not available from the owner or investor. Instead, under § 1024.39(a), servicers must establish or make good faith efforts to establish live contact with a delinquent borrower by the 36th day of the borrower's delinquency. Live contact includes telephoning or conducting an in-person meeting with the borrower. In addition, under § 1024.39(a), promptly after establishing live contact, servicers must inform the borrower about the availability of loss mitigation options if appropriate. Among other changes, the final rule includes commentary that clarifies that it is within a servicer's reasonable discretion to determine whether such a notice is appropriate under the circumstances. Commentary to the final rule also provides a more flexible good faith efforts standard that would permit servicers to comply by encouraging the borrower through written or electronic communication to make contact with the servicer. These changes are intended to help ensure servicers make efforts to contact delinquent borrowers who would be interested in learning about loss mitigation options and, at the same time, avoid causing servicers to spend resources notifying borrowers about loss mitigation options the servicer has reason to believe would not benefit from being informed of such options.

The final rule includes a written notice requirement similar to the one proposed at § 1024.39(b), but the Bureau has sought to mitigate compliance burden without undermining the protection of an early written notice by extending the deadline for providing the notice from 40 to 45 days of a borrower's delinquency to align with other notices that servicers may already provide to borrowers at that time. The Bureau has sought to develop flexible early intervention requirements to accommodate existing practices and requirements to avoid servicers having to duplicate existing early intervention practices. For example, if servicers are required by other laws to provide a notice that includes the content required by § 1024.39(b)(2) and if servicers may provide such notice within the first 45 days of a borrower's delinquency, the Bureau does not believe servicers would need to provide each notice separately.

The Bureau has further sought to accommodate existing practices by providing clarifying commentary to § 1024.39(b)(1) that servicers may combine notices that may already meet the content requirements of § 1024.39(b)(2) into a single mailing. In addition, comment 39(b)(2)–1 explains that the written notice contains minimum content requirements for the written notice and that a servicer may provide additional information that the servicer determines would be helpful or which may be required by applicable law or the owner or assignee of the mortgage loan. The Bureau has included this comment, in part, to accommodate similar notices that servicers may already be providing. Further, to assist with compliance, the Bureau has also developed model clauses, which the Bureau has tested with the assistance of Macro. A servicer's appropriate use of the model clauses will act as a safe harbor for compliance.

While the Bureau has designed its early intervention requirements to provide flexibility to servicers that already have early intervention practices in place or that are complying with external existing requirements, the Bureau acknowledges that some of the new requirements may not align perfectly with all existing practices. To address actual conflicts with State or Federal law, the Bureau has included new § 1024.39(c), which, as discussed in more detail below, provides that nothing in § 1024.39 shall require a servicer to make contact with a borrower in a manner that would be prohibited under applicable law. The Bureau believes this approach to conflicting laws is preferable to

(June 19, 2012), at 5–6; Michael A. Stegman *et al., Preventative Servicing,* 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11–12 (Freddie Mac, Working Paper No. 08–01, 2008).

[129] HUD and the VA have promulgated regulations and issued guidance on servicing practices for loans guaranteed or insured by their programs. *See* 24 CFR 203 subpart C (HUD); U.S. Hous. & Urban Dev., Handbook 4330.1 rev–5, Ch. 7; 38 CFR Ch. 1 pt. 36, Subpt. A. Fannie Mae & Freddie Mac have established recommended servicing practices for delinquent borrowers in their servicing guidelines and align their modification incentives with the number of days the mortgage loan is delinquent when the borrower enters a trial period plan. *See* Fannie Mae, *Single-Family Servicing Guide,* 700–1 (2012); Fannie Mae, *Outbound Call Attempts Guidelines* (Oct. 1, 2011), *available at https://www.efanniemae.com/home/index.jsp*; Fannie Mae, *Letters and Notice Guidelines* (Apr. 25, 2012), *available at https://www.efanniemae.com/home/index.jsp*; Freddie Mac, *Single-Family Seller/Servicer Guide,* Vol. 2, Ch. 64–69 (2012).

preempting other laws. Because § 1024.39 require servicers to proactively contact borrowers, the Bureau is concerned that preempting laws might override those that protect delinquent borrowers from certain contacts (*e.g.,* debt collection laws).

In addition, the Bureau is granting exemptions for small servicers as defined in 12 CFR 1026.41(e)(4); servicers with respect to any reverse mortgage transaction as that term is defined in § 1024.31; and servicers with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000. *See* the section-by-section analysis of § 1024.30(b) above. The Bureau is further limiting the application of §§ 1024.39 through 41 to mortgage loans that are secured by a borrower's principal residence, as discussed in more detail in the section-by-section analysis of § 1024.30(c)(2) above.

The Bureau is not mandating that servicers maintain specific staffing levels to perform early intervention with delinquent borrowers, but the Bureau notes that, under § 1024.38, servicers must maintain policies and procedures reasonably designed to achieve the objective of properly evaluating borrowers for loss mitigation options. The Bureau is not requiring servicers to maintain a Web site for delinquent borrowers to provide early intervention information because the Bureau believes such a requirement may be burdensome for all servicers and is unnecessary in light of the written notice at § 1024.39(b), which includes contact information for servicer continuity of contact personnel assigned pursuant to § 1024.40(a).

The Bureau declines to grant an exemption from the early intervention requirements with respect to borrowers who have ceased making payments for the past six months and have not contacted their servicer. To the extent loss mitigation options are available for such borrowers, the Bureau believes these borrowers should be so informed in accordance with § 1024.39(a) and (b). Further, the Bureau believes servicers should make good faith efforts to establish live contact with borrowers who may be reluctant to reach out before taking action that may result in the loss of the borrower's home. In addition, the Bureau believes these borrowers would benefit from information about how to contact their servicer as well as information about how to access housing counseling resources.

Legal Authority

The Bureau proposed to implement § 1024.39 pursuant to authority under sections 6(k)(1)(E), 6(j)(3), and 19(a) of RESPA. Violations of section 6 of RESPA are subject to a private right of action. Industry commenters, including the GSEs, industry trade associations, and several large bank servicers were concerned that a private right of action would result in uncertainty for servicers and could delay loss mitigation efforts and the foreclosure process if a borrower claimed it did not receive a timely notice required by the Bureau's rules. Commenters indicated that increased litigation costs would limit access to and increase the cost of credit to borrowers. One commenter was concerned that a private right of action would result in loss mitigation being perceived as a substantive right. Instead, commenters requested that the Bureau issue the early intervention and other loss mitigation provisions solely in reliance on RESPA section 19(a) authority.

The Bureau has considered industry comments but continues to rely on RESPA section 6 authority as a basis for the Bureau's early intervention requirements under § 1024.39. The Bureau does not believe § 1024.39 will result in loss mitigation being treated as a substantive right because it sets forth procedural requirements only. As finalized, § 1024.39 does not require servicers to offer any particular loss mitigation option to any particular borrower. The live contact requirement under § 1024.39(a) requires servicers to notify borrowers of the availability of loss mitigation options ''if appropriate''; associated commentary clarifies that it is within a servicer's reasonable discretion to determine whether it is appropriate to inform borrowers of such options. The written notice requirement under § 1024.39(b)(2)(iii) requires servicers to inform borrowers, ''if applicable,'' of examples of loss mitigation options available through the servicer. Nothing in § 1024.39 affects whether a borrower is permitted as a matter of contract law to enforce the terms of any contract or agreement between a servicer and an owner or assignee of a mortgage loan.

In addition, the Bureau has taken steps to clarify requirements in the rule, which the Bureau believes will help avoid uncertainty for servicers and help minimize litigation risk and compliance costs arising from a private right of action associated with RESPA section 6. For example, the final rule omits the proposed oral notice requirement under proposed § 1024.39(a) and instead requires that servicers establish or make good faith efforts to establish live contact with borrowers and, promptly after establishing live contact, inform borrowers of the availability of loss mitigation options ''if appropriate.'' Comment 39(a)–3.i explains that it is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances; the comment also includes illustrative examples to assist with compliance. While this guidance should provide servicers with some degree of certainty around compliance, the Bureau recognizes there may be limited situations that are less clear; in these cases, however, servicers could avoid compliance risk by informing borrowers of loss mitigation options. Comment 39(a)–3.ii explains that a servicer may inform borrowers about the availability of loss mitigation options either through an oral or written communication. The final rule also provides servicers with more flexibility in satisfying the good faith efforts standard; servicers may demonstrate compliance by providing written or electronic communication encouraging borrowers to establish live contact with their servicer. In addition, with respect to the written notice under § 1024.39(b), the final rule includes model clauses and clarifies in commentary that servicers may provide additional information about loss mitigation options not included in the model clauses. Further, the final rule includes flexible minimum content requirements for the written notice that will assist servicers in accommodating existing disclosures and other related disclosure requirements.

The Bureau does not believe that the risk of a private right of action will negatively impact access to, or cost of, credit. The requirements under § 1024.39 include clear procedural requirements as well as protections for a servicer's exercise of reasonable discretion. Further, the requirements have been implemented to reduce compliance burden and provide clear rules capable of efficient implementation by servicers, including through the use of model clauses. Accordingly, the Bureau believes that the early intervention rules under § 1024.39 provide necessary consumer protections and that servicers are capable of providing such protections without negative consequences for borrowers, including with respect to access to, or cost of, credit.

The Bureau is adopting § 1024.39 pursuant to its authorities under sections 6(j)(3), 6(k)(1)(E), and 19(a) of

RESPA. As explained in more detail below, the Bureau finds, consistent with RESPA section 6(k)(1)(E), that § 1024.39 is appropriate to achieve the consumer protection purposes of RESPA, including to help borrowers avoid unwarranted or unnecessary costs and fees and to facilitate review of borrowers for foreclosure avoidance options. For the same reasons, § 1024.39 is authorized under section 6(j)(3) of RESPA as necessary to carry out section 6 of RESPA, and under section 19(a) of RESPA as necessary to achieve the purposes of RESPA, including borrowers' avoidance of unwarranted or unnecessary costs and fees and the facilitation of review of borrowers for foreclosure avoidance options.

The Bureau is also adopting § 1024.39 pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that § 1024.39 is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objectives under section 1021(b) of the Dodd-Frank Act of ensuring that consumers are provided with timely and understandable information to make responsible decisions about financial transactions, and markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances. Consistent with section 1032(b) of the Dodd-Frank Act, the model clauses at appendix MS–4 have been validated through consumer testing.

39(a) Live Contact

Proposed § 1024.39(a)

Proposed § 1024.39(a) would have required that, if a borrower is late in making a payment sufficient to cover principal, interest, and, if applicable, escrow, the servicer must, not later than 30 days after the missed payment, notify or make good faith efforts to notify the borrower that the payment is late and that loss mitigation options, if applicable, may be available. Proposed § 1024.39(a) also provided that if the servicer attempts to notify the borrower by telephone, good faith efforts would require calling the borrower on at least three separate days in order to reach the borrower. The Bureau explained in the section-by-section analysis of the proposed rule that the ''if applicable'' qualification in proposed § 1024.39(a) meant that servicers that do not make any loss mitigation options available to borrowers would not be required to notify borrowers that loss mitigation options may be available.

The Bureau had proposed to clarify through comment 39(a)–1.i that the oral notice would have to be made through live contact or good faith efforts to make live contact with the borrower, such as by telephoning or meeting in-person with the borrower, and that oral contact does not include a recorded message delivered by phone. Proposed comment 39(a)–1.ii would have clarified that a servicer is not required to describe specific loss mitigation options, and that the servicer need only inform the borrower that loss mitigation options may be available, if applicable. The comment also would have clarified that a servicer may provide more detailed information that the servicer believes would be helpful. Proposed comment 39(a)–2 clarified that, in order to make a good faith effort by telephone, the servicer must complete the three phone calls attempting to reach the borrower by the end of the 30-day period after the payment due date.

The Bureau received significant comment on the proposed oral notice from consumer advocacy groups, trade associations, credit unions, community banks, rural servicers, large banks, non-bank servicers, and individual consumers. Consumer advocacy groups and two residential real estate trade associations were generally supportive of an oral notice requirement. One coalition of consumer advocacy groups explained that a mandatory phone call or visit would alert borrowers that loss mitigation options may be available and give borrowers an opportunity to ask questions and gather accurate information about the borrower's rights and responsibilities. Several consumer advocacy groups and individual consumers supported an oral notice requirement because it would permit borrowers to engage in an interactive conversation with servicers about their rights and responsibilities surrounding loss mitigation. A number of consumer advocacy groups, however, requested that the Bureau require that servicers provide more information about loss mitigation options than the notice set forth in proposed § 1024.39(a). These commenters recommended that servicers notify borrowers of all loss mitigation options that may be available, including application instructions and deadlines, and information about the foreclosure process at the time of the oral notice. Several consumer advocacy groups also recommended that the Bureau delete proposed comment 39(a)–1.ii, which explained that a servicer need not describe specific loss mitigation options during the oral notice and that the servicer need only inform borrowers that loss mitigation options may be available, if applicable.

Industry commenters expressed concern about the circumstances under which servicers would be required to notify borrowers about loss mitigation options. These commenters explained that a servicer's offer of loss mitigation depends on not only the stage of a borrower's delinquency but also the nature of the delinquency, as well as other circumstances, pursuant to investor or guarantor guidelines and could be perceived as misleading for borrowers who are ultimately ineligible based on owner or investor requirements. These commenters, including one Federal agency, also expressed concern that informing borrowers of loss mitigation options that are inappropriate for short-term delinquencies could impede the resolution of delinquent loans by discouraging borrowers from resolving a short-term delinquency they could have cured on their own. Industry commenters also asserted that notifying borrowers about loss mitigation options too early would be confusing or perceived as potentially harassing for those borrowers at low risk of default. In addition, several commenters cited concerns that requiring early intervention for low-risk borrowers would detract from helping high-risk borrowers. To address these concerns, they requested that the Bureau clarify the circumstances under which servicers would be required to notify borrowers that loss mitigation options may be available. In particular, several commenters requested that the Bureau clarify that, before providing the notice regarding loss mitigation options, a servicer may first determine whether a borrower is experiencing a short- or long-term delinquency, and that servicers be permitted to pursue

collection efforts in the case of short-term delinquencies.

Industry commenters also expressed concern with demonstrating compliance with the oral notice requirement, particularly in light of the possibility of a private right of action under RESPA section 6, which the Bureau relied on as a source of legal authority for proposed § 1024.39. Rural, community bank, and credit union servicers recommended against an oral notice requirement because such requirements are difficult to track and verify, would require systems reprogramming or upgrades, may be misunderstood by borrowers, and would not guarantee establishing contact with borrowers. One community bank commenter stated that a simple delinquency notice should suffice, without a need to have a live conversation about loss mitigation options. Several rural and credit union servicers indicated that staffing and resource limitations would make it difficult to reach borrowers after normal work hours, when most borrowers are available by phone. One industry commenter recommended that the Bureau mandate in-person outreach in addition to the oral and written notice requirements while another industry commenter asked that the Bureau clarify that this provision does not mandate in-person outreach.

Several industry commenters and individual consumers recommended that other forms of contact, such as text messages or email should be permitted, but not required, to satisfy good faith efforts, or that email should be permitted in lieu of live contact. These commenters noted that a more flexible approach, such as permitting written or other forms of electronic contact, would help reach borrowers and address compliance issues because written methods are more easily tracked. Several industry commenters requested that the Bureau permit servicers to engage in any form of contact that is reasonable under the circumstances. One industry commenter suggested that servicers should be permitted to leave a recorded message instead of three phone calls.

By contrast, a number of consumer advocacy groups stated that the good faith effort standard as proposed was reasonable, although some recommended that servicers be required to engage in more efforts to contact the borrower, such as by attempting to contact borrowers on every telephone number on record in order to reach the borrower and by requiring that servicers leave a message when servicers have that option. Some consumer advocacy groups recommended that servicers be required to leave a message when a borrower's telephone number provided a voicemail option, while an industry commenter indicated there may be privacy concerns with respect to any potential requirement for notices to be provided via text or email.

Final § 1024.39(a)

After considering comments on the proposal, the Bureau is revising the proposed oral notice requirement into a live contact requirement permits servicers to exercise reasonable discretion in determining whether informing delinquent borrowers of the availability of loss mitigation options is appropriate under the circumstances. The Bureau is also adjusting the timing of the contact requirement from the proposed 30-day timeframe to 36 days.

Under § 1024.39(a), a servicer must establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options ''if appropriate.'' The Bureau has added comment 39(a)–3.i to clarify that it is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances. To illustrate, comment 39(a)–3.i provides examples demonstrating when a servicer has made a reasonable determination regarding the appropriateness of providing information about loss mitigation options. Comment 39(a)–3.i.A illustrates a scenario in which a servicer provides information about the availability of loss mitigation options to a borrower that notifies a servicer during live contact of a material adverse change in the borrower's financial circumstances that is likely to cause the borrower to experience a long-term delinquency for which loss mitigation options may be available. Comment 39(a)–3.i.B illustrates a scenario in which a servicer does not provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.

The Bureau is adopting a modified version of the proposed oral notice in § 1024.39(a) because the Bureau agrees that a prescriptive requirement to provide an oral notice for all delinquent borrowers, where loss mitigation options were available, within the first 30 days of a delinquency would be overbroad. The Bureau observes that the oral notice as proposed would not have required servicers to offer options in a manner that is inconsistent with investor or guarantor requirements because servicers would only have had to notify borrowers that loss mitigation options, if applicable, ''may'' be available; servicers would not have been required to provide information about or offer options that the servicer did not already offer. However, the Bureau recognizes the potential for borrower confusion if servicers are required in every instance to notify borrowers who are experiencing short-term delinquencies of available loss mitigation options if these borrowers ultimately are unlikely to need or be eligible for such options. The Bureau agrees that providing the notice within the first 30 days of a borrower's delinquency may be unwarranted if a borrower would not ultimately qualify based on investor or guarantor requirements or for whom loss mitigation options are unnecessary, such as for borrowers who are experiencing a short-term cash-flow problem. As the Bureau noted in its proposal, borrowers who are 30 days delinquent generally present a lower risk for default, (compared to borrowers with more extended delinquencies), and such borrowers typically resolve their delinquency without the assistance of loss mitigation options.[130]

Nonetheless, while many borrowers who miss a payment will be able to self-cure within 30 days, some portion of these borrowers are likely to fall further behind on their payments, and the Bureau believes servicers should make efforts to inform such borrowers that help is available. As the Bureau noted in its proposal, evidence suggests that one of the barriers to communication between borrowers and servicers is that borrowers do not know that servicers may be helpful or that they have options to avoid foreclosure, and that as a result of these barriers, borrowers may not know that help is available until too late, when it can be more difficult to cure a delinquency. Although borrowers may receive notice of loss mitigation options through other written notices, such as the written early intervention notice proposed at § 1024.39(b), borrowers may be reluctant to contact a

[130] *See, e.g.,* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 10 (Freddie Mac, Working Paper No. 08–01, 2008) (explaining that, in one study, there was a ''significant cure rate out of the 30-day delinquency population without servicer intervention,'' but that ''as the time in delinquency increases so does the hurdle the borrower has to overcome to reinstate the loan and the importance of calling the servicer'').

servicer on their own but would nonetheless benefit from early notification that help is available. By establishing early live contact with borrowers, servicers would be able to begin working with the borrower to develop appropriate relief at the early stages of a delinquency. The Bureau recognizes that, by giving servicers flexibility to determine whether it is appropriate under the circumstances to notify borrowers about loss mitigation options, there is some risk that servicers, despite their reasonable exercise of discretion, may incorrectly determine a borrower is experiencing a short-term delinquency. The Bureau believes that, on balance, the potential that delinquent borrowers may remain uninformed of their options is mitigated by the requirement in § 1024.39(b)(1), discussed below, to provide a written notice not later than the 45th day of a borrower's delinquency.

Proposed comment 39(a)–1.i would have clarified that the proposed oral notice would have to be made through live contact or good faith efforts to make live contact, such as by telephoning or conducting an in-person meeting with the borrower, but not leaving a recorded message. The final rule adopts proposed comment 39(a)–1.i substantially as proposed, which the Bureau has renumbered as comment 39(a)–2 for organizational purposes. Final comment 39(a)–2 includes guidance appearing in proposed comment 39(a)–1.i about the meaning of live contact, but omits reference to the notice required under 1024.39(a) because, as discussed immediately below, the final rule does not require servicers to inform borrowers of the availability of loss mitigation options under § 1024.39(a) during live contact. Final comment 39(a)–2 further clarifies that a servicer may, but need not, rely on live contact established at the borrower's initiative to satisfy the live contact requirement in § 1024.39(a). Final comment 39(a)–2 also explains that live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency.

The Bureau has added comment 39(a)–3.ii to clarify that, if appropriate, servicers may inform borrowers about the availability of loss mitigation options orally, in writing, or through electronic communication, but that servicers must provide such information promptly after the servicer establishes live contact. This comment is intended to provide servicers flexibility in notifying borrowers about loss mitigation options at the early stages of delinquency. The Bureau believes establishing initial live contact is important for a servicer to learn about the circumstances for a borrower's delinquency and to determine whether it is appropriate under the circumstances to inform borrowers about the availability of loss mitigation options. The Bureau believes that providing borrowers with initial notice about the availability of loss mitigation options may be accomplished through an oral conversation or information delivered in writing, as long as it is provided promptly after the servicer establishes live contact, if appropriate.

Comment 39(a)–3.ii further explains that a servicer need not notify a borrower about any particular loss mitigation options promptly after the servicer determines that a borrower should be informed of loss mitigation options; a servicer need only inform a borrower generally that loss mitigation options may be available. This comment is substantially similar to proposed comment 39(a)–1.ii. The Bureau is not requiring that servicers to provide detailed information about all loss mitigation options, application deadlines, or foreclosure timelines because not all borrowers may benefit from such a conversation at the time of this contact. Further, the Bureau believes the continuity of contact provisions at § 1024.40 will serve to provide borrowers with access to personnel who can assist them with loss mitigation options. Comment 39(a)–3.ii also explains that, if appropriate, a servicer may satisfy the requirement in § 1024.39(a) to inform a borrower about loss mitigation options by providing the written notice required by § 1024.39(b)(1), but the servicer must provide such notice promptly after the servicer establishes live contact. The Bureau believes that the written notice that must be provided by the 45th day of a borrower's delinquency pursuant to § 1024.39(a) provides sufficient information about the availability of loss mitigation options.

Good Faith Efforts

The Bureau agrees with commenters who assert that servicers should be permitted to engage in a wide variety of methods of contacting borrowers who may be difficult to reach by telephone. Accordingly, in the final rule, the Bureau has developed a more flexible good faith efforts standard. Proposed § 1024.39(a) would have provided that, if the servicer attempts to notify the borrower about loss mitigation options by telephone, good faith efforts would require calling the borrower on at least three separate days in order to reach the borrower. The final rule does not define good faith efforts to establish live contact by identifying a particular number of days to reach the borrower. Instead, comment 39(a)–2 clarifies that good faith efforts to establish live contact consist of reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer.

The Bureau believes that, by permitting servicers to satisfy the good faith efforts standard through a wider variety of methods, servicers will be able to reach borrowers who may be difficult to reach by phone, particularly if a servicer does not have access to a borrower's mobile phone or if a borrower is unreachable by phone during the day. In addition, permitting servicers to satisfy the good faith efforts standard through written or electronic communication encouraging the borrower to establish live contact addresses servicer concerns about tracking and compliance risks associated with the proposed oral notice requirement.

Although the Bureau is permitting servicers to contact borrowers through a variety of means, the Bureau is not requiring servicers to contact borrowers through every means of contact possible because it would be difficult, if not impossible, to satisfy such a standard. The Bureau is not requiring servicers to leave a voicemail message when such an option is available because such a requirement may implicate privacy concerns. The Bureau is not adopting a requirement mandating that servicers establish in-person contact or so-called ''field calls'' to the borrower's residence. While such methods of contact may be effective methods of reaching delinquent borrowers, the Bureau believes telephone calls are equally, if not more effective in certain circumstances, and mandating an in-person contact requirement would be unduly burdensome for most servicers. Of course, a servicer could choose to establish live contact through in-person meetings.

36th Day of Delinquency

Proposed § 1024.39(a) would have required servicers to provide the oral notice not later than 30 days after a payment due date. In light of comments received, the Bureau is not adopting the 30-day timeframe in proposed § 1024.39(a) and instead is adopting a requirement that a servicer establish live contact not later than the 36th day of a borrower's delinquency to determine whether to inform such borrower that

loss mitigation options may be available.

Industry commenters stated that providing notices too early would be unnecessary for borrowers capable of curing a short-term delinquency or for borrowers at low risk of default, and that providing notice of loss mitigation, in such circumstances, may interfere with sound delinquency management. A variety of servicers and trade associations recommended that the Bureau extend the deadline to 40 or 45 days and one trade association recommended that the Bureau extend the deadline to 60 days to provide servicers with maximum flexibility. One industry commenter indicated that a 30-day timeframe would be burdensome for servicers that honor a 15-day grace period because it would only leave servicers only 15 days to satisfy the good faith efforts standard. Trade associations, community banks, and rural lenders were concerned that the Bureau's requirements might be duplicative of or not perfectly aligned with existing requirements. Some commenters requested that the Bureau create an exemption from the 30-day deadline for servicers that employ a behavior modeling tool. In contrast, consumer advocacy groups requested that the Bureau maintain the 30-day period and include more information in the oral notice. One consumer advocate recommended that borrowers be notified about their options as soon as their account is deemed delinquent by the servicer.

In the final rule, the Bureau is retaining a deadline by which a servicer must establish or make good faith efforts to establish live contact, but the Bureau is adjusting the timing of the deadline from the 30-day period originally proposed to a 36-day period. As the Bureau recognized in its proposal, certain borrowers may be temporarily delinquent because of an accidental missed payment, a technical error in transferring funds, a short-term payment difficulty, or some other reason. These borrowers may be able to cure a delinquency without a servicer's efforts to make live contact. Thus, if the borrower fully satisfies the payment before the end of the 36-day period, the servicer would not be required to establish live contact or otherwise comply with § 1024.39(a). Proposed comment 39(a)–4 explained that a servicer would not be required to notify or make good faith efforts to notify a borrower unless the borrower remains late in making a payment during the 30-day period after the payment due date. A similar comment appears in 39(a)–1.iv, revised to reflect the new 36-day period.

As the Bureau noted in its proposal, there is risk to borrowers as a result of a delay in notifying borrowers that loss mitigation options may be available; research indicates that the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure.[131] At the same time, the Bureau understands that a significant portion of borrowers who become delinquent are able to self-cure within 30 days of a missed payment.

The government-sponsored enterprises generally recommend that servicers initiate phone calls for borrowers who have missed a payment by the 16th day after a payment due date, although calling campaigns for high-risk borrowers must begin by the third day after a due date.[132] In general, calls must occur every three days through day 36 of delinquency, and follow-up calls are required after borrower solicitation packages have been sent. Other standards, such as HAMP [133] and the National Mortgage Settlement,[134] typically provide for the commencement of outreach efforts to communicate loss mitigation options for potentially eligible borrowers after two missed payments. For FHA-insured mortgages, HUD has a general requirement to contact borrowers with FHA-insured mortgages by telephone between the 17th day of delinquency and the end of the month.[135] However, HUD Mortgagee Letter 98–18 provides that, at the lender's discretion following a formal risk assessment, borrowers with FHA loans at low risk for foreclosure may be contacted by phone by the 45th day of delinquency.

The Bureau is adjusting the timing by which a servicer must establish live contact from 30 to 36 days to be more consistent with GSE outbound call guidelines, HAMP, and the National Mortgage Settlement, and to give borrowers more time to cure a delinquency before a servicer attempts to establish live contact. In addition, a 36-day deadline would help servicers screen for delinquent borrowers who regularly pay late, by permitting servicers to identify borrowers at risk of missing two payment deadlines before attempting efforts to contact them. The Bureau understands that servicers may not be able to complete an initial eligibility evaluation prior to the deadline for contact (potentially within five days after a second missed payment due date). However, the Bureau's rule would only require servicers to establish or make good faith efforts to establish live contact with borrowers and inform such borrowers of the availability of loss mitigation options promptly after establishing live contact ''if appropriate.'' Where a servicer determines that it would be appropriate to inform a borrower about the availability of such options, comment 39(a)–3.ii clarifies that a servicer need not notify borrowers about specific loss mitigation options under 1024.39(a), but only that loss mitigation options may be available. In addition, even if servicers have not completed an initial eligibility evaluation by the time of oral contact, the Bureau believes delinquent borrowers would still benefit from hearing about any other loss mitigation options for which they may be eligible. The Bureau believes a 36-day standard would be consistent with the Settlement terms requiring servicers to commence outreach efforts after the second missed

[131] *See, e.g.,* John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007); Laurie S. Goodman *et al.,* Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* 5–6 (June 19, 2012); Michael A. Stegman *et al., Preventative Servicing,* 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11–12 (Freddie Mac, Working Paper No. 08–01, 2008).

[132] Freddie Mac recommends servicers contact borrowers within three days of a missed payment, unless the servicers use a behavior modeling tool that would support an alternate approach. Fannie Mae recommends servicers contact ''high risk'' borrowers within three days of a missed payment; campaigns for non-high-risk borrowers should begin within 16 days of a missed payment. *See* Fannie Mae, *Single-Family Servicing Guide* 700–1 (2012); Fannie Mae, *Outbound Call Attempts Guidelines* (Oct. 1, 2011), *available at https://www.efanniemae.com/home/index.jsp;* Fannie Mae, Letters and Notice Guidelines (Apr. 25, 2012), *available at https://www.efanniemae.com/home/index.jsp.*

[133] Under HAMP, servicers must pre-screen all first lien mortgage loans where two or more payments are due and unpaid (at least 31 days delinquent). Servicers must proactively solicit for HAMP any borrower whose loan passes this pre-screen, unless the servicer has documented that the investor is not willing to participate in HAMP. *See* U.S. Dep't of Treasury & U.S. Dep't of Hous. & Urban Dev., *MHA Handbook version* 51 (June 1, 2011).

[134] ''Servicer shall commence outreach efforts to communicate loss mitigation options for first lien mortgage loans to all potentially eligible delinquent borrowers (other than those in bankruptcy) beginning on timelines that are in accordance with HAMP borrower solicitation guidelines set forth in the MHA Handbook version 3.2, Chapter II, Section 2.2, regardless of whether the borrower is eligible for a HAMP modification.'' *National Mortgage Settlement: Consent Agreement* A–23 (2012)(Loss Mitigation Communications with Borrowers), *available at http://www.nationalmortgagesettlement.com.*

[135] *See* U.S. Hous. & Urban Dev., *Handbook 4330.1 REV–5,* ch. 7, para. 7–7B, *available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14710.pdf.*

payment. Under § 1024.39(a), servicers must establish or make good faith efforts to establish live contact with borrowers by the 36th day of delinquency, which would occur after a second missed payment is due. Moreover, servicers need not inform borrowers of the availability of loss mitigation options at the time of establishing live contact (if appropriate); § 1024.39(a) requires that they do so promptly after establishing live contact. The Bureau declines to adopt a requirement to contact borrowers as soon as they become delinquent because the Bureau believes such a requirement would be overbroad, as discussed above.

The Bureau declines to adopt a general 40- or 45-day standard for all borrowers because the Bureau believes borrowers who may be experiencing the early stages of a long-term delinquency are, on balance, likely to benefit from earlier contact, and the Bureau believes that by the 36th day of a delinquency, servicers would know whether a borrower has missed two payments (subject only to the possibility that the payment will be received before the expiration of the grace period for the second payment). The Bureau believes that borrowers who miss two payments generally will present a greater financial risk than borrowers who are only one month late. The Bureau believes servicers should be required to establish live contact, or make good faith efforts to do so, not later than several days after a borrower has missed a second payment due date so the servicer may begin to learn about the circumstances of a borrower's delinquency. Of course, servicers may elect to contact borrowers sooner, and the Bureau believes most servicers will do so pursuant to GSE, FHA, and VA guidelines. Finally, the Bureau declines to permit servicers to delay contact for borrowers identified as low-risk based on a servicer's use of a behavior modeling tool. The Bureau is concerned that modeling tools used to predict future behavior are inherently imprecise and produce a certain percentage of false negatives—*i.e.,* borrowers who are predicted to self-cure but do not. As also discussed below, at this time, the Bureau does not have sufficient data to evaluate or validate such tools.

To account for situations in which a borrower proactively contacts the servicer about a late payment, proposed comment 39(a)–5 explained that, if the borrower contacts the servicer at any time prior to the end of the 30-day period to explain that the borrower expects to be late in making a payment, the servicer could provide the oral notice under proposed § 1024.39(a) by informing the borrower at that time that loss mitigation options, if applicable, may be available. The Bureau did not receive comment on proposed comment 39(a)–5 or the two illustrative examples at proposed 39(a)–5.i.A or –5.i.B. The Bureau is omitting these comments from the final rule because the Bureau does not believe they are necessary in light of the clarifications provided in comment 39(a)–2 (establishing live contact).

The Bureau proposed in § 1024.39(a) to require a servicer to provide an oral notice, or make good faith efforts to do so, if the borrower is late in making ''a payment sufficient to cover principal, interest, and, if applicable, escrow.'' Thus, a servicer would not have been required to provide the oral notice if a borrower is late only with respect to paying a late fee for a given billing cycle. As explained in the proposal, the Bureau proposed this trigger because the Bureau believes there is low risk that borrowers will default solely because of accumulated late charges if they are otherwise current with respect to principal, interest, and escrow payments. The Bureau proposed to add comment 39(a)–3 to explain that, for purposes of proposed § 1024.39(a), a payment would be considered late the day after a payment due date, even if the borrower is afforded a grace period before the servicer assesses a late fee. Thus, for example, if a payment due date is January 1, the servicer would be required to notify or make good faith efforts to notify the borrower not later than 30 days after January 1 (*i.e.,* by January 31) if the borrower has not fully paid the amount owed as of January 1 and the full payment remains due during that period.

The Bureau did not receive comment on what constitutes a late payment for purposes of providing the oral notice and is adopting a substantially similar standard in the final rule, which the Bureau has defined as ''delinquency'' for purposes of § 1024.39. The Bureau has added comment 39(a)–1.i to clarify that, for purposes of § 1024.39, delinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee. For example, if a payment due date is January 1 and the amount due is not fully paid during the 36-day period after January 1, the servicer must establish or make good faith efforts to establish live contact not later than 36 days after January 1—*i.e.,* by February 6. Delinquency is calculated in a similar manner with respect to the written notice under § 1024.39(b)(1) that must be provided by the 45th day of a borrower's delinquency. The Bureau uses the term ''delinquency'' in the final rule to improve and clarify the proposed regulatory text and intends no substantive difference from the proposal. Unlike proposed comment 39(b)(1)–2, comment 39(a)(1)–1.i does not use the term ''grace period'' but instead uses the phrase ''period of time after the due date has passed to pay before the servicer assesses a late fee.'' The Bureau intends no substantive difference between the final rule and the proposal, but has made this change to conform to similar changes in the Bureau's 2013 TILA Mortgage Servicing Final Rule.

Proposed comment 39(a)–6 clarified that a servicer would not be required under § 1024.39(a) to provide the oral notice to a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment. The Bureau did not receive comment on proposed comment 39(a)–6 and is adopting it substantially as proposed, but reorganized under comment 39(a)–1 as a clarification to whether a borrower is ''delinquent'' for purposes of § 1024.39(a). Thus, comment 39(a)–1.ii explains that a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment is not delinquent for purposes of § 1024.39.

Rural and community bank commenters requested clarification on whether the oral and written notices would be required to be provided on a recurring basis for borrowers who satisfy their mortgage payments late on a recurring basis and who may be unresponsive to servicer collection efforts. The Bureau has addressed the issue of recurring delinquencies with regard to the written notice below in the section-by-section analysis of § 1024.39(b), discussed below. With respect to the live contact requirement, servicers would be required to establish live contact or make good faith efforts to do so with borrowers to determine whether to inform borrowers of loss mitigation options. Thus, a servicer must establish live contact or make good faith effort to establish live contact, even with borrowers who are regularly delinquent, by the 36th day of a borrower's delinquency. However, it is within a servicer's reasonable discretion to determine whether it would be appropriate to inform a borrower who is delinquent on a recurring, month-to-month basis about the availability of loss mitigation options.

Servicing transfers. The Bureau has added comment 39(a)–1.iii, which explains that, during the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, a borrower is not delinquent for purposes of § 1024.39 if the transferee servicer learns that the borrower has made a timely payment that has been misdirected to the transferor servicer and the transferee servicer documents its files accordingly.

The Bureau has added this comment to address situations that may arise during the 60 days after a servicing transfer. RESPA section 6(d) provides that, during the 60-day period beginning on the effective date of transfer of servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive the payment) before the due date applicable to such payment. 12 U.S.C. 2605(d). This provision is implemented through current § 1024.21(d)(5), which the Bureau is moving and finalizing as § 1024.33(c)(1). As explained in more detail in the section-by-section analysis of § 1024.33(c)(1) above, the Bureau has added comment 33(c)(1)–2 to clarify a transferee servicer's compliance with 1024.39 during the 60-day period beginning on the effective date of a servicing transfer does not constitute treating a payment as late for purposes of § 1024.33(c)(1). The Bureau has added comment 33(c)(1)–2 to address situations in which a transferee servicer does not know the reasons for a late payment but may still need to comply with § 1024.39 in the face of this uncertainty.

To account for situations in which the transferee servicer learns that a borrower has simply misdirected a timely payment, the Bureau has added comment 39(a)–1.iii to clarify that, during the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, a borrower is not delinquent for purposes of § 1024.39 if the transferee servicer learns that the borrower has made a timely payment that has been misdirected to the transferor servicer and the transferee servicer documents its files accordingly. In such cases, the Bureau does not believe such borrowers should be treated as delinquent for purposes of § 1024.39. Comment 39(a)–1.iii also contains cross-references to § 1024.33(c)(1) and comment 33(c)(1)–2. To clarify that this guidance also applies to § 1024.39(b), comment 39(b)(1)–1 includes a cross-reference to comment 39(a)–1.

Borrower's representative. Several consumer group commenters and a housing counseling organization requested that the Bureau clarify that a servicer must communicate with a borrower's representative. The Bureau agrees that, in certain situations, such as where the borrower is represented by an attorney, it may be appropriate for servicers to communicate with the borrower's authorized representative, particularly in situations involving delinquency that may result in foreclosure. Accordingly, the Bureau has added comment 39(a)–4 to explain that § 1024.39 does not prohibit a servicer from satisfying the requirements of § 1024.39 by establishing live contact with, and, if applicable, providing information about loss mitigation to a person authorized by the borrower to communicate with the servicer on the borrower's behalf. The comment provides that a servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example by requiring that a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. This comment is similar to comments 35(a)–1, 36(a)–1, and 40(a)–1.

The Bureau does not believe it is necessary to specifically require servicers to communicate with a borrower's representative for purposes of § 1024.39. By comparison, the requirements applicable to notices of error and information requests under §§ 1024.35 and 36 include comments 35(a)–1 and 36(a)–1, which explain that notices of error and information requests from a borrower's representative are treated the same way that servicers treat such communications from a borrower though the servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf. In situations involving notices of error or information requests, in which a borrower requests through a representative that the servicer take some action that the servicer may not otherwise perform, there is some risk that a servicer might claim it had no obligation to act if the regulation only required actions with respect to the ''borrower.'' However, § 1024.39 requires that servicers reach out to borrowers. Thus, the risk that servicers would claim they had no obligation to act with respect to a borrower is not present in this case; to the contrary, the Bureau believes it would mitigate the burden on the servicer to be able to communicate with either the borrower or the borrower's representative.

39(b) Written Notice

39(b)(1) Notice Required

As discussed below, the Bureau is adopting a written notice requirement that has been slightly revised from the proposal. The Bureau proposed § 1024.39(b)(1) to require servicers to provide borrowers who are late in making a payment with a written notice containing information about the foreclosure process, contact information for housing counselors and the borrower's State housing finance authority, and, if applicable, loss mitigation options. The Bureau proposed to require that this notice be provided not later than 40 days after the payment due date. Proposed comment 39(b)(1)–1 explained that the written notice would be required even if the servicer provided information about loss mitigation and the foreclosure process previously during the oral notice under § 1024.39(a).

Consumer advocacy groups were generally supportive of a written notice, although they recommended including more detail about loss mitigation options, application instructions, and foreclosure timelines. Industry commenters were concerned that the written notice requirement would conflict with existing early intervention requirements and recommended that the Bureau provide more flexibility with respect to the content of the notice and that the Bureau extend the deadline for providing the written notice. Some commenters questioned the necessity of the written notice in light of an oral notice requirement and other existing requirements.

The Bureau is adopting a written notice requirement in the final rule at § 1024.39(b). Borrowers may not receive information about loss mitigation options either because the servicer is unable to establish live contact with a borrower despite good faith efforts or because the servicer exercises reasonable discretion to determine that providing information about loss mitigation options is not appropriate. Further, as the Bureau noted in its proposal, even if a borrower receives information about the availability of loss mitigation options orally, the Bureau believes a written notice is still necessary if a borrower has not cured by

day 45 because borrowers may be unable to adequately assess and recall detailed information provided orally and the written notice would provide more information than what would likely have been provided under § 1024.39(a).

In addition, a written disclosure would provide borrowers with the ability to review the information or discuss it with a housing counselor or other advisor. Accordingly, the Bureau is adopting comment 39(b)(1)–1 substantially as proposed. The proposed comment explained that the written notice would be required even if the servicer provided information about loss mitigation and the foreclosure process previously during an oral communication under § 1024.39(a). In the final rule, the Bureau has omitted the reference to foreclosure and renumbered this comment as 39(b)(1)–4 for organizational purposes. The Bureau has also included new comment 39(b)(1)–3 to provide a cross-reference to comment 39(a)–4 to clarify that the Bureau's guidance with respect to communicating with a borrower's representative also applies to the written notice provision at § 1024.39(b).

In response to comments, however, the Bureau is adjusting the timing of the notice from 40 to 45 days after a missed payment and is making certain adjustments to the proposed content of the notice. To assist servicers in complying with the notice requirement, the Bureau is adopting model clauses, referenced in § 1024.39(b)(3), which the Bureau has amended. The model clauses are discussed in the section-by-section analysis of appendix MS–4.

Some industry commenters were concerned that the breadth of the definition of ''Loss mitigation options'' would require servicers to offer options or take actions inconsistent with investor or guarantor requirements.

The Bureau does not believe the written notice requirement in § 1024.39(b) will pose a conflict with investor or guarantor requirements and is adopting it as applicable to servicers of all mortgage loans, with certain exemptions and limitations in scope, as discussed above.[136] Given the breadth of the definition of ''Loss mitigation option'' and the general industry practice of offering some sort of short-term relief or at least accepting a deed-in-lieu of foreclosure, the Bureau expects that few servicers would not offer any loss mitigation options. In addition, the definition of ''Loss mitigation option'' is limited to options offered by the owner or assignee of a mortgage loan that are available through the servicer. Thus, options that are not offered by an owner or assignee and thus not available through the servicer would not be required to be listed. In addition, the Bureau has developed flexible content requirements in the written notice with regard to how and which loss mitigation options are described. Finally, the Bureau has retained the ''if applicable'' qualifier in § 1024.39(b)(2) setting forth requirements to describe loss mitigation options. Thus, if an owner or assignee of a loan offers no loss mitigation options for delinquent borrowers, the servicer would not be required to include statements describing loss mitigation options, but would still be required to send a notice encouraging the borrower to contact the servicer and containing information about housing counselors; the Bureau believes borrowers would benefit from information about how to contact their servicer or housing counselors to ask questions, for example, about how the foreclosure process works.

45th Day of Delinquency

Similar to the proposed oral notice, the Bureau proposed in § 1024.39(b) to require servicers to provide the written notice if a borrower is late in making a payment sufficient to cover principal, interest, and, if applicable, escrow. However, unlike the proposed oral notice that servicers would have been required to provide, or make good faith efforts to provide, not later than 30 days after a payment due date, the Bureau proposed to require that the written notice be provided not later than 40 days after the payment due date. The Bureau had proposed a 40-day deadline to provide borrowers a reasonable opportunity to cure a short-term delinquency while also ensuring that they received information on loss mitigation options at the early stages of a delinquency. The Bureau proposed to permit servicers to provide the written notice at any time during the 40-day period. The Bureau proposed a deadline for the written notice that occurred after the 30-day deadline for the proposed oral notice to provide servicers an opportunity to tailor the written notice and other information to the borrower's individual circumstances following the oral notice. However, servicers would also have had the option of sending the notice at any time after the borrower's missed payment. The Bureau proposed to include guidance at comment 39(b)(1)–2 to clarify that servicers should consider a payment late in the same manner as they would for purposes of calculating when the oral notice must be provided. The Bureau solicited comment on whether the written deadline should be extended to 45 days, 65 days, or longer.

Consumer advocacy groups and one industry commenter were generally supportive of the timing of the written notice as proposed, although one consumer advocacy group recommended that borrowers receive a more detailed notice 60 days after the missed payment following a lighter notice about loss mitigation options immediately after a delinquency. Most industry commenters recommended that the Bureau extend the deadline for the written notice to sometime between 45 and 70 days after a missed payment. Industry commenters argued that extending the deadline would preserve servicer flexibility in managing delinquencies and reduce the compliance burden in light of existing early intervention practices and requirements. Similar to arguments made about the proposed oral notice, industry commenters and a Federal agency expressed concern that informing a borrower of loss mitigation options that the borrower does not qualify for or that are not available to the borrower could cause borrower confusion and impede the resolution of delinquent loans.

Industry commenters and several consumer advocacy groups noted that extending the deadline for the written notice would allow servicers time to distinguish between high- and low-risk borrowers, allowing servicers to focus on high-risk borrowers while avoiding the need to make contact with borrowers who are able to self-cure the occasional late payment or those who are repeatedly delinquent but who eventually make their payments. Several industry commenters recommended that the Bureau extend the deadline to 60 days to permit servicers additional time to complete an eligibility assessment required under HAMP and the National Mortgage Settlement. One trade association noted that the Bureau's original outline of proposals under consideration included a proposal for servicers to provide borrowers with written information about loss mitigation options within five days after notifying the servicer that they may have trouble making their payments.

[136] As discussed in the section-by-section analysis of § 1024.30(b), above, the Bureau is adopting exemptions from § 1024.39 for small servicers, servicers with respect to reverse mortgage transactions, and servicers with respect to mortgage loans for which the servicer is a qualified lender (as defined in 12 CFR 617.7000). In addition, as discussed in the section-by-section analysis of § 1024.30(c), § 1024.39 does not apply to any mortgage loan that is not secured by a borrower's principal residence.

The commenter requested that this be a requirement in the final rule.

In addition, as with the proposed oral notice, industry commenters were concerned that the Bureau's requirements may be duplicative of or not perfectly aligned with existing State and Federal requirements, GSE guidelines, consent orders, and settlement agreements. Many industry commenters noted that a 40-day deadline would be premature and that it would be more efficient, common, and would avoid borrower confusion to send the notice by 45 days after a missed payment, consistent with other notices that servicers send by that time, such as breach letters, a notice under section 106(c)(5) of the Housing and Urban Development Act of 1968, as amended, regarding the availability of housing counselors (12 U.S.C. 1701x(c)(5)(B)), and a notice under the Servicemembers Civil Relief Act (50 U.S.C. App. 501 *et seq.*).[137] One large servicer explained that extending the deadline from 40 to 45 days would still provide borrowers with sufficient notice of loss mitigation options before a servicer begins the foreclosure process. One industry commenter recommended that the Bureau extend the deadline to 50 days after the payment due date to better accommodate other loss mitigation-related communications that go out by the 45th day of delinquency. In addition, a variety of servicers and trade associations requested additional flexibility in delivering the content of the written notice, such as by combining the proposed written notice requirement with existing notices.

The GSEs, certain large lenders, and trade associations, as well as several consumer advocacy groups, recommended that the Bureau permit servicers to send the written notice by the 60th, 65th or 70th day of a borrower's delinquency. Other industry commenters and a few consumer advocacy groups recommended that the Bureau extend the deadline to sometime between 60 and 70 days after a missed payment. A number of commenters expressed concern that the proposed 40-day notice was not in line with GSE guidelines that permit servicers to send a loss mitigation solicitation package to borrowers identified by the servicer as low default risks by the 65th day of the borrower's delinquency. Other commenters recommended that the Bureau permit an exemption from the 40-day deadline for servicers to comply with a later deadline if the servicer uses behavior modeling to identify chronically late payers that do not appear at risk of serious delinquency and where the notice is unlikely to be helpful, in order to better align with GSE practice.

Based on comments received, the Bureau is adopting a 45-day deadline rather than a 40-day deadline in the final rule. First, the Bureau believes that a 45-day deadline strikes an appropriate balance between permitting servicers flexibility in managing delinquencies and providing borrowers information at the early stages of a delinquency. Some borrowers are in the habit of making their mortgage payments after the due date in order to take advantage of the 15-day period generally available to make payment without incurring a late fee. A borrower who has missed a payment entirely may likewise wait until up to the 15th day after the next payment is due (*i.e.,* the 45th day after the initial payment was due) before making a payment. A 45-day deadline would permit borrowers to receive a written notice of loss mitigation options at the early stages of their delinquency while also permitting servicers to distinguish between borrowers who can self-cure out of a 30-day delinquency and those experiencing longer-term problems. The Bureau believes that the fact that a borrower has not satisfied a late payment by the 45th day of a delinquency generally indicates that such borrower is having difficulty making payments and should be informed of the availability of loss mitigation options.

The Bureau understands that some servicers may not be able to complete eligibility assessments for borrowers by the 45th day of a delinquency under HAMP (which is set to expire by December 31, 2013).[138] However, the Bureau's rule would not require that servicers make a determination of eligibility of loss mitigation options by this time; they require only that they notify borrowers that loss mitigation options may be available. The Bureau has crafted flexible content standards that would not require servicers to list specific loss mitigation options in the written notice. With respect to the National Mortgage Settlement, the Bureau believes a 45-day standard would be in line with the Settlement terms requiring servicers to commence outreach efforts after the second missed payment.

The Bureau understands that GSE servicers have additional flexibility in providing the solicitation package to certain lower-risk borrowers as late as the 65th day of their delinquency.[139] As noted above, several industry commenters and consumer advocacy groups recommended that the Bureau extend the deadline for the written notice to sometime between 60 and 70 days after a missed payment in order to accommodate this GSE practice. However, the Bureau is not adopting an exemption for servicers who use behavior modeling tools to identify lower-risk borrowers for the following reasons. Evidence available to the Bureau indicates that the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure,[140] particularly as a borrower experiences a delinquency lasting 60 days or longer.[141] While waiting to day 65 to see if a delinquent borrower has self-cured may be appropriate for low-risk borrowers, modeling tools to predict future behavior are inherently imprecise and identify a certain number of borrowers who are predicted to self-cure but do not. At this time, the Bureau does not have data with which to validate or evaluate such models. Further, the Bureau is concerned that if these borrowers are not informed of their options until the beginning of the third month of their delinquency, it may be

[137] *See* Form, U.S. Hous. & Urban Dev., *Service Members Civil Relief Act Form HUD–92070* (June 30, 2011), *available at http://portal.hud.gov/hudportal/documents/huddoc?id=92070.pdf.*

[138] *See* U.S. Dep't of Treasury & U.S. Dep't of Hous. & Urban Dev., *Home Affordable Modification Program, available at http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx.*

[139] The GSEs allow servicers to rely on the results of a behavioral modeling tool to evaluate a borrower's risk profile. U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* 30 (Jun, 11, 2012).

[140] *See, e.g.,* John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007); Laurie S. Goodman *et al.,* Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* 5–6 (June 19, 2012); Michael A. Stegman *et al., Preventative Servicing,* 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11–12 (Freddie Mac, Working Paper No. 08–01, 2008).

[141] *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 12 (Freddie Mac, Working Paper No. 08–01, 2008)(examining the success of repayment plans, the authors found that ''[t]he cure rate among loans that are only 30 days delinquent is just under 60 percent, but that rate falls to less than 30 percent if they are 3 or more payments behind at the onset of the plan''); Laurie S. Goodman *et al.,* Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* 6 (June 19, 2012).

more difficult for them to find a solution than if they were notified sooner.

The Bureau appreciates that a 45-day notice requirement might result in notices to borrowers who would self-cure without any notice. On balance, however, the Bureau believes it is appropriate to be potentially overbroad to avoid situations in which borrowers may not receive any information until potentially three months of missed payments. The Bureau has sought to address the compliance burden on GSE servicers who use behavior modeling tools by creating flexible content standards for the written notice. The Bureau has also sought to limit the burden of sending the notice by limiting the number of times a borrower would receive the notice, as discussed in more detail below.

In addition, the Bureau believes a 45-day deadline would be more consistent with other notices that servicers send by that time than the 40-day deadline as originally proposed. As discussed in more detail in the section-by-section analysis of § 1024.39(b)(2), the Bureau has sought to adopt flexible content requirements for the 45-day written notice to accommodate existing early intervention notices. The Bureau agrees that permitting servicers to comply with § 1024.39(b) by combining other notices that go out at this time would reduce possible confusion among borrowers as well as compliance burden. *See* the discussion of comment 39(b)(2)–3 below. Servicers of VA loans generally must provide borrowers with a letter if payment has not been received within 30 days after it is due and telephone contact could not be made.[142] HUD generally requires servicers of FHA-insured loans to provide each mortgagor in default HUD's ''Avoiding Foreclosure'' pamphlet, or a form developed by the mortgagee and approved by HUD, not later than the end of the second month of delinquency, although HUD recommends sending the form by the 32nd day of delinquency in order to prevent foreclosures from proceeding where avoidable.[143]

Section 106(c)(5) of the Housing and Urban Development Act of 1968, as amended, generally requires creditors to provide notice of homeownership counseling to eligible delinquent borrowers not later than 45 days after a borrower misses a payment due date. 12 U.S.C. 1701x(c)(5)(B). In addition, HUD has developed a notice pursuant to the Servicemembers Civil Relief Act, as amended, providing notice of servicemembers' rights that must be provided within 45 days of a missed payment. Servicers of GSE loans are expected to send a written package soliciting delinquent borrowers to apply for loss mitigation options 31 to 35 days after a payment due date, unless the servicer has made contact with the borrower and received a promise to cure the delinquency within 30 days.[144]

The Bureau is not adopting a requirement in the final rule for servicers to provide the § 1024.39(b) written notice based solely on a borrower's indication of difficulty in making payment. The Bureau notes that, pursuant to § 1024.39(a) and comment 39(a)–3.i, servicers must promptly inform borrowers of the availability of loss mitigation options if appropriate, which servicers may determine based on their exercise of reasonable discretion. If the servicer determines informing a borrower of loss mitigation options is appropriate, they may choose to do so orally or in writing, in accordance with comment 39(a)–3.ii. The Bureau believes a strict 45-day deadline for the written notice required under § 1024.39(b) is necessary to mitigate the risk that borrowers may not receive notice of the availability of loss mitigation options pursuant § 1024.39(a): a servicer may not establish live contact with a borrower despite good faith efforts to do, or a servicer may make a reasonable determination that such notice is not appropriate under § 1024.39(a). In addition, as previously noted, a single deadline would provide servicers with flexibility, within the deadline, to determine the most appropriate time to provide the written notice, *e.g.,* for borrowers who may be able to self-cure. Finally, the Bureau believes that new § 1024.36, which will require servicers to respond to information requests, and new § 1024.38(b)(2)(i), which requires servicers to maintain policies and procedures that are reasonably designed to ensure that servicers provide accurate information regarding loss mitigation options available to a borrower, will address situations in which borrowers request information about loss mitigation and foreclosure.

In the final rule, the Bureau uses the term ''delinquency'' to identify when the 45-day period begins. The Bureau has clarified the meaning of delinquency in commentary in a manner substantially similar to the late payment trigger that was proposed in § 1024.39(b). Accordingly, in the final rule, § 1024.39(a) requires a servicer to provide the written notice not later than the 45th day of ''a borrower's delinquency.'' Comment 39(b)(1)–1 contains a cross-reference to comment 39(a)–1, which generally explains that delinquency begins on the day a payment sufficient to cover, principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period of time after the due date has passed to pay before the servicer assesses a late fee. The cross-reference also clarifies that a borrower is not delinquent for purposes of § 1024.39 if the borrower is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment.

Comment 39(b)(1)–1 provides an example substantially similar to the example proposed as comment 39(b)(1)–2, in which a borrower misses a January 1 payment that remains due during the 45–day period after January 1, requiring that the servicer provide the written notice by February 15. Comment 39(b)(1)–1 also contains an example similar to the example in proposed comment 39(b)(1)–3, which explained that a servicer is not required to provide the written notice if the borrower makes the payment during the 45 days after the payment due date. The Bureau has also replaced the 40-day period in the comment with a 45-day period to conform to changes adopted in the final rule regarding the timing of the written notice. The Bureau has made this change to clarify that the notice must be provided only if the borrower is delinquent, and must be provided not later than the 45th day of the borrower's delinquency.

Frequency of the Notice

Proposed § 1024.39(b)(1) would have provided that a servicer would not be required to provide the written notice under § 1024.39(b) more than once during any 180-day period beginning on the date on which the disclosure is provided. Proposed comment 39(b)(1)–4 further explained that, notwithstanding this limitation, a servicer would still be

[142] ''This letter should emphasize the seriousness of the delinquency and the importance of taking prompt action to resolve the default. It should also notify the borrower(s) that the loan is in default, state the total amount due and advise the borrower(s) how to contact the holder to make arrangements for curing the default.'' 38 CFR 36.4278(g)(iii).

[143] *See* 24 CFR 203.602; U.S. Hous. & Urban Dev., *HUD Handbook 4330.1 rev-5,* ch. 7, para. 7–7(G).

[144] *See* Fannie Mae, Letters and Notice Guidelines (Apr. 25, 2012), *available at https://www.efanniemae.com/home/index.jsp*; Freddie Mac Single-Family Seller/Servicing Guide, Volume 2, Chapter 64.5 (2012). During the Small Business Panel Review outreach, SERs that service for Fannie Mae and Freddie Mac generally described strict rules and tight timeframes in dealing with delinquent borrowers. *See* Small Business Review Panel Report at 25.

required to provide the oral notice required under § 1024.39(a) for each payment that is overdue. Several commenters provided feedback on the frequency of the written notice. Two consumer advocacy groups recommended that the Bureau require the notice be resent if the borrower redefaults on the mortgage loan. Other consumer advocacy groups recommended that servicers provide the notice again based on the results of a behavior modeling tool.

The Bureau is retaining the proposed 180-day limitation in § 1024.39(b)(1). The Bureau is also retaining substantially all of the language in comment 39(b)(1)–4, which the Bureau is renumbering to comment 39(b)(1)–2. The Bureau has replaced the 40-day time periods in the examples in the commentary with 45-day time periods to conform to the final rule; the Bureau is also omitting the reference in the proposed comment to 39(a) in the last example in light of the Bureau's change to the nature of the proposed oral notice.

The Bureau is requiring that servicers provide the notice once every 180 days to limit the number of times a servicer would have to send the notice to borrowers who consistently pay late but otherwise eventually make their payments. The Bureau does not believe that borrowers who consistently carry a short-term delinquency would benefit from receiving the same written notice every month. Because § 1024.32 requires that the written notice be provided in a form the borrower may keep, borrowers would be able to retain the disclosure for future reference. In addition, a 180-day timeframe is generally consistent with HUD's requirement that, in connection with FHA loans, HUD's ''Avoiding Foreclosure'' pamphlet must be resent to delinquent borrowers unless the beginning of the new delinquency occurs less than six months after the pamphlet was last mailed.[145]

The Bureau believes that the requirement to provide the notice once every 180 days as well as the requirement in § 1024.40(a) to make servicer personnel available to borrowers not later than the 45th day of a borrower's delinquency will, as a practical matter, address situations in which borrowers may redefault. Further, § 1024.39(a) requires that servicers establish or make good faith efforts to establish live contact with borrowers with respect to every delinquency and promptly inform such borrowers that loss mitigation options may be available if appropriate, subject to a servicer's reasonable exercise of discretion. In addition, borrowers who previously worked with servicer personnel assigned under the continuity of contact rule to develop a loss mitigation option would know that they may contact their servicer to discuss loss mitigation options. The Bureau is not adopting an exemption based on a servicer's use of a behavior modeling tool for the reasons discussed above with respect to the timing of the written notice.

39(b)(2) Content of the Written Notice

In General

The Bureau proposed to add new § 1024.39(b)(2) to set forth information that servicers would be required to include in the written notice. Under paragraphs (b)(2)(i) and (b)(2)(ii) of proposed § 1024.39, servicers would have been required to include a statement encouraging the borrower to contact the servicer, along with the servicer's mailing address and telephone number. Under paragraphs (b)(2)(iii) and (b)(2)(iv) of proposed § 1024.39, servicers would have been required, if applicable, to include a statement providing a brief description of loss mitigation options that may be available, as well as a statement explaining how the borrower can obtain additional information about those options. Proposed § 1024.39(b)(2)(v) would have required servicers to include a statement explaining that foreclosure is a process to end the borrower's ownership of the property. Proposed § 1024.39(b)(2)(v) also would have required servicers to provide an estimate for when the servicer may start the foreclosure process. This estimate would have been required to be expressed in a number of days from the date of a missed payment. Finally, proposed § 1024.39(b)(iv) would have required servicers to include contact information for any State housing finance authorities, as defined in FIRREA section 1301, for the State in which the property is located, and either the Bureau or HUD list of homeownership counselors or counseling organizations.

Industry commenters, particularly smaller servicers, were generally concerned that the written notice was too prescriptive. A number of industry commenters requested clarification whether the Bureau's notice would be in addition to other similar notices that servicers may be already providing to borrowers. A variety of servicers and several trade associations recommended that the Bureau permit servicers to combine the § 1024.39(b) notice with other notices servicers send around the 45-day time period to improve efficiency and reduce the risk of information overload. One industry commenter recommended that the Bureau allow an exemption from the written notice where existing notices satisfy the content requirements of the rule, or permit servicers to consolidate the required information into an existing letter. A non-bank servicer requested clarification on whether servicers would have flexibility in how servicers delivered the content in the written notices, such as by permitting the use of logos, color, web sites, and additional information beyond what was required.

Many consumer advocacy groups requested that the Bureau require more information in the written notice, particularly information about all available loss mitigation options from the servicer, detailed application instructions and eligibility requirements, and foreclosure referral deadlines. One coalition of consumer advocacy groups supported the Bureau's proposal to include model clauses, explaining that they would mitigate the cost of creating written notice forms, but would also set an essential standard for content and level of detail, and help ensure that all borrowers receive the same information, regardless of the type of servicer.

As noted in the proposal, the Bureau sought to establish minimum standards such that servicers that are already providing adequate notices of loss mitigation options would already be in compliance. The Bureau is not adopting standardized written notices because the Bureau continues to believe an overly-prescriptive written notice may not account for the variety of situations posed by delinquent borrowers or the variety of loss mitigation options available from investors and guarantors. Thus, the Bureau is adopting generally applicable minimum content requirements that can be tailored to a specific situations, as discussed in more detail in the section-by-section analysis of § 1024.39(b)(2) below. As discussed above in the section-by-section analysis of § 1024.30(b), the Bureau is granting exemptions from § 1024.39 for small servicers, servicers with respect to reverse mortgages, and servicers with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000.

The Bureau believes that permitting servicers to incorporate relevant portions of the notice required under § 1024.39(b)(1) into other disclosures that already include some or all of the statements required by § 1024.39(b)(2)

[145] *See* 24 CFR 203.602; U.S. Hous. & Urban Dev., *HUD Handbook 4330.1 rev-5,* ch. 7, para. 7–7(G).

would reduce the potential for borrower confusion otherwise resulting from duplicative statements. Accordingly, the Bureau has added comment 39(b)(2)–3 to clarify that servicers may satisfy the requirement to provide the written notice by grouping other notices that satisfy the content requirements of § 1024.39(b)(2) into the same mailing, provided each of the required statements satisfies the clear and conspicuous standard in § 1024.32(a)(1).

To accommodate existing servicer requirements and practices, proposed comment 39(b)(2)–1 explained that a servicer may provide additional information beyond the proposed content requirements that the servicer determines would be beneficial to the borrower. This would include any additional disclosures that servicers believe would be helpful, such as directing borrowers to Web sites. In addition, proposed comment 39(b)(2)–2 explained that any color, number of pages, size and quality of paper, type of print, and method of reproduction may be used so long as the disclosure is clearly legible. The Bureau is adopting comments 39(b)(2)–1 and 39(b)(2)–2 substantially as proposed. The Bureau has further amended proposed comment 39(b)(2)–1 to provide that servicers may provide additional information that the servicer determines would be helpful ''or which may be required by applicable law or the owner or assignee of the mortgage loan.'' The Bureau has added this language to clarify that servicers may provide additional content that may be required by, for example, State law. The Bureau has revised guidance in proposed comment 39(b)(2)–2 that had clarified that the statements required by § 1024.39(b)(2) must be ''clearly legible.'' Instead, comment 39(b)(2)–2 explains that the statements required by § 1024.39(b)(2) must satisfy the clear and conspicuous standard in § 1024.32(a)(1). The Bureau has made this revision in order to clarify that the § 1024.39(b) written notice is subject to the same legibility standard applicable to other notices, pursuant to § 1024.32(a)(1).

Finally, the Bureau notes that comment MS–2, which provides commentary that is generally applicable to the model forms and clauses in appendix MS, clarifies that, except as otherwise specifically required, servicers may add graphics or icons, such as the servicer's corporate logo, to the model forms and clauses. Thus, it is unnecessary to include a comment to § 1024.39(b)(2) to clarify that servicers may include corporate logos. The Bureau has addressed consumer group comments regarding additional content for the written notice below.

Statement Encouraging the Borrower to Contact the Servicer

Proposed § 1024.39(b)(2)(i) would have required the written notice to include a statement encouraging the borrower to contact the servicer. The Bureau did not receive comment on this requirement and is adopting it as proposed, renumbered as § 1024.39(b)(2)(i). As noted in its proposal, the Bureau believes that a statement informing borrowers that the servicer can provide assistance with respect to their delinquency is necessary to facilitate a discussion between the borrower and the servicer at the early stages of delinquency. Many borrowers do not know that their servicer can help them avoid foreclosure if they are having trouble making their monthly payments. The Bureau believes a statement encouraging the borrower to call would help remove this barrier to borrower-servicer communication.

Proposed comment 39(b)(2)(i)–1 explained that the servicer would not be required, for example, to specifically request the borrower to contact the servicer regarding any particular loss mitigation option. The Bureau is not adopting this comment in the final rule because the Bureau does not believe it is necessary in light of comment 39(b)(2)(iii)–1, which explains that § 1024.39(b)(2)(iii) does not require that a specific number of examples be disclosed in the written notice.

Contact Information for the Servicer

To facilitate a dialogue between the servicer and the borrower, proposed § 1024.39(b)(2)(ii) would have required the written notice to include the servicer's mailing address and telephone number. Proposed comment 39(b)(2)(ii)–1 had explained that, if applicable, a servicer should provide contact information that would put a borrower in touch with servicer personnel under the continuity of contact rule at § 1024.40. Under § 1024.40(a)(2), servicers are generally required to maintain policies and procedures that are reasonably designed to achieve the objective of ensuring that a servicer makes available to a delinquent borrower telephone access to servicer personnel to respond to borrower inquiries and, as applicable, assist with loss mitigation options by the time the servicer provides the borrower with the § 1024.39(b) written notice, but in any event not later than the 45th day of a borrower's delinquency. *See* the section-by-section analysis of § 1024.40(a) below.

The Bureau is moving language from comment 39(b)(2)(ii)–1 to regulation text to clarify that servicers are required to provide the telephone number to access servicer personnel assigned under § 1024.40(a) and the servicer's mailing address. The Bureau believes it is more appropriate to include as a requirement of § 1024.39(b)(2)(ii), rather than as commentary, that servicers must provide in the written notice the telephone number to access continuity of contact personnel. The Bureau believes that including this contact information will help direct borrowers to continuity of contact personnel who will be able to assist delinquent borrowers.

Brief Description of Loss Mitigation Options

Proposed § 1024.39(b)(2)(iii) would have required that the written notice include a statement, if applicable, providing a brief description of loss mitigation options that may be available from the servicer. Proposed comment 39(b)(2)(iii)–1 explained that § 1024.39(b)(2)(iii) does not mandate that a specific number of examples be disclosed, but explained that borrowers are likely to benefit from examples that permit them to remain in their homes and examples of options that would require that borrowers end their ownership of the property in order to avoid foreclosure. Proposed comment 39(b)(2)(iii)–2 explained that an example of a loss mitigation option may be described in one or more sentences. Proposed comment 39(b)(2)(iii)–2 also explained that if a servicer offers several loss mitigation programs, the servicer may provide a generic description of each option instead of providing detailed descriptions of each program. The comment explained, for example, that if a servicer provides several loan modification programs, it may simply provide a generic description of a loan modification.

Many consumer advocacy groups recommended that servicers should be required to provide detailed information about all loss mitigation options available from the servicer. One consumer group recommended that servicers provide individually tailored information about a borrower's options depending on the nature of the borrower's loan. Another recommended that servicers be required to inform borrowers specifically what type of loan they have and what options are available to them. By contrast, several industry commenters recommended that the description of loss mitigation options should be minimal, asserting that lengthy explanations could confuse,

overwhelm, and discourage borrowers from reaching out to their servicer. One large servicer indicated that, in its experience, providing borrowers with more generic information about loss mitigation options resulted in better contact rates and pull through to complete loan modifications. One industry commenter recommended that any communication regarding loss mitigation options should explicitly state that all loss mitigation options have qualification requirements and that not all options are available to all consumers to address the risk that listing options that are not available to certain borrowers could be perceived as deceptive.

The Bureau is adopting proposed § 1024.39(b)(2)(iii) and the associated commentary substantially as proposed. The Bureau is amending the regulatory text of proposed § 1024.39(b)(2)(iii) to require that servicers are required to describe only ''examples'' of loss mitigation options that may be available. The Bureau has made this revision to clarify the nature of the requirement, consistent with proposed comment 39(a)(2)(iii)–1, which explained that the regulation does not mandate that a specific number of examples be disclosed.

At the time the Bureau proposed its early intervention requirements for the Small Business Panel, the Bureau considered requiring servicers to provide a brief description of any loss mitigation programs available to the borrower.[146] However, the Bureau did not propose, and is not requiring in the final rule, that servicers list all of the loss mitigation options they offer. The Bureau understands that, pursuant to investor or guarantor requirements, eligibility criteria for certain loss mitigation options are complex and may depend on circumstances that may arise over the course of a borrower's delinquency. In addition, the Bureau understands that loss mitigation options may comprise several programs; servicers may have, for example several different types of loan modification options. The Bureau understands that there may be operational difficulties associated with explaining subtle differences among these programs in a written notice. Moreover, the Bureau is concerned that a lengthy written notice may undermine the intended effect of encouraging borrowers to contact their servicers to discuss their options. The Bureau is not requiring servicers to provide each borrower with an individually tailored written notice about that borrower's options because the Bureau does not believe it would be practicable for servicers to provide such a notice at this stage of a borrower's delinquency or without additional information about a borrower's particular circumstances. Instead, the Bureau believes borrowers would be better served by servicer continuity of contact personnel explaining, in accordance with policies and procedures required under § 1024.40(b), the various loss mitigation options for which borrowers may be eligible.

In lieu of providing borrowers with information about every option, the Bureau proposed that the written notice contain a statement, if applicable, informing borrowers how to obtain more information about loss mitigation options from the servicer, as well as contact information for housing counseling resources that could provide borrowers with information about other loss mitigation options that might not be listed on the written notice. As adopted in the final rule, the notice must also include the telephone number to access servicer personnel assigned under § 1024.40(a). In addition, the Bureau has included requirements in § 1024.40(b)(1) for servicers to establish policies and procedures reasonably designed to achieve the objectives of providing accurate information regarding loss mitigation options. Pursuant to § 1024.38(b)(2)(ii), servicers must also establish policies and procedures reasonably designed to achieve the objective of identifying all loss mitigation options for which a borrower may be eligible. For these reasons and those set forth in the proposal, the Bureau is adopting the § 1024.39(b)(2)(iii) substantially as proposed.

The Bureau is retaining proposed comment 39(b)(2)(iii)–1, which explains that § 1024.39(b)(2)(iii) does not require that a specific number of examples be disclosed, but that borrowers are likely to benefit from examples of options that would permit them to retain ownership of their home and examples of options that may require borrowers to end their ownership to avoid foreclosure. The comment further explains that a servicer may include a generic list of loss mitigation options that it offers to borrowers, and that it may include a statement that not all borrowers will qualify for all of the listed options, because different loss mitigation options may be available to borrowers depending on the borrower's qualifications or other factors. The Bureau proposed this comment to avoid borrower confusion regarding their eligibility for loss mitigation options listed in the materials. The Bureau agrees that servicers should be able to clarify that not all of the enumerated loss mitigation options will necessarily be available. During consumer testing of the proposed model clauses, all participants understood that the fact that they received this notice did not mean that they would necessarily qualify for these options. The Bureau is adopting this comment substantially as proposed.

The Bureau is also retaining proposed comment 39(b)(2)(iii)–2 substantially as proposed, which explains that an example of a loss mitigation option may be described in one or more sentences and that if a servicer offers several loss mitigation programs, the servicer may provide a generic description of the type of option instead of providing detailed descriptions of each program. The Bureau has included this comment because the Bureau recognizes that there may be operational difficulties associated with determining how to explain specialized loss mitigation programs. The Bureau recognizes that loss mitigation options are complex, and providing comprehensive explanations of each option may overwhelm borrowers and may undermine the intended effect of the written notice of encouraging borrowers to get in touch with their servicers to identify appropriate relief. The Bureau does not believe that borrowers would benefit from a disclosure with voluminous detail at the early stage of exploring available options. Instead, the Bureau believes that servicers should provide borrowers with a brief explanation of loss mitigation options and encourage borrowers to contact their servicer to discuss whether any options may be appropriate.

Explanation of How the Borrower May Obtain More Information About Loss Mitigation Options

Proposed § 1024.39(b)(2)(iv) would have required the written notice to include an explanation of how the borrower may obtain more information about loss mitigation options, if applicable. Proposed comment 39(b)(2)(iv)–1 explained that, at a minimum, a servicer could comply with this requirement by directing the borrower to contact the servicer for more information, such as through a statement like, ''contact us for instructions on how to apply.''

Consumer advocacy groups recommended that the Bureau require servicers to identify the deadline by which borrowers must send application

[146] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* appendix C (Jun, 11, 2012).

materials. One consumer group indicated that a requirement to notify borrowers of application deadlines in the written notice was necessary to coordinate with the Bureau's proposed requirement in 1024.41(g) that only applications received by the servicer's deadline are subject to the prohibition on foreclosure sales. In addition to application deadlines, many consumer advocacy groups recommended that servicers be required to provide borrowers with eligibility requirements, an application form and application instructions, along with a clear list of required documentation necessary to be considered a complete application, consistent with GSE practice. By contrast, an industry commenter indicated that communications about loss mitigation options should be more general in nature rather than provide too much detail that might overwhelm borrowers. An individual consumer indicated that the most important element of the notice was to inform borrowers who they could contact to discuss their options.

While the Bureau appreciates that borrowers may benefit from knowing about the applicability of deadlines, the Bureau is concerned that there may be operational difficulties with a requirement to disclose application deadlines in the written notice at § 1024.39(b). Because the Bureau is not requiring servicers to disclose in the written notice all loss mitigation options available from the servicer, the Bureau does not believe it would be appropriate to require servicers to disclose all loss mitigation application deadlines that may apply; otherwise, such information could be confusing to borrowers. Moreover, the Bureau is concerned that there may be comprehension difficulties associated with an explanation in the § 1024.39(b) written notice of the interaction between application deadlines and deadlines in the Bureau's loss mitigation procedures at § 1024.41. The Bureau believes that a requirement to specifically identify application deadlines in the early intervention notice requires further analysis by the Bureau to address the concern that disclosure of deadlines occurring far in the future might discourage borrowers from acting quickly to resolve a delinquency. See the discussion below under the heading ''Foreclosure Statement'' for more discussion of the Bureau's concerns about borrower perception of deadlines in the early intervention notice. Further, the Bureau notes that servicers must maintain policies and procedures reasonably designed to ensure that servicer personnel assigned to a borrower pursuant to § 1024.40(a) provide borrowers accurate information about actions that the borrower must take to be evaluated for loss mitigation options and applicable loss mitigation deadlines established by an owner or assignee of a mortgage loan or § 1024.41. *See* § 1024.40(b)(1)(ii) and (v); § 1024.41 (setting forth various procedural requirements and timeframes governing a servicer's consideration of a borrower's loss mitigation application). Finally, because the Bureau is adopting § 1024.41(f)(1) to prohibit servicers from making the first notice or filing required by applicable law unless a borrower's mortgage loan is more than 120 days delinquent, borrowers will have more time to submit loss mitigation applications before a servicer initiates the foreclosure process.

The Bureau is not adopting a rule to require servicers to identify application materials in the written notice. At the time the Bureau proposed its early intervention requirements for the Small Business Review Panel, the Bureau considered requiring servicers to provide a brief outline of the requirements for qualifying for any available loss mitigation programs, including documents and other information the borrower must provide, and any timelines that apply.[147] The Bureau did not propose requiring servicers to provide this level of detail because each loss mitigation option may have its own specific documentation requirements and servicers may be unable to provide comprehensive application instructions generally applicable to all options. Additionally, because the Bureau had proposed that servicers provide only examples of loss mitigation options in the written notice, the proposal noted that detailed instructions for only the listed options may not be useful for all borrowers. The Bureau believes setting consistent and streamlined requirements best achieves the central purpose of the early intervention notice, which is to inform borrowers that help is available and to encourage them to contact their servicer. In addition, the Bureau understands that not all loss mitigation options are necessarily appropriate for every borrower. The Bureau is concerned that a requirement to provide application materials for all options listed in the notice might be overwhelming for borrowers at this stage in the process. Servicers might have multiple loss mitigation options and each may have its own documentation requirements. A requirement to prospectively disclose all documentation requirements for all listed options could prove voluminous. Additionally, a borrower's eligibility for options depends on the borrower's circumstances as well as the stage of delinquency, and the Bureau believes servicers or housing counselors are best suited to advising borrowers about their options during a live conversation.

The Bureau's continuity of contact requirements are designed to assist borrowers who are provided the § 1024.39(b) written notice or who reach a certain stage of delinquency. These requirements are designed to ensure servicers have servicer personnel dedicated to guiding such borrowers through the loss mitigation application process. Pursuant to § 1024.40(a), servicers must maintain policies and procedures that are reasonably designed to achieve the objective of making available to a delinquent borrower telephone access to servicer personnel to respond to the borrower's inquiries and, as applicable, assist the borrower with loss mitigation options to borrowers by the time the servicer provides the borrower with the § 1024.39(b) written notice but in any event no than the 45th day of a borrower's delinquency. Pursuant to § 1024.40(b)(1), the Bureau has set forth objectives that servicer policies and procedures for continuity of contact personnel must be reasonably designed to achieve. These objectives include providing accurate information about loss mitigation options available to a borrower from the owner or assignee of a mortgage loan; actions the borrower must take to be evaluated for such options, including actions the borrower must take to submit a complete loss mitigation application, as defined in § 1024.31, and, if applicable, actions the borrower must take to appeal the servicer's determination to deny the borrower's loss mitigation application for any trial or permanent loan modification program offered by the servicer; the status of any loss mitigation application that the borrower has submitted to the servicer; the circumstances under which the servicer may make a referral to foreclosure; and applicable loss mitigation deadlines established by an owner or assignee of a mortgage loan or § 1024.41. The Bureau believes these requirements will help ensure borrowers receive accurate information about how to submit a complete loss mitigation application.

Of course, servicers may choose to provide application materials with the written notice. Accordingly, the Bureau

[147] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* appendix C (Jun, 11, 2012).

proposed comment 39(b)(2)(iv)–1 to explain that, to expedite the borrower's timely application for any loss mitigation options, servicers may wish to provide more detailed instructions on how a borrower could apply, such as by listing representative documents the borrower should make available to the servicer, such as tax filings or income statements, and by providing estimates for when the servicer expects to make a decision on a loss mitigation option. Proposed comment 39(b)(2)(iv)–1 also provided that servicers may supplement the written notice with a loss mitigation application form. The Bureau is adopting this comment substantially as proposed in the final rule.

Foreclosure Statement

Proposed § 1024.39(b)(2)(v) would have required that the written notice include a statement explaining that foreclosure is a legal process to end the borrower's ownership of the property. Proposed § 1024.39(b)(2)(v) also would have required that the notice include an estimate of how many days after a missed payment the servicer makes the referral to foreclosure. The Bureau proposed to clarify through comment 39(b)(2)(v)–1 that the servicer may explain that the foreclosure process may vary depending on the circumstances, such as the location of the borrower's property that secures the loan, whether the borrower is covered by the Servicemembers Civil Relief Act, and the requirements of the owner or assignee of the borrower's loan. The Bureau also proposed to clarify through comment 39(b)(2)(v)–2 that the servicer may qualify its estimates with a statement that different timelines may vary depending on the circumstances, such as those listed in comment 39(b)(2)(v)–1. Proposed comment 39(b)(2)(v)–2 also explained that the servicer may provide its estimate as a range of days.

Consumer advocacy groups and industry commenters were generally divided over whether servicers should be required to provide information about foreclosure in the written notice, although one industry trade group supported such a requirement. Several industry commenters supported the Bureau's proposal to provide an estimated range of dates for when foreclosure may occur, citing the need to be flexible in light of unforeseen circumstances and the variety of timelines in which a foreclosure could proceed in light of the nature of the property. However, other industry commenters were concerned that including any range may be too inaccurate to provide meaningful guidance to borrowers because of the variety of factors that could influence a foreclosure referral. One large servicer explained that servicers do not typically review accounts for or pursue foreclosure until much later in a borrower's delinquency and that including information about foreclosure could be construed as a threat to take action that is not likely to happen until much later. Another industry commenter and a trade group expressed concern that requiring prospective disclosure of possible foreclosure timelines could lead to litigation if the information turned out to be inaccurate. By contrast, some consumer advocacy groups recommended that the notices should include a narrower foreclosure timeline. Some consumer advocacy groups also believed it was appropriate to make servicers accountable to their estimates, such as by prohibiting servicers from initiating foreclosure earlier than the timeline in the notice.

Industry commenters and consumer advocacy groups were also divided over whether the estimated foreclosure timeline would undermine the purpose of the early intervention notice. Several industry commenters expressed concern that a foreclosure timeline estimate could confuse borrowers into believing that the referral date is the last day for loss mitigation options whereas help may be available even after the foreclosure referral date. One of these commenters recommended that the Bureau add qualifying language to address concerns that a foreclosure timeline estimate could mislead borrowers into believing they had more time to take action to avoid foreclosure.

Consumer advocacy groups, on the other hand, believed that a more detailed notice about the foreclosure process could serve an educational function. One consumer advocacy group recommended provision of detailed, State-specific foreclosure timelines tailored to the borrower's residence. One coalition of consumer advocacy groups recommended that the foreclosure statement should provide more explanation of the steps occurring in the foreclosure process, such as a description of court procedures and a sheriff's sale that occur in judicial foreclosure jurisdictions; this group explained that borrowers are often confused about how foreclosure referrals are related to the actual sale of their home. This group of advocates also explained that information when foreclosure will start and end is also important in non-judicial foreclosure jurisdictions, where the foreclosure process can occur quickly and with fewer opportunities for borrowers to object. In addition, this group of advocates recommended that the Bureau should specify a minimum period of time between a missed payment and the date on which foreclosure may begin.

The Bureau notes at the outset that because the Bureau is adopting § 1024.41(f)(1) to delay foreclosure referrals until 120 days after a missed payment, there is less risk of borrower confusion about when foreclosure may begin. Section 1024.41(f)(1) is discussed in more detail below in the applicable section-by-section analysis. Nonetheless, while a single foreclosure deadline would minimize compliance issues around potentially inaccurate estimates, the Bureau is concerned that requiring foreclosure information in the written early intervention notice may cause borrower confusion and may possibly discourage borrowers from seeking early assistance. In addition, an explanation that a servicer will not initiate foreclosure until the 120th day of delinquency may suggest to some borrowers that they cannot submit a loss mitigation application after the initiation of foreclosure, which may not necessarily be the case. *See* § 1024.41(g).[148]

During consumer testing of the model clauses, participants had a mixed reaction to the foreclosure statement, which included an estimated timeline for when foreclosure may begin. The statement tested a timeline that explained foreclosure could occur 90–150 days after a missed payment. All participants understood before reading the statement that foreclosure was a process through which their lender could take their home if they did not make their mortgage payments.

With respect to the estimated timeline for when foreclosure may begin, some thought that the estimated timeline meant nothing would happen before that date, despite the fact that the clause stated that the process ''may begin earlier or later.'' While some participants appeared to be motivated to act quickly because of the foreclosure statement, others commented that the estimated timeline implied that it was less important to act immediately because there would be a period of time during which they would be safe from foreclosure. One participant felt strongly

[148] Section 1024.41(g) generally provides that, if a borrower submits a complete loss mitigation application after a servicer has made the first foreclosure filing but more than 37 days before a scheduled or anticipated foreclosure sale, a servicer may not move for foreclosure judgment or order of sale, or conduct a foreclosure sale until a borrower is notified of the borrower's ineligibility for a loss mitigation options, the borrower rejects a loss mitigation offer, or the borrower fails to perform as agreed under an option.

that if it were true that the foreclosure process could start in less than 90 days, then the reference to the 90 to 150 day time period should be removed from the clause because it was misleading.

The Bureau is not finalizing the proposed requirement that servicers notify borrowers about foreclosure in the written notice. While the Bureau agrees that the early intervention written notice could serve an educational function with regard to the foreclosure process, the Bureau believes a requirement to notify borrowers about the foreclosure process in the written early intervention notice requires further evaluation by the Bureau because of the risk that such a disclosure could be perceived as confusing or negatively by borrowers, and may discourage some borrowers from reaching out to their servicer promptly. As the Bureau noted in its proposal, during the Small Business Review Panel outreach, some small servicer representatives explained that information about foreclosure is typically not provided until after loss mitigation options have been explored;[149] and during consumer testing, several participants indicated that the tone of the foreclosure statement seemed at odds with the tone of the rest of the clauses encouraging borrowers to resolve their delinquency as soon as possible. Further, the Bureau is concerned that, given the variation in State foreclosure processes, a prescriptive requirement to explain foreclosure may either result in explanations that are too generic to be useful or too complex to be easily understood. Accordingly, for the reasons set forth above, the Bureau is removing the proposed requirement that servicers provide information about the foreclosure process in the written early intervention notice.

Although the Bureau is not finalizing the requirement for servicers to provide a statement describing foreclosure in the written notice, the Bureau agrees that some borrowers would benefit from receiving information about foreclosure at the time of receiving information about loss mitigation options. Such information could help some borrowers understand their choices they face at the early stages of delinquency. The Bureau believes the requirements to include contact information for housing counselors and servicer personnel assigned under § 1024.40(a) will help address potential information shortcomings of the written notice. Pursuant to § 1024.40(b)(1)(iv), servicers must have policies and procedures reasonably designed to ensure that servicer continuity of contact personnel provide accurate information about the circumstances under which borrowers may be referred to foreclosure. Accordingly, for the reasons discussed above, the Bureau is not finalizing proposed § 1024.39(b)(2)(iv) or model clause MS–4(D), which contained language illustrating the foreclosure statement.

Contact Information for Housing Counselors and State Housing Finance Authorities

Proposed § 1024.39(b)(vi) would have required the written notice to include contact information for any State housing finance authority for the State in which the borrower's property is located, and contact information for either the Bureau list or the HUD list of homeownership counselors or counseling organizations.

With respect to contact information for homeownership counselors or counseling organizations, the Bureau proposed to require similar information pertaining to housing counseling resources that would be required on the ARM interest rate adjustment notice and the periodic statement, as provided in the Bureau's 2012 TILA Mortgage Servicing Proposal.[150] For these notices, the Bureau did not propose that servicers include a list of specific housing counseling programs or agencies (other than the State housing finance authority, discussed below), but instead that servicers provide contact information for either the Bureau list or the HUD list of homeownership counselors or counseling organizations. The Bureau solicited comment on whether the written early intervention notice should include a generic list to access counselors or counseling organizations, as proposed here, or a list of specific counselors or counseling organizations, as was proposed in the 2012 HOEPA Proposal.[151]

Some consumer advocacy groups recommended that the Bureau require that servicers provide a list of specific counselors or HUD-certified agencies, citing the need to protect borrowers against so-called ''foreclosure rescue'' scams, and one organization recommended that the Bureau require servicers to refer borrowers directly to specific counselors upon the borrower's request. Industry commenters expressed support for the proposed requirement to provide generic contact information for borrowers to access a list of counselors. One industry commenter was concerned that requiring servicers to provide a list of counselors would require frequent updating by servicers to ensure the accuracy of the notice. In addition, the commenter was concerned that providing a list of counselors could be construed as the servicer advocating for a particular counselor. One housing counseling organization and an industry commenter explained that some States already require that servicers provide a list of nonprofit housing counseling agencies at the time of sending a written foreclosure notice. The housing counseling organization recommended that the final rule require servicers to provide a list of HUD-approved nonprofit counseling agencies in the written notice, while the industry commenter was concerned about complying with overlapping requirements.

During the fourth round of consumer testing in Philadelphia, all participants indicated they were likely to take advantage of the contact information contained in the notice, although they indicated they would try to contact their bank first.[152] Several participants said that they would contact HUD[153] or the State housing finance agency[154] if they were not satisfied with the assistance they got from their bank. One participant indicated that this contact information would be useful to help verify that information provided by the

[149] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking,* 31 (Jun, 11, 2012).

[150] *See* proposed Regulation Z §§ 1026.20(d) and 1026.41(d)(7) in the Bureau's 2012 TILA Mortgage Servicing Proposal.

[151] The 2013 HOEPA Final Rule, which, among other things, implements RESPA section 5(c), which requires lenders to provide applicants of federally related mortgage loans with a ''reasonably complete or updated list of homeownership counselors who are certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) and located in the area of the lender.'' The list provided to applicants pursuant to this requirement will be obtained through a Bureau Web site Bureau or data made available by the Bureau or HUD to comply with this requirement.

[152] During consumer testing, participants referred colloquially to their ''bank.'' The Bureau does not believe this reflects comprehension difficulties with respect to the party borrowers must contact. During testing when asked whether the terms ''servicer'' and ''lender'' were identical, participants indicated that they were not.

[153] Macro tested a statement including HUD's housing counselor list and phone number because, at the time of testing, the Bureau did not have a web site containing this information. The Bureau believes consumers would have the same reaction if the Bureau's contact information were listed instead of HUD's.

[154] At the time of testing, the Bureau tested clauses that included contact information for a State housing finance agency, as the Bureau would have required to be listed under proposed § 1024.39(b)(2)(vi).

lender was accurate and followed legal guidelines.

The Bureau is adopting the requirement substantially as proposed, renumbered as § 1024.39(b)(2)(v) from § 1024.39(b)(2)(vi). Section 1024.39(b)(2)(v) requires servicers to include in the written notice the Web site to access either the Bureau list or the HUD list of homeownership counselors or counseling organizations, and the HUD toll-free telephone number to access homeownership counselors or counseling organizations.[155] The Bureau is modifying the proposed requirement, which would have required servicers to list either the HUD telephone number or a Bureau telephone number. In the final rule, the Bureau is requiring servicers to list the HUD telephone number but not a Bureau telephone number because the Bureau believes the HUD telephone number that currently exists provides adequate access to approved counseling resources.

As noted in its proposal, the Bureau believes that delinquent borrowers would benefit from knowing how to access housing counselors because some borrowers may be more comfortable discussing their options with a third-party.[156] In addition, a housing counselor could provide a borrower with additional information about loss mitigation options that a servicer may not have listed on the written notice. The Bureau also believes the contact information to access the HUD or Bureau list would provide borrowers with access to qualified counselors or counseling organizations that could counsel borrowers about potential foreclosure rescue scams. While the Bureau agrees that borrowers may benefit from a list of specific counseling organizations or counselors, the Bureau also believes that there is value in keeping the content requirements in the written notice flexible to ensure the notice is able to accommodate existing requirements, such as State laws, that may overlap with the Bureau's requirements. The Bureau believes that providing borrowers with the Web site address for either the Bureau or HUD list of homeownership counseling agencies and programs would streamline the disclosure and present clear and concise information for borrowers.

In addition to information about accessing housing counselors, the Bureau proposed to require that the written notice include contact information for the State housing finance authority located in the State in which the property is located. In its proposal, the Bureau sought comment on the costs and benefits of the provision of information about housing counselors and State housing finance authorities to delinquent borrowers in the proposed written notice. The Bureau also sought comment on the potential effect of the Bureau's proposal on access to homeownership counseling generally by borrowers, and the effect of increased borrower demand for counseling on existing counseling resources, including demand on State housing finance authorities.

A State housing finance agency, an association of State housing finance agencies, and a large servicer recommended that the Bureau remove housing finance authority contact information from the written notice, citing resource limitations of State housing finance authorities. The large servicer expressed concern that borrowers would blame their servicer for directing them to State housing finance agencies that proved unable to provide assistance, or that such an experience would discourage borrowers from seeking other assistance. Two industry commenters also recommended that the Bureau eliminate the requirement to provide State housing finance authority contact information, citing the tracking burden associated with this requirement. One commenter explained that a phone number to access housing counselors (*e.g.,* through a HUD or Bureau phone number or Web site) would provide borrowers with sufficient access to assistance. As an alternative, the industry commenter suggested that the Bureau host this information or that the Bureau simply include language that there may be State-sponsored programs in the borrower's State that could be helpful. Another servicer recommended that the written notice simply reference that assistance may be available through the State Housing Finance Authority and provide a telephone number that borrowers could call to learn more about them.

In the final rule, the Bureau is omitting the proposed requirement to disclose State housing finance authority contact information in the written notice because the Bureau shares the concern of the State housing finance authorities that directing borrowers to specific State agencies may overwhelm their limited resources. The Bureau also understands that not all State housing finance authorities offer counseling services, which may cause confusion among delinquent borrowers directed to such entities. In addition, the Bureau believes providing contact information for housing counselors or counseling organizations through access to a HUD or Bureau Web site or telephone number will ensure borrowers have access to assistance. Accordingly, the Bureau is amending proposed paragraph (b)(2)(vi) to contain no subparagraphs and is renumbering it as paragraph (b)(2)(v) in light of the deletion of the proposed foreclosure statement. In addition, the Bureau is deleting the portion of model clause MS–4(E) containing language about State housing finance authorities.

39(b)(3) Model Clauses

The Bureau proposed to add new § 1024.39(b)(3), which contained a reference to proposed model clauses that servicers may use to comply with the written notice requirement. The Bureau proposed to include these model clauses are in new appendix MS–4. For more detailed discussion of the model clauses, see the section-by-section analysis of appendix MS below.

39(c) Conflicts With Other Law

As noted above, industry commenters were concerned that the Bureau's proposed early intervention requirements could conflict with existing law. Several commenters requested guidance on whether servicers would be required to comply with the early intervention requirements if the borrower instructed the servicer to cease collection efforts, not to contact the borrower by telephone, or that the borrower refuses to pay the debt. Several of these commenters requested that the Bureau include an exemption in cases involving debt collection or bankruptcy law. One industry commenter requested that the Bureau clarify whether servicers would have immunity from claims of harassment or improper conduct under the Fair Debt Collection Practices Act, 15 U.S.C. 1692.

To address concerns about conflicts with other law, the Bureau has added subsection (c) to § 1024.39 to provide that nothing in § 1024.39 shall require a servicer to communicate with a borrower in a manner otherwise prohibited under applicable law. The Bureau has added this provision to clarify that the Bureau does not intend for its early intervention requirements to require servicers to take any action that may be prohibited under State law, such

[155] The HUD list is available at *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm* and the HUD toll-free number is 800–569–4287. The Bureau list will be available by the effective date of this final rule at *http://www.consumerfinance.gov/.*

[156] Some servicers have found that borrowers may trust independent counseling agencies more than they trust servicers. *See* Office of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers,* Insights (June 2007) at 6, *available at http://www.occ.gov/topics/community-affairs/publications/insights/insights-foreclosure-prevention.pdf.*

as a statutory foreclosure regime that may prohibit certain types of contact with borrowers that may be required under § 1024.39. The Bureau has also added this provision to clarify that servicers are not required to make contact with borrowers in a manner that may be prohibited by Federal laws, such as the Fair Debt Collection Practices Act or the Bankruptcy Code's automatic stay provisions. The Bureau has also added comment 39(c)–1 to address borrowers in bankruptcy. Comment 39(c)–1 provides that § 1024.39 does not require a servicer to communicate with a borrower in a manner inconsistent with applicable bankruptcy law or a court order in a bankruptcy case; and that, to the extent permitted by such law or court order, servicers may adapt the requirements of § 1024.39 in any manner that would permit them to notify borrowers of loss mitigation options. Through this comment the Bureau has not sought to interpret the Bankruptcy Code, but instead intended to indicate that servicers may take a flexible approach to complying with § 1024.39 in order to provide information on loss mitigation options to borrowers in bankruptcy to the extent permitted by applicable law or court order.

Section 1024.40 Continuity of Contact

Background. As discussed above, this final rule addresses servicers' obligation to provide delinquent borrowers with access to servicer personnel to respond to inquiries, and as applicable, assist them with foreclosure avoidance options. Widespread reports of communication breakdowns between servicers and delinquent borrowers who present a heightened risk for default have revealed that one of the most significant impediments to the success of foreclosure mitigation programs is the inadequate manner by which servicer personnel at major servicers have provided assistance to these borrowers. The Bureau noted in the proposal that the problem was systemic. For example, Federal regulatory agencies reviewing mortgage servicing practices have found that ''a majority of the [servicers examined] had inadequate staffing levels or had recently added staff with limited servicing experience.'' [157] The Bureau proposed § 1024.40 to establish requirements to ensure that there would be a baseline level of standards that would address the issue.

Proposed § 1024.40(a)(1) would have provided that a servicer must assign personnel to respond to borrower inquiries and as applicable, assist a borrower with loss mitigation options no later than five days after a servicer has provided such borrower with the oral notice that would have been required by proposed § 1024.39(a). For a transferee servicer, proposed § 1024.40(a)(1) would have required such servicer to make the assignment within a reasonable time after the mortgage servicing right to a borrower's mortgage loan has been transferred to such servicer if the borrower's previous servicer had assigned personnel to such borrower as would have been required by proposed § 1024.40(a)(1) before the mortgage servicing right was transferred and the assignment had not ended when the servicing right was transferred. Proposed § 1024.40(a)(2) would have required a servicer to make access to assigned personnel available via telephone and would have set forth related requirements on what a servicer must do if a borrower contacts the servicer and does not receive a live response from the assigned personnel. Proposed § 1024.40(b) would have required a servicer to establish reasonable policies and procedures designed to ensure that the servicer personnel the servicer assigns to a borrower pursuant to proposed § 1024.40(a) perform certain enumerated functions. Proposed § 1024.40(c) would have set forth requirements with respect to how long the assigned personnel must be assigned and available to a borrower.

Although many servicers failed to adequately assist delinquent borrowers, the Bureau recognized that some servicers provide a high level of customer service to their borrowers both to ensure loan performance (because either they or one of their affiliates owned the loan) and maintain strong customer relationships (because they rely on providing borrowers with other products and services and thus have a strong interest in preserving their reputation and relationships with their customers). The Bureau believed that to the extent that a servicer's existing practices with respect to providing assistance to delinquent borrowers have been successful at helping borrowers avoid foreclosure, it was important that these practices be permitted to continue to exist within the framework of proposed § 1024.40. The Bureau sought to clarify the Bureau's intent by explaining in proposed comment 40(a)(1)–3.i that the continuity of contact provisions allowed a servicer to exercise discretion to determine the manner by which continuity of contact is implemented.

The Bureau received general comments about whether it was appropriate for the Bureau to regulate the manner by which servicer personnel at servicers provide assistance to delinquent borrowers. With one exception, consumer groups expressed support for proposed § 1024.40. One consumer group that identified itself as primarily serving Asian-Americans and Pacific Islander communities expressed concern that proposed § 1024.40 only appeared to address the initial assignment of servicer staff to assist delinquent borrowers. The commenter also urged the Bureau to mirror the more prescriptive approach of the National Mortgage Settlement and the California Homeowner Bill of Rights.

A number of consumer groups suggested that the Bureau add an additional requirement to require servicers to establish electronic loan portals to facilitate the exchange of documents related to a borrower's loan modification application. Consumer groups asserted that servicers' insistence that borrowers have not submitted requested documents remains a barrier to loan modification success and that the National Mortgage Settlement already requires the five largest servicers to develop online portals linked to a servicer's primary servicing system where borrowers can check the status of their first-lien loan modifications, at no cost to them.

Industry commenters generally expressed agreement with the principle that servicers must have adequate staffing levels to meet the needs of delinquent borrowers and commended the Bureau for recognizing the importance of permitting successful servicing practices with respect to how servicers provide assistance to delinquent borrowers to continue to exist. But smaller servicers and rural creditors subject to Farm Credit Administration rules generally requested exemptions from the continuity of contact requirements.

Smaller servicers predicted that the continuity of contact requirements will bring about a significant increase in borrower communication, which they will have to respond by significantly increasing the size of their staff and making substantial changes to their servicing platforms. Smaller servicers asserted that these adjustments will increase their compliance costs and result in the reduction in the high quality of customer service they already provide to their customers. Rural lenders subject to Farm Credit

[157] *See* Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, Interagency Review of Foreclosure Policies and Practices, at 8 (2011).

Administration rules asserted that they should be exempted from the Bureau's continuity of contact requirements because they are already required to follow a highly prescriptive set of regulations when working with borrowers with distressed loans issued by the Farm Credit Administration. They expressed concern about potentially having to comply with inconsistent regulations and borrower confusion.

A national trade association representing the reverse mortgage industry sought a general exemption for reverse mortgages, asserting that continuity of contact requirements would be duplicative of existing HUD regulations that require servicers of home equity conversion mortgages (HECM) to assign specific employees to assist HECM borrowers and provide the information to HECM borrowers on an annual basis and whenever the assigned employees change.

Several industry commenters urged the Bureau to make changes to § 1024.40 where they contend the proposal is inconsistent with the National Mortgage Settlement because of the cost of potentially being required to comply with different standards. One non-bank servicer requested that the Bureau specify that compliance with § 1024.40 would provide a safe harbor from compliance with similar applicable law, including State law, the National Mortgage Settlement, HAMP guidelines, and investor requirements. Another non-bank servicer asserted that several of the functions the Bureau proposed to require continuity of contact personnel to perform under § 1024.40 would require servicers under some States' law to make available licensed loan originators to assist borrowers and that the Bureau should preempt such laws because servicers may not have an adequate number of licensed staff.

One bank servicer and one non-bank servicer suggested the Bureau could reduce any potential compliance burden with § 1024.40 if the Bureau limited a servicer's duty to comply with § 1024.40 to borrowers who are responsive to servicers' attempts to engage them in foreclosure avoidance options and who have not vacated their principal residences. One non-bank servicer urged the Bureau create an exemption from compliance with continuity of contact requirements with respect to borrowers who have filed for bankruptcy.

In light of the comments received and upon further consideration, the Bureau has made a number of changes to § 1024.40. The Bureau has concluded that the best way to ensure that existing, successful servicing practices with respect to assisting delinquent borrowers be able to continue to exist would be to adopt proposed § 1024.40 as a requirement for servicers to maintain policies and procedures reasonably designed to achieved specified objectives, and leave it to each servicers to implement its own policies and procedures calculated to achieve the desired results. Given the flexibility provided by § 1024.40 as finalized, the Bureau does not discern a need to provide servicers with express safe harbors or preemptions or a need to make § 1024.40 align exactly with the terms of the National Mortgage Settlement.

The Bureau also declines to adopt the electronic portal requirement a number of consumers have urged the Bureau to impose on servicers. The Bureau agrees that servicers should, consistent with the purposes of RESPA, facilitate the exchange of documents related to a borrower's loan modification application and is adopting requirements in the final rule that would support this objective. For example, § 1024.38(b)(2)(iii) requires servicers to maintain policies and procedures reasonably designed to achieve the objective of providing prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option to servicer personnel assigned to assist the borrower as described in § 1024.40. The Bureau believes that to fulfill this requirement, servicers must have policies and procedures for the use of reasonable means to track and maintain borrower-submitted loss mitigation documents. However, imposing on servicers a specific obligation to establish electronic portals would supplant other reasonable means to track and maintain borrower-submitted loss mitigation documents. As noted above, the Bureau expects to further consider the benefits of electronic portals, as well as requirements regarding electronic communication with servicers more broadly.

Further, for reasons discussed in the section-by-section analysis of § 1024.30, the Bureau has decided that requirements set forth in the Bureau's discretionary rulemakings are generally not appropriate to impose on small servicers (servicers that servicers 5,000 mortgage loans or less and only servicers mortgage loans that either they or their affiliates own or originated), housing finance agencies, servicers with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000, and servicers of reverse mortgage transactions.

In addition, for reasons set forth above, the Bureau has limited the scope of §§ 1024.39 through 41 to mortgage loans that are secured by a borrower's principal residence. But the Bureau declines to further limit the scope of § 1024.40 to ''responsive borrowers'' or to exclude borrowers who have filed for bankruptcy. As discussed above, the purpose of the early intervention, continuity of contact, and loss mitigation procedure requirements is to ensure that a borrower who resides in a property as a principal residence have the protection of clear standards of review for loss mitigation options so that the borrower can be considered for an option that will assist the borrower in retaining the property and the owner or assignee in mitigating losses. The Bureau believes limiting the applicability of § 1024.40 to ''responsive'' borrowers introduces a notable degree of subjectivity that conflicts with this purpose. The Bureau additionally declines to create an exemption with respect to borrowers who have filed for bankruptcy because the exemption would be too broad. A borrower could have filed for bankruptcy but still be eligible for loss mitigation assistance.

Legal Authority

The Bureau proposed § 1024.40 pursuant to authority under sections 6(k)(1)(E), 6(j)(3), and 19(a) of RESPA, and accordingly, like other rules issued pursuant to the Bureau's authority under section 6 of RESPA, § 1024.40 would have been enforceable through private rights of action. But as discussed above, the Bureau is adopting § 1024.40 as an objectives-based policies and procedures requirement. As discussed above in the section-by-section analysis of § 1024.38, the Bureau believes that private liability is not compatible with objectives-based policies and procedures requirements. The Bureau has therefore decided to finalize § 1024.40 such that there will be no private liability for violations of the provision. Accordingly, the Bureau no longer relies on its authorities under section 6 of RESPA to issue § 1024.40. Instead, the Bureau is adopting § 1024.40 pursuant to its authority under section 19(a) of RESPA. The Bureau believes that the objectives-based policies and procedures set forth in § 1024.40 that regulate the manner by which servicer personnel provide assistance to delinquent borrowers are necessary to achieve the purposes of RESPA, including avoiding unwarranted or unnecessary costs and fees, ensuring that servicers are responsive to consumer requests and

complaints, and facilitating the review of borrowers for foreclosure avoidance options.

The Bureau is also adopting § 1024.40 pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws. Specifically, the Bureau believes that § 1024.40 is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

Proposed 40(a)

Proposed § 1024.40(a)(1) would have provided that no later than five days after a servicer has notified or made a good faith effort to notify a borrower to the extent required by proposed § 1024.39(a), the servicer must assign personnel to respond to the borrower's inquiries, and as applicable, assist the borrower with loss mitigation options. Proposed § 1024.40(a)(1) further provided that if a borrower has been assigned personnel as required by § 1024.40(a)(1) and the assignment has not ended when servicing for the borrower's mortgage loan has transferred to a transferee servicer, subject to § 1024.40(c)(1) through (4), the transferee servicer must assign personnel to respond to the borrower's inquiries, and as applicable, assist the borrower with loss mitigation options, within a reasonable time of the transfer of servicing for the borrower's mortgage loan. In support of the continuity of contact requirements with respect to the transfer of a borrower's mortgage loan, the Bureau reasoned that the transfer of a borrower's mortgage loan from one servicer to another should not negatively impact the borrower's pursuit of loss mitigation options.

Proposed comment 40(a)(1)–1 would have explained that for purposes of responding to borrower inquiries and assisting the borrower with loss mitigation options, the term ''borrower'' includes a person whom the borrower has authorized to act on behalf of the borrower (a borrower's agent), and may include, for example, a housing counselor or attorney. The comment would have further explained that servicers may undertake reasonable procedures to determine if such person has authority from the borrower to act on the borrower's behalf. Proposed comment 40(a)(1)–1 reflects the Bureau's understanding that some delinquent borrowers may authorize third parties to assist them as they pursue alternatives to foreclosure. Accordingly, the Bureau sought to clarify that a servicer's obligation in proposed § 1024.40 extends to persons authorized to act on behalf of the borrower.

Proposed comment 40(a)(1)–2 would have clarified that for purposes of § 1024.40(a)(1), a reasonable time for a transferee servicer to assign personnel to a borrower is by the end of the 30-day period of the transfer of servicing for the borrower's mortgage loan. Proposed comment 40(a)(1)–2 reflects the Bureau's belief that a transferee servicer may require some time after the transfer of servicing to identify delinquent borrowers who had personnel assigned to them by the transferor servicer. The Bureau believed that 30 days is a reasonable amount of time for a transferee servicer to assign personnel to a borrower whose mortgage loan has been transferred to the servicer through a servicing transfer. The Bureau invited comments on whether a longer time frame is appropriate.

Proposed comment 40(a)(1)–3.i. would have explained that a servicer has discretion to determine the manner by which continuity of contact is implemented and reflected the Bureau's belief that a one-size-fits-all approach to regulating the mortgage servicing industry may not be optimal, and thus servicers should be given flexibility to implement proposed § 1024.40 in the manner best suited to their particular circumstances. Proposed comment 40(a)(1)–3.ii would have explained that § 1024.40(a)(1) requires servicers to assign personnel to borrowers whom servicers are required to notify pursuant to § 1024.39(a). If a borrower whom a servicer is not required to notify pursuant to § 1024.39(a) contacts the servicer to explain that he or she expects to be late in making a particular payment, the comment would have explained that the servicer may assign personnel to the borrower upon its own initiative. Proposed comment 40(a)(1)–4 would have explained that proposed § 1024.40(a)(1) does not permit or require a servicer to take any action inconsistent with applicable bankruptcy law or a court order in a bankruptcy case to avoid any potential conflict between the continuity of contact requirements and the automatic stay. The Bureau, however, invited comment on whether servicers should be required to continue providing delinquent borrowers continuity of contact after borrowers have filed for bankruptcy.

The Bureau proposed § 1024.40(a)(2) to require a servicer to make access to the assigned personnel available via telephone. If a borrower contacted the servicer and did not receive a live response from the assigned personnel, proposed § 1024.40(a)(2) would have required that the borrower be able to record his or her contact information and that the servicer respond to the borrower within a reasonable time. Proposed comment 40(a)(2)–1 would have provided that for purposes of § 1024.40(a)(2), three days (excluding legal public holidays, Saturdays, and Sundays) is a reasonable time to respond. The Bureau intended comment 40(a)(2)–1 to function as a safe harbor because the Bureau believed in most cases, it would be reasonable to expect that borrowers receive a response within the proposed time frame. The Bureau invited comments on whether the Bureau should provide for a longer response time.

As discussed above, consumer groups generally supported the Bureau's proposed continuity of contact requirements, but industry commenters urged the Bureau to make changes in various ways. With respect to proposed § 1024.40(a)(1), industry commenters overwhelmingly opposed the requirement that would have required a servicer to make contact personnel available to any borrower five days after a servicer has orally notified such borrower about the borrower's late payment in accordance with proposed § 1024.39(a). Commenters asserted that tying the assignment of contact staff to the oral notification requirement might require servicers to devote significant resources to assist borrowers who do not require formal loss mitigation assistance because in most cases, borrowers who are delinquent for 30 days or less self-cure. The commenters additionally asserted that the diversion of resources would adversely impact borrowers who actually need loss mitigation assistance by diverting servicer resources unnecessarily. One state credit union association suggested that there might

be implementation challenges because servicers' current systems might not be set up to assign personnel based on a borrower's payment status.

Industry commenters suggested alternative methods of assignment that they asserted would be more effective: (1) Delay assignment until borrowers become at least 45 days delinquent (the range was between 45 and 60 days); (2) permit servicers to rely on their internal policies and procedures to determine the timing of assignment; (3) require servicers to assign contact personnel to borrowers who request loss mitigation assistance, which could be demonstrated by either submitting a loss mitigation application or the first piece of documentation a servicer has requested from a borrower with respect to a loss mitigation application. Industry commenters who suggested the last alternative observed that limiting a servicer's obligation to assign contact personnel would be consistent with the National Mortgage Settlement and thus would make compliance with the Bureau's proposed rule less costly to servicers who have already implemented systems changes to comply with the National Mortgage Settlement.

With respect to comments received on proposed § 1024.40(a)(2), one non-bank servicer expressed concern about whether proposed § 1024.40(a)(2) would have required servicers to track voicemail messages left in the voicemail box of individual staff members and urged the Bureau to change the requirement such that borrowers are transferred to available live representatives or require servicers to call borrowers back within some set amount of time. With respect to proposed comment 40(a)(2)–1, one national non-profit organization urged the Bureau to provide that a servicer may take five days to respond because it saw the three-day response time as a requirement that it could not meet because it is mostly staffed by volunteers. A non-bank servicer requested clarification whether the three-day response time is guidance or a requirement.

Final 1024.40(a)

For reasons discussed above, the Bureau is adopting proposed § 1024.40 as a requirement that servicers maintain a set of policies and procedures reasonably designed to achieve specified objectives. Accordingly, the Bureau is withdrawing § 1024.40(a)(1) and (2) because they are proposed as specific requirements. But, the objectives the Bureau is adopting in § 1024.40(a) largely draw from the specific requirements concerning assignment of personnel in proposed § 1024.40(a), unless otherwise noted below. As adopted, § 1024.40(a) requires a servicer to maintain policies and procedures that are reasonably designed to achieve the following objectives: (1) Assign personnel to a delinquent borrower by the time a servicer provides such borrower with the written notice required in § 1024.39(b), but in any event, not later than the 45th day of a borrower's delinquency; (2) make available to such borrower, via telephone, the assigned personnel to respond to the borrower's inquiries and, as applicable, assist the borrower with available loss mitigation options until the borrower has made two consecutive mortgage payments in accordance with the terms of a permanent loss mitigation agreement without incurring a late charge; and (3) ensure that the servicer can provide a live response to a delinquent borrower who contacts the assigned personnel but does not immediately receive a live response.

After carefully considering industry commenters' concern that tying the assignment of contact personnel to the oral notification requirement in proposed § 1024.39(a) might require servicers to devote significant resources to assist borrowers who do not require formal loss mitigation assistance, the Bureau has decided to delay the timing of the assignment of contact personnel to the 45th day of a borrower's delinquency, unless the servicer provides the written notice required by § 1024.39(b) beforehand. The Bureau believes that this change adequately addresses the concern of industry commenters that the proposal might require servicers to devote significant resources to assist borrowers who do not require formal loss mitigation assistance. To the extent a servicer becomes obligated to assign contact personnel to a borrower before such borrower becomes 45-days delinquent, it would be because the servicer has determined that such borrower should be informed of the availability of loss mitigation options before day 45.

The Bureau does not believe it is appropriate to make assignment and availability of contact personnel contingent on a borrower making a request for loss mitigation assistance. The Bureau believes that servicers have more information about the qualifications for various loss mitigation options than borrowers, and accordingly, the Bureau believes it is necessary to achieve the purposes of RESPA to require servicers to engage a borrower in communication that would facilitate reviewing a borrower for foreclosure avoidance options. The Bureau also disagrees that servicers would be unduly burdened by a continuity of contact provision that does not exactly align with the terms of the National Mortgage Settlement. The Bureau observes that the National Mortgage Settlement requires a servicer to identify the contact personnel to a borrower after a borrower has requested assistance. The Bureau is not requiring that a servicer provide borrowers with identifying information about the contact personnel, just that contact personnel be available to borrowers to whom a servicer has provided loss mitigation information to answer borrower inquiries and assist borrowers with loss mitigation options, as applicable. The Bureau believes the Bureau's requirement is less burdensome than the terms and conditions of the National Mortgage Settlement.

The Bureau has made changes to proposed comment 40(a)(1)–1 in response to general concerns expressed by several industry commenters about communicating with persons other than a borrower with respect to error resolution, information requests, and during the loss mitigation process. Industry commenters asserted that it would be costly to servicers to verify whether such persons are in fact authorized to act on a borrower's behalf. They also expressed concern regarding potential liability for inadvertent release of confidential information and violation of applicable privacy laws.

The Bureau acknowledges that requiring servicers to provide continuity of contact personnel to borrowers' agents is more costly than limiting the requirement to borrowers. The Bureau believes, however, that borrowers who are experiencing difficulty in making their mortgage payments or in dealing with their servicer may turn, for example, to a housing counselor or other knowledgeable persons to assist them in addressing such issues. The Bureau believes that it is necessary to achieve the purposes of RESPA to permit such agents to communicate with the servicer on a borrower's behalf.

Proposed comment 40(a)(1)–1 is adopted as comment 40(a)–1 to clarify that a servicer may undertake reasonable procedures to determine if a person who claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf and that such reasonable policies and procedures may require that a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf.

The Bureau believes that this clarification adequately balances the duty of servicers to communicate with third parties authorized by delinquent borrowers to act on their behalf in pursuing alternatives to foreclosure and the compliance cost and potential liability asserted by industry commenters and described above. Further, the Bureau notes that this comment is similar to commentary appearing in §§ 1024.35, 36, and 39.

In adopting § 1024.40(a), the Bureau has added to comment 40(a)–1 clarification of what the term ''delinquent borrower'' means for purposes of § 1024.40(a). Upon further consideration, the Bureau believes it would be better to state clearly in § 1024.40(a) that the continuity of contact requirements in § 1024.40 only apply to delinquent borrower rather than setting forth a separate section in proposed § 1024.40(c) to the same effect. Accordingly, the Bureau is not adopting proposed § 1024.40(c) and is instead moving the substance of proposed § 1024.40(c), which the Bureau has modified for reasons set forth below, into commentary as part of comment 40(a)–1 to explain the term ''delinquent borrower.''

The Bureau is adopting proposed comment 40(a)(1)–3.i as comment 40(a)–2. Two GSEs and a credit union commenter asked the Bureau to move the clarification in proposed comment 40(a)(1)–3.i that a servicer may assign a team of persons to assist a borrower as required by proposed § 1024.40(a)(1) from commentary to rule text. The Bureau declines because the proposed clarification is an example of how a servicer may exercise discretion to determine the manner by which continuity of contact is implemented. Accordingly, the Bureau believes that it is appropriate that the clarification remains in the commentary.

As adopted, comment 40(a)–2 additionally provides that a servicer may assign single-purpose or multi-purpose personnel. Single-purpose personnel are personnel whose primary responsibility is to respond to a delinquent borrower who meets the assignment criteria described in § 1024.40(a)(1). Multi-purpose personnel can be personnel that do not have a primary responsibility at all, or personnel for whom responding to a borrower who meet the assignment criteria set forth in § 1024.40(a)(1) is not the personnel's primary responsibility. The Bureau added this clarification to address comments by industry commenters expressing concern that some servicers do not have the capacity to dedicate staff members to assisting borrowers with loss mitigation options to the exclusion of other responsibilities. Comment 40(a)–2 further explains that when a borrower who meets the assignment criteria of § 1024.40(a) has filed for bankruptcy, a servicer may assign personnel with specialized knowledge in bankruptcy law to assist such borrowers in response to questions raised by industry commenters about whether the Bureau's continuity of contact requirement would allow servicers to reassign a borrower who has filed for bankruptcy to personnel with specialized knowledge and training in bankruptcy law. Because the Bureau is adopting this clarification in comment 40(a)–2, the Bureau is not adopting proposed comment 40(a)(1)–4, which, as explained above, was proposed to clarify the relationship between proposed § 1024.40 and bankruptcy law to address situations in which servicers transfer the borrower's file to a separate unit of personnel (*i.e.,* personnel who are not part of the servicer's loss mitigation unit), or to outside bankruptcy counsel to comply with bankruptcy law). The Bureau is also not adopting proposed comment 40(a)(1)–3.ii because the final rule no longer ties the assignment of contact personnel to a servicer's provision of the oral notice that would have been required pursuant to proposed § 1024.39(a).

As discussed above, proposed § 1024.40(a)(1) would have required a transferee servicer to assign contact personnel to a borrower if the borrower had been assigned personnel by the transferor servicer, and the assignment had not ended at the time of the borrower's mortgage loan had been transferred. The Bureau became concerned that transferee servicers may try to evade compliance with the obligation to provide continuity of contact by asserting that this obligation is contingent upon whether the borrower has been assigned contact personnel by the transferor servicer. The Bureau believes that preventing a servicer's evasion of its continuity of contact obligation is necessary to achieve the purposes of RESPA. The Bureau believes that finalized § 1024.40(a) makes it clear that a servicer's obligation to maintain policies and procedures reasonably designed to assign contact personnel to certain delinquent borrowers is not contingent upon whether the borrower was assigned such personnel by the borrower's previous servicer.

Proposed 40(b)

The Bureau proposed § 1024.40(b)(1) to require a servicer to establish policies and procedures reasonably designed to ensure that the servicer personnel the servicer makes available to the borrower pursuant to proposed § 1024.40(a) perform certain functions that the Bureau believed would facilitate servicers' review of a borrower for loss mitigation options. The functions would have been as follows: (1) Providing a borrower with accurate information about loss mitigation options offered by the servicer and available to the borrower based on information in the servicer's possession (proposed § 1024.40(b)(1)(i)(A)), actions a borrower must take to be evaluated for loss mitigation options, including what the borrower must do to submit a complete loss mitigation application, as defined in proposed § 1024.41, and if applicable, what the borrower must do to appeal the servicer's denial of the borrower's application (proposed § 1024.40(b)(1)(i)(B)), the status of the borrower's already-submitted loss mitigation application (proposed § 1024.40(b)(1)(i)(C)), the circumstances under which a servicer must make a foreclosure referral (proposed § 1024.40(b)(1)(i)(D)), and loss mitigation deadlines the servicer has established (proposed § 1024.40(b)(1)(i)(E)); (2) accessing a complete record of the borrower's payment history in the servicer's possession, all documents the borrower has submitted to the servicer in connection with the borrower's application for a loss mitigation option offered by the servicer, and if applicable, documents the borrower has submitted to prior servicers in connection with the borrower's application for loss mitigation options offered by those servicers, to the extent that those documents are in the servicer's possession (proposed § 1024.40(b)(1)(ii)(A through (C)); (3) providing the documents in § 1024.40(b)(1)(ii)(B) through (C) to persons authorized to evaluate a borrower for loss mitigation options offered by the servicer if the servicer personnel assigned to the borrower is not authorized to evaluate a borrower for loss mitigation options (proposed § 1024.40(b)(1)(iii)); and (4) within a reasonable time after a borrower request, provide the information to the borrower or inform the borrower of the telephone number and address the servicer has established for borrowers to assert an error pursuant to § 1024.35 or make an information request pursuant to § 1024.36 (proposed § 1024.40(b)(1)(iv)). Proposed comment 40(b)(1)(iv) would have clarified that for purposes of § 1024.40(b)(1)(iv), three days

(excluding legal public holidays, Saturdays, and Sundays) is a reasonable time to provide the information the borrower has requested or inform the borrower of the telephone number and address the servicer has established for borrowers to assert an error pursuant to § 1024.35 or make an information request pursuant to § 1024.36.

Proposed § 1024.40(b)(1) reflected the Bureau's belief that having staff available to help delinquent borrowers is necessary, but not sufficient, to ensure that when a borrower at a significant risk of default reaches out to a servicer for assistance, the borrower is connected to personnel who can address the borrower's inquiries or loss mitigation requests adequately. The staff a servicer makes available to delinquent borrowers must be able to perform functions that are calibrated toward, among other things, facilitating the review of borrowers for foreclosure avoidance options. Further, as discussed in the proposal, § 1024.40 was intended to work together with proposed §§ 1024.39 and 1024.41. For example, proposed § 1024.41 would have required a servicer to notify a borrower if the borrower has submitted an incomplete loss mitigation application. Proposed § 1024.40(b)(1) would have addressed this duty by requiring the personnel assigned to the borrower to inform the borrower about the steps the borrower must take to complete his or her loss mitigation application.

The Bureau additionally proposed § 1024.40(b)(1) based on the recognition that mortgage investors and other regulators have responded to breakdowns in borrower-servicer communication by requiring servicers to adopt staffing standards. The Bureau believed that the functions set forth in proposed § 1024.40(b)(1) would have complemented existing standards. The Bureau did not receive comments in response to proposed § 1024.40(b)(1), with the exception that two national consumer groups questioned whether proposed § 1024.40(b)(1)(ii)(C) would unnecessarily dilute a transferor servicer' responsibility to ensure it transfers all relevant borrower information and a transferee servicer's responsibility to ensure that it take possession of all such information because proposed § 1024.40(b)(1)(ii)(C) would have limited the transferred documents to ones in a transferee servicer's possession. The consumer groups also questioned whether § 1024.40(b)(1)(ii)(C) would have conflicted with proposed § 1024.38(b)(4), which would have required servicers to transfer all of the information and documents relating to a transferred mortgage loan. The Bureau observes that the limitation was proposed because the Bureau did not believe a transferee servicer should be exposed to potentially costly litigation if the lack of access to documents is due to the fault of the transferor servicer. The Bureau observes that several of the proposed objectives with respect to providing information or accessing information would have been limited to circumstances where the information was in the servicer's possession. This proposed limitation was intended to be a safeguard to help servicers manage costs arising from the litigation risk that would have been created by the existence of civil liability for violations of proposed § 1024.40. But because the Bureau has decided to finalize § 1024.40 such that there will be no private liability for violations of the provision, the Bureau is not adopting the safeguard.

Proposed § 1024.40(b)(2) would have provided that a servicer's policies and procedures satisfy the requirements in § 1024.40(b)(1) if servicer personnel do not engage in a pattern or practice of failing to perform the functions set forth in § 1024.40(b)(1) where applicable. Proposed comment 40(b)(2)–1.i would have provided that for purposes of § 1024.40(b)(2), a servicer exhibits a pattern or practice of failing to perform such functions, with respect to a single borrower, if servicer personnel assigned to the borrower fail to perform any of the functions listed in § 1024.40(b)(1) where applicable on multiple occasions, such as, for example, repeatedly providing the borrower with inaccurate information about the status of the loss mitigation application the borrower has submitted. Proposed comment 40(b)(2)–1.ii would have explained that a servicer exhibits a pattern or practice of failing to perform such functions, with respect to a large number of borrowers, if servicer personnel assigned to the borrowers fail to perform any of the functions listed in § 1024.40(b)(1) in similar ways, such as, for example, providing a large number of borrowers with inaccurate information about the status of the loss mitigation applications the borrowers have submitted.

The Bureau recognizes that contact personnel may occasionally make a mistake and fail to perform a function enumerated in proposed § 1024.40(b)(1). Proposed § 1024.40(b)(2) reflects the Bureau's belief that the occasional mistake is not necessarily indicative of servicers not complying with the servicing obligation set forth in proposed § 1024.40(b)(1). Accordingly, just as the Bureau proposed the safe harbor in proposed § 1024.38(a)(2) for servicers for non-systemic violations of § 1024.38 to manage the costs arising from the litigation risk created by the existence of civil liability for violations of § 1024.38, the Bureau proposed a safe harbor in proposed § 1024.40(b)(2) for servicers for non-systemic violations of § 1024.40(b)(1).

Both consumer groups and industry commenters opposed the safe harbor the Bureau proposed in § 1024.40(b)(2). Just as consumer groups urged the Bureau to eliminate the proposed safe harbor in proposed § 1024.38(a)(2) to reduce barriers to successful litigation and to ensure that the rule provides protection for more borrowers, they urged the Bureau to withdraw proposed § 1024.40(b)(2). Just as industry groups urged the Bureau to eliminate the pattern or practice private cause of action under § 1024.38(a)(2) to reduce significant litigation exposure, they urged the Bureau to do the same with respect to proposed § 1024.40(b)(2). Moreover, as is true in the general servicing policies and procedures context, the Bureau is concerned that the safe harbor in proposed § 1024.40(b)(2) would hamper the Bureau and other regulators in exercising supervisory authority and could preclude relief from being secured until there have been widespread or repeated incidents of consumer harm. Further, the safe harbor is no longer necessary because, as discussed above, the Bureau has decided to finalize § 1024.40 such that there will be no private liability for violations of the provision. Accordingly, the Bureau is not adopting § 1024.40(b)(2) and related comments 40(b)(2)–1.i and ii. Instead, the Bureau is only adopting § 1024.40(b)(1) as § 1024.40(b).

New 40(b)

Proposed § 1024.40(b)(1) is largely adopted as § 1024.40(b)(1) through (3). In addition to changes that have been noted above, the Bureau has made technical changes to proposed § 1024.40(b)(1)(i)(B) (redesignated as § 1024.40(b)(1)(ii)) to be consistent with changes to the language of § 1024.41, to clarify that the function of accessing the information set forth in proposed § 1024.40(b)(1)(ii) (redesignated as § 1024.40(b)(2)) means retrieval, and to clarify that the retrieval must be done in a timely manner. The Bureau is also clarifying that ''document'' means ''written information'' for purposes of proposed § 1024.40(b)(1)(ii)(B) (redesignated as § 1024.40(b)(2)(ii)).

Proposed 40(c)

The Bureau proposed § 1024.40(c) to provide that a servicer shall ensure that

the personnel it assigns and makes available to a borrower pursuant to § 1024.40(a) remain assigned and available to the borrower until any of the following occur: (1) the borrower refinances the mortgage loan (*see* proposed § 1024.40(c)(1)); (2) the borrower pays off the mortgage loan (*see* proposed § 1024.40(c)(2)); (3) a reasonable time has passed since (i) the borrower has brought the mortgage loan current by paying all amounts owed in arrears, or (ii) the borrower and the servicer have entered into a permanent loss mitigation agreement in which the borrower keeps the property securing the mortgage loan (*see* proposed § 1024.40(c)(3)(i) through (ii)); (4) title to the borrower's property has been transferred to a new owner through, for example, a deed-in-lieu of foreclosure, a sale of the borrower's property, including, as applicable, a short sale, or a foreclosure sale (*see* proposed § 1024.40(c)(4)); or (5) if applicable, a reasonable time has passed since servicing for the borrower's mortgage loan was transferred to a transferee servicer (*see* proposed § 1024.40(c)(5)). The Bureau observes that proposed § 1024.40(c) clearly indicates that the Bureau intended § 1024.40 to apply to more than just the initial assignment of contact personnel.

The Bureau proposed comment 40(c)(3)–1 to provide that for purposes of § 1024.40(c)(3), a reasonable time has passed when the borrower has made on-time mortgage payments for three consecutive months. The Bureau noted in the 2012 RESPA Servicing Proposal that the ability of a borrower to make on-time mortgage payments for three consecutive months has gained wide acceptance as an indicator of whether a previously-delinquent borrower can succeed in keeping his or her mortgage loan current. For example, under Treasury's HAMP program, a borrower is put in a trial modification period lasting three months. The borrower must have made all trial period payments to qualify for a permanent loan modification.[158] The Bureau sought comment on whether criteria other than a borrower making on-time mortgage payments for three consecutive months should be used to determine what is a ''reasonable time'' for purposes of § 1024.40(c)(3).

A number of industry commenters asserted that three months of tracking a borrower who later becomes current would generally be excessive, particularly if the borrower cures without the aid of loan modification. Several industry commenters urged the Bureau to conform proposed § 1024.40(3) to the requirement in the National Mortgage Settlement, which permits a servicer to end the assignment of a single point of contact to a borrower upon the reinstatement of the loan, which occurs either due to voluntary reinstatement or the processing of a permanent loan modification program. They urged the Bureau to not discount a borrower's completion of a trial modification program, and several commenters urged servicers to count a borrower's trial modification payments toward meeting the proposed on-time payment requirement in § 1024.40(c)(3).

One bank servicer suggested that the Bureau should further clarify proposed § 1024.40(c)(3) by replacing the phrase ''on-time mortgage payment'' with ''when the borrower has made payment for three consecutive months that have not incurred a late fee.'' The servicer expressed the concern that narrowly interpreting ''on-time'' payments as paying as of the due date could unnecessarily extend the duration of the continuity of contact and that the Bureau should take account of any grace period after the payment due date during which a borrower could pay without incurring a late fee.

Proposed comment 40(c)(5)–1 would have provided that for purposes of § 1024.40(c)(5), a reasonable time would have passed 30 days after servicing for the borrower's mortgage loan was transferred to a transferee servicer. As discussed above, the Bureau believed that the transferee servicer may require up to 30 days from the date of transfer of servicing to identify borrowers who had personnel assigned to them by the transferor servicer.

A large bank servicer and a national trade association representing large mortgage financing companies opposed requiring a transferor servicer to continue making continuity of contact personnel available to a borrower whose loan has been transferred because after servicing has been transferred, the transferor servicer would no long have access to any records or documents of the borrower and could no longer reasonably be expected to assist a borrower effectively. The large bank servicer suggested that if the Bureau adopts a rule that requires a transferor service to continue making continuity of contact personnel available after a borrower's loan has been transferred, the Bureau should require the assignment to last no more than 15 days following the transfer. The national trade association suggested that the Bureau should require contact information for the continuity of contact personnel made available by a transferee servicer be disclosed in the servicing transfer letter or provide an exemption for liability for potentially violating § 1024.40(b) as the personnel will be unable to perform many of the functions set forth in proposed § 1024.40(b). One bank servicer recommended that the Bureau provide a safe harbor for situations where a continuity of contact personnel is no longer available due to staffing changes in the normal course of business.

The Bureau has considered the comments the Bureau has received in response to proposed § 1024.40(c) and is making several adjustments. The Bureau has reconsidered the appropriate continuity of contact objectives where a borrower's mortgage loan is made current through voluntary reinstatement. The Bureau believes that the objective should be to maintain continuity of contact until a borrower either brings a mortgage loan current by paying all amount owed in arrears or is able to make at least the first two payments following a permanent modification agreement. In the case of a borrower who brings her mortgage current, the Bureau believes that the likelihood of a near-term re-default is relatively low and thus the servicer should not be required to implement policies and procedures reasonably designed to maintain continuity of contact with such a borrower. On the other hand, The Bureau believes that the risk of a re-default for a borrower who has gone through formal loss mitigation assistance is sufficiently high that the servicer's policies and procedures should be reasonably designed to maintain continuity of contact with such a borrower throughout any trial modification and for a period of time after the borrower enters into a permanent loan modification agreement. The Bureau is adopting § 1024.40(a)(2), which reduces the number of consecutive monthly payments from three to two. This responds to concerns about whether three months of tracking might be excessive. The Bureau has also considered the request to permit a servicer to factor in grace periods when determining whether a payment was an on-time payment and believes that it would be an appropriate change. This change is reflected in final § 1024.40(a)(2).

The Bureau has considered the issue of a transferor servicer's obligation to continue making contact personnel available to a borrower whose loan has been transferred. As discussed above, the Bureau reasoned that it might

[158] Making Home Affordable Program Handbook, v3.4, at 89 (December 15, 2011); *see also* Fannie Mae Single Family Servicing Guide, Ch. 6, § 602 (2012).

reasonably take some time for transferee servicers to identify borrower who had personnel assigned to them by the transferor servicer. The Bureau believes this safeguard is no longer necessary when violations of finalized § 1024.40 no longer expose a servicer to civil liability. Accordingly, the Bureau is not finalizing proposed § 1024.40(c)(5).

As discussed above, one industry commenter suggested that the Bureau should relieve a servicer of its obligation to make continuity of contact personnel available due to staffing changes in the normal course of business. The Bureau disagrees. The Bureau expects that servicers already have existing policies and procedures in place to address the implication of staffing changes to their servicing operations, including the impact on borrower-servicer communications and accordingly, this limitation is unnecessary.

As discussed above, after further consideration, the Bureau believes it would be better to state clearly in § 1024.40(a) that the continuity of contact policy and procedures requirements in § 1024.40 only applies to delinquent borrower rather than setting forth a separate section in proposed § 1024.40(c) to the same effect. Accordingly, the Bureau is not adopting proposed § 1024.40(c) as a separate subsection of § 1024.40 and is instead moving the substance of proposed § 1024.40(c), revised as discussed above, to comment 40(a)–1, which elaborates on the meaning of the term ''delinquent borrower'' for purposes of § 1024.40(a). As adopted, comment 40(a)–1 clarifies that a borrower is no longer a ''delinquent borrower'' (for purposes of § 1024.40(a)) if a borrower has refinanced the mortgage loan, paid off the mortgage loan, brought the mortgage loan current by paying all amounts owed in arrears, or if title to the borrower's property has been transferred to a new owner through, for example, a deed-in-lieu of foreclosure, a sale of the borrower's property, including, as applicable, a short sale, or a foreclosure sale.

Proposed 40(d)

The Bureau proposed § 1024.40(d) to provide that a servicer has not violated § 1024.40 if the servicer's failure to comply with this section is caused by conditions beyond a servicer's control. Proposed comment 40(d)–1 would have explained that ''conditions beyond the servicer's control'' include natural disasters, wars, riots or other major upheaval, delays or failures caused by third parties, such as a borrower's delay or failure to submit any requested information, disruptions in telephone service, computer system malfunctions, and labor disputes, such as strikes. The Bureau intended proposed § 1024.40(d) to limit the liability of servicers to borrowers under RESPA. The Bureau did not believe that failures to comply with the continuity of contact requirements in proposed § 1024.40 caused by conditions beyond a servicer's control should expose a servicer to liability to a borrower under section 6 of RESPA. Even if servicers implement processes that would address staffing failures that had a significant adverse impact on borrowers seeking alternatives to foreclosure, the Bureau believes that such conditions may occasionally occur that could adversely affect a servicer's ability to provide adequate and appropriate staff to assist delinquent borrowers.

One non-bank servicer recommended that the Bureau add to the list of conditions beyond a servicer's control circumstances under which a servicer cannot establish reasonable contact with a borrower or the borrower is not responsive to reasonable attempts to make contact. Another servicer asked the Bureau to provide that major business reorganizations, such as mergers, be added to the list of conditions beyond a servicer's control. In response to the first commenter, the Bureau observes that a servicer's obligation under proposed § 1024.40 would have been to simply make contact personnel available in accordance with § 1024.40(a). The contact personnel would not have been required by § 1024.40 to make multiple attempts to contact a borrower. Making multiple attempts to contact a borrower is also not an objective of § 1024.40 as adopted. In response to the second commenter, the Bureau observes that major business organizations typically require advanced negotiation and planning. Accordingly, the Bureau believes that such transactions should not be added to the list of conditions beyond a servicer's control.

But importantly, the Bureau is withdrawing proposed § 1024.40(d) and related comment 40(d)–1. For reasons discussed above, violations of § 1024.40 will not give rise to civil liability. Accordingly, the Bureau believes that adopting proposed § 1024.40(d) is no longer necessary.

Section 1024.41 Loss mitigation procedures

As discussed in the Bureau's 2012 RESPA Servicing Proposal, and in part II above, there has been widespread concern among mortgage market participants, consumer advocates, and policymakers regarding pervasive problems with servicers' performance of loss mitigation activity in connection with the financial crisis, including lost documents, non-responsive servicers, and unwillingness to work with borrowers to reach agreement on loss mitigation options. In response, servicers, investors, guarantors, and State and Federal regulators have undertaken efforts to adjust servicer loss mitigation and foreclosure practices to address problems relating to evaluation of loss mitigation options. Specifically: (1) Treasury and HUD sponsored the Making Home Affordable program, which established guidelines for Federal government sponsored loss mitigation programs such as HAMP; [159] (2) the Federal Housing Finance Agency (FHFA) directed Fannie Mae and Freddie Mac to align their guidelines for servicing delinquent mortgages they own or guarantee to improve servicing practices; [160] (3) prudential regulators, including the Board and the OCC, undertook enforcement actions against major servicers, resulting in consent orders imposing requirements on servicing practices; [161] (4) the National Mortgage Settlement agreement imposes obligations on five of the largest servicers, including on the conduct of loss mitigation evaluations; [162] and (5) a number of States have adopted, and others continue to propose, regulations relating to mortgage servicing and foreclosure processing, including requiring evaluation for loss mitigation options.[163]

Many of these initiatives imposed a similar set of consumer protective practices on covered servicers with respect to delinquent borrowers. For example, the FHFA servicing alignment initiative, the National Mortgage Settlement, and HAMP all require servicers to review loss mitigation

[159] *www.makinghomeaffordable.gov.*

[160] Press Release, Federal Housing Finance Agency, Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages (Apr. 28, 2011), *http://www.fhfa.gov/webfiles/21190/SAI42811.pdf. See also* Comment letter submitted by Fannie Mae and Freddie Mac.

[161] Press Release, Office of the Comptroller of the Currency, NR 2011–47, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011); Federal Reserve Board Press Release, Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing (April 13, 2011), available at: *http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm.*

[162] *www.nationalmortgagesettlement.com.*

[163] *See, e.g.,* N.Y. Comp. Codes R. & Regs. tit. 3, § 419.1 *et seq.;* 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923.6. *See also* Massachusetts proposed mortgage servicing regulations, *available at http://www.mass.gov/ocabr/docs/dob/209cmr18proposedred.pdf.* (last accessed November 19, 2012).

applications within 30 days.[164] Further, the FHFA servicing alignment initiative and the National Mortgage Settlement require a servicer that receives an application for a loss mitigation option from a borrower before the 120th day of delinquency to postpone the referral of the borrower's mortgage loan account to foreclosure until the borrower has been evaluated for a loss mitigation option.[165]

While these various initiatives are starting to bring standardization to significant portions of the market, none of them to date has established a set of consistent national procedures and expectations regarding loss mitigation procedures. The Financial Stability Oversight Council, observing that the mortgage servicing industry was unprepared and poorly structured to address the rapid increase in defaults and foreclosures, recommended that federal regulators establish national mortgage servicing standards to address structural vulnerability in the mortgage servicing market.[166] Further, the GAO recommended that to the extent federal regulators create national servicing standards, such standards should address servicer foreclosure practices.[167]

In response to these recommendations, the Bureau has developed these final rules to serve as national mortgage servicing standards. The Bureau believes that because so many borrowers are more than 90 days delinquent and in need of consideration for loss mitigation, because borrowers often are not able to choose the servicer of their mortgage loan, and because the manner in which loss mitigation is handled has such potentially significant impacts on both individual consumers and the health of the larger housing market and economy, establishing national mortgage servicing standards is necessary and appropriate to protect borrowers and achieve the consumer protection purposes of RESPA. Such standards establish appropriate expectations for loss mitigation processes for borrowers and for owners or assignees of mortgage loans. Such standards also ensure that borrowers have a full and fair opportunity to receive an evaluation for a loss mitigation option before suffering the harms associated with foreclosure. These standards are appropriate and necessary to achieve the consumer protection purposes of RESPA, including facilitating borrowers' review for loss mitigation options, and to further the goals of the Dodd-Frank Act to ensure a fair, transparent, and competitive market for mortgage servicing.

As stated in the proposal, the Bureau has considered a number of different options for addressing consumer harms relating to loss mitigation. In general, the Federal government has at least three approaches to addressing loss mitigation: (1) Establishing processes to facilitate actions by market participants; (2) mandating outcomes of loss mitigation process (implicitly raising costs to market participants of pursuing foreclosure actions in violation of the mandated outcomes); or (3) providing subsidies to incent the desired outcomes.[168] Only options (1) and (2) were considered by the Bureau in light of resources and other factors. These present a stark choice: Whether to mandate processes that provide consumer protections without mandating specific outcomes or whether to mandate specific outcomes by establishing criteria for when such outcomes are required. For example, a requirement that a servicer review a completed loss mitigation application in a certain time period establishes a process requirement but does not impose upon the servicer a criterion for determining whether to offer a loss mitigation option. In contrast, a requirement that a servicer provide a loan modification when an evaluation of a loss mitigation application indicates that a loan modification may have a positive net present value would impose a substantive criterion. Mandating a methodology or set of assumptions for determining when a modification has a positive net present value would further constrain the investor's discretion in deciding under what circumstances to offer a loss mitigation option.

The 2012 RESPA Servicing Proposal included proposed procedural requirements for servicers to follow in reviewing borrowers for loss mitigation options. Specifically, proposed § 1024.41 provided that servicers that make loss mitigation options available to borrowers in the ordinary course of business must undertake certain duties in connection with the evaluation of borrower applications for loss mitigation options. The proposal was intended to achieve three main goals: First, it was designed to provide protections to borrowers to ensure that, to the extent a servicer offers loss mitigation options, a borrower would receive timely information about how to apply, and that a servicer would evaluate a complete application in a timely manner. Second, it was designed to prohibit a servicer from completing a foreclosure process by proceeding with a foreclosure sale until a borrower and a servicer had terminated discussions regarding loss mitigation options.[169] Third, it was designed to set timelines for loss mitigation evaluation that could be completed without requiring a suspension of the foreclosure sale date in order to avoid strategic use of these procedures to extend foreclosure timelines.

The Bureau intended that the protections that were set forth in

[164] *See e.g.,* National Mortgage Settlement at Appendix A, at A–26; Freddie Mac Single Family Seller/Servicer Guide, Vol. 2 § 64.6(d)(5) (2012); Fannie Mae Single Family Servicing Guide § 205.08 (2012); HAMP Guidelines, Ch. 6 (2011).

[165] *See e.g.,* National Mortgage Settlement at Appendix A, at A–17, available at *http://www.nationalmortgagesettlement.com* (last accessed January 15, 2013).

[166] *See* Financial Stability Oversight Council, 2011 Annual Report (July 22, 2011), available at *http://www.treasury.gov/initiatives/fsoc/Documents/FSOCAR2011.pdf* (last accessed January 15, 2013).

[167] U.S. Government Accountability Office, Mortgage Foreclosures—Documentation Problems Reveal Need for Ongoing Regulatory Oversight (May 2011), available at *http://www.gao.gov/assets/320/317923.pdf* (last accessed January 15, 2013).

[168] *See* Patricia A. McCoy, Barriers to Home Mortgage Modifications During the Financial Crisis, at 4 (May 31, 2012).

[169] Although there is a paucity of reliable data about the prevalence of problems resulting from proceeding with a foreclosure sale while loss mitigation discussions are ongoing, the Federal Reserve identified anecdotal evidence of these problems in 2008. *See* Larry Cordell *et al., The Incentives of Mortgage Servicers: Myths and Realities,* at 9 (Federal Reserve Board, Working Paper No. 2008–46, Sept. 2008). Anecdotal evidence continues to accumulate. *See, e.g., Haskamp, et al.* v. *Federal National Mortgage Assoc., et al.,* No. 11–cv–2248, Plaintiff's Memorandum of Law In Support of Their Motion For Partial Summary Judgment (D. Minn. June 14, 2012); *Stovall* v. *Suntrust Mortgage, Inc.,* No. 10–2836, 2011 U.S. Dist. LEXIS 106137 (D. Md. September 20, 2011); Debra Gruszecki, *REAL ESTATE: Homeowner Protests ''Dual Tracking,''* Press-Enterprise (June 19, 2012), available at: *http://www.pe.com/local-news/local-news-headlines/20120619-real-estate-homeowner-protests-dual-tracking.ece.* Information presented by consumer advocacy groups illustrates that consumers and their advocates continue to be frustrated by the process of dual tracking. For example, the NCLC conducted a survey of consumer attorneys to identify instances of foreclosure sales occurring while loss mitigation discussions were on-going. Per that survey, 80 percent of surveyed consumer attorneys surveyed reported an instance of an attempted foreclosure sale while awaiting a loan modification. National Consumer Law Center & National Association of Consumer Bankruptcy Attorneys, *Servicers Continue to Wrongfully Initiate Foreclosures: All Types of Loans Affected* (Feb. 2012), available at *http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/wrongful-foreclosure-survey-results.pdf.* Further, a survey by the National Housing Resource Center stated that 73 percent of 285 housing counselors surveyed rate servicer performance in complying with dual tracking rules outlined in HAMP guidelines as ''fair'' or ''poor.'' National CAPACD Comment Letter, at 7. These surveys, while certainly not conclusive evidence of the prevalence of dual tracking or compliance with requirements imposed on servicers, indicate that concurrent loss mitigation and foreclosure processes continue to negatively impact borrowers.

proposed § 1024.41 would have been augmented and supplemented by protections in other sections of the 2012 RESPA Servicing Proposal that addressed loss mitigation issues. In proposed § 1024.39, for instance, the Bureau proposed to implement obligations on servicers that would have required servicers to contact borrowers early in the delinquency process and to provide information to borrowers regarding loss mitigation options. In proposed § 1024.40, the Bureau proposed to implement obligations on servicers that would have required servicers, in certain circumstances to provide borrowers with contact personnel to assist them with the process of applying for a loss mitigation option. Such personnel would have been required to have access to, among other things, information regarding loss mitigation options available to the borrower, actions the borrower must take to be evaluated for such loss mitigation options, and the status of any loss mitigation application submitted by the borrower. Further, in proposed § 1024.38, the Bureau proposed to require that servicers implement policies and procedures reasonably designed to achieve the objective of reviewing borrowers for loss mitigation options. Finally, in proposed § 1024.35, the Bureau proposed to permit a borrower to assert an error as a result of a servicer's failure to postpone a scheduled foreclosure sale when a servicer has failed to comply with the requirements for proceeding with a foreclosure sale. The Bureau believed that all of these protections, when implemented together, would have a substantial impact on reducing consumer harm.

The Bureau requested comment on all aspects of the proposal, and, in particular, whether focusing on the provision of procedural rights was the appropriate approach to addressing the consumer harm it had identified. The Bureau sought comment on whether there were additional appropriate measures that could be required to improve loss mitigation outcomes for all parties. The Bureau also sought comment on whether the proposed requirements ensured that consumers' timely and complete applications would receive fair and full consideration and ensured the predictability of outcomes for consumers as well as owners and assignees of mortgage loans. Finally, and as discussed further below, the Bureau sought comment on whether proposed § 1024.41 would have required servicers to undertake practices that conflicted with other Federal regulatory requirements or State law or may have caused servicers to undertake practices that might reduce the availability of loss mitigation options or access to credit.[170]

The Bureau received comments from numerous individual consumers, consumer advocates, as well as some servicers and industry trade associations in support of the Bureau's implementation of loss mitigation procedures. Although many of these commenters indicated specific areas where adjustments to the proposed requirements might be warranted, a number of commenters indicated that the loss mitigation procedures proposed by the Bureau would provide necessary and appropriate tools to assist consumers in receiving evaluations for loss mitigation options. Other commenters disagreed with the Bureau's proposed approach with respect to loss mitigation requirements. Numerous consumer advocacy groups commented that the Bureau's proposed requirements were inadequate to address consumer harm, and that the Bureau should more aggressively regulate loss mitigation activities. Conversely, the majority of industry participants and their trade associations commented that the proposed requirements were burdensome, unnecessary to address consumer harm, and could create an incentive for servicers and owners or assignees of mortgage loans to withdraw current loss mitigation practices.

Consumer advocacy groups primarily commented on three main topics: (1) Mandating specific loss mitigation criteria; (2) addressing consumer harms relating to dual tracking of processes for pursuing foreclosures and evaluating borrowers for loss mitigation; and (3) appropriate timelines for the loss mitigation procedures. These topics are addressed in turn below. In certain circumstances, because the Bureau's approach to loss mitigation is not limited to the loss mitigation procedures set forth in § 1024.41, but involves a coordinated use of tools set forth in different provisions of the mortgage servicing rules (including the error resolution procedures in § 1024.35, the reasonable information management policies and procedures in § 1024.38, the early intervention requirements in § 1024.39, and the continuity of contact requirements in § 1024.40), the Bureau has implemented adjustments to other provisions in light of the comments received with respect to the loss mitigation procedures in § 1024.41 as discussed further below and in the discussions of the other sections as appropriate.

Mandating Specific Loss Mitigation Criteria

Consumer advocates submitted a significant number of comments requesting that the Bureau mandate criteria for loss mitigation programs. For example, twelve individual consumer advocacy groups, as well as two coalitions of consumer advocacy groups, commented that the Bureau's proposal to require loss mitigation procedures did not go far enough to protect consumers from harms relating to the loss mitigation process.

Many consumer advocate commenters set forth a list of goals that should be considered by the Bureau to guide the development of a fuller set of consumer protections relating to the loss mitigation process. These goals included: (1) The Bureau should mandate specific home-saving strategies, with affordable loan modifications ranked first and with an order of priority among types of modifications (*e.g.* temporary or permanent interest rate reduction, extension of term, reduction of principal, *etc.*); (2) the Bureau should require all servicers to offer affordable, net present value positive loan modifications to qualified homeowners facing hardship and should establish rules for determining what constitutes an affordable modification by establishing a maximum or target debt-to-income ratio;[171] (3) the Bureau should require that successful trial loan modifications must be automatically converted to permanent modifications by servicers;[172] and (4) the Bureau should require servicers to notify homeowners regarding the status of evaluations for loss mitigation options in writing. Notably, one commenter stated that the Bureau should require that if a homeowner is ineligible for a loan modification option, a servicer should fully explore non-home retention options, such as cash-for-keys or deed-in-lieu of foreclosure, with the homeowner before a foreclosure is filed.

Mandatory loan modifications were addressed by a number of other

[170] With respect to investor or guarantor requirements that do not constitute Federal or State law, such as requirements of the GSEs, the Bureau observes that such entities may need to review and adjust their requirements in light of the consumer protections set forth in the final rules.

[171] One commenter added that servicers should be required to demonstrate that these models are accurate and do not result in discriminatory impacts.

[172] The commenters indicated that they believed servicers unduly delayed conversion of trial modifications to permanent modifications and stated that homeowners should not bear the financial burden of undue delay in conversion of a trial modification to a permanent modification.

comment submissions. A coalition of 60 consumer advocacy groups further commented that the Bureau should require loan modification programs similar to HAMP using a public and transparent net-present-value test mandated by the Bureau. One consumer advocacy group commented that a servicer should be required to offer loss mitigation when the servicer is a participant in a Federal, State, or private loss mitigation program or process. Further, one commenter stated that servicers should be prohibited from offering loss mitigation options that grossly deviate from standard industry practices. Finally, individual consumers that participated in a discussion of the proposed rules in connection with the Regulation Room project commented that the Bureau should mandate specific loan modification programs and requirements.

On the other hand, three consumer advocacy groups expressly stated that the Bureau should not mandate specific loan modification programs and requirements. Although these groups advocated that the Bureau should mandate that all servicers engage in loss mitigation procedures and ''include loan modifications that reduce payments to an affordable level as one of the loss mitigation options generally available to borrowers,'' these groups recommended against prescribing specific loss mitigation criteria, specified waterfalls or debt-to-income targets, or net present value models or assumptions. Rather, these groups stated that servicers should be given discretion to implement loss mitigation programs. These groups did urge, however, that servicers should be responsible for implementing loss mitigation programs consistent with the requirements imposed by owners or assignees of mortgage loans with respect to the administration of those programs.

In contrast with consumer advocates, industry commenters stated that regulations concerning loss mitigation procedures will limit the availability of loss mitigation options and restrict the availability of credit. Specifically, a community bank, a credit union, and a non-bank mortgage lender commented that mandating outcomes would be a disincentive to offering loss mitigation programs. Further, these commenters indicated that such programs would be costly and burdensome to implement. Further, a number of servicers, their trade associations, and a law firm stated that allowing a private right of action for loss mitigation options would substantially increase costs for lenders, limit the offering of loss mitigation options, and more generally, restrict the availability of credit.

After careful consideration of the comments, the Bureau has decided to refrain at this time from mandating specific loss mitigation programs or outcomes. The Bureau continues to believe that it is necessary and appropriate to achieve the purposes of RESPA to implement required procedures for servicers' evaluations of borrowers for loss mitigation options and that this approach will maintain consumer access to credit.

As discussed in the 2012 RESPA Servicing Proposal, the Bureau is concerned that mandating specific loss mitigation programs or outcomes might adversely affect the housing market and the ability of consumers to access affordable credit. Even in its current constrained state, the mortgage market generates approximately $1.4 trillion dollars in new loans.[173] The mortgage market necessarily depends on a large number of creditors, investors, and guarantors who are willing to accept the credit risk entailed in mortgage lending. The market is constrained today at least in part because, in the wake of the financial crisis, private capital is largely unwilling to accept that risk without a government guarantee.

As with any secured lending, those who take the credit risk on mortgage loans do so in part in reliance on their security interest in the collateral. When a borrower is unable (or unwilling) to repay a loan, it is in the interest of those who own the loans to attempt to mitigate (*i.e.,* reduce) their losses. There are myriad options, ranging from forbearance, to loan modification, to short sales, to foreclosure or deed-in-lieu of foreclosure to achieve that end. Further, there is a wide range of borrower situations regarding which the borrower and owner or assignee of the mortgage loan must make judgments as to the desirable options. And for any given situation with respect to a borrower's willingness and ability to pay, there are a large number of issues to resolve in determining how to structure a particular option, such as a forbearance plan, loan modification, or short sale.

The Bureau understands that different creditors, investors, and guarantors have differing perspectives on how best to achieve loss mitigation based in part on their own individual circumstances and structures and in part on their market judgments and assessments. Community banks and credit unions with loans on portfolio may have a different viewpoint, for example, than large investors who purchased mortgage loans on the secondary market. Even government insurance programs adopt approaches that differ in material respects from each other, as well as from those programs implemented by the GSEs.

The Bureau does not believe that it can develop, at this time, rules that are sufficiently calibrated to protect the interests of all parties involved in the loss mitigation process and is concerned that an attempt to do so may have unintended negative consequences for consumers and the broader market. Loss mitigation programs have evolved significantly since the onset of the financial crisis and the Bureau is concerned that an attempt to mandate specific loss mitigation outcomes risks impeding innovation, that would allow such programs to evolve to the needs of the market. The Bureau further believes that if it were to attempt to impose substantive loss mitigation rules on the market at this time, consumers' access to affordable credit could be adversely affected. Creditors who were otherwise prepared to assume the credit risk on mortgages might be unwilling to do so, or might charge a higher price (interest rate) because they would no longer be able to establish their own criteria for determining when to offer a loss mitigation option in the event of a borrower's default. Investors in the secondary market might likewise reduce their willingness to invest in mortgage securities or pay less for securities at present rates (thereby requiring creditors to charge higher interest rates to maintain the same yield). The cost of servicing might increase substantially to compensate servicers for the burden of complying with prescribed criteria for evaluation of loss mitigation applications. Based upon these considerations, the Bureau declines to prescribe specific loss mitigation criteria at this time.

The Bureau is implementing requirements, however, for servicers to evaluate borrowers for loss mitigation options pursuant to guidelines established by the owner or assignee of a borrower's mortgage loan. In order to effectuate this policy, the Bureau has created certain requirements in § 1024.38, with respect to general servicing policies, procedures, and requirements, and other requirements in connection with the loss mitigation

[173] *See* Laurie Goodman, Outlook and Opportunities U.S. RMBS Market (October 2012) (estimated originations through the first six months of 2012 were approximately $777 billion; originations for CY2011 were approximately $1.308 trillion). *See also* Mortgage Bankers Association, MBA Increases Originations Estimate for 2012 by Almost $200 Billion (May 24, 2012) *http://www.mortgagebankers.org/NewsandMedia/PressCenter/80910.htm.*

procedures in § 1024.41. Pursuant to § 1024.38, servicers are required to maintain policies and procedures to achieve the objective of (1) identifying, with specificity, all loss mitigation options for which borrowers may be eligible pursuant to any requirements established by an owner or assignee of the borrower's mortgage loan and (2) properly evaluating a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Further, in § 1024.41, the Bureau is implementing procedural protections for borrowers with respect to the process of obtaining an evaluation for loss mitigation options, as well as restrictions on the foreclosure process while a borrower is being evaluated for a loss mitigation option. Borrowers have a private right of action to enforce the procedural requirements in § 1024.41, as set forth in § 1024.41(a); borrowers do not, however, have a private right of action under the Bureau's rules to enforce the requirements set forth in § 1024.38 or to enforce the terms of an agreement between a servicer and an owner or assignee of a mortgage loan with respect to the evaluation of borrowers for loss mitigation options. The Bureau believes this framework provides an appropriate mortgage servicing standard; servicers must implement the loss mitigation programs established by owners or assignees of mortgage loans and borrowers are entitled to receive certain protections regarding the process (but not the substance) of those evaluations.

In reaching the conclusion not to impose substantive requirements on loss mitigation programs, such as eligibility criteria, or to mandate the outcomes of loss mitigation processes, the Bureau recognizes that there is abundant evidence that the current system is not producing a level of loan modifications and other foreclosure alternatives that best meets the interests of distressed borrowers, the communities that would be hurt by borrowers' loss of their homes, and owners or assignees of mortgage loans. To the extent that is the result of process failures by servicers—specifically, the lack of infrastructure to handle the flood of delinquent borrowers resulting from the financial crisis—the Bureau believes that it can best contribute to solving that problem through the rules it is adopting which, as previously discussed, will require servicers to establish policies and procedures governing servicer operations, to implement continuity of contact policies and procedures, to engage in early intervention with delinquent borrowers, and to comply with procedures regarding the evaluation of a borrower for loss mitigation options. Together, these requirements are necessary and appropriate to achieve the consumer protection purposes of RESPA.

To the extent the failure of the current system to produce an optimal level of loss mitigation is the result of servicers pursuing their self-interest rather than the interest of their principals (*i.e.* the owners or assignees of the mortgage loans), the Bureau is addressing that issue by requiring servicers to maintain policies and procedures reasonably designed to identify all available loss mitigation options of their principals and properly consider delinquent borrowers for all such options.

The Bureau observes that the vast bulk of delinquent mortgages today are owned or guaranteed by governmental agencies such as FHA or by the GSEs in conservatorship. Those agencies, and the FHFA as conservator for the GSEs, are accountable to the public for meeting their statutory responsibilities to borrowers and taxpayers. The Bureau believes these agencies are best situated to establish loss mitigation programs for their mortgage loans, to determine the extent to which they believe it appropriate to allow individual borrowers to enforce their loss mitigation rules, and to evaluate whether a borrower should be able to obtain judicial review of the decision of a servicer in an individual case to offer a loss mitigation option. If the Bureau were to effectively mandate such review, the Bureau fears that investors and guarantors might dilute the obligations they impose on servicers or the loss mitigation options they make available. Such a result would not serve the interests of consumer or the housing market. Accordingly, the Bureau has determined not to establish substantive criteria for review of loss mitigation programs at this time and not to make investor guidelines with respect to loss mitigation enforceable against servicers by borrowers through RESPA. The Bureau will continue to monitor developments in the market and work with the prudential regulators, as well as other Federal agencies, to assess collectively whether additional rules are necessary and appropriate to improve outcomes for all participants in the mortgage market.

Although the Bureau is not mandating specific loss mitigation criteria and, instead, is adopting a procedural approach, the Bureau is finalizing the loss mitigation procedures as proposed with significant adjustments, as set forth below, that are designed to enhance the effectiveness of the proposed procedures in light of the public comments. Such adjustments include, for example, expanding the scope of the loss mitigation procedures to apply to all servicers, not just servicers that offer loss mitigation options in the ordinary course of business, adjusting the timelines for the loss mitigation procedures, and implementing protections for borrowers from the harms of dual tracking. Although the Bureau believes that substantially all, if not all, servicers offer loss mitigation options, as defined by the Bureau, in the ordinary course of business, the Bureau acknowledges, and agrees with, comments received from consumer advocates that requiring servicers to comply with the loss mitigation requirements notwithstanding their business practices better achieves the consumer protection purposes of RESPA.

As set forth more fully below (and above with respect to § 1024.38), the Bureau is also making adjustments to other sections of the rule to address concerns raised by certain consumer advocate commenters related to loss mitigation. For example, § 1024.38 requires servicers to maintain policies and procedures reasonably designed to implement the loss mitigation program requirements established by owners or assignees of mortgage loans. Such programs may require servicers to consider whether a borrower's material change in financial circumstances warrants further consideration of the availability of loss mitigation options and may require consideration of loss mitigation applications beyond the timelines required by the Bureau. Although the Bureau has determined not to adjust the loss mitigation procedures requirements in § 1024.41 to address such concerns, the Bureau has made adjustments to the requirements for servicers to adopt policies and procedures in § 1024.38, as set forth above, which has the effect of addressing such concerns.

Restricting Dual Tracking

The proposed rule would have required servicers to comply with the loss mitigation procedures by reviewing complete and timely loss mitigation applications before a servicer could proceed with a foreclosure sale. Timely applications included complete loss mitigation applications submitted within a deadline established by a servicer, which could be no earlier than 90 days before a foreclosure sale. By

prohibiting servicers from proceeding to a foreclosure sale while a complete and timely loss mitigation application is pending, the proposed rule would have addressed one of the most direct consumer harms resulting from concurrent evaluation of loss mitigation options and prosecution of foreclosure proceedings.

The comments from consumer advocacy groups regarding dual tracking set forth three distinct themes: (1) Borrowers should have the opportunity to be reviewed for a loss mitigation option before a servicer begins a foreclosure process, (2) borrowers should not receive inconsistent communications relating to, or incur costs for, continuing the foreclosure process when a loss mitigation review is underway, and (3) borrowers should receive the protection of required loss mitigation procedures closer in time to the date of a foreclosure sale than 90 days. The first two of these themes are addressed here and the third is addressed below with respect to timelines.

Consumer advocates submitted a significant number of comments stating that although the Bureau's proposal would address harms resulting from a foreclosure sale, other harms to consumers relating to dual tracking were not addressed by the proposed rule. These included consumer harms resulting from participating in the foreclosure process, including confusion from receiving inconsistent and confusing foreclosure communications, while loss mitigation reviews are on-going. Such harm potentially may lead to failures by borrowers to complete loss mitigation processes that may have more beneficial consequences for borrowers as well as owners or assignees of mortgage loans. Further, borrowers may be negatively impacted because borrowers are responsible for accruing foreclosure costs while an application for a loss mitigation option is under review. These costs burden already struggling borrowers and may impact the evaluation and ultimate outcome for a borrower for a loss mitigation option.

These commenters recommended that the Bureau restrict servicers from pursuing the foreclosure process and evaluating a borrower for loss mitigation options on dual tracks. For example, twelve individual consumer advocacy groups, as well as two coalitions of consumer advocacy groups stated that the Bureau should require servicers to undertake loss mitigation evaluations, including loan modification reviews and offers, prior to beginning the foreclosure process. These commenters further stated that homeowners applying for loss mitigation options after a foreclosure has started should have their foreclosures paused while their files are reviewed, and if needed, appealed, in a timely fashion. Further, three consumer advocacy groups commented that the Bureau should create a defined pre-foreclosure period of 120 days before a borrower can be referred to foreclosure. This period should also have a mandatory review of a borrower before proceeding with foreclosure.

Industry commenters also addressed whether the Bureau should implement protections relating to dual tracking apart from the prohibition on foreclosure sale set forth in the proposal. Outreach with servicers and their trade associations indicated general support for maintaining consistency among any ''dual tracking'' requirements established by the Bureau and the National Mortgage Settlement. A law firm commented that the Bureau's requirements with respect to ''dual tracking'' should model the National Mortgage Settlement. Notably, a community bank and its trade association commented that, as a consequence of the Bureau's regulations on loss mitigation procedures, servicers may try to begin foreclosures as soon as possible after delinquency in order to evade the requirements of the Bureau's loss mitigation procedures and preserve flexibility in handling the foreclosure process.

The Bureau is persuaded by the comments that the potential harm to consumers of commencing a foreclosure proceeding before the consumer has had a reasonable opportunity to submit a loss mitigation application or while a complete loss mitigation application is pending is substantial. The fact that the GSEs and the National Mortgage Settlement both prohibit servicers from commencing foreclosure for a specified period of time to afford a borrower a reasonable opportunity to apply for a loss mitigation option is further persuasive that providing borrowers with the same protection would advance the consumer protection purposes of RESPA and would not present a significant risk of unintended consequences.

Accordingly, in light of the comments, the Bureau has determined to implement restrictions on dual tracking beyond those set forth in the proposal. These restrictions have three main components. First, the Bureau is prohibiting a servicer of a mortgage loan subject to § 1024.41 from making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent. After a borrower is 120 days delinquent, a servicer may make the first notice or filing required for a foreclosure process unless the borrower has submitted a complete loss mitigation application, in which case, the servicer must complete the review and appeal procedures set forth in § 1024.41 before starting the foreclosure process. If a borrower is performing under an agreement on a loss mitigation option, such as a trial modification, the servicer may not commence the foreclosure process.

Second, the Bureau is expanding and clarifying the prohibition on proceeding with a foreclosure sale. If a borrower submits a complete loss mitigation application by an applicable deadline, as discussed below, a servicer must complete the loss mitigation procedures before proceeding to a foreclosure judgment, obtaining an order of sale for the property, or conducting a foreclosure sale. As set forth below, the Bureau has clarified that proceeding to a foreclosure judgment includes filing a dispositive motion, such as a motion for a default judgment, judgment on the pleadings, or summary judgment, which may result in the issuance of a foreclosure judgment. If such a motion is pending when a servicer receives a complete loss mitigation application, the servicer should take reasonable steps to avoid a ruling on such motion until completing the loss mitigation procedures. The Bureau is also finalizing the prohibition on proceeding with a foreclosure sale if a borrower is performing under a trial modification or other agreed upon loss mitigation option.

Third, as set forth below with respect to timelines, the Bureau is implementing procedures applicable to the evaluation of complete loss mitigation applications submitted by borrowers less than 90 days before a foreclosure sale, but 37 days or more before a foreclosure sale. These procedures expand the protections from the harms of dual tracking to borrowers that submit complete loss mitigation applications closer in time to a foreclosure sale. The Bureau received comments from consumer advocates in states with non-judicial foreclosure processes that operate on relatively short timelines indicating that consumers in such states may not benefit from the protections implemented by the Bureau. The Bureau agrees with these comments and is implementing protections on dual tracking that address different timing scenarios. The Bureau believes that such provisions are necessary and appropriate to achieve the consumer

protection purposes of RESPA, including ensuring that consumers in all jurisdictions have an opportunity to submit a complete loss mitigation application and avoid certain of the harms resulting from dual tracking.

The Bureau is not, however, otherwise mandating a pause in foreclosure proceedings if a loss mitigation application is submitted after a foreclosure proceeding has been commenced. Once the foreclosure process is initiated, there are typically timelines for the steps that follow that are established by state law or, in judicial foreclosure jurisdictions, by court rules or orders entered in individual cases. Those timelines and steps vary from state to state and even from case to case. Some of these timelines and steps have been implemented to ensure that consumers receive the benefit of disclosures or processes enacted by state law to assist consumers. So long as a servicer does not proceed with a dispositive motion in a foreclosure action, the Bureau does not believe that the benefits that might accrue to borrowers from mandating a pause in a foreclosure proceeding (which pause may last for up to 88 days under the timelines the Bureau is mandating for resolving loss mitigation applications) are justified by the disruption that might result to state court proceedings from a mandated pause and the risk of a loss mitigation application being submitted strategically to delay or derail the foreclosure process.

The Bureau recognizes that requiring a pause in foreclosures while a complete loss mitigation application is being considered would create incentives for servicers to address such applications expeditiously. The Bureau believes, however, that the best way to address this issue is by mandating strict deadlines for review of a complete loss mitigation application, as the Bureau is doing, and providing for enforcement of those deadlines through private rights of action. The Bureau also recognizes that a pause could reduce costs to borrowers that would otherwise be incurred for the foreclosure process while a loss mitigation application is under review. However, so long as a servicer adheres to the timelines established by the Bureau, the Bureau does not believe that these costs are likely to be substantial.

Appropriate Timelines for the Loss Mitigation Procedures

The proposed rule would have required mortgage servicers to comply with the procedures set forth in proposed § 1024.41 with respect to a complete loss mitigation application that was received by a deadline established by a servicer, which deadline could be no earlier than 90 days before a foreclosure sale. In the proposal, the Bureau stated that a 90-day threshold set an appropriate line because a servicer who received a complete loss mitigation application 90 days before a foreclosure sale would have 30 days to review a borrower's application for a loss mitigation option, would be able to provide the borrower with 14 days to respond to the servicer's offer of a loss mitigation option and/or to file an appeal, would be able to consider any timely appeal during a subsequent 30 day period, and would be able to provide the borrower with an additional 14 days to respond to any offer of a loss mitigation option after an appeal. Thus, with the timeline set forth, a servicer would be able to complete the entire process within 88 days and a 90 day deadline could accommodate completing the process without rescheduling the foreclosure sale. Proposed comment 41(f)–1 would have clarified that where a foreclosure sale had not been scheduled, or where a foreclosure sale could occur less than 90 days after the sale is scheduled pursuant to State law, a servicer should establish a deadline that is no earlier than 90 days before the day that a servicer reasonably anticipates that a foreclosure sale will be scheduled.

Although some servicers and a trade association indicated support for the 90 day maximum deadline, in general, commenters indicated substantial disagreement regarding the appropriate deadlines and framework for structuring timing requirements for reviewing loss mitigation applications. A substantial number of consumer advocacy groups objected to the underlying premise of the deadline requirement. In addition to establishing timeframes prior to a foreclosure referral, as discussed above, consumer advocacy groups stated that borrowers should be permitted to provide complete loss mitigation applications less than 90 days before a foreclosure sale and receive the protection of the procedures required by the Bureau. A housing counselor and three consumer advocacy groups indicated that the deadline should be extended until a maximum of 14 days before a foreclosure sale. Another consumer advocacy group stated that the deadline should be no more than 7 days before a foreclosure sale. These commenters further recommended postponing a foreclosure sale if an application received at least 14 days before a sale is still in the review process by 14 days before a sale to allow time for review and appeals. Further, consumer advocacy groups operating in states with non-judicial foreclosure processes with relatively short timelines stated that borrowers may not be able to benefit from the loss mitigation procedures established by the Bureau within the 90-day deadline set forth in the proposal.

Conversely, banks, credit unions, and non-bank servicers, as well as their trade associations, objected to the proposed 90 day deadline requirement because it would purportedly provide too much time for borrowers to pursue loss mitigation applications. Two credit unions, two large banks, and two non-bank servicers objected to the 90 day deadline on the basis that the rules should encourage borrowers to seek assistance at the earliest possible time while the delinquency may be curable and allow the borrower to retain the home. A non-bank servicer stated that it appreciated the 90 day deadline but indicated that this deadline could be so far after an initial delinquency in certain jurisdictions that it may lead to a borrower submitting an application after so much time has passed that no option could reasonably assist the borrower with curing a delinquency. Further, a non-bank servicer suggested the Bureau implement staged timelines rather than requiring servicers to establish timelines that may be inconsistent with state law.[174]

In light of the comments, the Bureau has reconsidered the proposed approach to timelines for the loss mitigation procedures and has made certain adjustments. The Bureau is persuaded that, however regrettable, some borrowers simply may not be prepared to come to terms with their situations and explore the availability of loss mitigation options until foreclosure is close at hand. The Bureau also is persuaded that it is necessary, and appropriate, to implement protections for consumers that apply for loss mitigation options closer in time to a foreclosure sale than 90 days. At the same time, the Bureau is cognizant that if applications received at the last moment were allowed to unduly delay a foreclosure from proceeding, there is a risk that the application process could be used tactically to stall foreclosure. Given that foreclosure timelines are already very long in many jurisdictions; given that the Bureau is implementing protections to mandate early communication with borrowers

[174] A large bank servicer also commented that in light of the incentives for the borrower, it should not be required to notify a consumer of a deadline so long as the communication with the consumer is not within 90 days of the foreclosure sale.

regarding loss mitigation options; and given that the Bureau is prohibiting servicers from proceeding to foreclosure unless a borrower is more than 120 days delinquent to ensure that borrowers have the opportunity to apply for loss mitigation options early in the delinquency timeline; the Bureau does not believe it is appropriate to permit applications provided shortly before a foreclosure sale to delay the foreclosure.

Accordingly, as set forth below, instead of setting an overall deadline for the loss mitigation procedures, the Bureau is implementing timelines that provide different loss mitigation processes with differing levels of protection at certain stages of the foreclosure process. These requirements are: (1) Pursuant to § 1024.41(b)(2), a servicer must comply with the requirements relating to acknowledgement of a loss mitigation application and notice of additional documents and information required to complete a loss mitigation application for any loss mitigation application received 45 days or more before a foreclosure sale; (2) pursuant to § 1024.41(c)(1), a servicer must evaluate within 30 days any complete loss mitigation application received more than 37 days before a foreclosure sale; (3) pursuant to § 1024.41(e)(1), if a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale, the servicer must provide the borrower at least 14 days to accept or reject an offer of a loss mitigation option; if a servicer receives a complete loss mitigation application less than 90 days before a foreclosure sale but more than 37 days before a foreclosure sale, the servicer must provide the borrower at least 7 days to accept or reject an offer of a loss mitigation option; and (4) pursuant to § 1024.41(h)(1), a servicer must comply with the appeal process for any complete loss mitigation application received 90 days or more before a foreclosure sale. Applying these timelines together yields four timing scenarios depending upon when a borrower submits a complete loss mitigation application.

Scenario 1. If a borrower is less than 120 days delinquent, or if a borrower is more than 120 days delinquent but the servicer has not made the first notice or filing required for a foreclosure process, and a borrower submits a complete loss mitigation application, the servicer (1) must review the complete loss mitigation application within 30 days, (2) must allow the borrower at least 14 days to accept or reject an offer of a loss mitigation option, and (3) must permit the borrower to appeal the denial of a loan modification option pursuant to § 1024.41(h)(1). Further, for all loss mitigation applications received in this timeframe, the servicer must comply with the requirements for acknowledging a loss mitigation application and providing notice of additional information and documents necessary to make an incomplete loss mitigation application complete. The servicer may not make the first notice or filing required for a foreclosure process unless these procedures are completed.

Scenario 2. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing for a foreclosure process, but 90 days or more exist before a foreclosure sale, the servicer (1) must review the complete loss mitigation application within 30 days, (2) must allow the borrower at least 14 days to accept or reject an offer of a loss mitigation option, and (3) must permit the borrower to appeal the denial of a loan modification option pursuant to § 1024.41(h). Further, for all loss mitigation applications received in this timeframe, the servicer must comply with the requirements for acknowledging a loss mitigation application and providing notice of additional information and documents necessary to make an incomplete loss mitigation application complete. The servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, unless these procedures are completed.

Scenario 3. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing for a foreclosure process, and less than 90 days, but more than 37 days, exist before a foreclosure sale, the servicer (1) must review the complete loss mitigation application within 30 days, and (2) must allow the borrower at least 7 days to accept or reject an offer of a loss mitigation option. The servicer is not required to permit the borrower to appeal the denial of a loan modification option pursuant to § 1024.41(h)(1). Further, the servicer must comply with the requirements for acknowledging a loss mitigation application and providing notice of additional information and documents necessary to make an incomplete loss mitigation application complete only if the loss mitigation application was received 45 days or more before a foreclosure sale. The servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, unless these procedures are completed.

Scenario 4. None of the loss mitigation procedures apply to a loss mitigation application, including a complete loss mitigation application, received 37 days or less before a foreclosure sale. Servicers are required, however, pursuant to § 1024.38 to implement policies and procedures reasonably designed to achieve the objective of reviewing borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan. As set forth below, nothing in § 1024.41 excuses a servicer from complying with additional requirements imposed by an owner or assignee of a mortgage loan. For example, the GSEs require servicers to engage in certain procedures to review loss mitigation applications submitted 37 days or less before a foreclosure sale, and servicers may be required by the GSEs to comply with those requirements. The requirement to implement policies and procedures to achieve the objective of reviewing borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan includes timelines established by any such owner or assignee of a mortgage loan.

Other Servicer Loss Mitigation Requirements

As set forth above, the Bureau recognizes that servicers have many layers of requirements with which they must comply. These include requirements imposed by owners or assignees of mortgage loans, as well as requirements imposed by State law or pursuant to settlement agreements and consent orders.

Notably, certain commenters requested clarification regarding the interaction between the proposed rules and certain existing servicing requirements. The GSEs commented that their processes allow reviews of loss mitigation applications closer in time to foreclosure than the 90 day timeline proposed by the Bureau and requested clarification regarding the impact of the proposed deadlines in the loss mitigation procedures and the GSE requirements. A non-bank servicer also requested clarification regarding the interaction of timelines imposed by the Bureau and existing State or local pre-foreclosure mediation requirements that may require a complete loss mitigation application package in advance of the mediation meeting.

In order to reduce burden to servicers and costs to borrowers, the Bureau has sought to maintain consistency among § 1024.41, the National Mortgage Settlement, FHFA's servicing alignment initiative, Federal regulatory agency consent orders, and State law mortgage

servicing statutory requirements. In certain instances, each of these other sources of servicing requirements may be more restrictive or prescriptive than § 1024.41. That is intentional. Section 1024.41 establishes standard consumer protections and provides flexibility for Federal regulatory agency requirements, State law, or investor and guarantor requirements to impose obligations that may be more restrictive on servicers.

Servicers should comply with the most restrictive requirements to which they are subject. For example, § 1024.41 imposes requirements with respect to complete loss mitigation applications received more than 37 days before a foreclosure sale. This is consistent with the National Mortgage Settlement and GSE requirements.[175] Notably, the National Mortgage Settlement and GSE requirements impose obligations to conduct an expedited loss mitigation evaluation for servicers with respect to loss mitigation applications received 37 days or less before a foreclosure sale (although in certain circumstances the servicer is not necessarily required to complete the review before foreclosure). Nothing in § 1024.41 prohibits or impedes a servicer from complying with these requirements and servicers may be required to comply with requirements that are more prescriptive than the regulations implemented by the Bureau. Indeed, as noted, § 1024.38 requires servicers to maintain policies and procedures reasonably designed to achieve the objective of evaluating borrower for loss mitigation options pursuant to requirements established by owners or assignees of mortgage loans. Similarly, if a servicer is required to proactively engage with a borrower to evaluate a borrower for a loss mitigation option prior to engaging in a mandatory mediation or arbitration process, § 1024.41 does not prohibit a servicer from obtaining a loss mitigation application before such process so long as the servicer complies with the procedures set forth in § 1024.41 with respect to such application.

Legal Authority

The Bureau relies on its authority under sections 6(j)(3), 6(k)(1)(C), 6(k)(1)(E) and 19(a) of RESPA to establish final rules setting forth obligations on servicers to comply with the loss mitigation procedures in § 1024.41. These loss mitigation procedures are necessary and appropriate to achieve the consumer protection purposes of RESPA, including by requiring servicers to provide borrowers with timely access to accurate and necessary information regarding an evaluation for a foreclosure avoidance option and to facilitate the evaluation of borrowers for foreclosure avoidance options. Further, the loss mitigation procedures implement, in part, a servicer's obligation to take timely action to correct errors relating to avoiding foreclosure under section 6(k)(1)(C) of RESPA by establishing servicer duties and procedures that must be followed where appropriate to avoid errors with respect to foreclosure.

In addition, the Bureau relies on its authority pursuant to section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial law, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that § 1024.41 is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe the rules to ensure that features of any consumer financial product or service, both initially and over the terms of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

41(a) Enforcement and Limitations

Proposed § 1024.41(a) would have required any servicer that offers loss mitigation options in the ordinary course of business to comply with the requirements of § 1024.41. The purpose of this section was to clarify that the requirements in proposed § 1024.41 are applicable only to those servicers that are engaged in a practice, in the ordinary course of business, of evaluating loss mitigation options for their own portfolios or pursuant to duties owed to investors or guarantors of mortgage loans. Further, proposed comment 41(a)–1 clarified that nothing in proposed § 1024.41 was intended to impose a duty on a servicer to offer loss mitigation options to borrowers generally or to offer or approve any particular borrower for a loss mitigation option. As set forth in the 2012 RESPA Servicing Proposal, the Bureau did not intend to create a private right of action for borrowers to enforce, in private litigation, any requirements that are imposed by owners or assignees of mortgage loans (including investors or guarantors) on servicers to mitigate losses for such parties. Rather, the Bureau intended that borrowers could enforce the loss mitigation procedures against servicers to ensure that servicers complied with the appropriate procedural steps before completing the foreclosure process when a borrower had submitted a complete loss mitigation application.

If a servicer did not evaluate borrowers for loss mitigation options in the ordinary course of business, the servicer would not have been subject to proposed § 1024.41. In proposed comment 41(a)–2, the Bureau set forth examples of practices that, by themselves, would not have been considered indicia that a servicer had opted to offer loss mitigation options in the ordinary course of business. The Bureau notes, however, that the proposed definition of loss mitigation options in § 1024.31, however, was expansive, encompassing not just loan modifications, but also forbearance plans, short sale agreements, and deed-in-lieu of foreclosure programs. The Bureau believes that substantially all, if not all, servicers offer these loss mitigation options in the ordinary course of business.

Consumer advocate commenters stated that the loss mitigation procedures should not be limited to mortgage servicers that offered loss mitigation options in the ordinary course of business. These commenters stated that the recent financial crisis has demonstrated that reviewing borrowers for loss mitigation options has risen to the level of a standard servicer duty that should be expected of all mortgage servicers. Further, industry commenters did not take issue with the concept that engaging in loss mitigation should be considered a standard servicer duty. Rather, comments from industry focused instead on whether prescriptive loss mitigation requirements would adversely affect the manner in which servicers engage in reviews of borrowers for loss mitigation options. Specifically, a number of large banks and their trade associations stated that a private right of action for loss mitigation was a particular concern. These commenters indicated that borrowers should not be entitled to bring an action to enforce loss mitigation requirements set forth by an owner or assignee of a mortgage loan or a voluntary loss mitigation program

[175] *See* National Mortgage Settlement., at Appendix A, at A–19.

(such as HAMP). In addition, the Bureau's outreach and additional analysis raised questions regarding whether the scope of the loss mitigation provisions should be limited to a borrower's principal residence consistent with other governmental initiatives.

Community banks, credit unions, and their trade associations commented that the loss mitigation procedures (and other rulemakings not specifically required by the Dodd-Frank Act) should exempt small servicers. These commenters also argued that the definition of small servicers should be large enough to cover most credit unions and community banks. A trade association for reverse mortgage lenders commented that reverse mortgage servicers should be exempt from the proposed rules. Further, four farm credit system institutions stated that they should be exempt because they are required to comply with distressed borrower regulations promulgated by the Farm Credit Administration in 12 CFR part 617. A nonprofit lender commented that bona-fide nonprofits should be exempt from the mortgage servicing rules.

The Bureau has adjusted § 1024.41(a) in response to the public comments. First, the Bureau has revised § 1024.41(a) to eliminate the limitation on the loss mitigation procedures to only those servicers that offer loss mitigation options in the ordinary course of business. The Bureau has not identified from the comments or outreach any servicers that did not offer loss mitigation options in the ordinary course of business as contemplated by the Bureau and would not have been subject to § 1024.41 as proposed. Moreover, the Bureau believes that owners or assignees of mortgage loans should determine whether they will offer loss mitigation options and, if so, the Bureau does not believe an exemption from complying with the loss mitigation procedures should exist based on separate business practices of a servicer. Further, the Bureau believes that it is preferable that temporary or pilot programs should be addressed through clarifications regarding for which programs, if any, a servicer should evaluate a borrower's application, not by limiting the overall application of the loss mitigation procedures. Accordingly, § 1024.41(a) has been adjusted to require that servicers comply with the requirements of § 1024.41 without consideration of whether a servicer currently offers loss mitigation options in the ordinary course of business.

Second, for the reasons set forth above with respect to § 1024.30, the scope of § 1024.41 has been changed to limit the scope of the loss mitigation procedures to a borrower's principal residence. Third, for the reasons set forth above with respect to § 1024.30, the Bureau has exempted from the loss mitigation procedures requirements (1) small servicers (with the exception of § 1024.41(j)), (2) reverse mortgage transactions, and (3) ''qualified lenders'' that are required to comply with Farm Credit Administration regulations relating to distressed borrowers.

Finally, the Bureau observes that the loss mitigation procedures are issued, among other authorities, pursuant to the Bureau's authority under section 6 of RESPA. Violations of section 6 of RESPA are subject to a private right of action pursuant to section 6(f) of RESPA. Servicers may be liable to borrowers pursuant to section 6(f) of RESPA for failure to comply with the loss mitigation procedures in § 1024.41. The Bureau believes a private right of action for borrowers to enforce the loss mitigation procedures is necessary to ensure that individual borrowers have the necessary tools to ensure they receive the benefit of the loss mitigation procedures in their own individual circumstances. Further, the Bureau believes that the risk of a private right of action will not negatively impact access to, or cost of, credit. The requirements in § 1024.41 include clear procedural requirements and have been calibrated to avoid risks of litigation relating to owner or assignee contractual requirements, as discussed below. Further, the requirements in § 1024.41 are consistent with requirements already implemented by the GSEs, the National Mortgage Settlement, and certain State laws, with respect to certain servicers. Accordingly, the Bureau has revised § 1024.41(a) to reflect the effect of section 6(f) of RESPA with respect to a private right of action.

Although servicers are required to comply with the procedural requirements of § 1024.41, the Bureau has clarified in response to inquiries raised by commenters that servicers are not required by the Bureau's rules to offer any particular loss mitigation option to any particular borrower. Nothing in § 1024.41 should affect whether a borrower is permitted as a matter of contract law to enforce the terms of any contract or agreement between a servicer and an owner or assignee of a mortgage loan. Accordingly, the Bureau finalizes § 1024.41(a) by relocating the substance of proposed comment 41(a)–1 in the text of § 1024.41(a). Section 1024.41(a) provides that nothing in § 1024.41 imposes a duty on a servicer to offer any borrower any particular loss mitigation option. Further, § 1024.41(a) states nothing in § 1024.41 should be construed to permit a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or provision of, any loss mitigation option.

41(b) Loss Mitigation Application

Proposed § 1024.41(b) defined the term complete loss mitigation application and set forth requirements for servicers with regard to both complete and incomplete loss mitigation applications. Specifically, proposed § 1024.41(b)(1) stated that a complete loss mitigation application means a borrower's submission requesting evaluation for a loss mitigation option for which a servicer has received all the information the servicer regularly obtains and considers in evaluating a loss mitigation application by the deadline established by the servicer. Proposed § 1024.41(b)(2) would have required a servicer that receives an incomplete loss mitigation application to exercise reasonable diligence in obtaining information from a borrower to make the application complete. Further, proposed § 1024.41(b)(2) would have required a servicer that receives an incomplete loss mitigation application earlier than 5 days (excluding legal public holidays, Saturdays, and Sundays) before the deadline established by the servicer to notify the borrower that the application was incomplete, the documents and information necessary to make the application complete, and the date by which the borrower must submit such documents. The servicer would have been required to provide the notice within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving an incomplete loss mitigation application.

The Bureau received numerous comments regarding these requirements. First, the Bureau received comments regarding the definition of a loss mitigation application and a complete loss mitigation application. A large bank servicer requested clarification regarding prequalification processes, including whether oral communications with borrowers should be considered a loss mitigation application. A non-bank servicer commented that defining a complete loss mitigation application as requiring all the information the servicer ''regularly obtains'' is both ambiguous and unduly limiting with respect to evaluations of borrowers in

substantially different circumstances or subject to substantially different investor requirements. The commenter suggested instead that the Bureau define a complete loss mitigation application as a borrower's submission requesting evaluation for a loss mitigation option for which a servicer has received all the information the servicer obtains and considers in evaluating a loss mitigation application for a particular loan type, investor, or other group of loans, as deemed appropriate by the servicer.

Second, the Bureau received comments regarding servicer obligations upon receipt of a loss mitigation application. Specifically, four consumer advocacy groups stated that servicers should be required to review a loss mitigation application for completeness promptly upon receipt. Conversely, a trade association commented that five days is too short a time to evaluate a loss mitigation application, determine that it is incomplete, determine what additional documentation is needed, and generate a notice to the borrower. A financial industry trade association requested that the Bureau provide guidance in the form of examples of ''reasonable diligence'' to obtain information from borrowers. The commenter suggested that one example be that the servicer sends a letter or electronic communication to the borrower with a list of what information is needed and how the borrower can submit that information.

Third, a non-bank servicer commented that the Bureau should create standard loss mitigation applications so that industry may align around similar loss mitigation strategies. Finally, a coalition of 60 consumer advocacy groups commented that the Bureau should mandate that servicers provide borrowers that submit incomplete loss mitigation applications a reasonable amount of time to complete the applications.

The Bureau has adjusted § 1024.41(b) in response to the public comments. First, the Bureau agrees with commenters that further clarification regarding the definitions of the term loss mitigation application and complete loss mitigation application is appropriate. Section 1024.31 defines a loss mitigation application to mean an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option. This definition is intended to distinguish between inquiries regarding the availability of loss mitigation options and an actual request for an evaluation for a loss mitigation option. The Bureau intends the loss mitigation procedures to apply when servicers receive loss mitigation applications during oral communications with borrowers, including communications between the borrower and any contact personnel assigned to the borrower's mortgage loan account pursuant to § 1024.40.

The definition of a complete loss mitigation application (and, consequently, an incomplete loss mitigation application) has been designed similarly to the complete and incomplete application concepts underlying Regulation B. *See* 12 CFR 1002.2(f), 1002.9(c). Thus, at a point in a conversation between a borrower and a mortgage servicer, if the borrower requests an evaluation for a loss mitigation option and provides information to the servicer that will be used in the evaluation of a loss mitigation application, the borrower has made a loss mitigation application, and the servicer, pursuant to § 1024.41(b)(2)(i)(A), must review the application promptly to determine whether it is complete or incomplete.

If a loss mitigation application is complete and has been submitted by an applicable deadline, the servicer must evaluate the loss mitigation application pursuant to the requirements in § 1024.41. Under § 1024.41(b)(1), a complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. The Bureau has removed the requirement that a loss mitigation application must include all the information the servicer regularly obtains and considers in evaluating loss mitigation applications. This change is intended to further the goal of providing servicers flexibility to determine the information required for any individual mortgage loan borrower's application for a loss mitigation option and require servicers to consider an application complete notwithstanding that the borrower has not submitted certain information that the servicer may regularly require but is irrelevant with respect to a particular borrower. Thus, under § 1024.41(b)(1), a loss mitigation application is complete when a servicer receives all information that a servicer requires from a borrower.

Section 1024.41(b)(1) requires a servicer to exercise reasonable diligence in obtaining information to complete a loss mitigation application and to evaluate a complete loss mitigation application. Accordingly, a servicer is required to exercise reasonable diligence to follow up with borrowers to obtain any information the borrower has not submitted that is necessary to make the application complete and to ensure that the servicer timely receives any necessary third-party information, such as an automated valuation or consumer report. Contrary to requests from commenters, the Bureau declines to implement commentary that providing the notice required by § 1024.41(b)(2) constitutes reasonable diligence for purposes of § 1024.41(b)(1). Rather, reasonable diligence is based on the circumstances, including the circumstances of any continuing discussions between a borrower and the contact personnel assigned pursuant to § 1024.40. Such contact personnel should have information regarding the status of a borrower's loss mitigation application and should work with borrowers to make any such loss mitigation application complete. The Bureau has added commentary to clarify this requirement as set forth below.

The Bureau has added commentary to § 1024.41(b) to clarify the meaning of a complete loss mitigation application. The Bureau has added comment 41(b)(1)–1 to clarify that a servicer, consistent with the requirements of the investor or assignee with respect to a particular mortgage, has flexibility to establish application requirements for a loss mitigation option offered by an owner or assignee and to decide the type and amount of information it will require from borrowers applying for loss mitigation options. The Bureau agrees with the comments that servicers may require different application information for loss mitigation programs undertaken for different owners or assignees of mortgage loans. Different owners or assignees may establish widely varying criteria and requirements for loss mitigation evaluations, and servicers may require different forms and types of information to effectuate such programs. The Bureau believes the requirement that a complete loss mitigation application contain information required by servicers provides appropriate flexibility to servicers to determine application requirements consistent with the variety of borrower circumstances or owner or assignee requirements that servicers must evaluate and to ensure that individual borrowers are not obliged to provide information or documents that are unnecessary and inappropriate for a loss mitigation evaluation.

The Bureau has added comments 41(b)(1)–2 and 41(b)(1)–3 in response to comments requesting clarity regarding prequalification programs and other feedback seeking clarification regarding informal communications between

servicers and borrowers. As set forth above, the Bureau received a comment from a large bank servicer requesting clarification regarding prequalification programs. Further, in outreach, another large bank servicer requested clarification regarding whether the Bureau's regulations, and specifically, the error resolution and the loss mitigation procedures represented a policy of regulation of informal communication.

Although the Bureau has withdrawn the proposed requirements regarding oral error resolution and information request process with respect to §§ 1024.35–1024.36, the Bureau believes that the loss mitigation procedures should apply when a borrower orally requests evaluation for a loss mitigation option. One of the principal goals of the early intervention and continuity of contact requirements of the rule is to establish oral communications between servicers and borrowers; it would be inconsistent with that purpose to ignore these communications in determining whether a borrower has requested consideration for a loss mitigation option. Further, one of the purposes of the loss mitigation procedures is to provide accurate information to borrowers and to facilitate the evaluation of foreclosure avoidance options by creating uniform evaluation processes and ensuring that a borrower obtains an evaluation for all loss mitigation options available to the borrower. That purpose may be circumvented if the loss mitigation requirements focused only on written communications, and a servicer could steer a borrower into a specific loss mitigation option through oral communications. Consistent with the requirements set forth in Regulation B regarding applications for credit, the Bureau believes it is necessary and appropriate to achieve the purposes of RESPA to implement requirements on servicers to treat oral communications that have sufficiently passed the point of inquiries as loss mitigation applications subject to the loss mitigation procedures.

The Bureau has added comment 41(b)(1)–2 to clarify when an inquiry or prequalification request becomes an application. The Bureau recognizes there is substantial ambiguity in interpersonal communications but believes that loss mitigation applications should be considered expansively. For example, if a borrower indicates that the borrower would like to apply for a loss mitigation option and provides any information the servicer would evaluate in connection with a loss mitigation application, a borrower has submitted a loss mitigation application. Because a servicer must exercise reasonable diligence in making a loss mitigation application complete, the Bureau believes appropriate communication with a borrower that expresses an interest in a loss mitigation option is to clarify the borrower's intention regarding the submission and to obtain information from the borrower to make a loss mitigation application complete.

Not all communications regarding loss mitigation options will constitute loss mitigation applications. Accordingly, the Bureau has added comment 41(b)(1)–3 to illustrate circumstances where oral communications will not constitute a loss mitigation application. Comment 41(b)(1)–3.i states that a borrower calls to ask about loss mitigation options and servicer personnel explain the loss mitigation options available to the borrower and the criteria for determining the borrower's eligibility for any such loss mitigation option. In this example, only an inquiry has taken place. The borrower has not submitted information that would be evaluated in connection with a loss mitigation option. Comment 41(b)(1)–3.ii states that a borrower calls to ask about the process for applying for a loss mitigation option but the borrower does not provide any information that a servicer would consider for evaluating a loss mitigation application. A servicer that provides information regarding the process for applying for a loss mitigation application has not taken a loss mitigation application in this circumstance.

The Bureau has added comment 41(b)(1)–4 to indicate how a servicer should comply with its requirement to undertake reasonable diligence to obtain the information necessary to make an incomplete loss mitigation application complete. For example, a servicer must request information necessary to make a loss mitigation application complete promptly after receiving the loss mitigation application. Comment 41(b)(1)–4.i provides that reasonable diligence requires contacting an applicant promptly to obtain information missing from a loss mitigation application, like an address or telephone number to verify employment. This obligation exists notwithstanding a servicer's obligation to provide a notice pursuant to § 1024.41(b)(2)(i)(B). Further, comment 41(b)(1)–4.ii provides that reasonable diligence also includes reviewing documents that may have been included in connection with a servicing transfer to determine if a borrower previously submitted information or documents to a transferor servicer that may complete a loss mitigation application.

The Bureau has added comment 41(b)(1)–5 regarding circumstances where a servicer requires information that is not in the borrower's control. A loss mitigation application is complete when a borrower provides all information required from the borrower notwithstanding that additional information may be required by a servicer that is not in the control of a borrower. For example, if a servicer requires a consumer report for a loss mitigation evaluation, a loss mitigation application is considered complete if a borrower has submitted all information required from the borrower without regard to whether a servicer has obtained a consumer report that a servicer has requested from a consumer reporting agency.

The Bureau has also adjusted the requirements in § 1024.41(b)(2) with respect to a servicer's obligation upon receipt of a loss mitigation application. The Bureau agrees with the comments it received that a servicer should be required to promptly evaluate a loss mitigation application to determine whether the application is complete or incomplete. Accordingly, § 1024.41(b)(2)(i)(A) requires a servicer that receives a loss mitigation application to determine promptly upon receipt whether such application is complete or incomplete. Further, under § 1024.41(b)(2)(i)(B), a servicer must notify a borrower in 5 days (excluding legal public holidays, Saturdays, and Sundays) regarding whether the servicer has determined an application is complete or incomplete.

Proposed § 1024.41(b)(2) would have required a servicer that receives a loss mitigation application to provide a notice to a borrower only in the event a loss mitigation application is incomplete. The Bureau recognizes, however, that a borrower that submits a complete loss mitigation application may not realize that such application has been considered complete and that an evaluation for a loss mitigation application is ongoing. Accordingly, § 1024.41(b)(2)(i)(B) requires providing a notice to a borrower regardless of whether the application is complete or incomplete.

Section 1024.41(b)(2)(i)(B) further requires a servicer that determines a loss mitigation application is incomplete to notify the borrower of the additional documents and information the borrower must submit to make the loss mitigation application complete and the date by which the borrower must submit the additional documents and

information to be reviewed. The notice to the borrower must also include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options. The Bureau has added this statement to the notice in connection with withdrawing proposed § 1024.41(j), discussed below, with respect to providing a loss mitigation application to servicers of other mortgage loan liens. Further, because of the added content of the notice and the requirements with respect to oral communications constituting loss mitigation applications, the Bureau has determined to withdraw the proposal that the notice required pursuant to § 1024.41(b)(2)(i)(B) could be provided orally. Rather, the Bureau has determined the notice must be provided in writing.

Finally, the Bureau finds that 5 days (excluding legal public holidays, Saturdays, and Sundays) is a reasonable amount of time for a servicer to comply with the requirements for an incomplete loss mitigation application. Fannie Mae and Freddie Mac guidelines, as well as the National Mortgage Settlement, require servicers to provide a substantially similar but, in some cases, more prescriptive, notice within 5 business days of receipt of an incomplete loss mitigation application.[176]

The Bureau has added § 1024.41(b)(2)(ii) to clarify how a servicer communicates to a borrower the deadline by which the borrower should submit a complete loss mitigation application. A servicer must state to the borrower that the borrower should submit documents needed to complete the application by the earliest remaining date of four potential options. The rule provides that a servicer must disclose the date a borrower should complete a loss mitigation application, rather than the date a borrower must complete a loss mitigation application, because the effect of the various timelines is that a borrower may miss the deadline communicated by the servicer but still be able to submit a complete loss mitigation application in the future (and thus a requirement that a borrower must complete an application by an earlier deadline may be inaccurate). However, a borrower should complete the application by the applicable deadline in order to incur the lowest application burden and to gain the benefit of the most consumer protections for the loss mitigation application. Further, the Bureau agrees with comments received from a number of servicers and their trade associations that it is appropriate to encourage earlier submission of loss mitigation applications by borrowers.

A servicer must state that the borrower should provide the documents and information by the earliest remaining date of: (a) The date by which any document or information already submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation program available to the borrower; (b) the date that is the 120th day of the borrower's delinquency; (c) the date that is 90 days before a foreclosure sale; or (d) the date that is 38 days before a foreclosure sale. Dates in (b), (c), and (d) are designed to match the various scenarios set forth above with respect to the timing of the loss mitigation procedures. The date in (a) is meant to incorporate any internal servicer policy to ensure that borrowers do not submit documents beyond the date when documents and information previously provided are considered stale or invalid, which would frustrate the process of obtaining a complete loss mitigation application.

41(c) Evaluation of Loss Mitigation Applications

Proposed § 1024.41(c) would have required that, within 30 days of receiving a complete loss mitigation application, a servicer must evaluate the borrower for all loss mitigation options available to the borrower and provide the borrower with a written notice stating the servicer's determination of whether it will offer the borrower a loss mitigation option. In the proposal, the Bureau stated that it was appropriate to require servicers to evaluate complete loss mitigation applications within 30 days because review of a loss mitigation application in 30 days is an industry standard, as discussed above.

The Bureau further stated that it is appropriate to require a servicer to evaluate a borrower for all loss mitigation options available to the borrower rather than requiring borrowers to select options for which the borrower may be evaluated. A servicer is in a better position than a borrower to determine the loss mitigation programs for which a borrower may qualify. Requiring that a borrower select a loss mitigation option for which the borrower may be considered, or only evaluating a borrower for a few loss mitigation options, may cause a borrower to accept or reject an option without seeking evaluation for another option. This may lead to less effective programs, disparate outcomes for similarly situated borrowers, and longer timelines for effectuating loss mitigation options. Instead, the Bureau has proposed that a servicer evaluate a borrower for all loss mitigation programs available to the borrower. The Bureau believes that this approach will ensure that all borrowers receive fair evaluations for all options available to them and will be able to select options appropriate for their circumstances. In sum, owners or assignees of mortgage loans (including investors, guarantors, and insurers that establish criteria governing loss mitigation programs) retain the ability to manage loss mitigation programs to ensure that borrower eligibility and program administration is consistent with their requirements, while borrowers will be able to understand all potential options that may be available.

Consumer advocate commenters supported the proposed requirement that a servicer evaluate a borrower for all loss mitigation options available to the borrower within 30 days. For example, one such commenter stated that the rule as proposed would add more transparency in the loss mitigation process, would enable borrowers to make a more informed decision on their loss mitigation options, and would actually reduce paperwork burdens on borrowers by eliminating the necessity of a borrower having to send duplicate and additional paperwork each time a borrower requested consideration for a different loss mitigation option.

Conversely, industry commenters, including numerous large banks, credit unions, community banks, non-bank servicers, and their trade associations, generally opposed the requirement that a servicer review a borrower for all loss mitigation options available to the borrower within 30 days. These commenters generally believed that servicers should be permitted to follow investor waterfalls for foreclosure prevention options. These commenters stated that the volume of documents borrowers may be required to submit to effectuate a review of all loss mitigation options may be substantial. Further, industry commenters stated that the rule as proposed would require overly complicated and unclear communications with customers and those customers should be entitled to a communication only about the option for which they specifically applied.

Commenters requested that the Bureau permit servicers to allow borrowers to choose between home retention and non-home retention

[176] *See United States of America* v. *Bank of America Corp.,* at Appendix A, at A–26, *http://www.nationalmortgagesettlement.com*; Freddie Mac Single Family Seller/Servicer Guide, Vol. 2 § 64.6(d)(4) (2012); Fannie Mae Single Family Servicing Guide § 205.07 (2012).

options for evaluations. For example, a Federal agency stated that servicers should be able to separate borrowers for evaluation purposes based upon whether a hardship is temporary or permanent and, accordingly, whether a home retention or non-home retention option is appropriate. A law firm commented that servicers should be able to apply different evaluations for borrowers that indicate a preference for a home retention or non-home retention option. A small credit union and three community bank commenters stated that loss mitigation should be a flexible process and prescriptive requirements that servicers review for all options may reduce optionality in favor of a ''one size fits all'' process. Further, a credit union trade association stated that requiring credit unions to review for all loss mitigation options would be overly burdensome. One trade association requested that the requirement that a servicer be required to review for all loss mitigation options should be withdrawn because it is not required by the Dodd-Frank Act and because providing a notice of all options will result in appeals from borrowers seeking more attractive workout options.[177] Finally, a large bank servicer and a Federal agency requested clarification that a servicer is not required to provide borrowers with information about modifications that are not available to the borrower.

For the reasons discussed below, the Bureau is adopting § 1024.41(c) as proposed with minor modifications. Further, the Bureau is adopting the commentary to § 1024.41(c) with minor modifications. The requirements of proposed § 1024.41(c) are located within § 1024.41(c)(1). The Bureau has also added § 1024.41(c)(2) to implement requirements for offering loss mitigation options to borrowers that have not completed loss mitigation applications, which are discussed below.

Eligibility Criteria

The Bureau agrees with commenters that owners and assignees of mortgage loans should have latitude to establish appropriate loss mitigation programs and the eligibility criteria for such programs. For example, if a servicer services mortgage loans for itself and for the GSEs, a servicer is only required to review a borrower whose mortgage loan is guaranteed by the GSEs for programs approved by the GSEs, pursuant to criteria established by the GSEs. The servicer is not required to review the GSE borrower for loss mitigation options the servicer implements for mortgage loans owned by the servicer or another investor, because such loss mitigation options are not available to the borrower and any such evaluation is unnecessary and futile. Further, the applicable owner or assignee has latitude to set forth any evaluation criteria the owner or assignee deems appropriate. If a loss mitigation option is only available for military servicemembers, a servicer has conducted a proper evaluation if it determines that the borrower is not a servicemember and, therefore, does not meet the eligibility criteria for the program. Similarly, to the extent eligibility criteria for pilot programs, temporary programs, or programs that are limited by the number of participating borrowers, would exclude a borrower from eligibility, a servicer is not obligated to evaluate the borrower for any such loss mitigation option as if such eligibility criteria did not exist. The owner or assignee of a mortgage loan has the freedom to establish or authorize any programs it deems appropriate and to establish or authorize the eligibility criteria for such programs that the owner or assignee deems appropriate; a servicer is only obligated to provide the borrower a notice stating the results of the servicer's review of the borrower's complete loss mitigation application for the programs established or authorized by the owner or assignee of a mortgage loan. To this end, the Bureau has clarified in § 1024.41(c)(1) that a servicer is required to evaluate a borrower for all loss mitigation options available to the borrower.

Use of a ''waterfall'' as an eligibility criterion. The Bureau believes the requirements in § 1024.41(c)(1) to evaluate a loss mitigation application for all loss mitigation options available to the borrower is not inconsistent with a determination by an owner or assignee of a mortgage loan to evaluate a borrower for loss mitigation options by using a ''waterfall'' method. A waterfall is simply an evaluation rule. For example, an owner or assignee may provide six loss mitigation programs for which borrowers should be evaluated. The owner or assignee may further provide that the programs should be evaluated in order from one through six and that if a borrower is offered a program evaluated higher in the order, the borrower will be denied for all other programs lower in the order. Thus, in this example, if a borrower were offered program two, the borrower would necessarily be denied for programs three through six as a consequence of the owner's or assignee's requirements. Nothing in the loss mitigation procedures dictates a result different than that obtained using a waterfall.

Evaluation for all loss mitigation options. The requirement that a servicer evaluate a borrower for all loss mitigation options available to the borrower, in combination with the notice requirements of § 1024.41(d)(1), is intended to enable a borrower (1) to understand the loss mitigation options for which the servicer has determined the borrower is eligible, (2) to understand the results of the servicer's evaluation of the borrower for any loan modification option, and (3) for any loan modification option, to obtain the reasons for the borrower's denial for a loan modification option. The impact of the requirement that a borrower receive an evaluation for all loss mitigation options available to the borrower is that the borrower may, by submitting a single application, receive a complete review and either obtain a loss mitigation option that a borrower may or may not have known was available or, pursuant to § 1024.41(d)(1), understand the reasons why the borrower is not eligible for a loan modification option. The Bureau does not believe that the requirements in § 1024.41(c)(1) will impair an investor's or guarantor's ability to implement or manage loss mitigation programs.

The Bureau also does not believe that the requirement that a servicer evaluate a borrower for all loss mitigation options available to the borrower will impose onerous application burdens on a borrower, require a servicer to provide confusing or unhelpful communications to borrowers, or frustrate borrowers that, in theory, may only wish to obtain an evaluation for a specific type of loss mitigation option. Loss mitigation options generally fall into two categories, those involving home retention (most notably loan modifications) and non-home retention options. Insofar as commenters are suggesting that different retention options carry with them different application requirements and that servicers should be free to consider borrowers sequentially for different options through separate application processes, the Bureau disagrees. With respect to home retention options, outreach with consumer advocates and

[177] Notably, a large bank servicer stated that the 30 day requirement should be waived if a servicer does not have delegated authority to approve loss mitigation options. The commenter's suggestion is contrary to the purposes of the loss mitigation procedures and the general servicing policies, procedures, and requirements (which require a servicer to establish policies and procedures for identifying with specificity the loss mitigation options that are available to borrowers and evaluating borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan).

industry participants has not indicated that there are significant differences in the information required for consideration for differing retention options offered by a single investor or assignee such that requiring consideration for all of these options at once will add burden to the consumer or servicer. Importantly, the National Mortgage Settlement states that ''[u]pon timely receipt of a complete loan modification application, Servicer shall evaluate borrowers for all available loan modification options for which they are eligible * * *.''[178]

Although it is true, as a large bank commenter stated, that the Bureau's requirements apply to all loss mitigation options and not just loan modification options, the Bureau does not believe that this additional requirement will add significant burden to consumers or servicers. The Bureau understands from outreach with servicers that most investors or guarantors do not permit a borrower to be evaluated for a non-home retention option (i.e., to walk away from a mortgage) unless a home retention option is not viable. Thus, in all events borrowers will be required to submit the financial and other information required for consideration of retention options and servicers will be required to obtain additional information about the borrower (such as a consumer report) and the property (such as an automated valuation). The Bureau is not persuaded that significant additional burdens are required to be able to consider a borrower for non-home retention options if the borrower is found not to be eligible for home retention options.

The Bureau understands that industry commenters and trade associations are concerned that evaluation for non-home retention options may cause servicers to incur additional work and cost, including by obtaining a title search or an appraisal. The Bureau has added comment 41(c)(1)–3 to clarify that an offer of a non-home retention option may be conditional upon receipt of further information not in the borrower's possession and necessary to establish the parameters of a servicer's offer. For example, a servicer complies with the requirement for evaluating the borrower for a short sale option if the servicer offers the borrower the opportunity to enter into a listing or marketing period agreement but indicates that specifics of an acceptable short sale transaction may be subject to further information obtained from an appraisal or title search.

The Bureau believes that significant consumer benefits will result from requiring that consumers be considered for all loss mitigation options in a single process. The Bureau understands that borrowers may incur more significant burdens in the current market as evaluations occur sequentially over time and borrower documents and information must be continuously updated to make such documents and information current. The requirements of § 1024.41(c)(1) will eliminate the need for borrowers to submit multiple applications for different loss mitigation options and will provide for more efficient compliance by servicers with the requirements of the rule. In addition, as set forth below with respect to § 1024.41(d), the Bureau believes providing information to borrowers on the result of their review for available loss mitigation options will assist consumers and is unlikely to create confusion.

Further, the Bureau believes that a process that imposes the obligation on the borrower to identify the appropriate loss mitigation option is inappropriate. The selection of a loss mitigation option is complex and requires an understanding of the potential eligibility of a borrower when compared against the complex rule systems applied to evaluate such options. The differences among loss mitigation programs befuddle industry experts, much less borrowers attempting to evaluate such options while under the fear of foreclosure. The Bureau simply does not believe that permitting servicers to steer borrowers to apply for particular loss mitigation options, when the servicer has a far superior capacity to make the relevant determination, reasonably protects the borrower's interest. Rather, the Bureau believes a more reasonable default is for the party with the knowledge of all loss mitigation options available to the borrower, and the capability of evaluating the borrower for all loss mitigation options available to the borrower, to carry the burden of evaluating the borrower for all loss mitigation options available from the owner or assignee of the mortgage loan and to communicate the results of that review to the borrower. If the borrower is found to be eligible for more than one option, the borrower can then make a more informed choice of the options available *after* the evaluation has occurred, not before; if the borrower is found to be eligible for only one option (as would likely be the case where the owner or assignee follows a waterfall) the borrower will at least receive information indicating why the borrower is being offered a particular option and not others and will, in certain circumstances, be able to seek further review from the servicer if the borrower believes that the waterfall has been misapplied.

In addition, review for non-home retention options may provide a valuable sorting function to the short sale market. Currently, a borrower who has been denied a loan modification and who is attempting to complete a short sale may proceed with little guidance from a servicer regarding whether the borrower will be eligible for a short sale. A short sale involves identifying a potential purchaser and working to obtain funding and a transaction that may be acceptable to an owner or assignee of a mortgage loan even before a determination regarding whether an owner or assignee would potentially consider a short sale. By requiring an evaluation for non-home retention options simultaneously with the evaluation for home retention options, the Bureau creates a process by which a borrower that is denied a home retention option will be told whether the borrower is eligible for a non-home retention option, such as a short sale. Borrowers who are told that they are eligible for a short sale may better undertake the effort necessary to reach a viable sale, and may make the market for short sale transactions more efficient by obtaining servicer agreement to consider a short sale transaction. Further, concurrent evaluation reduces the risk that borrowers do not pursue options that may be available as a result of exhaustion with the loss mitigation process.

The Bureau has added commentary to § 1024.41(c)(1) to clarify a servicer's obligation to evaluate a complete loss mitigation application for all loss mitigation options available from the owner or assignee of a mortgage loan. Comment 41(c)(1)–1 states that the conduct of a servicer's evaluation with respect to any loss mitigation option is in the discretion of the servicer. A servicer meets the requirements of § 1024.41(c)(1)(i) if the servicer makes a determination regarding the borrower's eligibility for a loss mitigation program. Consistent with § 1024.41(a), because nothing in section 1024.41 should be construed to resolve whether borrower can enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or provision of, any loss mitigation option, § 1024.41(c)(1) does not require that an evaluation meet any standard other than the discretion of the servicer. Accordingly, the Bureau intends that

[178] *See United States of America* v. *Bank of America Corp.,* at Appendix A, at A–16, *http://www.nationalmortgagesettlement.com.*

the requirement that a servicer evaluate a borrower for all loss mitigation options available from an owner or assignee of a mortgage loan sets forth the procedure that must be followed by servicers but does not create, in itself, a requirement that a servicer conduct such evaluation in any particular manner. Accordingly, the Bureau does not intend to create a private right of action to enforce the guidelines of any owner or assignee's loss mitigation program, including any HAMP requirements or GSE requirements, as a consequence of this requirement. Servicers should take note, however, that, pursuant to § 1024.38, above, and independent of the requirements of § 1024.41, a servicer may be required to implement policies and procedures to achieve the objective of properly evaluating borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan.

Comment 41(c)(1)–2 states that a servicer should evaluate a borrower for all loss mitigation options for which a borrower may qualify based upon eligibility criteria applicable to each loss mitigation option, as established by the owner or assignee of a mortgage loan. For example, a servicer services mortgage loans for two different investors or guarantors of mortgage loans. Those investors or guarantors each have different loss mitigation programs. A servicer is only required to evaluate the borrower for loss mitigation options offered by the owner or assignee of a borrower's mortgage loan and is not required to evaluate a borrower for any other program implemented by a mortgage servicer for an owner or assignee that is different than the owner or assignee of the borrower's mortgage loan. Further, if a servicer services mortgage loans for an owner or assignee of a mortgage loan that has established pilot programs, temporary programs, or programs that are limited by the number of participating borrowers, a servicer is only required to evaluate whether a borrower is eligible for any such program consistent with criteria established by an owner or assignee of a mortgage loan. For example, if an owner or assignee has limited a pilot program to a certain geographic area or to a limited number of participants, a servicer should evaluate the borrower in accordance with any such restrictions, which may include an owner or assignee's determination not to include the borrower in the pilot program or among the group of participants applying for a limited option.

Evaluation of Incomplete Loss Mitigation Applications

The Bureau also believes it is appropriate to clarify the impact of the loss mitigation procedures when a borrower submits an incomplete loss mitigation application. As set forth above, the definition of a loss mitigation application is expansive. When a borrower begins the process by submitting a loss mitigation application, a servicer should be required to work with that borrower to make the loss mitigation application complete, and thereby assure the borrower receives the protections set forth in § 1024.41. Accordingly, § 1024.41(c)(2)(i) states that a servicer shall not evade the requirement to evaluate a complete loss mitigation option for all loss mitigation options available to the borrower, including, for example, by offering an individual loss mitigation option based upon an evaluation of borrower's incomplete loss mitigation application.

Comment 41(c)(2)(i)–1 clarifies that § 1024.41(c)(2)(i) does not prohibit a servicer from offering a loss mitigation option to a borrower that has not submitted a loss mitigation application. Further, a servicer may offer a borrower that has submitted an incomplete loss mitigation application a loss mitigation option, but only if the offer of the loss mitigation option is not based on an evaluation of the individual borrower's circumstances. Comment 41(c)(2)(i)–1 provides, for example, that if a servicer offers trial loan modification programs to all borrowers that become 150 days delinquent without an application or consideration of any information provided by a borrower in connection with a loss mitigation application, the servicer is not required to comply with the requirements of section 1024.41 with respect to any such trial loan modification program for any borrower that has not submitted a loss mitigation application or that has submitted an incomplete loss mitigation application. The example complies with § 1024.41(c)(2) because the offer of the loss mitigation option is based on a standard practice and not on an evaluation of any information or documents submitted by a borrower in connection with a loss mitigation application. Comment 41(c)(2)(i)–2 clarifies that although a review of a borrower's incomplete loss mitigation application is within a servicer's discretion, and is not required by § 1024.41, a servicer may be required separately, in accordance with policies and procedures maintained pursuant to § 1024.38(b)(2)(v), to properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options available to the borrower pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Such evaluation may be subject to requirements applicable to loss mitigation applications otherwise considered incomplete pursuant to § 1024.41.

The Bureau recognizes that some borrowers may submit incomplete loss mitigation applications and may not submit the documents or information necessary to make those applications complete. The Bureau believes that the best approach for servicers to comply with the requirements of § 1024.41 is to work with borrowers to make incomplete loss mitigation applications complete and servicers have an obligation to undertake reasonable diligence in this regard. However, where such diligence has failed, the loss mitigation procedures should not serve as an impediment to working with borrowers that are not able to complete the loss mitigation application requirements. Accordingly, § 1024.41(c)(2)(ii) provides that notwithstanding § 1024.41(c)(2)(i), if a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its discretion, evaluate an incomplete loss mitigation application and determine to offer a borrower a loss mitigation option. Any such evaluation and offer is not subject to the requirements of § 1024.41 and shall not constitute an evaluation of a single complete loss mitigation application for purposes of § 1024.41(i). The Bureau has further added comment 41(c)(2)(ii) to clarify the meaning of a significant period of time under the circumstances. Any such circumstances may include consideration of the relative timing of the foreclosure process. Thus, a delay of 10 or 15 days in providing documents or information to make a loss mitigation complete may be more significant if the period is close to a potential foreclosure sale than such period would be if it were to occur early in the foreclosure process, including, for example, in the time period that is less than 120 days of delinquency.

Timing

The Bureau is adjusting the requirement in § 1024.41(c) to

implement the various staged timing requirements set forth above. Specifically, to implement the staged deadlines, a servicer is required to comply with the requirements of § 1024.41(c) for any complete loss mitigation application received more than 37 days before a foreclosure sale.

41(d) Denial of Loan Modification Options

Proposed § 1024.41(d) would have required that servicers comply with additional obligations with respect to a denial of a borrower's loss mitigation application with respect to trial or permanent loan modification options. A servicer would have been required to provide any such borrower a written notice stating the specific reasons for the determination and inform the borrower of the right to appeal the servicer's determination pursuant to proposed § 1024.41(h). The notice would have included the deadline for filing the appeal and any requirements for pursuing the appeal, such as, for example, forms or documents the borrower must file in connection with the appeal process. Further, proposed comments 41(d)(1)–1 and 41(d)(1)–2 would have provided examples regarding the information that should be included in the specific reasons provided to the borrower in the notice when a borrower is denied a loan modification on the basis of an investor requirement or a net present value calculation. The Bureau stated that it believed such information would assist borrowers in providing appropriate and relevant information to servicers in connection with the appeal process. Further, such requirements were consistent with the National Mortgage Settlement.[179]

Consumers and consumer advocacy group commenters generally supported the requirements in § 1024.41(d). One such commenter stated that the requirement would further the goal of protecting consumers against discriminatory servicing practices because the required notice would likely discourage those practices. A consumer advocacy group commented that the notification requirement should be expanded to all loss mitigation programs beyond loan modifications and a coalition of consumer advocacy groups commented that servicers should be required to provide specific information and documents about the investor denial to borrowers. Consumer commenters on Regulation Room were concerned that servicers misrepresented that investor requirements barred a loan modification when no such restriction existed and sought fuller disclosure in that regard.

Industry commenters submitted various requests for clarification regarding § 1024.41(d). Two credit unions and their trade associations, as well as a consumer advocacy group, requested clarification regarding the impact of the required notification regarding a denial of a loan modification option with the adverse action notice required by Regulation B when a consumer report is used in connection with a denial for a loan modification option. Further, the GSEs requested clarification regarding whether the offer of an alternative loss mitigation option (such as a forbearance or repayment plan) constitutes a denial of a loss mitigation option. Finally, a financial industry trade association requested clarification regarding whether servicers could use the ''check-the-box'' model clauses adopted by the Making Home Affordable Program to communicate with borrowers regarding denials of loss mitigation options pursuant to § 1024.41(d).

The Bureau is finalizing § 1024.41(d) as proposed, with technical changes to clarify that the requirement applies to complete loss mitigation applications and that loan modification options refers to programs offered by the applicable owner or assignee of a mortgage loan. In light of the comments, the Bureau believes that adjustments to the commentary are warranted. The Bureau is adjusting comments 41(d)(1)–1 and 41(d)(1)–2 as set forth below, and adding comments 41(d)(1)–3 and 41(d)(1)–4.

Accordingly, pursuant to § 1024.41(d), a servicer that denies a borrower's complete loss mitigation application for any trial or permanent loan modification option available from the owner or assignee of a mortgage loan shall state in the notice provided to the borrower pursuant to § 1024.41(c)(1)(ii) the specific reasons for the servicer's determination for each such trial or permanent loan modification program; and, if applicable, that the borrower may appeal the servicer's determination for any such trial or permanent loan modification option, the deadline for the borrower to make an appeal, and any requirements for making an appeal. Importantly, § 1024.41(d) provides special rules for those loss mitigation options that involve loan modifications. With respect to those options, the servicer is required to provide the borrower with the specific reasons for denying the borrower for each trial or permanent modification for which the borrower was considered and, if applicable, notice of the borrower's right to appeal. However, under § 1024.41(d), a servicer is not required to disclose to a borrower a denial for a loss mitigation option that is not a loan modification program (for non-loan modification options, such denial is implicit in the servicer's failure to offer such a loss mitigation option).

With respect to identifying the reasons for a servicer's denial of a borrower for a loan modification option, the Bureau recognizes the consumer frustration resulting from servicer statements that investor requirements or net present value tests bar a loan modification option when the proper application of such purported requirements or tests may or may not actually result in such a determination. To assist consumer understanding, and to effectuate the appeal process, the Bureau believes that servicers that deny a loan modification option on the basis of an investor requirement or net present value model must provide additional detail to support such statements. Accordingly, the Bureau has adjusted comment 41(d)(1)–1 to state that if a trial or permanent loan modification option is denied because of a requirement of an owner or assignee of a mortgage loan, the specific reasons in the notice provided to the borrower must identify the owner or assignee of the mortgage loan and the requirement that is the basis of the denial. A statement that the denial of a loan modification option is based on an investor requirement, without additional information specifically identifying the relevant investor or guarantor and the specific applicable requirement, is insufficient. However, where an investor or guarantor has established a waterfall and a borrower has qualified for a particular option on the waterfall, it is sufficient for the servicer to inform the borrower, with respect to other options further down the waterfall that the investor's requirements include the use of a waterfall and that a determination to offer an option on the waterfall necessarily results in a denial for any other options below the option for which the borrower has qualified, to the extent applicable for any such option.

Further, the Bureau has adjusted comment 41(d)(1)–2 to provide that if a trial or permanent loan modification is denied because of a net present value calculation, the specific reasons in the notice provided to the borrower must include all the inputs used in the net present value calculation, rather than

[179] *See United States of America* v. *Bank of America Corp.,* at Appendix A, at A–27, *http://www.nationalmortgagesettlement.com.*

just the limited inputs identified in the proposed commentary.

The Bureau has also added comments to address the form of the notice required by § 1024.41(d). No specific format is required for the notice provided pursuant to § 1024.41(d). Accordingly, servicers may determine the appropriate form, so long as the form includes the content required pursuant to § 1024.41(d). Comment 41(d)(1)–3 clarifies that a servicer may combine other notices required by applicable law, including, without limitation, a notice with respect to an adverse action, as required by Regulation B (12 CFR 1002 *et seq.*), or a notice required pursuant to the Fair Credit Reporting Act, with the notice required pursuant to section 1024.41(d), unless otherwise prohibited by applicable law.

Further, servicers may develop standard language and forms that are appropriate to comply with this section. The Making Home Affordable Program has promulgated model clauses that servicers operating pursuant to that program may use in communications with borrowers regarding denials of applicable loan modification options. Those clauses are set forth in Appendix A to the Making Home Affordable Program Handbook.[180] Without endorsing the use of those model clauses in any instance, the model clauses adopted by the Making Home Affordable Program may be appropriate for use in specific circumstances.[181] A servicer is responsible for monitoring whether the use of the model clauses is accurate and appropriate for any individual borrower.

Finally, comment 41(d)(1)–4 clarifies that any determination not to offer a loan modification option, notwithstanding whether a servicer offers a borrower a different loan modification option or other loss mitigation option, constitutes a denial of a loan modification option. Thus, if a servicer offers a borrower a forbearance option or repayment plan after evaluation of a complete loss mitigation application, any such offer, without an offer of a loan modification option, constitutes a denial for a loan modification option and a servicer shall provide the disclosures required pursuant to § 1024.41(d) with respect to any loan modification program available to the borrower. Again, to the extent a waterfall was the basis for the determination, the disclosure may state, for example, that the investor's requirement do not permit a borrower to receive a loan modification offer if a determination is made that the borrower has the capacity to repay the mortgage with forbearance or repayment, along with an explanation of the reasons for the conclusion that the borrower can do so with a forbearance plan.

41(e) Borrower Response

Proposed § 1024.41(e) would have imposed standards for when a borrower is considered to have accepted or rejected a loss mitigation option offered by a servicer. The proposal stated that a servicer may impose requirements on the manner in which a borrower must accept or reject a loss mitigation option, subject to standards for acceptance and rejection set forth in the rule. The proposed rule would have provided that a borrower must have no less than 14 days to accept or reject an offer of a loss mitigation option. Further, the proposed rule would have clarified that if a servicer has not received a response from a borrower to an offer of loss mitigation after 14 days, the servicer may deem the borrower's lack of a response as a rejection of the loss mitigation option. A 14-day timeframe for a borrower to respond to an offer of a loss mitigation option is consistent with GSE requirements, the National Mortgage Settlement, certain State laws, and Federal regulatory agency requirements.[182] The proposed rule also would have provided that if a borrower does not satisfy the servicer's requirements for accepting a loss mitigation option, but submits the first payment that would be owed pursuant to any such loss mitigation option within the deadline established by the servicer, the borrower was to be deemed to have accepted the offer of a loss mitigation option. This presumption was intended to maintain consistency with the terms of the National Mortgage Settlement.

Numerous commenters, including large bank servicers, non-bank servicers, community banks, credit unions, their trade associations, and the GSEs objected to allowing a borrower to accept a loss mitigation option by submitting a payment. Two financial industry trade associations and a community bank indicated that compliance with the statute of frauds, as well as investor contracts, requires written acceptance of a loss mitigation option, and the lack of a written agreement would create unjustified risks for servicers and owners or assignees of mortgage loans. A non-bank servicer stated that allowing acceptance by payment would only work for trial loan modification plans, and then only if subject to future documentation. The commenter stated that written agreements must be required for permanent loan modifications, short sales, deed-in-lieu of foreclosure agreements, and longer term repayment plans.

Further, a large bank servicer, a credit union, and two industry trade associations commented that it would be impractical to allow a borrower to accept a loss mitigation offer while simultaneously appealing an offer of a loan modification option. A large bank servicer suggested instead that the time for accepting the loss mitigation option should be suspended until after an appeal has been considered.

The Bureau has revised § 1024.41(e) in response to the comments as set forth below. Specifically, the Bureau has revised § 1024.41(e) to reflect changes to the timeline, the manner by which a borrower can accept a trial loan modification program, and the interaction with the appeal process.

41(e)(1) In General

The Bureau has adjusted the applicable timelines as discussed above. The proposed rule would have provided that a borrower must have no less than 14 days to accept or reject an offer of a loss mitigation option. This requirement has been changed to set two stages of deadlines: (1) If a borrower submits a complete loss mitigation application 90 days or more before a foreclosure sale, a borrower shall have at least 14 days to accept or reject the offer of a loss mitigation option, and (2) if a borrower submits a complete loss mitigation application less than 90 days but more than 37 days before a foreclosure sale, a borrower shall have at least 7 days to accept or reject the offer of a loss mitigation option. As discussed above, the 14 day timeline requirement is

[180] Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, Version 4.0, August 17, 2012, available at *https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf* (last accessed January 18, 2012).

[181] The model clauses set forth in Appendix A of the Making Home Affordable Program Handbook are not incorporated by reference in Regulation X and do not provide servicers a safe harbor pursuant to section 19(b) of RESPA.

[182] *See United States of America* v. *Bank of America Corp.,* at Appendix A, at A–17, *http://www.nationalmortgagesettlement.com*; Freddie Mac Single Family Seller/Servicer Guide § 64.6(d)(5) (2012); Fannie Mae Single Family Servicing Guide § 103.04 (2012); 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923. Moreover, Fannie Mae servicing guidelines provide a servicer's review of a borrower's application for a loss mitigation option must not exceed 30 days and that if a servicer receives a borrower response package before 37 days prior to the foreclosure sale date, no delay in legal action is required, unless an offer is made and the foreclosure sale is within the borrower's 14-day response period. *See* Fannie Mae Single Family Servicing Guide §§ 103.04, 107.01.02 (2012).

consistent with the National Mortgage Settlement and certain State law requirements. Further, the secondary 7-day timeline is designed to implement appropriate procedures for timing scenario 3, discussed above. Nothing in the rule would preclude a servicer who considers an application received less than 37 days before a foreclosure sale to offer the borrower a loss mitigation option and require a response in less than 7 days.

41(e)(2) Rejection

41(e)(2)(i) In General

The Bureau has added § 1024.41(e)(2)(i), to set forth the general rule that a servicer may deem that a borrower that has not accepted an offer of a loss mitigation option within the deadlines established pursuant to paragraph (e)(1) to have rejected that offer. This general rule is subject to the exceptions provided in § 1024.41(e)(2)(ii) and (e)(2)(iii). This provision finalizes the provision previously set forth in proposed § 1024.41(e)(3). Proposed § 1024.41(e)(3) is withdrawn.

41(e)(2)(ii) Trial Loan Modification Plan

The Bureau agrees with commenters that the requirement that a servicer consider a borrower that has made the first payment for a loss mitigation option to have accepted the option is infeasible as proposed. The Bureau finds persuasive the arguments made by commenters regarding the necessity of clear contractual arrangements, as well as, potential issues posed by various State law statutes of frauds. Accordingly, the Bureau has substantially modified, and separately enumerated, this requirement, which was previously set forth in proposed § 1024.41(e)(2), as § 1024.41(e)(2)(ii). Pursuant to § 1024.41(e)(2)(ii), and consistent with the requirement suggested by servicers and their trade associations, a borrower that does not comply with the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan, shall be provided a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond the time period established pursuant to § 1024.41(e)(1). A servicer would not be required to consider such payment as acceptance of a servicer's offer of a loan modification option.

41(e)(2)(iii) Interaction With Appeal Process

The Bureau agrees with commenters that the requirement that a servicer permit a borrower to both accept an offer of a loss mitigation option and appeal the denial of a different loan modification option is infeasible as proposed. Specifically, the Bureau agrees that it is infeasible to require a servicer to implement a loss mitigation option, only to potentially have to back out of the implementation of such option and implement a different loss mitigation option after an appeal has been determined. Accordingly, the Bureau has modified this requirement and separately enumerated the requirement, which was previously set forth in proposed § 1024.41(e)(4), as § 1024.41(e)(2)(iii). Proposed § 1024.41(e)(4) is withdrawn.

Pursuant to § 1024.41(e)(2)(iii), and consistent with the requirement suggested by a large bank servicer, if a borrower makes an appeal of a denial of a loan modification option pursuant to § 1024.41(h), the borrower's deadline for accepting a loss mitigation option offered pursuant to § 1024.41(c) shall be extended to 14 days after the servicer provides the notice required pursuant to § 1024.41(h)(4). Accordingly, a borrower will be able to have an appeal reviewed and receive the servicer's decision regarding the appeal before a borrower will be required to accept any offer of a loss mitigation option.

Thus, if an appeal is granted, the borrower will have 14 days to determine whether to accept the loss mitigation option offered as a result of the appeal or any other previous offer made pursuant to § 1024.41(c)(1)(ii). If an appeal is denied, the borrower will have 14 days to determine whether to accept an offer for another loss mitigation option previously offered pursuant to § 1024.41(c)(1)(ii). A borrower may voluntarily determine to accept an offer of a loss mitigation option and withdraw an appeal at any time.

41(f) Prohibition on Foreclosure Referral

Proposed § 1024.41(f) would have required servicers to comply with the loss mitigation procedures by reviewing complete and timely loss mitigation applications before a servicer could proceed with a foreclosure sale. Timely applications included complete loss mitigation applications submitted within a deadline established by a servicers, which could be no earlier than 90 days before a foreclosure sale. By prohibiting servicers from proceeding to a foreclosure sale while a complete and timely loss mitigation application is pending, the proposed rule would have addressed one of the most direct consumer harms relating to concurrent evaluation of loss mitigation options and prosecution of foreclosure proceedings. The proposed rule also would have prohibited a servicer from moving forward with a foreclosure sale while the borrower was performing under an agreement on a loss mitigation option.

As discussed above, the Bureau received a significant number of comments from consumer advocacy groups regarding dual tracking of evaluation of loss mitigation options and foreclosure processing. These comments generally stated that borrowers should have the opportunity to be reviewed for a loss mitigation option before a servicer begins a foreclosure process. Further, consumer advocates submitted a significant number of comments stating that although the Bureau's proposal would address harms resulting from a foreclosure sale, other harms to consumers relating to dual tracking were not addressed by the proposed rule. These included consumer harms resulting from participating in the foreclosure process, including confusion from receiving inconsistent and confusing foreclosure communications while loss mitigation reviews are on-going. Such confusion potentially may lead to failures by borrowers to complete loss mitigation processes, or impede borrowers' ability to identify errors committed by servicers reviewing applications for loss mitigation options that may have more beneficial consequences for borrowers as well as owners or assignees of mortgage loans. Further, borrowers may be negatively impacted because borrowers are responsible for accruing potentially unnecessary foreclosure costs while an application for a loss mitigation option is under review. These costs burden already struggling borrowers and may impact the evaluation for a loss mitigation option.

As stated above, consumer advocacy group commenters recommended that the Bureau restrict servicers from pursuing the foreclosure process as well as evaluations of borrowers for loss mitigation on dual tracks. Twelve individual consumer advocacy groups as well as two coalitions of consumer advocacy groups stated that the Bureau should require servicers to undertake loss mitigation evaluations, including loan modification reviews and offers, prior to beginning the foreclosure process. Further, three consumer advocacy groups commented that the Bureau should create a defined pre-foreclosure period of 120 days before a borrower can be referred to foreclosure, and that servicers should perform a mandatory review of a borrower for loss mitigation options during this period.

Industry commenters also addressed whether the Bureau should implement protections relating to dual tracking apart from the prohibition on foreclosure sale set forth in the proposal. Outreach with servicers and their trade associations, indicated general support for maintaining consistency among any ''dual tracking'' requirements established by the Bureau and the National Mortgage Settlement. A law firm commented that Bureau requirements with respect to ''dual tracking'' should model the National Mortgage Settlement. Notably, a community bank and its trade association commented that as a consequence of the Bureau's regulations on loss mitigation procedures, servicers may try to begin foreclosures as soon as possible after delinquency in order to preserve flexibility to comply with the loss mitigation procedures.

As discussed more fully in the opening of the discussion of § 1024.41, the Bureau is persuaded by the comments that the potential harm to consumers of commencing a foreclosure proceeding before the consumer has had a reasonable opportunity to submit a loss mitigation application or while a complete loss mitigation application is pending is substantial. The fact that the GSEs and the National Mortgage Settlement defer commencing foreclosure proceedings until a borrower has had a reasonable opportunity to apply for a loss mitigation option is further persuasive that such a restriction on the commencement of foreclosure proceedings would further the consumer protection purposes of RESPA and would not present a significant risk of unintended consequences.

The Bureau further believes it is necessary and appropriate for borrowers, servicers, and courts to have a known early period during which a servicer shall not begin the foreclosure process. The Bureau also believes that a servicer should not be permitted to begin the foreclosure process when there is a pending complete loss mitigation application and believes that such a requirement, unless coupled with a restriction on when the foreclosure process can begin, might incentivize servicers to begin the foreclosure process earlier than would otherwise occur to avoid delay resulting from the submission of a complete loss mitigation application. Accordingly, the Bureau believes it is necessary and appropriate to implement the consumer protection purposes of RESPA by barring servicers from making the first notice or filing required for a foreclosure process if a borrower has submitted a complete loss mitigation application before any such filing. The Bureau further believes it is necessary and appropriate to implement the consumer protection purposes of RESPA to bar servicers from making the first notice or filing required for a foreclosure process if a borrower is not more than 120 days delinquent in order to provide the borrower sufficient time to submit a complete loss mitigation application. The Bureau understands and intends that any such requirement will preempt State laws to the extent such laws permit filing of foreclosure actions earlier than after the 120th day of delinquency.

Accordingly, § 1024.41(f) implements these prohibitions. First, pursuant to § 1024.41(f)(1), a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is greater than 120 days delinquent. Second, pursuant to § 1024.41(f)(2), if a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (f)(1) or before a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless the borrower is not eligible for any loss mitigation option (and any appeal is inapplicable or has been exhausted), has rejected all offers of loss mitigation options, or has failed to comply with the terms of an agreement on a loss mitigation option.

The Bureau has also added comment 41(f)(1)–1 to clarify the prohibition on making the first notice or filing required by applicable law. Per comment 41(f)(1)–1, the first notice or filing required by applicable law refers to any document required to be filed with a court, entered into a land record, or provided to a borrower as a requirement for proceeding with a judicial or non-judicial foreclosure process. Such filings include, for example, a foreclosure complaint, a notice of default, a notice of election and demand, or any other notice that is required by applicable law in order to pursue acceleration of a mortgage loan obligation or sale of a property securing a mortgage loan obligation.

41(g) Prohibition on Foreclosure Sale

Proposed § 1024.41(g) would have required that if a servicer receives a complete loss mitigation application by a deadline established by a servicer that was no earlier than 90 days before a foreclosure sale, the servicer may not proceed to foreclosure sale unless: (1) The servicer denies the borrower's application for a loss mitigation option and the appeal process is inapplicable, the borrower has not requested an appeal, or the time for requesting an appeal has expired; (2) the servicer denies the borrower's appeal; (3) the borrower rejects a servicer's offer of a loss mitigation option; or (4) a borrower fails to perform pursuant to the terms of a loss mitigation option.

The Bureau stated that it is appropriate to require that if a borrower submits a complete loss mitigation application by the deadline established by the servicer, a servicer should not proceed with a foreclosure sale until the servicer and borrower have terminated discussions regarding loss mitigation options. Further, the Bureau stated that it is appropriate to suspend a foreclosure sale when a borrower is performing under an agreement on a loss mitigation option. A servicer's basis for servicing a mortgage loan, and undertaking actions to collect on an unpaid obligation, emanates from the contractual relationship between the owner or assignee of the mortgage loan and the borrower. A servicer's determination to hold a foreclosure sale when a borrower is performing under an agreement that forestalls foreclosure violates the agreement entered into with the borrower. Additionally, it is already standard industry practice for a servicer to suspend a foreclosure sale during any period where a borrower is making payments pursuant to the terms of a trial loan modification. The Bureau stated in the proposal that prohibiting a servicer from proceeding with a foreclosure sale until termination of the loss mitigation discussion will eliminate the clearest harms to borrowers resulting from servicers' pursuit of loss mitigation and foreclosure proceedings concurrently.

Proposed comments 41(g)(4)–1 and 41(g)(4)–2 would have clarified the application of the borrower performance definitions with respect to short sales. As stated in the proposal, a short sale typically will include a listing or marketing period during which a servicer will agree to postpone a foreclosure sale in order to allow a borrower to market a property for a short sale transaction. The proposed comments stated that a borrower is considered to be performing under the terms of a short sale agreement, or other similar loss mitigation agreement, during the term of any such marketing or listing period, and any time subsequent to such periods, if a short sale transaction is approved by all relevant parties, and the servicer has received proof of funds or financing.

The Bureau received comments from industry trade associations as well as consumer advocacy groups supporting a prohibition on proceeding with a foreclosure sale while a loss mitigation application is pending or an appeal from a loan modification denial is pending. Numerous consumer advocate commenters also stated, as discussed above with respect to § 1024.41(f), that the Bureau should go further to bar servicers from beginning or continuing with a foreclosure process even before a foreclosure sale. Specifically, a consumer advocate stated that a servicer should be barred from proceeding to foreclosure judgment in a judicial foreclosure, not just from completing a foreclosure sale, because of the difficulty in delaying a foreclosure sale once a foreclosure judgment has been rendered.

Conversely, a credit union trade association, a non-bank servicer, and an individual consumer stated that the Bureau should not implement regulations that may have the impact of further delaying the foreclosure process. An individual consumer indicated that regulations that delay foreclosure will reduce access to credit and disproportionately increase costs of credit for low and moderate income households and first time homebuyers. Further, a non-bank servicer stated that borrower action should not be required before a servicer can proceed to foreclosure.

Finally, a non-bank servicer requested clarification regarding application of the prohibition to a short sale. Specifically, the commenter requested clarification regarding whether a servicer can proceed with a foreclosure sale if a property does not sell during a listing or marketing period for a short sale transaction.

The Bureau finalizes the rule as proposed with three adjustments. First, the Bureau has adjusted the prohibition on proceeding with a foreclosure sale to state that a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale. Second, the Bureau has adopted further clarification regarding the impact of the requirements on short sale transactions. Third, the Bureau has adjusted the timing of the requirement consistent with other changes to the timing of § 1024.41 generally, as discussed above.

As the Bureau stated in the proposal, the Bureau believes it is consistent with the purposes of RESPA, as well as with current market practice, to prohibit a servicer from completing the foreclosure process if a borrower has submitted a timely and complete application for a loss mitigation option until the servicer has completed the evaluation of the borrower for a loss mitigation option. In light of current market practice, the Bureau does not believe that § 1024.41(g) will have a substantial impact on expected foreclosure timelines. Significantly, the Bureau has structured the timelines for borrowers to submit complete loss mitigation applications, and for servicers to evaluate loss mitigation applications, consistently with the National Mortgage Settlement, the California Homeowner Bill of Rights, and requirements currently imposed on servicers that service mortgage loans for the GSEs or government lending programs. Accordingly, there is no reason to believe that the Bureau's requirements will substantially impact foreclosure timelines separate and apart from the baseline established as a result of current market practices. The Bureau also believes that avoiding the consumer harm caused by conducting a foreclosure sale before a servicer has completed an evaluation of a borrower for a loss mitigation option justifies any remaining concern regarding the potential impact on foreclosure timelines.

The Bureau agrees that it is appropriate to clarify that the prohibition on conducting a foreclosure sale includes a prohibition that a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale. The final rule clarifies servicer obligations in judicial foreclosure jurisdictions and, moreover, is consistent with the requirements imposed on certain servicers under the National Mortgage Settlement.[183]

The Bureau is also adding commentary to clarify the impact of this requirement on the foreclosure process. Comment 41(g)–1 clarifies the impact of the prohibition on moving for foreclosure judgment by dispositive motions. Specifically, comment 41(g)–1 states that the prohibition on a servicer moving for judgment or order of sale includes making a dispositive motion for foreclosure judgment, such as a motion for default judgment, judgment on the pleadings, or summary judgment, which may directly result in a judgment of foreclosure or order of sale. If a servicer has made any such motion before receiving a complete loss mitigation application, a servicer should make a good faith attempt to avoid the issuance of a judgment on any such motion prior to completing the procedures required by § 1024.41. In addition, comment 41(g)–2 clarifies how servicers may proceed with a foreclosure process. As stated in comment 41(g)–2, nothing in 1024.41(g) prohibits a servicer from continuing to move forward with a foreclosure process (assuming that the first notice or filing was made before a servicer received a complete loss mitigation application) so long as the servicer does not take an action that will directly result in the issuance of a foreclosure judgment or order of sale, or a foreclosure sale. For example, if a servicer is required to engage in mediation or to make publications in a local paper, a servicer may proceed with any such requirements, so long as the applicable result of a foreclosure judgment or order of sale, or conduct of a foreclosure sale does not result from such action. The Bureau has also added comment 41(g)–3, which provides that a servicer is responsible for promptly instructing foreclosure counsel retained by the servicer not to proceed with filing for foreclosure judgment or order of sale, or to conduct a foreclosure sale, in violation of § 1024.41(g) when a servicer has received a complete loss mitigation application.

The Bureau has also clarified the application of § 1024.41 with respect to loss mitigation applications submitted 37 days or less before a foreclosure sale in comment 41(g)–4. Comment 41(g)–4 clarifies that although a servicer is not required to comply with the requirements in § 1024.41 with respect to a loss mitigation application submitted 37 days or less before a foreclosure sale, a servicer is required separately, in accordance with policies and procedures maintained pursuant to § 1024.38(b)(2)(v), to properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Such evaluation may be subject to requirements applicable to a review of a loss mitigation application submitted by a borrower 37 days or less before a foreclosure sale.

The Bureau also agrees that clarity is warranted regarding the impact of the requirements of § 1024.41(g)(3) on short sale transactions. The Bureau is finalizing comments 41(g)(3)–1 and 41(g)(3)–2, the substance of which was previously proposed as comments 41(g)(4)–1 and 41(g)(4)–2.[184] Comment

[183] *See e.g.,* National Mortgage Settlement at Appendix A, at A–18, available at *http://www.nationalmortgagesettlement.com.*

[184] These comments had been identified as 41(g)(4)–1 and 41(g)(4)–2 in the proposal but have been relocated in light of a non-substantive adjustment to the numeration of § 1024.41(g).

41(g)(3)–1 provides that a borrower is deemed to be performing under an agreement on a short sale, or other similar loss mitigation option, during the term of a marketing or listing period. Further comment 41(g)(3)–2 states that a borrower should be deemed to have obtained an approved short sale transaction if a short sale transaction has been approved by all relevant parties, including the servicer, other affected lienholders, or insurers, if applicable, and the servicer has received proof of funds or financing, unless circumstances otherwise indicate that an approved short sale transaction is not likely to occur. The Bureau has revised comment 41(g)(3)–2 in light of the public comments to further provide that if a borrower has not obtained an approved short sale transaction at the end of any marketing or listing period, a servicer may determine that a borrower has failed to perform under an agreement on a loss mitigation option. Finally, the Bureau has adjusted the timing requirements for § 1024.41(g) consistent with the discussion above regarding timelines.

41(h) Appeal Process

Proposed § 1024.41(h) would have required a servicer to establish an appeals process to review denials of complete loss mitigation applications for loan modifications. Pursuant to proposed § 1024.41(h), if a servicer reviewed an appeal and determined to offer a loss mitigation option, the servicer would have been prohibited from proceeding with a foreclosure sale unless the borrower rejects the offer of the loss mitigation option or fails to comply with terms of the loss mitigation option. If a servicer denied a borrower's appeal of a loss mitigation option, the servicer would have been permitted to proceed with a foreclosure sale. A servicer would have been required to provide a notice to the borrower stating the servicer's determination of the borrower's appeal.

Proposed § 1024.41(h) also stated that an appeal must be reviewed by servicer personnel that were not directly involved in the initial evaluation. Further, proposed comment 41(h)(3)–1 would have clarified that individuals who supervised the personnel that conducted the initial evaluation may conduct the appeal evaluation if they were not directly involved in the initial evaluation.

The appeals process would have been limited to denials of loan modification options. The Bureau stated in the proposal that an appeal process for denials of loan modification options maintains consistency with existing appeals and escalation processes established under State law or Federal regulatory agency requirements. For example, the appeal processes established by the National Mortgage Settlement and the California Homeowner Bill of Rights relate to denials of first lien loan modification denials.[185] Moreover, loan modifications are some of the most complex loss mitigation programs with respect to the evaluation of borrowers, and the Bureau stated that loan modifications provide an appropriate scope for an appeal process. The Bureau requested comment regarding the appeal requirements, including the impact of the appeal process on small servicers.

Consumer advocates commented that the scope of the appeal process should be expanded beyond loan modifications to include appeals of denials for any loss mitigation option. A consumer advocate further stated that there should be transparent standards for appeals, requirements on the information that servicers must review, and disclosure to the consumer of the reasons an appeal was denied. A housing counselor supported the appeal process requirement but requested clarification regarding the timing of the deadlines. The commenter suggested using a postmark to determine when applicable timelines start.

By contrast, industry commenters objected to the appeal process requirement. A credit union and a trade association stated that many investors, including the GSEs and government insurance programs, do not consider appeals and that requiring a second review is ultimately futile and wasteful. A law firm commented that the appeal process is unnecessary and overreaching because it is unreasonable to believe that servicers will not comply with current loss mitigation evaluation requirements. Further, the commenter stated that an appeals process will extend foreclosure timelines, which may ultimately harm the housing market without benefiting consumers.

The GSEs commented that they also generally oppose an appeal process but emphasized that, in any event, an appeal process should be limited to a denial of a loan modification option and only where a loss mitigation application is submitted 90 days or more before a scheduled foreclosure sale. A Federal regulatory agency further commented that instead of a formal appeal process, the Bureau should provide a less formalized escalation process.

Credit unions and their trade associations, as well as a community bank and a non-bank servicer, commented that the appeal process presents unique issues for small servicers. These commenters stated that small servicers could not implement the appeal process because small servicers generally have so few employees that it is not possible to assign a separate employee to handle an appeal. One trade association commented that, as a consequence, an appeal may be reviewed by staff that may not be appropriate to the task. A credit union and a credit union trade association also commented that supervisory personnel should be allowed to conduct appeals.

The Bureau believes that it is appropriate to require servicers to respond to appeals of denials for loan modification options. The Bureau's proposed requirement is consistent with other obligations imposed on servicers, including, as set forth above, obligations pursuant to the National Mortgage Settlement and the California Homeowner Bill of Right. Consumers have consistently and forcefully complained that servicers have failed to review borrowers for loan modification options authorized by investors or guarantors of mortgage loans. Significantly, consumers and consumer advocates dispute in many individual instances whether servicers have properly applied the requirements of the Making Home Affordable program and the loan modification review requirements of the National Mortgage Settlement. Further, the terms of loan modification program reviews and compliance are complex and the Bureau understands from outreach with investors and guarantors of mortgage loans that servicers continue to have difficulty conducting the evaluations for loan modification programs pursuant to the guidelines and programs established by those investors and guarantors. Considering these factors, the Bureau believes that, as with any complex and unique process, servicers may make mistakes in evaluating borrowers for loan modification options. The notice that the Bureau is requiring servicers provide borrowers to explain the reasons for the denial of a loan modification, which include inputs that may have been the basis for such denials, may help uncover such mistakes. Many of these mistakes can then be corrected if a servicer undertakes a second review where a borrower believes that such further review is warranted. Thus, the Bureau believes that borrowers may reasonably

[185] *See* National Mortgage Settlement, at Appendix A, at A–27, available at *http://www.nationalmortgagesettlement.com; see also* 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923.6.

benefit from the opportunity to have an independent review at a servicer where the borrower believes a mistake was made in the evaluation of a loan modification option.

Further, the Bureau believes the scope and requirements of the appeal process as proposed are appropriate. The Bureau proposed limiting the scope of the appeal process to denials of loan modification options. Further, the appeal process would only have been available if a complete loss mitigation application was received 90 days or more before a scheduled foreclosure sale. These requirements are consistent with appeals processes set forth in the National Mortgage Settlement and the California Homeowner Bill of Rights and set an appropriate balance of processes that improve consumer protection when considered against burdens that may impact access and costs of credit for consumers. Although commenters focused on whether the process should be characterized as an ''appeal'' process or an ''escalation'' process, this semantic distinction does not affect the actual requirements that would be imposed on servicers. Essentially, if a borrower believes that a servicer made a mistake regarding the evaluation of a borrower for a loan modification option, the borrower can indicate that to the servicer. The servicer would be required to ensure that personnel other than those that made the initial determination review the borrower's evaluation and determine whether to offer the borrower a loss mitigation option. The Bureau also believes the timing of the loss mitigation procedures, including the appeal process, are clear. All such deadlines are based on when information is received or provided by a servicer.

Although the Bureau believes that servicers should review borrower appeals and make a determination regarding whether the servicer shall offer the borrower a loss mitigation option, the Bureau declines to establish guidelines for appeals. As set forth above, the Bureau believes it is appropriate to allow investors or guarantors, including most notably the GSEs and FHA, to establish their own requirements and to determine the extent to which they want those requirements to be enforceable through private litigation.

Accordingly, the Bureau finalizes § 1024.41(h) as proposed, with minor changes to reflect adjustments to the deadlines applicable to § 1024.41 generally, as discussed above, and certain non-substantive changes to clarify the text. Further, the Bureau finalizes comment 41(h)(3)–1 as proposed.

41(i) Duplicative Requests

Proposed § 1024.41(i) would have clarified that a servicer is only required to comply with the requirements of proposed § 1024.41 for a single complete loss mitigation application submitted by a borrower. A servicer would not have been required to comply with the requirements of proposed § 1024.41 if a borrower had previously been evaluated for loss mitigation options for the borrower's mortgage loan account by that servicer.

In the proposal, the Bureau stated that where servicing was transferred after the borrower received an evaluation on a complete loss mitigation application from the transferor servicer, the transferee servicer still may be required to comply with the requirements of proposed § 1024.41. The Bureau believes that when an investor or guarantor is transferring servicing to a new servicer, which may have been driven by an investor's or guarantor's determination that the new servicer can better achieve loss mitigation options with borrowers, borrowers should be able to renew an application for a loss mitigation option with the transferee servicer, subject to the applicable deadlines and requirements in proposed § 1024.41.

The Bureau requested comment regarding whether a borrower should be entitled to renewed evaluation for a loss mitigation option if an appropriate time period has passed since the initial evaluation or if there is a material change in the borrower's circumstances.

A consumer advocate coalition commented that servicers should be required to review a subsequent loss mitigation submission when a borrower has demonstrated a material change in the borrower's financial circumstances. Conversely, a trade association supported the Bureau's proposal stating that it would ensure that adequate time and resources are devoted to borrowers applying for the first time for a loss mitigation option.

A non-bank servicer stated concerns that requiring review of renewed applications would obstruct a servicer's ability to proceed with an inevitable foreclosure sale. The commenter indicated that renewed applications may not actually reflect a material change in the borrower's financial circumstances and may only constitute a strategic attempt to delay the foreclosure process. The commenter suggested that if a servicer is required to review a renewed loss mitigation application, a borrower should have a restricted time period for submitting such information and a servicer should only be required to comply with an expedited review process. Finally, after further consideration, the Bureau believed it appropriate to clarify the application of the loss mitigation procedures if servicing is transferred for a borrower's mortgage loan account.

The Bureau believes that it is appropriate to limit the requirements in § 1024.41 to a review of a single complete loss mitigation application. Specifically, the Bureau believes that a limitation on the loss mitigation procedures to a single complete loss mitigation application provides appropriate incentives for borrowers to submit all appropriate information in the application and allows servicers to dedicate resources to reviewing applications most capable of succeeding on loss mitigation options. Further, the Bureau is cognizant that the borrowers may pursue a private right of action to enforce the procedures set forth in § 1024.41 and significant challenges exist to determine whether a material change in financial circumstances has occurred and, if so, what procedures should be required. Accordingly, the Bureau is finalizing the rule as proposed.

The Bureau agrees, however, that there is merit to providing protections for a borrower that has had a material change in the borrower's financial circumstances after a review of an initial loss mitigation application. Accordingly, as discussed above for § 1024.38(b)(2)(v), servicers are required to implement policies and procedures to achieve the objective of reviewing borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan. The Bureau understands from outreach that many owners or assignees of mortgage loans require servicers to consider material changes in financial circumstances in connection with evaluations of borrowers for loss mitigation options and servicer policies and procedures must be designed to implement those requirements.

Finally, the Bureau believes that it is appropriate to clarify the application of the requirements of § 1024.41 when servicing for a mortgage loan has been transferred. As set forth in the proposal, a transferee servicer would have been required to comply with the requirements of § 1024.41, notwithstanding whether a borrower has received a determination on a complete loss mitigation application from a transferor servicer. To the extent that an evaluation for a loss mitigation option is in process with a transferor servicer, but

a borrower has not finalized an agreement on a loss mitigation option, the Bureau believes it is appropriate for a transferee servicer to comply with the loss mitigation procedures, including reviewing a borrower again for all available loss mitigation options.

The Bureau, therefore, has added comments 41(i)–1 and 41(i)–2 to clarify a transferee servicer's obligations in connection with a servicing transfer for a borrower that has submitted a loss mitigation application. Comment 41(i)–1 provides that a transferee servicer is required to comply with the requirements of § 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer. Further, comment 41(i)–1 states that documents and information transferred from a transferor servicer to a transferee servicer may constitute a loss mitigation application to the transferee servicer and may cause a transferee servicer to be required to comply with the requirements of § 1024.41 with respect to a borrower's mortgage loan account. Comment 41(i)–2 states that a transferee servicer must obtain documents and information submitted by a borrower in connection with a loss mitigation application pending at the time of a servicing transfer, consistent with policies and procedures adopted pursuant to § 1024.38, and must continue the evaluation of a complete loss mitigation application to the extent practicable. Comment 41(i)–2 further provides that for purposes of § 1024.41(e)(1), 1024.41(f), 1024.41(g), and 1024.41(h), a transferee servicer must consider documents and information received from a transferor servicer that constitute a complete loss mitigation application for the transferee servicer to have been received by the transferee servicer as of the date such documents and information were provided to the transferor servicer. The purpose of this clarification is to ensure that a servicing transfer does not have the consequence of depriving a borrower of protections to which a borrower was entitled from the transferor servicer in accordance with the requirements of § 1024.41.

Accordingly, the Bureau finalizes § 1024.41(i) as proposed. The Bureau finalizes the comments to § 1024.41(i) to clarify the impact of the requirements in § 1024.41 in connection with servicing transfers.

41(j) Other Liens (Withdrawn)

Proposed § 1024.41(j) would have required any servicer that receives a complete loss mitigation application to determine if any other servicers service mortgage loans that have senior or subordinate liens encumbering the property that is the subjection of the loss mitigation application within 5 days. If a servicer determines that any other servicers service a mortgage loan for the property, the servicer would be required to provide the loss mitigation application received from the borrower to the other servicer. This provision was intended to require servicers of other liens that were not the original recipient to become engaged in the loss mitigation evaluation process by requiring such servicers to apply the loss mitigation procedures to loss mitigation applications received from other servicers on behalf of the borrower.

Numerous commenters, including large banks, community banks, credit unions, their respective trade associations, the GSEs, a law firm, and a housing finance agency, objected to the proposed rule. These commenters stated that the proposed rule raises significant concerns regarding consumer welfare. First, the required transmittal of borrower personal information among servicers raises significant privacy concerns for borrowers. Second, borrowers that are current on other mortgage loans may be harmed by requiring information sharing among mortgage servicers. For example, a borrower that is current on a subordinate lien HELOC that is not fully utilized may find that the HELOC line has been frozen even though the borrower expects to need to draw on the additional credit that would have been available. Third, servicers would be required to undertake the expense of a title search to identify other liens, the costs for which would be passed on to a borrower, even though a borrower likely knows whether another lien and servicer exist.

Commenters also stated that servicers could not reasonably comply with the proposed rule. Servicers indicated that they could not identify whether other mortgage liens exist from a title search within 5 days. A small credit union commented that credit unions lack the expertise, staffing, and training to ensure compliance with the requirement. Commenters also identified other operational problems, including delays and logistical problems identifying appropriate personnel to receive loss mitigation applications at other servicers, and problems relating to exchanging potentially proprietary information relating to collecting information for a loss mitigation application.

Commenters suggested different approaches for involving servicers of other mortgage liens in loss mitigation evaluations. A financial industry trade association suggested that the Bureau require servicers to inform borrowers that they may wish to contact a servicer for another mortgage loan to obtain an evaluation for a loss mitigation option. Another industry commenter suggested that the Bureau sponsor a database for exchanging lienholder information and submitting and storing borrower applications. Further, a consumer advocate coalition suggested that the Bureau implement requirements regarding re-subordination of a junior lien after a loan modification. Specifically, the commenter states that a servicer should be required to secure a re-subordination of a junior lien to a modified mortgage loan secured by a senior lien. The commenter further states that a servicer should be prohibited from rejecting a loan modification even where a title problem exists or where another lienholder refuses to re-subordinate its lien to a modified mortgage loan.

Some of the most difficult loss mitigation situations for consumers and owners or assignees of mortgage loans involve properties secured by multiple mortgage liens. Loss mitigation options for such properties can be significantly impeded or delayed because of miscommunications, lack of coordination, and differing interests among servicers of senior and subordinate liens. As the Bureau stated in the proposal, when servicers hold a second lien that is behind a first lien owned by a different owner or assignee, one study has found a lower likelihood of liquidation and modification, and a higher likelihood of inaction by a servicer. Specifically, ''liquidation and modification of securitized first mortgages are 60 percent [to] 70 percent less likely respectively and no action is 13 percent more likely when the servicer of that securitized first mortgage holds on its portfolio the second lien attached to the first mortgage.'' [186]

The Bureau proposed § 1024.41(j) to require servicers to coordinate on evaluations of borrowers for loss mitigation options. However, commenters have identified significant concerns with the requirement as proposed. For example, with respect to privacy concerns, the Bureau observed in the proposal that the Gramm-Leach-Bliley Act as implemented by Regulation P did not require provision of an initial notice and opt-out in

[186] Sumit Agarwal *et al., Second Liens and the Holdup Problem in First Mortgage Renegotiation* (Dec. 14, 2011), *available at* available at *http://ssrn.com/abstract=2022501.*

connection with providing the loss mitigation application submitted by a borrower to another servicer under the exception set forth in 12 CFR 1016.15(a)(7). However, notwithstanding that servicers may provide personal information to additional servicers pursuant to applicable law, the Bureau finds persuasive the concerns raised by servicers with respect to the potential privacy implications regarding the circulation of borrower personal information among servicers.

In light of the comments, the Bureau has determined to withdraw the substance of proposed § 1024.41(j). The Bureau is requiring that a servicer inform a borrower in the notice required by § 1024.41(b)(2)(i)(B) that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options. Although a servicer is not required to comply with the requirements that would have been implemented by proposed § 1024.41(j), the Bureau believes that borrowers should be aware of the potential complications to achieving a loss mitigation option in situations where multiple liens exist.

41(j) Small Servicers

As previously stated above, the proposed rule applied all of the loss mitigation provisions to small servicers. For the reasons previously discussed with respect to § 1024.30, the Bureau has concluded that the available evidence indicates that the concerns underlying the loss mitigation provisions arise in the context of larger servicers and that the benefits of applying all of these requirements to small servicers who service loans they or an affiliate own or originated may not be justified by the burdens on these small servicers.

There are, however, two elements of the loss mitigation rules that the Bureau believes should be applied across all servicers. First, new § 1024.41(j) states that a small servicer is required to comply with requirements similar to those in § 1024.41(f)(1) by not making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent. Second, a small servicer shall not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

The Bureau has no reason to believe that any small servicers, servicing loans they or an affiliate owns or originated, in fact commence foreclosure before a borrower is at least 120 days delinquent or either commence a foreclosure process or conduct a foreclosure sale if a borrower is performing under an agreed-upon loss mitigation program. Nonetheless, the Bureau believes these protections, which are discussed in more detail above, are such essential standards that all borrowers should understand that they are entitled to protection from consumer harms relating to dual tracking notwithstanding the size of the servicer. The Bureau believes that imposing only these limited requirements on small servicers creates easily understood and clearly implemented consumer protections while appropriately calibrating the burdens that small servicers may incur.

Supplement I to Part 1024

As discussed throughout in this part VI, Section-by-Section Analysis, the Bureau is adopting a number of comments that are the Bureau's official interpretations to specific Regulation X provisions. In addition to these specific comments, the Bureau is adopting five comments of general applicability to the Bureau's official interpretations of Regulation X. Comment I–1 provides that the official Bureau interpretations in supplement I to part 1024 is the primary vehicle by which the Bureau issues official interpretations of Regulation X, and that good faith compliance with the official Bureau interpretations affords protection from liability under section 19(b) of the Real Estate Settlement Procedures Act (RESPA).

Comment I–2 provides that request for an official interpretation shall be in writing and addressed to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street, NW., Washington, DC 20552. The requests shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents. Except in unusual circumstances, such official interpretations will not be issued separately but will be incorporated in the official commentary to this part, which will be amended periodically. No official interpretations will be issued approving financial institutions' forms or statements. This restriction does not apply to forms or statements whose use is required or sanctioned by a government agency.

Comment I–3 provides that unofficial oral interpretations may be provided at the discretion of Bureau staff. Written requests for such interpretations should be sent to the address set forth for official interpretations. Unofficial oral interpretations provide no protection under section 19(b) of RESPA. Ordinarily, staff will not issue unofficial oral interpretations on matters adequately covered by this part or the official Bureau interpretations. The Bureau proposed I–1 through I–3 in the 2012 RESPA Servicing Proposal. Having received no comments on proposed I–1 through I–3, the Bureau adopts I–1 through I–3 as proposed.

The Bureau is adopting comment I–4 to provide instructions on rules of construction applicable to the comments set forth in Supplement I to Part 1024—Official Bureau Interpretations. Comment I–4 provides that: (1) 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''; and (2) 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. The Bureau is also adopting comment I–5 to explain that each comment in the commentary is identified by a number and the regulatory section or paragraph that the comment interprets and that the comments are designated with as much specificity as possible according to the particular regulatory provision addressed. Although the Bureau did not propose comments I–4 and I–5, the Bureau believes that adopting these comments in the final rule promotes the proper use of commentary the Bureau has set forth in Supplement I to part 1024.

Legal Authority

As discussed in part V (Legal Authority), section 19(a) of RESPA authorizes the Bureau to make such reasonable interpretations of RESPA as may be necessary to achieve the consumer protection purposes of RESPA, and section 19(b) of RESPA provides that good faith compliance with the interpretations affords servicers protection from liability.

Appendix MS

Current appendix MS–1 to part 1024 contains a model form that a servicer could use in connection with providing a loan applicant, at the time of application, information about whether servicing of the loan such applicant is applying may be assigned, sold, or transferred at any time while the loan is outstanding, as required by current

§ 1024.21(b) and (c). Current appendix-MS–2 to part 1024 contains a model from that a servicer could use in connection with providing a borrower with information related to servicing transfers, as required by current § 1024.21(d)(1)(i). The Bureau proposed to modify the current model form that a servicer could use in connection with providing a borrower with information related to servicing transfers in current appendix MS–2. Additionally, the Bureau proposed adding four model forms that a servicer could use in connection with providing a borrower with information related to force-placed insurance that would have been required by proposed §§ 1024.37(c)(2), (d)(2)(i) and (ii), or (e)(2), as applicable, in proposed appendix MS–3 to part 1024, and adding five model clauses that a servicer could use in connection with providing delinquent borrowers with information about loss mitigation options, foreclosures, and housing counselors that would have been required by proposed § 1024.39(b) in proposed appendix MS–4 to part 1024. In adopting the final rule, the Bureau has organized current appendix MS–1, revised appendix MS–2, and new appendices MS–3 and 4 under the heading ''Appendix MS.''

The Bureau also proposed official commentary to provide general instructions on how to use model forms and clauses in appendix MS. Specifically, proposed comment 1 to appendix MS would have explained that appendix MS contains model forms and clauses for mortgage servicing disclosures, and that each such model form or clause is designated for use in a particular set of circumstances, as indicated by the title of such model form or clause. Proposed comment 1 to appendix MS would have additionally clarified that although a servicer is not required to use such model forms and clauses, a servicer that uses them properly will be deemed to be in compliance with the regulations with regard to the disclosure requirements connected with such model forms and clauses. Proposed comment 1 to appendix MS would have explained that to use such forms and clauses appropriately, information required by regulation must be set forth in the disclosures. Proposed comment 2 to appendix MS would have explained that servicers may make certain changes to the format or content of the model forms and clauses and may delete any disclosures that are inapplicable without losing the protection from liability so long as those changes do not affect the substance, clarity, or meaningful sequence of the forms and clauses, and that servicers making revisions to that effect will lose their protection from civil liability. Proposed comment 2 to appendix MS also would have provided examples of changes that the Bureau considered acceptable changes.

The Bureau solicited comments on the appropriateness of proposing official commentary to provide general instructions on how to use model forms and clauses in appendix MS to part 1024. No comments were received on either the substance of the proposed commentary or the appropriateness of using them to provide general instructions on how to use model forms and clauses in appendix MS to part 1024.

Appendix MS–2—Model Form for Mortgage Servicing Transfer Disclosure

Appendix MS–2 to part 1024 sets forth the format for the servicing transfer disclosure required pursuant to section 6(a)(3) of RESPA and proposed § 1024.33(b)(5). The Bureau proposed to revise the model form in appendix MS–2 to significantly reduce the length of the required disclosure to borrowers in connection with mortgage servicing transfers. As discussed below, the Bureau is adopting appendix MS–2 substantially as proposed, except as otherwise noted.

In its proposal, the Bureau observed that, unless a transferor and transferee servicer coordinate to provide a consolidated disclosure, a borrower will receive substantially similar disclosures in the form of appendix MS–2 from both a transferor servicer and a transferee servicer. The Bureau is concerned that the volume of the disclosure may overwhelm borrowers, who will not focus on the information set forth in the form, while also imposing a burden on servicers to provide lengthy and unnecessary disclosures. Thus, the Bureau proposed to streamline the language of the model form to focus on only the elements of information that a borrower needs in connection with a mortgage servicing transfer, specifically (1) the date of the transfer, (2) contact information for the transferor servicer, (3) contact information for the transferee servicer, (4) applicable dates for when each of the servicers will begin or cease to accept payments, (5) the impact of the transfer on any insurance products and (6) a statement that the transfer does not otherwise affect the terms or conditions of the mortgage loan.

The Bureau proposed to remove significant discussion in the model form regarding the complaint resolution process and the borrower's rights pursuant to RESPA. Two consumer advocacy groups submitted comment requesting that the Bureau not remove information about a borrower's complaint resolution rights under RESPA. For the reasons discussed in the section-by-section analysis of § 1024.33(b)(4) above, the Bureau is omitting language about complaint resolution from appendix MS–2.

The Bureau's proposed amendments to appendix MS–2 also would have omitted language informing borrowers of the prohibition in RESPA section 6(d) (as implemented through current § 1024.21(d)(5)). Appendix MS–2 currently informs borrowers, in general, that pursuant to RESPA section 6, during the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by the borrower's old servicer before its due date may not be treated by the new loan servicer as late, and a late fee may not be imposed on the borrower. Upon further consideration, and in light of comment received with respect to the complaint resolution statement, the Bureau believes this information should be retained in appendix MS–2 because the Bureau believes information about misdirected payments is uniquely relevant to borrowers during a servicing transfer (unlike the complaint resolution statement, which the Bureau believes should be made available to borrowers in circumstances that do not necessarily depend on the transfer of servicing). Additionally, in light of its brevity, the Bureau does not believe its inclusion will significantly add to the length of the form. While the Bureau did not test this statement, the Bureau does not believe it is likely to cause confusion or present comprehension problems in light of its simplicity and because it includes language substantially similar to what appears in the current model form. Accordingly, the Bureau has retained the substance of the current statement about late payments and has omitted the prefatory language about a borrower's rights under RESPA section 6 with a more general statement.

The Bureau has amended existing language in the statement that explains that a payment received ''before its due date'' would not be treated as late to more accurately reflect the requirement in § 1024.33(c)(1). The language appearing in the model form now provides, ''Under Federal law, during the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by your old servicer on or before its due date may not be treated by the new servicer as late, and a late fee may not be imposed on you.''

Consumer testing. To test consumer comprehension of the revised model form proposed by the Bureau, the Bureau contracted with Macro to conduct eight qualitative interviews during one round of consumer testing in the Philadelphia, Pennsylvania area on November 7, 2012. After reading the notice, all participants understood that they would have to send their payments to a different servicer after the date listed in the notice. All participants saw the contact information for both the transferor and transferee servicers. Most participants also understood the basic relationship between a lender and a servicer.

During this round of testing, the Bureau was interested in whether participants preferred a form that listed the transferor and transferee servicer contact information in a side-by-side fashion, as opposed to a vertical fashion, as the form proposed by the Bureau would have been formatted. The Bureau expected that listing the transferor and transferee servicers in a side-by-side fashion would enhance consumer comprehension of who the old and new servicers are. To test this, the Macro showed participants the original notice (Version A) and asked participants a series of questions to measure their understanding of the notice. Macro then showed participants a reformatted notice (Version B) and asked which version they preferred. All participants said they preferred Version B. They commented that the format of Version B was easier to read and understand, and that the current and new servicers were easier to identify at a glance.

The Bureau is finalizing appendix MS–2 with substantially the same content as proposed. However, the Bureau has retained, with certain modifications discussed above, language in current appendix MS–2 about the treatment of payments during the 60-day period beginning on the effective date of transfer. The Bureau has also reformatted the model form to list the contact information for the transferor and transferee servicers in a side-by-side fashion.

Appendix MS–3—Model Force-Placed Insurance Notice Forms

The Bureau proposed to add appendix MS–3 to part 1024 to include four model forms that a servicer could use in connection with providing a borrower with information related to force-placed insurance that would have been required by proposed §§ 1024.37(c)(2), (d)(2)(i) and (ii), or (e)(2), as applicable. The Bureau observed in the 2012 RESPA Servicing Proposal that the model forms underwent three rounds of consumer testing. As discussed above in the section-by-section analysis of § 1024.37(c)(3), one large bank servicer commended the Bureau for proposing model forms that were thoughtfully designed. Having received no other comment on the design of the model forms, the Bureau is finalizing appendix MS–3 as proposed, except that the content of the model forms in appendix MS–3, as adopted, reflects changes the Bureau made with respect to the §§ 1024.37(c)(2), (d)(2)(i) and (ii), and (e)(2), as applicable.

The Bureau also proposed related commentary to appendix MS–3. Proposed comment MS–3–1 would have explained that the model form MS–3(A) illustrates how a servicer may comply with § 1024.37(c)(2). Proposed comment MS–3–2 would have explained that the model form MS–3(B) illustrates how a servicer may comply with § 1024.37(d)(2)(i). Proposed comment MS–3 would have explained that the model form MS–3(C) illustrates how a servicer may comply with § 1024.37(d)(2)(ii). Proposed comment MS–3–4 would have explained that model MS–3(D) illustrates how a servicer may comply with § 1024.37(e)(2). Proposed comment MS–3–5 would have clarified that where the model forms MS–3(A), MS–3(B), MS–3(C), and MS–3(D) use the term ''hazard insurance,'' the servicer may substitute ''hazard insurance'' with, as applicable, ''homeowners' insurance'' or ''property insurance.''

The Bureau did not receive any comments on the proposed commentary. But upon further consideration, the Bureau believes that proposed comment MS–3–1 through 4 are not necessary because the title of each model form in appendix MS–3 already indicates the circumstances under which such model form is to be used. Accordingly, the Bureau is adopting proposed comment MS–3–5 as proposed, but renumbered as comment MS–3–1.

Appendix MS–4—Model Clauses for the Written Early Intervention Notice

In the 2012 RESPA Mortgage Servicing Proposal, the Bureau proposed model clauses in new appendix MS–4 to illustrate the disclosures that would be required under proposed § 1024.39(b)(1). The Bureau developed the proposed model clauses to encourage the borrower to contact the servicer and provide information about loss mitigation options, foreclosure, and housing counselors. The Bureau developed the proposed clauses based on its own analysis and review of existing notices for delinquent borrowers, such as the HUD ''Avoiding Foreclosure'' pamphlet.[187] Several consumer advocacy groups supported the Bureau's decision to provide model clauses but recommended that the Bureau require standardized notices for all servicers because they were concerned that servicers are not consistent in the way they describe loss mitigation options. Industry commenters generally requested more flexibility in the way the notices are provided. Macro conducted one round of consumer testing in Philadelphia, Pennsylvania to assess consumer comprehension of the proposed early intervention model clauses. The Bureau also notes that Macro conducted three rounds of one-on-one cognitive interviews to test disclosure forms for the Bureau's proposed ARM interest rate adjustment notices, which the Bureau is finalizing in the 2013 TILA Servicing Final Rule. The ARM interest rate adjustment notices contained clauses describing loss mitigation options and contact information to access housing counseling resources.

Proposed clauses in Model MS–4(A) illustrated how a servicer may provide its contact information and how a servicer may request that the borrower contact the servicer, as would have been required under proposed § 1024.39(b)(2)(i) and (ii). Consumer testing indicated that all participants understood from this statement[188] that if they were having trouble making their payments, they should contact their bank to see what options may be available.[189] Several participants specifically noticed the sentence stating that ''The longer you wait, or the further you fall behind on your payments, the harder it will be to find a solution.'' These participants said this sentence would make them more likely to contact their bank. Participants generally thought that this statement was similar to a separate statement illustrating how the servicer may inform the borrower how to obtain additional information about loss mitigation options, as would

[187] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev–5, 7–7(G).

[188] The tested statement provided, ''Please contact us. We may be able to make your mortgage more affordable. The longer you wait, or the further you fall behind on your payments, the harder it will be to find a solution.'' This was followed by a sample servicer's address and contact information.

[189] Consumer testing of the servicing transfer notice, discussed above, during the Philadelphia round of testing indicated participants understood the distinction between their servicer and their lender and that this distinction did not present comprehension problems. The Bureau notes that, pursuant to comment MS–2.ii, servicers may freely substitute the words ''lender'' and ''servicer'' as appropriate.

have been required under § 1024.39(b)(2)(iv), as illustrated in proposed MS–4(C).[190] Most participants responded positively to these statements and believed that their bank was reaching out towards a solution, although two participants thought that the statements could be more polite or resembled an advertisement rather than a communication from their bank. Separately, during the public comment process, one credit union commenter also noted that the tone in the model notices did not necessarily reflect the way it communicated with their borrowers and requested more flexibility with respect to how the notices are worded.

The Bureau believes that the clauses required under § 1024.39(b)(2)(i), (ii), and (iv) may be combined into a single clause, as illustrated in Model MS–4(A) that the Bureau is adopting in the final rule. Both clauses in proposed MS–4(C) and MS–4(A) instruct borrowers to contact the servicer to discuss their options, and the statement instructing borrowers to contact their servicer to learn more about how to apply in proposed MS–4(C) is very closely related. The Bureau is not otherwise changing the phrasing of statements as proposed. Most testing participants reacted favorably to the proposed clauses, and the Bureau notes that servicers can make minor modifications to the sample clauses, pursuant to general comment MS–2 to appendix MS. Moreover, the Bureau notes that the model clauses are not required; they only illustrated how the required statements in § 1024.39(b)(2) can be provided.

Model MS–4(A) contains a bracketed clause stating, ''The longer you wait, or the further you fall behind on your payments, the harder it will be to find a solution.'' The Bureau has included this statement in brackets because it is optional, but the Bureau is including it as recommended language that the Bureau believes will help encourage borrowers to contact their servicer.

Finally, the Bureau has omitted the clause stating ''We may be able to make your mortgage more affordable'' from proposed MS–4(A). During consumer testing, participants were concerned that the statement was potentially misleading. The Bureau does not believe this language is necessary to encourage delinquent borrowers to contact their servicer. That statement also appeared in proposed MS–4(B), illustrating proposed § 1024.39(b)(2)(iii) (brief description of loss mitigation options). The Bureau has deleted this clause in MS–4(B) for the same reason.

Proposed clauses in Model MS–4(B) illustrated how the servicer may inform the borrower of loss mitigation options that may be available, as would have been required under proposed § 1024.39(b)(2)(iii). The proposed clauses in Model MS–4(B) illustrated four commonly offered examples: (1) Forbearance, (2) mortgage modification, (3) short-sale, and (4) deed-in-lieu of foreclosure. During consumer testing of proposed MS–4(B), all participants understood the overall message of the statement—that if they were having difficulty making a mortgage payment, their bank may be able to offer options to help them. After reading the clauses, while participants generally could explain what a forbearance and a loan modification were, only approximately half of the participants could explain ''short-sale'' and ''deed-in-lieu.'' All but one of the participants understood the primary difference between options that would let borrowers remain in their homes (forbearance and mortgage modification) and options that would require that the borrower leave their home (short-sale and deed-in-lieu of foreclosure). All participants understood that the fact that they received this notice did not mean that they would necessarily qualify for these options.

During the public comment process, one large servicer requested clarification that servicers only be required to list loss mitigation options to the extent those options are available from the servicer. Another large servicer recommended that clauses illustrating deeds-in-lieu of foreclosure and short sales include language noting that lenders may seek a deficiency obligation from the borrower, except in the case of bankruptcy.

The Bureau is not finalizing the Model Clauses proposed as Model MS–4(B). Instead, the Bureau is finalizing MS–4(B) by including clauses substantially similar to ones that the Bureau developed over the course of several rounds of consumer testing of the ARM disclosures contained in § 1026.20, which the Bureau tested prior to publication of the 2012 TILA Mortgage Servicing Proposal and that tested better than the options described in proposed MS–4. The Bureau recognizes that these examples of loss mitigation options may not necessarily accurately reflect a servicer's loss mitigation programs. Thus, comment MS–4–2 explained that the language in Model MS–4(B) is optional, and that a servicer may add or substitute any examples of loss mitigation options the servicer offers, as long as the information required to be disclosed is accurate and clear and conspicuous. The Bureau noted in its proposal that if the servicer offered no loss mitigation options, a servicer may not include Models MS–4(B) and MS–4(C) because including those statements would be misleading.

The Bureau proposed comment MS–4–2 clarifying appropriate use of model clause MS–4(B). The comment explained that Model MS–4(B) does not contain sample clauses for all loss mitigation options that may be available. Comment MS–4–2 also explained that the language in the model clauses contained in square brackets is optional, and that a servicer may comply with the disclosure requirements of § 1024.39(b)(2)(iii) by using language substantially similar to the language in the model clauses, or by adding or substituting applicable loss mitigation options for options not represented in these model clauses, as long as the information required to be disclosed is accurate and clear and conspicuous. The Bureau is adopting comment MS–4–2 substantially as proposed.

In response to industry concerns, the Bureau has also added language to comment MS–4–2 to explain that servicers may use clauses to illustrate options to the extent they are available. In addition, the Bureau has clarified that servicers may provide additional detail about the options, provided the information disclosed is accurate and clear and conspicuous. This clarification responds to industry commenters' recommendation to clarify that servicers may explain that the discussion of certain options, such as a short sale, may require deficiency obligations from the borrower.

Proposed clauses in Model MS–4(D) illustrated how a servicer may explain foreclosure and provide the estimated number of days in which the servicer may begin the foreclosure process, as would have been required under proposed § 1024.39(b)(2)(v). During consumer testing of proposed MS–4(D), participants had mixed reactions to the foreclosure statement. Participants understood that this notice was intended to provide the consumer with a definition of the term ''foreclosure'' and to warn them that foreclosure could be a possibility in their future because of a missed payment. However, participants appeared to understand what foreclosure was even before reading this clause. Therefore, they did not appear to learn much from reading

[190] The tested statement provided, ''Call us today to learn more about your options and instructions for how to apply.''

the first sentence of this clause.[191] A few participants specifically commented that this sentence seemed out of place, because it was a definition rather than a statement specifically about their situation. The Bureau tested a hypothetical estimated 90–150 day timeframe for when foreclosure could occur. When asked when lenders could begin to pursue foreclosure, all participants referred to the 90 to 150 day timeframe in the clause, and understood that this time period would start from the due date of their missed payment. However, at least two participants mistakenly thought that the reference to this time period implied that the foreclosure process could not start sooner than 90 days after the missed payment, despite the fact that the clause states that the process ''may begin earlier or later.'' [192] One participant felt strongly that if it was true that the foreclosure process could start in less than 90 days, then the reference to the ''90 to 150 day'' time period should be removed from the clause because it was misleading. For the reasons explained in the section-by-section analysis of § 1024.39(b)(2) above, the Bureau has omitted the clauses in proposed MS–4(D) that illustrated how a servicer could explain foreclosure and provide the estimated number of days in which the servicer may begin the foreclosure process, as would have been required under proposed § 1024.39(b)(2)(v).

Proposed clauses in Model MS–4(E) illustrated how the servicer may provide contact information for the State housing finance authority and housing counselors, as would have been required under proposed § 1024.39(b)(2)(vi). During consumer testing of proposed MS–4(E), all participants understood that the purpose of this message was to provide contact information for the Federal government agency identified in the clause.[193] Contact information for accessing housing counseling resources was also tested during previous rounds of testing of the ARM interest rate adjustment notice. The Bureau is adopting in the final rule the clauses substantially as proposed setting forth contact information for either the Bureau or HUD Web site to access a list of housing counselor or counseling organizations, as well as the HUD telephone number to access the list of HUD-approved counselors. The Bureau is renumbering MS–4(E) as MS–4(C). For the reasons discussed above in the section-by-section analysis of § 1024.39(b)(2), the Bureau is omitting contact information for State housing finance authorities.

VI. Effective Date

This final rule is effective on January 10, 2014. The Bureau believes that this approach is consistent with the timeframes established in section 1400(c) of the Dodd-Frank Act and, on balance, will facilitate the implementation of the Title XIV Rulemakings' overlapping provisions, while also affording covered persons sufficient time to implement the more complex or resource-intensive new requirements. Certain of the regulations set forth in the Final Servicing Rules are required under title XIV. Specifically, section 1420 of the Dodd-Frank Act, which requires the periodic statement, states that the Bureau ''shall develop and prescribe a standard form for the disclosure required under this subsection, taking into account that the statements required may be transmitted in writing or electronically.'' 15 U.S.C. 1638(f)(2). Other regulations set forth in the Final Servicing Rules, while implementing amendments under title XIV of the Dodd-Frank Act, are *not* regulations required under title XIV. Pursuant to section 1400(c)(2) of the Dodd-Frank Act, the effective dates of these regulations need not be within one year of issuance.

The Bureau received approximately 60 comments from industry participants with respect to the appropriate effective date. As stated above, comments from consumer advocacy groups generally urged earlier effective dates. A number of industry trade associations, as well as a large bank and a small credit union indicated that the Bureau should provide a sufficient amount of time, but did not express an opinion regarding an appropriate timeframe. The majority of servicers, including large and small banks, non-bank servicers, and numerous credit unions, as well as their trade associations, indicated that the Bureau should establish an effective date of between 12 and 18 months after issuance.[194] Some large banks, a bank servicer, numerous trade associations, the Office of Advocacy of the U.S. Small Business Administration, and the GSEs stated that the Bureau should consider an implementation period of approximately 18–24 months for certain of the requirements. Further, three banks and numerous trade associations for banks and manufactured housing servicers stated that the Bureau should consider an effective date between 24 and 36 months after issuance. Each of the industry commenters generally stated that the requested time was necessary to effectively implement the regulations because of the complexity of the proposed rules, the impact on systems changes and staff training, and the cumulative impact of the proposed mortgage servicing rules when combined with other requirements imposed by the Dodd-Frank Act or proposed by the Bureau. These letters provide some basis to believe that implementing the regulations within 12 months is challenging for many firms. They do not establish, however, that implementation in 12 months is impracticable.

For the reasons already discussed above, the Bureau believes that an effective date of January 10, 2014 for this final rule and most provisions of the other title XIV final rules will ensure that consumers receive the protections in these rules as soon as reasonably practicable, taking into account the timeframes established by the Dodd-Frank Act, the need for a coordinated approach to facilitate implementation of the rules' overlapping provisions, and the need to afford covered persons sufficient time to implement the more complex or resource-intensive new requirements.

VII. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[195] The 2012 RESPA Servicing Proposal set forth a preliminary analysis of these effects, and the Bureau requested and received comments on this topic. In addition, the Bureau has consulted, or offered to consult, with the prudential regulators, HUD, FHFA, the Federal Trade Commission, and the Federal Emergency Management Agency,

[191] ''Foreclosure is a legal process a lender can use to take ownership of a property from a borrower who is behind on his or her mortgage payments.''

[192] This specific question was not asked of all participants, so it is not possible to estimate exactly how many of the participants might have had this misconception.

[193] Macro tested a statement including HUD's housing counselor list and phone number because, at the time of testing, the Bureau did not have a web site containing this information.

[194] In addition, a force-placed insurer stated that it would be require between 6–12 months to implement regulations relating to force-placed insurance requirements.

[195] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a 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.

including regarding consistency with any prudential, market, or systemic objectives administered by such agencies. The Bureau also held discussions with and solicited feedback from the United States Department of Agriculture Rural Housing Service, the Federal Housing Administration, Ginnie Mae, and the Department of Veterans Affairs regarding the potential impacts of the final rule on those entities' mortgage loan insurance or securitization programs.

In this rulemaking, the Bureau amends Regulation X, which implements RESPA, and the official commentary to the regulation, as part of the Bureau's implementation of the Dodd-Frank Act amendments to RESPA regarding mortgage loan servicing. The final rule includes amendments to Regulation X that implement, among other things, section 1463 of the Dodd-Frank Act. In addition, the final rule includes amendments to Regulation X to impose servicer obligations that are not specifically required by RESPA pursuant to various authorities under RESPA and Title X. The amendments to Regulation X include new requirements with respect to error resolution and information requests; the placement of forced-placed insurance; general servicing policies, procedures and requirements; early intervention with delinquent borrowers; continuity of contact with delinquent borrowers; and loss mitigation procedures. The final rule would also reorganize and amend the mortgage servicing related provisions of Regulation X, currently published in 12 CFR part 1024.21. Such provisions relate to, for example, disclosures with respect to mortgage servicing transfers and servicers' obligations to manage escrow accounts.

Contemporaneously with issuing this rule, the Bureau is also issuing a final rule under TILA to amend Regulation Z (12 CFR part 1026). The amendments to Regulation Z implement the following sections of the Dodd-Frank Act: section 1418 (initial rate-adjustment notice for adjustable-rate mortgages (ARMs)), section 1420 (periodic statement), and section 1464 (prompt crediting of mortgage payments and response to requests for payoff amounts). The final rule also revises certain existing regulatory requirements in Regulation Z for disclosing rate and payment changes to ARMs in current § 1026.20(c).

Part II.A of the final rule (''Overview of the Mortgage Servicing Market and Market Failures'') discusses the servicing market and servicer incentives. As stated above in the proposed rule, a fundamental feature of the market for servicing is that borrowers generally do not choose their own servicers.[196] It is therefore difficult for borrowers to protect themselves from shoddy service or harmful practices. A borrower may select a servicer at origination by choosing a lender that pledges to service the loans that it originates. However, relatively few lenders commit to servicing the loans that they originate, most borrowers do not choose a servicer at origination, and some borrowers who do choose a servicer at origination may find that the servicer retains a subservicer that interacts with the borrower. A borrower may refinance a mortgage loan in order to receive a new servicer. However, refinancing is an expensive and generally impractical way for a homeowner to obtain a new servicer, and, similar to origination, the borrower does not generally select the new servicer.

The Bureau recognizes that certain servicers have incentives to service well. Servicers that rely on a local reputation—their ability to attract new consumers depends on how well they treat current consumers—have incentives to provide high quality servicing. This describes many of the small servicers that the Bureau consulted as part of a process required under SBREFA. They described their businesses as requiring a ''high touch'' model of customer service, both to ensure loan performance and to maintain a strong reputation in their local communities. The vast majority of smaller servicers are community banks and credit unions, which tend to operate in narrowly defined geographic areas, depend deeply on the economies of these communities for their profitability, offer a range of products and services in both deposits and loans, are known for a ''relationship'' model that depends on repeat business to obtain more deposits and extend more loans, and could suffer significant harm to the business from any major failure to treat customers properly because they are particularly vulnerable to ''word of mouth.'' These small servicers also generally service only loans they either originated or hold on portfolio.

The Bureau believes that servicers that service relatively few loans, all of which they either originated or hold on portfolio, generally have incentives to service well: foregoing the returns to scale of a large servicing portfolio indicates that the servicer chooses not to profit from volume, and owning or having originated all of the loans serviced indicates a stake in either the performance of the loan or in an ongoing relationship with the borrower. In light of these favorable incentives, and to preserve access to this type of servicing, the Bureau is exempting many small servicers from the requirements regarding general servicing policies, procedures and requirements, early intervention with delinquent borrowers, continuity of contact with delinquent borrowers; and, with a few exceptions, the requirements regarding loss mitigation, as well as the restriction on obtaining force-placed insurance when a servicer is able to disburse funds from a borrower's escrow account and force-placed insurance would be more expensive for the borrower.

In general, however, mortgage servicing is influenced by the absence of avenues through which borrowers can effectively reward or penalize servicers for the quality of servicing. A borrower cannot readily leave a servicer if the quality of servicing proves to be unsatisfactory, and the borrower cannot control the selection of the new servicer. Borrowers also generally do not have other ways of imposing financial consequences on servicers for poor servicing. Markets are incomplete between borrowers and servicers, and incomplete markets are a form of market failure. This market failure leaves many servicers with only limited incentives to engage in certain activities of value to consumers.[197]

Of particular relevance to this rulemaking is the fact that servicers obtain limited benefits from providing a number of services that are important to borrowers, and especially to delinquent borrowers. As discussed in part II, compensation structures have tended to make mortgage servicing a high-volume, low margin business in which servicers have little incentive to invest in customer service. Servicers have an incentive to provide borrowers with information and services that keep collection costs low, and fees from default servicing may encourage servicers to invest in efficiently ordering and tracking billable work. However, there has generally been no such

[196] *See* 77 FR 57200, 57203 (Sept. 17, 2012).

[197] *See* Joseph E. Stiglitz, *Market Failure,* in *Economics of the Public Sector* (W.W. Norton & Co., Inc., 3d ed. 2000). An alternative way to view the market failure is that servicers are both the agents of investors and, as a practical matter, monopoly providers of information to consumers about details of the loan and consumer payments. Market failures need not be mutually exclusive (Stiglitz, p. 85). Further, as discussed below in the section on general servicing policies, procedures and requirements, foreclosure produces negative externalities, and some reduction in foreclosure may result from provisions of the final rule, particularly general servicing policies, procedures and requirements; early intervention; continuity of contact; and loss mitigation.

compensation for hands-on work with borrowers associated with error resolution, information requests, early intervention, continuity of contact, loss mitigation; and for effectively managing the information that is collected from borrowers and provided to them in this work.[198]

Congress included mortgage servicing provisions in the Dodd-Frank Act in response to pervasive and profound consumer protection problems. The new protections in the rules promulgated under TILA and RESPA will significantly improve the transparency of mortgage loans after origination, including by facilitating timely responses to borrower requests and complaints, requiring the maintenance and provision of accurate and relevant information, avoiding the imposition of unwarranted or unnecessary costs and fees, and requiring review of borrowers for foreclosure avoidance options.

B. Provisions To Be Analyzed

The analysis below considers the potential benefits, costs, and impacts of the following major provisions:

1. Notices of error and requests for information.
2. Force-placed insurance.
3. General servicing policies, procedures and requirements.
4. Early intervention.
5. Continuity of contact.
6. Loss mitigation procedures.

With respect to each major provision, the analysis considers the benefits and costs to consumers and covered persons, and in certain instances other impacts. The analysis also addresses comments the Bureau received on the proposed section 1022 analysis, as well as certain other comments on the benefits or costs of provisions of the proposed rule that are helpful to understanding the section 1022 analysis. Comments that mention the benefits or costs of a provision of the proposed rule in the context of commenting on the merits of that provision are addressed in the section-by-section analysis for that provision. The analysis also addresses certain alternative provisions that were considered by the Bureau in the development of the proposed rule, the final rule, or in response to comments.

C. Data and Quantification of Benefits, Costs and Impacts

Section 1022 of the Dodd-Frank Act requires that the Bureau, in adopting the rule, consider potential benefits and costs to consumers and covered persons resulting from the rule, including the potential reduction of access by consumers to consumer financial products or services resulting from the rule. As noted above, it also requires the Bureau to consider the impact of proposed rules on covered persons and the impact on consumers in rural areas. These potential benefits and costs, and these impacts, however, are not generally susceptible to particularized or definitive calculation in connection with this rule. The incidence and scope of such potential benefits and costs, and such impacts, will be influenced very substantially by economic cycles, market developments, and business and consumer choices, which are substantially independent from adoption of the rule. No commenter has advanced data or methodology that it claims would enable precise calculation of these benefits, costs, or impacts. Moreover, the potential benefits of the rule on consumers and covered persons in creating market changes that are anticipated to address market failures are especially hard to quantify.

In considering the relevant potential benefits, costs, and impacts, the Bureau has utilized the available data discussed in this preamble, where the Bureau has found it informative, and applied its knowledge and expertise concerning consumer financial markets, potential business and consumer choices, and economic analyses that it regards as most reliable and helpful, to consider the relevant potential benefits and costs, and relevant impacts. The data relied upon by the Bureau includes the public comment record established by the proposed rule. The Bureau recognizes that some parties may have different perspectives or consider potential benefits and costs differently.

However, the Bureau notes that for some aspects of this analysis, there are limited data available with which to quantify the potential costs, benefits, and impacts of the final rule. For example, data on the number and volume of various loan products originated for the portfolios of bank and non-bank lenders exists only in certain circumstances. The Bureau has obtained available information about the cost of improving servicer operations, and the discussion below uses this information to quantify some of the costs to servicers of the final rule. However, comprehensive data on the costs of improving servicer operations is unavailable. Data regarding many of the benefits of the rule such as the benefits from prevented defaults or from prevented injuries to the financial system are also limited.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the final rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts. Where possible, the Bureau has made quantitative estimates based on these principles and the data that are available.[199] For the reasons stated in this preamble, the Bureau considers that the rule as adopted faithfully implements the purposes and objectives of Congress in the statute. Based on each and all of these considerations, the Bureau has concluded that the rule is appropriate as an implementation of the Act.[200]

D. Baseline for Analysis

The amendments to RESPA made by Dodd-Frank Act section 1463 regarding error resolution, information requests, and force-placed insurance are largely self-effectuating, and the Dodd-Frank Act generally does not require the Bureau to adopt regulations to implement these amendments.[201] Thus,

[198] For documentation of problems with servicer foreclosure processes and general operating processes, and for discussions of servicer incentives, *see* Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* (2011); Larry Cordell *et al., The Incentives of Mortgage Servicers: Myths and Realities,* at 9 (Fed. Reserve Board, Working Paper No. 2008–46, 2008); and Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers 15 Housing. Pol'y Debate 753 (2004).*

[199] The Bureau noted in the proposals associated with the Title XIV Rulemakings that it sought to obtain additional data to supplement its consideration of the rulemakings, including additional data from the National Mortgage License System (NMLS) and the NMLS Mortgage Call Report, loan file extracts from various lenders, and data from the pilot phases of the National Mortgage Database. Each of these data sources was not necessarily relevant to each of the rulemakings. The Bureau used the additional data from NMLS and NMLS Mortgage Call Report data to better corroborate its estimate of the contours of the non-depository segment of the mortgage market. The Bureau has received loan file extracts from three lenders, but at this point, the data from one lender is not usable and the data from the other two is not sufficiently standardized nor representative to inform consideration of the final rules. Additionally, the Bureau has thus far not yet received data from the National Mortgage Database pilot phases. The Bureau also requested that commenters submit relevant data. All probative data submitted by commenters were discussed in this document.

[200] The Bureau received one comment that stated that by failing to identify the extent to which servicers do not already operate in a manner that would meet the standards of the rule, the Bureau failed to identify whether there was a ''compelling public need'' for regulatory action. The Bureau, however, believes it has demonstrated a compelling public need for regulation, including, for example, through the review of material failures of private markets in part II and the discussion of incomplete markets above. In any event, the Bureau has described the authority and basis for the rule and a ''compelling public need'' is not a legal prerequisite for rulemaking.

[201] *See* 12 U.S.C. 2605(k)(1)(A) and 2605(k)(1)(C) through (D).

many costs and benefits of the provisions of the final rule regarding error resolution, information requests, and force-placed insurance derive largely or entirely from the statute and from regulations regarding qualified written requests previously issued by HUD and republished by the Bureau, not from the final rule. These provisions of the final rule provide substantial benefits to servicers compared to allowing the RESPA amendments to take effect against the existing regulatory framework under Regulation X and without implementing regulations by clarifying ambiguous provisions of the statute and integrating the new statutory requirements into the existing regulatory regime. Greater clarity and integration, as provided by the final rule, should reduce the compliance burdens on covered persons by, for example, reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation.

Section 1022 of the Dodd-Frank Act permits the Bureau to consider the benefits, costs and impacts of the final rule solely compared to the state of the world in which the statute takes effect without implementing regulations. To provide the public better information about the benefits and costs of the statute, however, the Bureau has chosen to consider the benefits, costs, and impacts of the major provisions of the final rule against a pre-statutory baseline. That is, the Bureau's analysis below considers the benefits, costs, and impacts of the relevant provisions of the Dodd-Frank Act combined with the final rule implementing those provisions relative to the regulatory regime that pre-dates the Dodd-Frank Act and remains in effect until the final rule takes effect.[202] As noted above, Regulation X currently regulates servicers' responses to assertions of error and requests for information through the qualified written request process.

As discussed above, RESPA and Title X also give the Bureau authority to develop mortgage servicing rules under Regulation X that are not required by specific statutory provisions. In addition to relying on these authorities to supplement certain of the requirements under RESPA added by the Dodd-Frank Act, the Bureau is relying on these authorities to require servicers to: maintain certain general servicing policies, procedures and requirements; undertake early intervention with delinquent borrowers; provide delinquent borrowers with continuity of contact with staff equipped to assist them; and follow certain procedures when evaluating loss mitigation applications. Because Dodd-Frank Act section 1463 does not specifically impose these obligations on servicers, the pre-statute and post-statute baseline are the same with respect to the analysis of these provisions.

E. Coverage of the Final Rule

The coverage of the mortgage servicing rules is summarized in part I above. The rules generally apply to federally related mortgage loans that are closed-end, with certain exemptions. Open-end lines of credit are generally exempt. Small servicers are exempt from most of the discretionary rulemakings, as discussed below.

Size of the Small Servicer Exemption

As discussed above, the Bureau believes that servicers that service relatively few loans, all of which they either originated or hold on portfolio, generally have incentives to service well: foregoing the returns to scale of a large servicing portfolio indicates that the servicer chooses not to profit from volume, and owning or having originated all of the loans serviced indicates a stake in either the performance of the loan or in an ongoing relationship with the borrower. The vast majority of smaller servicers are community banks and credit unions, which tend to operate in narrowly defined geographic areas, depend deeply on the economies of these communities for their profitability, offer a range of products and services in both deposits and loans, are known for a ''relationship'' model that depends on repeat business to obtain more deposits and extend more loans, and could suffer significant harm to the business from any major failure to treat customers properly because they are particularly vulnerable to ''word of mouth.'' These small servicers generally maintain ''high-touch,'' customer-centric customer service models. They also generally service only loans they either originated or hold on portfolio.

Where small servicers already have incentives to provide high levels of customer contact and information, the Bureau believes that the circumstances warrant exempting those servicers from complying with certain provisions. For community banks and credit unions in particular, affirmative communications with consumers help them (and their affiliates) to ensure loan performance, market other consumer financial products and services to the customers for whom they service mortgages and have a relationship, and protect their reputations in their local communities.[203] Because these servicers generally have a long-term relationship with the consumers, their incentives with regard to charging fees and other servicing practices tend to be more aligned with consumer interests.

The Bureau believes that two conditions are necessary to warrant a possible exemption from a provision of the rule—that is, that an exemption may be appropriate only for servicers that service a relatively small number of loans and either own or originated the loans. Larger servicers are likely to be much more reliant on, and sophisticated users of, computer technology in order to manage their operations efficiently. In such situations, compliance is likely to be somewhat easier to accomplish. Further, larger servicers also generally operate in a larger number of communities under circumstances in which the ''high touch'' model of customer service is not practical or service many loans in which they do not have as much of a stake in the long-term performance.

In order to implement the small servicer exemption, the Bureau defines a small servicer to be any servicer that, together with any affiliates, services 5,000 or fewer mortgages loans, all of which the servicer or affiliates originated or own. [204] The definition incorporates the requirement that the servicer or affiliates originated or own the loans that the servicer services because, as explained above, the Bureau believes that this is a key indicator of servicers that generally have incentives to provide high levels of customer contact and information. To develop the loan count threshold, the Bureau computed loan counts for insured depository institutions using data on aggregate unpaid principal balance and a measure the Bureau derived for the average loan unpaid principal balance at

[202] The Bureau has chosen, as a matter of discretion, to consider the benefits and costs of those provisions that are required by the Dodd-Frank Act in order to better inform the rulemaking. The Bureau has discretion in future rulemakings to choose the relevant provisions to discuss and to choose the most appropriate baseline for that particular rulemaking.

[203] *See* Lori J. Pinto *et al.,* Prime Alliance Loan Servicing, *Re-Thinking Loan Serving,* at 8 (Apr. 2010) (''Pinto Paper''), *available at http://cuinsight.com/media/doc/WhitePaper_CaseStudy/wpcs_ReThinking_LoanServicing_May2010.pdf.*

[204] As stated above, the 5,000-loan threshold reflects the purposes of the exemption that the rule establishes for these servicers and the structure of the mortgage servicing industry. The Bureau's choice of 5,000 in loans serviced for purposes of Regulation Z does not imply that a threshold of that type or of that magnitude would be an appropriate way to distinguish small firms for other purposes or in other industries.

insured depositories.[205] The Bureau's methodology takes into account the fact that servicers that service smaller numbers of loans also tend to service loans with smaller unpaid principal balances. For example, the Bureau finds that the average unpaid principal balance on mortgage loans at insured depositories and credit unions is about $160,000, but it is only about $80,000 at insured depositories and credit unions with under $1 billion in assets.

The Bureau believes that the 5,000 mortgage loan threshold further identifies the group of servicers that make loans only or largely in their local communities or more generally have incentives to provide high levels of customer contact and information. The Bureau also believes, in light of the available data, that no other threshold is superior in balancing potential over-inclusion and under-inclusion. With the threshold set at 5,000 loans, the Bureau estimates that over 98 percent of insured depositories and credit unions with under $2 billion in assets fall beneath the threshold. In contrast, only 29 percent with over $2 billion in assets fall beneath the threshold and only 11 percent of those with over $10 billion in assets do so. Further, over 99.5 percent of insured depositories and credit unions that meet the traditional threshold for a community bank—$1 billion in assets—fall beneath the threshold.[206] The Bureau estimates there are about 60 million closed-end mortgage loans overall, with about 5.7 million serviced by insured depositories and credit unions that qualify for the exemption.[207]

The Bureau believes that the insured depositories and credit unions that fall below the 5,000 loan threshold consist overwhelmingly of entities that make loans only or largely in their local communities and have incentives to provide high levels of customer contact and information. Further, while some such entities may service more than 5,000 loans, the Bureau believes that relatively few do, so expanding the loan count above 5,000 is more likely to include entities that use a different servicing model. If the loan count threshold were set at 10,000 mortgage loans, over 99.5 percent of insured depositories and credit unions with under $2 billion in assets would fall beneath the threshold. However, 50 percent of insured depositories with over $2 billion in assets and 20 percent of those with over $10 billion in assets would fall beneath the threshold. The Bureau recognizes that some of these servicers may not qualify as small servicers because some may not own or have originated all of the loans they service. However, the Bureau believes that these figures give a fair representation of the types of servicers that would qualify as small servicers given the respective thresholds.[208]

The Bureau concludes that the 5,000 mortgage loan threshold, coupled with the requirement to service only loans owned or originated, provides a reasonable balance between the goal of including a substantial number of servicers that make loans only or largely in their local communities or more generally have incentives to provide high levels of customer service and the goal of excluding servicers that use a different, less personal business model. The Bureau further believes that it is appropriate for a definition of small servicers, for purposes of an exemption to servicing rules, to include conditions specifically associated with the incentives and business model of servicers, such as owning or originating all loans. There is no perfect way, however, to identify servicers that have chosen a business model in which an essential component is providing high levels of customer service.[209]

Finally, the Bureau estimates that there are about 13.9 million closed-end mortgage loans serviced by non-depositories.[210] The data is not available with which to accurately estimate the number of exempt non-depository servicers or the number of loans they service. However, the Bureau believes that the number of loans serviced is a small percentage of this total given the financial advantages of servicing large numbers of loans. The Bureau has therefore decided not to distinguish, in the definition of a small servicer, whether a mortgage servicer is an insured depository or credit union or has some other business form.

F. Potential Benefits and Costs to Consumers and Covered Persons

1. Notices of Error and Requests for Information

Section 1463 of the Dodd-Frank Act amends section 6 of RESPA by, among other things, establishing new servicer obligations with respect to handling notices of error and requests for information from borrowers and making certain changes to the existing qualified written request process under RESPA and Regulation X. Specifically, section 1463 of the Dodd-Frank Act (1) prohibits servicers from failing to take timely action to respond to borrower requests to correct errors relating to allocation of payments, final balances for purposes of paying off a mortgage loan, avoiding foreclosure, or other standard servicer duties, (2) prohibits servicers from failing to respond within ten business days to requests from borrowers regarding the identity of the

[205] Credit unions report the number and aggregate balance of mortgages held in portfolio on their Call Report. Using these reports the Bureau calculated the average unpaid principal balance of portfolio mortgages by State for credit unions with less than $1 billion in assets and applied the State specific figures to banks and thrifts under $10 billion in assets. For banks and thrifts with over $10 billion in assets, the Bureau relied on the OCC Mortgage Metrics Report, which showed an average unpaid principal balance estimate of $175,000. For securitized loans, the Bureau relied on the FHFA's non-public Home Loan Performance database, which provides data by size of securitized loan book; this yielded average unpaid principal balances ranging from $141,000 to $189,000.

[206] The Bureau notes, however, that the FDIC recently released a new set of empirical criteria for identifying community banks in which some banks with under $1 billion in assets are excluded and some banks with over $1 billion in assets are included. *See* Fed. Deposit Ins. Corp., *FDIC Community Banking Study,* at 1–5 (Dec. 2012), *available at http://www.fdic.gov/regulations/resources/cbi/study.html.* The study is somewhat critical of using a $1 billion threshold to define community banks, as has been traditional. The Bureau's rule equates roughly to a $2 billion threshold to the extent that the rule covers 98 percent of insured depositories and credit unions with fewer assets.

[207] To obtain estimates of aggregate loan counts, the Bureau aggregated mortgage loan counts obtained or derived from the FHFA ''Home Loan Performance'' data described above, the Board's Flow of Funds Accounts of the United States (statistical release z.1), the data from the credit union Call Report and the bank and thrift Call Report, the CoreLogic mortgage loan servicing data set, and the BBx data set from BlackBox Logic.

[208] The Bureau believes that almost all insured depositories and credit unions that service 5,000 or fewer loans own or originated those loans. Entities servicing loans they did not originate and do not own most likely view servicing as a stand-alone line of business, and they would choose to service substantially more than 5,000 loans in order to obtain a profitable return on their investment in servicing. To the extent the assumption does not hold, it is more likely not to hold for insured depositories and credit unions servicing more than 5,000 loans.

[209] In the 2012 RESPA Servicing Proposal, the Bureau solicited comment on whether to exempt small servicers from certain provisions. As discussed above in the analysis of § 1024.30, the Bureau received comments on this issue. Regarding a threshold for the number of mortgage loans in the definition of a small servicer, commenters recommended thresholds between 5,000 and 15,000 mortgage loans. For the reasons described above, the Bureau believes that the 5,000 loan count threshold coupled with the requirement that the servicer owns or originated the loans provide an appropriate definition of small servicer for purpose of the exemption.

[210] To obtain estimates of loan counts, the Bureau aggregated mortgage loan counts obtained or derived from the FHFA ''Home Loan Performance'' data described above, the Board's Flow of Funds Accounts of the United States (statistical release z.1), the data from the credit union Call Report and the bank and thrift Call Report, the CoreLogic mortgage loan servicing data set, and the BBx data set from BlackBox Logic.

owner or assignee of their mortgage loan, and (3) prohibits servicers from charging fees for responding to qualified written requests. Further, section 1463 of the Dodd-Frank Act shortens the timeframe for servicers to acknowledge and respond to qualified written requests.

The Bureau has implemented these amendments to RESPA through §§ 1024.35 and .36. Under § 1024.35, servicers are required to respond to written notices from borrowers regarding certain covered errors, including errors relating to the servicing of a borrower's mortgage loan. Under § 1024.36, servicers are2 required to respond to borrowers' written requests for information regarding their mortgage loan. Both §§ 1024.35 and 1024.36 apply to qualified written requests asserting covered errors or requesting information regarding the borrower's mortgage loan, respectively, but notices of error and information requests need not meet the requirements for submission of a qualified written request to fall under §§ 1024.35 and 1024.36.[211]

Under § 1024.35, servicers must provide borrowers with a written acknowledgement within five days (excluding legal public holidays, Saturdays and Sundays) of receipt of a notice of error. In addition, § 1024.35 requires servicers to respond to a notice of error by either correcting the asserted error and notifying the borrower of such correction in writing, or conducting a reasonable investigation and providing the borrower with written notification including a statement that no error occurred and of the borrower's right to request documents relied upon by the servicer to reach this determination. For most asserted errors, § 1024.35 requires that the investigation must be completed and a response provided within 30 days (excluding legal public holidays, Saturdays and Sundays) after receipt of the notice of error. Servicers are not required to comply with these acknowledgement and response requirements if they correct the error asserted by the borrower and notify the borrower of the correction in writing within five days (excluding legal public holidays, Saturdays and Sundays). Servicers also are not required to comply with these requirements for notices of error that are duplicative, overbroad, or untimely.

The final rule provides for substantially similar requirements with respect to borrower requests for information. Under § 1024.36, servicers must provide borrowers with written acknowledgement within five days (excluding legal public holidays, Saturdays and Sundays) of receipt of an information request. In addition, § 1024.35 requires servicers to respond to an information request by either providing a borrower with the requested information or conducting a reasonable search for the information and providing the borrower with a written notification that the information requested is not available to the servicer. For requests for most types of information, the servicer must respond to a borrower's request within 30 days (excluding legal public holidays, Saturdays and Sundays) after receipt of the information request. Servicers are not required to comply with these acknowledgement and response requirements if they provide the information requested to the borrower within five days (excluding legal public holidays, Saturdays and Sundays). Servicers also are not required to comply with these requirements for requests for confidential, proprietary, or privileged information, or requests for information that are overbroad, unduly burdensome, duplicative, or untimely.

Potential benefits and costs to consumers—error resolution. Section 1024.35 lists eleven categories of errors subject to the requirements of the section, including a catch-all category for any error relating to the servicing of a borrower's loan. Any qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error under the rule. However, the rule also applies to notices of error that are not covered by the current qualified written request mechanism.

The benefits to borrowers of the new error resolution process depend on (a) the number of borrowers who use the new error resolution process who would otherwise assert errors informally, via phone calls or email, either because the new process is broader in scope or is easier to use than the qualified written request process, (b) the additional benefits to these borrowers from using the new error resolution process instead of an informal process, and (c) the additional benefits from reduced response times and enhanced investigation requirements to borrowers who, absent the rule, would use the qualified written request process.[212]

In developing the proposed rule, the Bureau conducted outreach with servicers regarding error resolution. The Bureau could not obtain representative, quantitative information about the number or types of errors currently asserted by borrowers under either informal processes or the qualified written request process. Thus, it is not possible to quantify the potential for greater use of the new process or the potential additional benefits to those who would use it instead of using current informal or formal processes.[213]

Some of the enumerated errors subject to the error resolution requirements under the final rule concern basic duties that servicers perform frequently for large numbers of borrowers (*e.g.,* accept conforming payments, properly apply payments as required under the terms of the mortgage loan, pay taxes and insurance). The Bureau believes that servicers currently generally perform these duties. Further, when servicers do not, the errors frequently are, and will continue to be, asserted and resolved adequately through an informal process. Borrowers who currently assert these errors through the qualified written request process may benefit given the simpler form requirements and faster response times required under the final rule. On occasion, however, borrowers who currently use an informal process may instead use the error resolution process under the final rule, perhaps because it is more convenient than the existing qualified written request process, and these borrowers may obtain a better outcome given the final rule's investigation and response requirements.

Other enumerated errors concern activities that servicers perform less frequently. With respect to these activities, errors are more likely to occur and informal mechanisms are less likely to lead to effective resolution. For example, under the final rule, it is a covered error for a servicer to fail to provide accurate information to a borrower with respect to loss mitigation options and foreclosure or to fail to suspend a foreclosure sale when, for example, the borrower is performing under a loss mitigation agreement. The greater scope and clarity of the new error resolution process will allow borrowers who would otherwise not assert errors relating to these issues at all or would assert them informally to obtain the benefits of the new investigation and response requirements of the error resolution process. Borrowers who would use the qualified

[211] In the final rule, the provisions in § 1024.35 and § 1024.36 apply only to written notices or requests from borrowers. However, § 1024.38 provides obligations on servicers regarding oral assertions of error and oral requests for information.

[212] There may be benefits to borrowers generally if assertions of errors induce servicers to improve their operations, although whether this will occur is uncertain.

[213] See, however, the general discussion of servicing operations and avoidable foreclosure in the analysis of the provisions on reasonable information management, *infra.*

written request process will also benefit from the new investigation and response requirements of the error resolution process. Because many of these errors have the potential to impose substantial financial and other costs on borrowers, the error resolution requirements under the final rule may provide substantial benefits to borrowers who experience such errors.

More generally, the Bureau believes that the rule would benefit borrowers because, as discussed above, there is reason to believe that many servicers do not currently invest sufficiently in providing robust error resolution procedures to borrowers. Borrowers do not choose their servicers, except indirectly by choosing their lenders, and have little recourse for poor customer service against either their servicers or the owners or assignees of their loans (for whom servicers are the agents). Thus, the market for servicing may not fully reflect the interests of borrowers in having robust error resolution procedures.

The Bureau recognizes the possibility that the provisions on error resolution may impose costs on some servicers. One-time training costs and system updates as well as higher ongoing costs from the new error resolution process may lead servicers to reduce other services. Servicers may, for example, reallocate resources from oral error resolution to written error resolution, reducing access to servicer personnel for some borrowers while increasing access and quality of outcomes for others. This particular effect should be limited given the requirements in § 1024.38 regarding policies and procedures for responding to oral assertions of complaints. Servicers may, however, reduce other services. Similarly, servicers may not charge a fee or require a borrower to make any payment that may be owed as a condition of responding to a notice of error. Servicers may, however, charge fees for other activities.

Potential benefits and costs to consumers—requests for information. The benefits to borrowers of the new information request process depend on (a) the number of borrowers who use the new process for requesting information who would otherwise make these requests informally, via phone calls or email, either because the new process is broader in scope or is easier to use than the qualified written request process, (b) the additional benefits to these borrowers from using the new process for requesting information instead of an informal process, and (c) the additional benefits from reduced response times and enhanced investigation requirements to borrowers who, absent the rule, would use the qualified written request process.

Regarding outcomes of the new information request process, the servicer is a convenient source of certain information that may be requested by borrowers (*e.g.,* details about the terms of the loan, the annual amount of interest paid, the remaining mortgage balance) and may be the only source of other information (*e.g.,* the date a payment was received or a disbursement from escrow was made, the new payment on an adjustable rate mortgage). Receipt of such information may provide many benefits to borrowers; both by facilitating household budgeting in the near term and over time, which can improve the household's welfare, and by allowing borrowers to forestall or correct problems likely to cause them monetary losses (*e.g.,* by verifying that payments were received or taxes and insurance were paid from escrow).

In developing the proposed rule, the Bureau conducted outreach with servicers regarding existing information request processes. One servicer estimated that it receives 70,000 phone calls a month on a portfolio of 300,000 loans; another estimated it receives 160,000 phone calls per month on a portfolio of about 1 million loans. Borrowers may call servicers both to request information and to assert errors, but the Bureau was informed that the vast majority of phone calls are requests for information. The most common request for information is whether the servicer has received the borrower's payment. Most requests for information that are made by phone are addressed by servicers in the same call. The Bureau believes that other servicers generally follow the same practice.

Given the convenience of receiving information through informal oral processes, the Bureau does not believe that the final rule will cause large numbers of borrowers to change from using informal oral processes to formal written processes. However, borrowers who do make this change as well as borrowers who would use the qualified written request process if not for the rule will benefit from the reduced form requirements and the new investigation and response requirements applicable to requests.

More generally, the Bureau believes that the rule would benefit borrowers because, as discussed above, there is reason to believe that many servicers do not currently invest sufficiently in having robust procedures for addressing information requests from borrowers. Borrowers do not choose their servicers, except indirectly by choosing their lenders, and have little recourse for poor customer service against either their servicers or the owners or assignees of their loans (for whom servicers are the agents). Thus, the market for servicing may not fully reflect the interests of borrowers in having robust procedures for information requests.

The Bureau recognizes the possibility that the provisions on requests for information may impose costs on some borrowers. One-time training costs and system updates and higher ongoing costs from the new process for requesting information may lead servicers to reduce other services. Servicers may, for example, reallocate resources from addressing oral requests for information to written requests for information, reducing access to servicer personnel for some borrowers while increasing access and quality of outcomes for others. This particular effect should be limited given the requirements in § 1024.38 regarding maintaining policies and procedures to address oral complaints and requests for information. Similarly, servicers generally may not charge a fee or require a borrower to make any payment that may be owed as a condition of responding to an information request. Servicers may, however, charge fees for other activities.

Potential benefits and costs to covered persons. The Bureau has carefully considered whether there are any significant benefits to covered person from this provision and has determined that there are not.

Servicers currently incur costs responding to qualified written requests to correct errors and to provide information. Servicers will incur additional one-time and ongoing costs to comply with the new investigation and response requirements and meet the new time limits. Servicers will need new training materials and possibly better access to borrower data, in which case some servicers will need system updates and better data storage and data management capabilities. On the other hand, as discussed above, the convenience of oral and other informal means of asserting errors and requesting information should moderate the extent to which borrowers make use of even the expanded and streamlined formal written processes under §§ 1024.35 and 1024.36 for asserting errors and requesting information. Some servicers may also need to hire additional employees.

Certain provisions of § 1024.35 and 1024.36 are intended to mitigate the costs of complying with the procedures. Notices of error and information requests that are resolved within five

days (excluding legal public holidays, Saturdays and Sundays) are not subject to the acknowledgement or response requirements of the error resolution and information request provisions. Servicers do not need to respond to notices of error or information requests that are overbroad or duplicative. Further, the provisions of the final rule provide substantial clarity to servicers regarding servicer duties compared to the current qualified written request mechanism. As noted, clarity reduces costs for attorney and compliance officer time as well as potential costs of over-compliance and unnecessary litigation.

The Bureau further considered whether to define as a covered error a servicer's failure to accurately and timely provide a disclosure to a borrower as required by applicable law. The Bureau determined that such a failure was not appropriate as a covered error because the information request provisions provide the borrower the ability to obtain the underlying information. Further, the Bureau believes that a servicer's action to attempt to correct the failure, such as by sending the disclosure after the deadline, would not actually correct the error and would not be helpful or useful to borrowers. In that circumstance, the error resolution request would create burden and impose costs on servicers without offering concomitant benefit for borrowers.

As discussed above in the section-by-section analysis for §§ 1024.35 and 1024.36, in light of comments received, the Bureau reconsidered its assessment in the 2012 RESPA Servicing Proposal of the costs of applying the error resolution procedures to oral notices of error. Specifically, the Bureau concluded that tracking, investigating, documenting, and providing written responses to oral notices of error—expanded under the final rule from a finite list of errors to include a limited catch-all provision—would impose significant new costs on servicers. Relative to the proposed rule, the final rule restricts the error resolution and information request requirements solely to notices of error and information requests received in writing, but adds a catch-all provision to the definition of covered errors similar to the current statutory requirement that servicers respond to qualified written requests relating to the servicing of a mortgage loan. By not applying the error resolution procedures to oral assertions of error or requests for information, the Bureau avoids imposing on servicers the incremental costs of compliance with the strict requirements of §§ 1024.35 and 1024.36 with respect to oral notices of error and requests for information, including with respect to errors that may be asserted by means of the catch-all category.

2. Requirements Regarding Force-Placed Insurance Policies

Dodd-Frank Act section 1463 amends RESPA to prohibit a servicer of a federally related mortgage loan from obtaining force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. In addition, the statute sets forth a mandatory process servicers must follow before obtaining force-placed insurance. The process includes sending the borrower two written notices over a 45-day period. The statute also requires servicers to terminate force-placed insurance and refund to borrowers force-placed insurance premium charges and related fees paid during any period during which the borrower's hazard insurance coverage and the force-placed insurance coverage were both in effect. The statute also specifies that servicers must accept any reasonable form of written confirmation from a borrower of existing insurance coverage, and that charges related to force-placed insurance must be bona fide and reasonable.

The Bureau has implemented these requirements through § 1024.37 of the final rule. Section 1024.37 also requires servicers to provide borrowers with written notice before renewing existing force-placed insurance policies. The final rule provides model forms for the force-placed insurance notices to be sent to borrowers.

Additionally, with respect to borrowers with escrow accounts for the payment of hazard insurance, § 1024.17(k)(5) prohibits servicers from purchasing force-placed insurance where the servicer can continue the borrower's homeowner insurance, even if the servicer needs to advance funds to the borrower's escrow account to do so.

Potential benefits and costs to consumers. Borrowers pay for force-placed insurance, but they do not select the insurance provider or have other ways of providing consequential feedback to the insurance provider regarding its services. Further, incentives like commissions paid to servicers or their insurance affiliates may cause servicers to prefer purchasing force-placed insurance or renewing pre-existing force-placed insurance over ensuring that borrowers have adequate opportunity to renew their hazard insurance. Thus, the market for force-placed insurance may not fully reflect the interests of borrowers in minimizing force-placement and the amount of time force-placed insurance is in effect. Accordingly, mandated force-placed insurance disclosures and procedures may reduce the number of borrowers who pay for unnecessary force-placed insurance or the length of time during which borrowers pay for such insurance.

The Bureau and ICF Macro (Macro) worked closely during the first quarter of 2012 to develop and test force-placed insurance disclosures that would satisfy the requirements of the Dodd-Frank Act and provide information to consumers in a manner that would be understandable and useful. Specifically, the Bureau undertook three rounds of qualitative testing of the notices, and participants said that if they received force-placed insurance notices like the ones the Bureau is issuing, they would immediately contact their insurance provider to find out whether or not their hazard insurance was still in force. In light of our testing, anecdotal evidence and the Bureau's own judgment and expertise about consumer needs and behavior, the Bureau believes that these required disclosures will benefit consumer. This testing is summarized in part III and discussed further in part V, above.

The Bureau does not have representative data with which to quantify the extent to which industry practice currently meets the standards of the force-placed insurance provisions or the extent to which the provisions on force-placed insurance would reduce the need for force placement or the duration of force placement; however, as discussed in greater detail below, the Bureau believes that many servicers already send borrowers multiple notices before charging borrowers for force-placed insurance. Further, the Bureau understands that industry practice generally entails servicers terminating force-placed insurance coverage and refunding to borrowers any premiums charged during any period when the borrower had borrower-obtained insurance coverage in place. Borrowers whose servicers already provide multiple notice before charging borrowers for force-placed insurance and follow the provisions under § 1024.37 regarding termination and refunds will benefit less from § 1024.37 than borrowers whose servicers currently do not follow these practices. But even for the former category of borrowers, the final rule may result in benefits by ensuring that adequate time is given for borrowers to review the force-place insurance notices sent by servicers and that the form and content

of the notices are tailored to enhance consumer understanding. Depending on their current servicers' practices, such borrowers may also benefit from the requirements under the final rule regarding the evidence that servicers are required to accept of existing hazard insurance, the requirement that charges related to force-placed insurance be bona fide and reasonable, and the requirement to provide notice before renewing or replacing existing force-placed insurance.

The Bureau notes that even a small reduction in force-placed insurance may provide borrowers with substantial benefits. In 2009, the average premium for homeowner's insurance was $880 while on average force-placed insurance cost about twice this amount.[214] Thus, on average, a homeowner who pays for force-placed insurance for one to six months pays an additional $73 to $440 dollars.[215] If the provisions of the final rule reduce the incidence of force-placed insurance by just 10 percent, approximately 171,000 homeowners will save between $7.6 million and $45.8 million in unnecessary premiums each year.[216]

For purposes of qualitative analysis, it is useful to first divide borrowers into those with insurance that has been force-placed by a servicer and those with hazard insurance coverage obtained by the borrower. Of those with borrower-obtained hazard insurance, it is useful to sub-divide this group into two additional groups: Those with hazard insurance that is about to lapse and who have the funds to renew (whether the funds are kept in an escrow account or elsewhere); and those with hazard insurance that is about to lapse and who do not have the funds to renew. The force-placed insurance disclosures and procedures may provide different benefits to borrowers depending on the group to which they belong. In all cases, the benefits to borrowers from the rule are smaller to the extent the current business practices of servicers approximate the practices required by the rule.

Borrowers with force-placed insurance benefit from provisions that reduce the number of days the borrower has force-placed insurance and the charge per day. A borrower with forced-placed insurance and a servicer that does not currently comply with some of the requirements regarding renewal of force-placed insurance, evidence of hazard insurance, cancellation of force-placed insurance, or bona fide and reasonable charges may pay less each day and for a fewer number of days under the rule.

Next, consider a borrower who has hazard insurance the borrower obtained (*i.e.* the servicer did not force-place), the policy is about to lapse, and the borrower has the funds to renew the insurance. If the funds are not in an escrow account, then the borrower may fail to properly renew the insurance. The force-placed insurance procedures would not require the servicer to renew the hazard insurance of a borrower who does not have an escrow account established to pay the borrower's hazard insurance; however, the servicer still has to provide two notices before charging such borrowers for force-placed insurance. Insofar as these forms are more effective than existing forms, compliance would reduce the chance that the borrower would pay for unnecessary force-placed insurance. Further, if the borrower's insurance does lapse, compliance with the requirements regarding renewal of force-placed insurance, evidence of hazard insurance and cancellation of force-placed insurance may reduce both the number of days and the cost per day that the borrower has force-placed insurance.

Next, consider a borrower who has hazard insurance that is about to lapse and does not have the funds to renew the insurance. If the borrower does not have an escrow account and the servicer obtains force-placed insurance, but the borrower later acquires the funds to obtain hazard insurance, then compliance by the servicer with the requirements regarding evidence of hazard insurance and cancellation of force-placed insurance may reduce both the number of days and the cost per day that the borrower has force-placed insurance. If this borrower has escrowed for the payment of hazard insurance and the escrow account contains insufficient funds to pay his or her hazard insurance premium charges, the servicer is currently required under Regulation X to advance funds for the timely payment of escrowed items as long as the borrower's payment is not more than 30 days overdue. For this borrower, compliance by the servicer removes the possibility that the borrower's hazard insurance would be canceled for nonpayment after 30 days and accordingly, the chance that the borrower would pay for force-placed insurance.

The Bureau does not believe that the requirements of the final rule regarding force-placed insurance will increase costs to borrowers for mortgage credit or impose other significant costs on borrowers. The costs to servicers are discussed below, but servicers or force-placed insurers currently incur expenses associated with the activities required by the rule even if they do not comply with the rule. As discussed below, however, the Bureau recognizes that the rule may change financial relationships between servicers and force-placed insurers and servicers may eventually see some increase in costs. Servicers might pass these costs on to investors or, if they originate loans, at origination to borrowers who are more likely than others to require force-placed insurance.

Potential benefits and costs to covered persons. In general, to the extent servicers manage the force-placement of insurance and not the insurers or (for the disclosures) vendors, compliance will require the development of new disclosures, system updates to incorporate information specific to each loan into those disclosures, the development of internal policies and procedures consistent with the rule, staff training on those policies and procedures, internal monitoring for compliance, and other expenses discussed below. In all cases, the costs to servicers from the rule are smaller to the extent the current business practices of servicers approximate the practices required by the rule.

The first of the two required disclosures given before charging a borrower for force-placed insurance would require minimal customization to each loan, but the second disclosure would have to include the cost or a reasonable estimate of the cost of force-placed insurance, stated as an annual premium. Further, even if servicers provide the new disclosures, they will likely use vendors who will be developing and providing similar disclosures to many other servicers in light of the new rules. Thus, the one-time costs of the new disclosures will be spread over many servicers. The development costs are also mitigated by fact the Bureau has developed model forms. Servicers will not incur these costs to the extent force-placed

[214] For the average homeowner's insurance premium, *see* data provided by Insurance Institute of America, available at: *http://www.iii.org/facts_statistics/homeowners-and-renters-insurance.html*. For information on the cost of force-placed insurance, see *http://newsroom.assurant.com/releasedetail.cfm?ReleaseID=645046&ReleaseType=Featured%20News* (reporting force-placed insurance costs 1.5 to 2 times hazard insurance).

[215] That is to say, the homeowner pays one-twelfth to one-half of the additional $880.

[216] Discussions with industry during the development of the proposed rule suggested that 2 percent of mortgages incurred force-placement each year. There are approximately 52 million first liens, so about 1.04 million homeowners incur force-placement each year. Ten percent of this figure multiplied by $73 (or $440) gives $7.6 million (or $45.8 million).

insurance providers perform these duties for servicers and will continue to do so after the new rules take effect. However, the Bureau recognizes that these arrangements may change if the new rules make force-placement less frequent.

With respect to the renewal notice, there does not appear to be an industry standard for providing advance notice before a servicer renews or replaces existing force-placed insurance. Thus, this provision may impose new and ongoing costs on servicers of the types described above. The renewal notice need only be given once per year, however, so again the Bureau does not believe that this requirement imposes any substantial costs relative to the baseline.[217] The points made above regarding the use of vendors and force-placed insurance providers are applicable to renewal notices as well and would mitigate the cost of providing the notice.

The Bureau recognizes that under the final rule servicers (or insurers) may need to wait longer between the time they send disclosures to borrowers and when they may charge for force-placed insurance, as compared to current practice. Servicers (or insurers) may incur some initial expenses in adjusting how they monitor accounts in order to provide the notices in advance of imposing charges, or they may make greater use of retroactive provisions in force-placed insurance policies.

With respect to borrowers with escrow accounts, servicers may not purchase force-placed insurance unless a servicer is unable to disburse funds from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges are paid in a timely manner. While servicers have priority in recovering these funds either from the homeowner or when the property is sold in foreclosure, they do not recover interest on these advances.[218] The Bureau is not aware of representative and reasonably available data that would it allow it to estimate the quantity of funds that will be advanced for different periods of time as a result of the final rule.

As discussed above, current industry practice generally entails servicers terminating force-placed insurance coverage and refunding to borrowers any premiums charged during any period when the borrower had borrower-obtained insurance coverage in place. Thus the Bureau does not believe that the required refund of premiums for force-placed insurance that overlapped with existing hazard insurance will impose substantial costs relative to the baseline for most servicers. Although the Bureau understands that most, if not all, servicers and force-placed insurers refund premiums paid for overlapping coverage, a servicer who does not follow this practice may incur costs to develop systems and train staff necessary to process such refunds. Further, because the servicer is obligated to refund the premiums, there may be interests costs on funds between the time the servicer refunds the premium to the borrower and the corresponding time when a premium advanced by the servicer to the insurer is refunded from the insurer to the servicer.

The Bureau notes that the owners or assignees of mortgage loans may also benefit from the force-placed insurance disclosures and procedures. As discussed in part V, above, force-placed insurance is often significantly more expensive than hazard insurance obtained by the borrower. If the final outcome is foreclosure, the additional cost of funds forwarded for force-placed insurance produces an additional expense to such persons, who benefit when this additional expense is minimized.

Finally, the Bureau recognizes that the force-placed insurance provisions may produce a number of changes in how force-placed insurance is provided and paid for. These changes may increase the costs to servicers from monitoring insurance coverage and placing and removing force-placed insurance. The Bureau believes that currently some servicers incur all of the costs associated with providing force-placed insurance notices, tracking borrower coverage, and placing and terminating the insurance. However, for other servicers, the Bureau believes that the force-placed insurance provider handles these activities and absorbs the costs or passes them on to the borrower. If the force-placed insurance provisions reduce the frequency with which servicers obtain force-placed insurance, then total payments by borrowers to servicers and force-placed insurers may fall. This may reduce commission income that in some cases is paid by insurers to servicers or their insurance affiliates, and it may also reduce the willingness of force-placed insurance providers to perform the tracking and other activities stated above as part of the service. Servicers may therefore see a reduction in commission income and an increase in costs.

3. General Servicing Policies, Procedures, and Requirements

Section 1024.38 imposes requirements on servicers to maintain policies and procedures that are reasonably designed to achieve certain objectives. These are: (1) Accessing and providing timely and accurate information; (2) properly evaluating loss mitigation applications; (3) facilitating oversight of, and compliance by service providers; (4) facilitating transfer of information during servicing transfers; and (5) informing borrowers of written error resolution and information request procedures. Section 1024.38 also requires that servicers retain records for a specified time period and that servicers maintain certain documents and data on each mortgage loan account in a manner that facilitates compiling such documents and data into a servicing file within five days. Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from the requirements in this section of the final rule.

Potential benefits and cost to consumers. The Bureau does not have representative data with which to quantify the extent to which current business practices satisfy the general servicing policies, procedures and requirements in § 1024.38, the extent to which compliance would provide additional benefits to borrowers, or the monetary value of those additional benefits to borrowers. The discussion below therefore generally provides a qualitative analysis. In all cases, the benefits to borrowers from the rule are smaller to the extent the current business practices of servicers approximate the practices required by the rule.

In general, the Bureau believes that most servicers currently correctly perform the basic duty of receiving timely and conforming payments and allocating them. Borrowers who make timely and conforming payments every payment period may request information or assert errors about their accounts from time to time, but by assumption they do not need to be evaluated for loss mitigation options. Such borrowers are likely to derive just small benefits from the policies and procedures requirements in § 1024.38

[217] Further, as discussed in greater detail in part V, above, servicers already are subject to a disclosure regime with some similar characteristics when obtaining force-placed flood insurance as required by the FDPA. The presence of these systems may make it less costly for servicers to comply with the Bureau's procedures for force-placed insurance, since systems are in place that could be adapted outside the force-placed flood insurance context.

[218] *See e.g.,* Adam Levitin and Tara Twomey, *Mortgage Servicing,* 28 Yale J. on Reg. 48 (2011) (explaining that servicing advances, which include advances for taxes and insurance, are costly to servicers because they do not recover interest on the advances).

because such borrowers are not likely to be directly affected by improved operations regarding accessing and providing accurate information, properly evaluating loss mitigation applications, facilitating oversight of service provider, and informing borrowers of written error resolution and information request procedures. These borrowers may still, however, benefit from the policies and procedures that relate to facilitating the transfer of information during servicing transfers. Borrowers may experience a servicing transfer irrespective of whether they make timely and conforming payments and information and documents may be lost during transfers even with respect to borrowers who make timely and conforming payments.

A substantial number of borrowers, however, do not make timely and conforming payments every payment period. Lender Processing Services reports that at the end of September 2012, about 5.6 million homes were 30 or more days delinquent or in foreclosure.[219] One large database of first-lien residential mortgages shows that about 12 percent of mortgages failed to be current and performing in each of the five quarters ending with the third quarter of 2012.[220] Extrapolating this figure to the national level indicates over 6 million loans in some type of distress.

Borrowers who do not make timely and conforming payments are likely to benefit from all the policies and procedures and other requirements in § 1024.38. First, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of accessing and providing accurate information. Such borrowers are both likely to need information from their servicer and to experience harm if the information needed is unavailable or inaccurate. For example, delinquent borrowers managing a number of different debts face an especially difficult challenge in determining how best to allocate scarce household resources. Managing this challenge requires accurate information from a mortgage servicer about the consequences of paying different amounts on fees and penalties, unpaid interest, equity, and the likelihood of foreclosure. Further, accurate information is necessary for servicers to achieve other objectives and requirements to protect borrowers. For example, properly evaluating delinquent borrowers for loss mitigation options requires, among other things, accurate information regarding the borrower's mortgage loan account in addition to accurate information regarding the options available.

Second, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of properly evaluating loss mitigation applications. Loss mitigation options necessarily relate to borrowers that are delinquent or are likely to become delinquent because it is the losses resulting from such delinquency that such options are designed to mitigate. Delinquent borrowers benefit from servicers maintaining policies and procedures that facilitate servicers understanding which loss mitigation options, if any, are available for a delinquent borrower and facilitate reviewing the borrower for loss mitigation options available pursuant to requirements established by an owner or assignee of a mortgage loan. Improving loss mitigation evaluations for delinquent borrowers improves the accuracy of servicer determinations, causing more borrowers that may benefit from, and should receive, such options to be afforded the opportunity to benefit from such options. Further, improved operations reduce costs that borrowers may accrue from delays in loss mitigation evaluations (including costs relating to ongoing foreclosure processes).

Third, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of facilitating oversight of, and compliance by, service providers. Service providers typically provide services in connection with mortgage loan accounts for delinquent borrowers. Such services may include broker price opinions, property maintenance, or attorney costs for foreclosure processes. Delinquent borrowers, who are generally subject to incurring such costs, benefit from oversight of such service providers to ensure that such service providers do not pass charges on to borrowers for services that are unnecessary or were not actually performed.

Fourth, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of facilitating transfer of information during servicing transfers. As stated above, borrowers may experience a servicing transfer irrespective of whether they make timely and conforming payments. Further, delinquent borrowers, who may have been interacting with servicers on loss mitigation options, may benefit because such interactions are typically document intensive, and information and documents may be lost during transfers.

Fifth, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of informing borrowers of written error resolution and information request procedures. As discussed above, delinquent borrowers are more likely to need the written error resolution and information request provisions. The policies and procedures that require servicers to inform borrowers of the available options will help ensure delinquent borrowers have access to this information.

Finally, § 1024.38 requires that servicers comply with two requirements: Servicers must retain documents with respect to the servicing of a mortgage loan until one year after a mortgage loan is paid in full or servicing for a mortgage loan is transferred. Further, a servicer must store certain information regarding a mortgage loan in a manner that facilitates compiling such information into a servicing file within five days. All borrowers, whether delinquent or not, derive some benefit from these requirements because these requirements facilitate the error resolution and information request requirements in §§ 1024.35 and 1024.36. Because borrowers may submit notices of error or information requests until one year after a mortgage loan has been paid in full or servicing has been transferred, borrowers benefit if servicers are required to have the documents and information that would be necessary to evaluate any such notices of error or to provide to the borrower in response to any such timely notice of error or information request. Further, all borrowers, and especially delinquent borrowers, benefit from the servicing file provision.

Although in general data is unavailable to quantify the benefits and costs of the policies and procedures required under § 1024.38, it is possible to provide a rough estimate of a key consumer benefit—an increase in the probability a borrower is offered a loan modification—that may result from the collective impact of all the provisions of the final rule that address loss mitigation (*i.e.,* §§ 1024.38–1024.41) but may depend especially on the

[219] *See* Lender Processing Servs., LPS *First Look* Mortgage Report, Oct. 22, 2012, *available at http://www.lpsvcs.com/LPSCorporateInformation/NewsRoom/Pages/20121022a.aspx.*

[220] *See* Office of the Comptroller of Currency, Release 2012–178, *OCC Mortgage Metrics Report, Third Quarter 2012,* at 13 tbl. 7 (2012).

requirement under § 1024.38(b) that servicers maintain policies and procedures to achieve the objective of properly evaluating loss mitigation applications. It is also possible to provide a rough estimate of another benefit—the reduction in avoidable default (*i.e.,* 90 day delinquency) associated with better servicers—that may be attributed to all of the provisions of the final rule regarding loss mitigation, including § 1024.38. These benefits are discussed below.

First, recent research strongly indicates that substantially similar borrowers receive different loss mitigation options from different servicers. Regression analysis of data in the OCC–OTS Mortgage Metrics database shows that the identity of a servicer is an important determinant of the loss mitigation options received by distressed borrowers, along with the characteristics of the borrower (*e.g.,* FICO score), the mortgage loan (*e.g.,* ARM, LTV, origination year), and the investor (*i.e.,* GSE, private label, or portfolio).[221] Research focusing on the HAMP program presents a similar result: Some servicers renegotiate mortgage debt with borrowers at more than four times the rate of other servicers, even after taking into account the characteristics of loans, borrowers and investors.[222]

Second, this research shows that offering modifications is a persistent characteristic of certain servicers. Differences across servicers in the likelihood of giving HAMP modifications depend positively on the likelihood the servicer offered private modifications prior to HAMP, again taking into account the characteristics of loans, borrowers and investors. A borrower applying for a trial loan modification would have a 58 percent better chance of receiving it from the high-modifying ''type'' of servicer loans than from the low-modifying type. For permanent modifications, the difference between the two types is more than double (117 percent).

Finally, investigation into the differences across servicers in the likelihood of giving modifications prior to HAMP shows that these differences depend on the characteristics of the servicing staff and the technology used by the servicer. In particular, the likelihood of giving modifications prior to HAMP depends positively on the size of the staff and the number of training hours given the staff, negatively on the workload of the staff, and negatively on indicators of poor technology like the percentage of dropped calls and time callers spend on hold. Again, all of these results take into account the characteristics of loans, borrowers and investors—they are not an artifact of differences in the servicing portfolios of the servicers.

The Bureau believes that these results are broadly indicative of the benefits to consumers of the provisions relating to loss mitigation and in particular the provisions in § 1024.38(b) associated with properly evaluating loss mitigation applications. Servicers are required to maintain policies and procedures reasonably designed to ensure that servicers can properly evaluate borrowers for available loss mitigation options. Compliance with these policies and procedures will require servicers to devote resources to the proper evaluation of borrowers, presumably by investing in the staff, training and technology that the research shows leads, through some process, to more trial modifications. The Bureau cannot quantify the impact of the provisions for loss mitigation in § 1024.38 on resources devoted to the proper evaluation of borrowers and better outcomes for borrowers. However, the Bureau believes that these provisions of the final rule will tend to reduce the deficiencies in the abilities of certain servicers to evaluate borrowers for loss mitigation that recent research strongly indicates have been detrimental to borrowers.[223]

The estimate of avoidable default relies on a study of the performance of approximately 28,000 housing loans tracked from September 1998 to December 2004 (and originated prior to December 2003).[224] Most of the loans were serviced by eight servicers. After restricting the sample to loans that at some point experience a 30-day delinquency, the authors estimate a logic regression model to isolate the impact each servicer has on the probability a loan ever reaches 90-day delinquency (which they define as ''default'').

The authors show that there are significant differences among the servicers in the probability a loan defaults, even after controlling for borrower credit score and income, certain characteristics of the property, and other factors.[225] The best servicing (servicing performed by servicers with the highest cure rates for loans that become 30 days delinquent) achieves approximately a 41 percent reduction in the probability that a loan that becomes 30 days delinquent will eventually default, relative to the worst servicing (servicing performed by servicers with the lowest cure rates for loans that become 30 days delinquent).[226]

To translate this figure into an estimate of avoidable default, suppose that 1 million mortgages become 30–60 days late each year (currently the figure may be closer to 3 million).[227] The model predicts that about 19 percent would default if they were serviced by the worst performing servicer in the sample. However, only 11 percent would default if they were serviced by the best performing servicer in the sample. This is approximately a 41 percent reduction in default due to differences in servicing. This reduction

[221] ''Servicer fixed effects [*i.e.,* servicer identities] explain at least as much variation in modification terms as do borrower characteristics.'' *See* Sumit Agarwal *et al., Market-Based Loss Mitigation Practices for Troubled Mortgages Following the Financial Crisis,* at 5, (Fed. Reserve Bank of Chi., Working Paper No. 2011–03, 2010).

[222] Sumit Agarwal *et al., Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program,* at 25, Figure 6 (Nat'l Bureau of Economic Research, Working Paper No. 18311, 2012).

[223] As discussed in part V, there is also a concern that certain servicers may pursue their self-interest to the detriment of both borrowers and investors. The final rule addresses this concern by requiring servicers to maintain policies and procedures reasonably designed to identify with specificity all loss mitigation options for which borrowers may be eligible pursuant to any requirements established by an owner or assignee of a mortgage loan (*see* § 1024.38(b)(2)(ii)) and to properly evaluate delinquent borrowers for all such options (§ 1024.38(b)(2)(v)).

[224] *See* Michael A. Stegman *et al., Preventative Servicing is Good for Business and Affordable Homeownership Policy,* 18 Housing Pol'y Debate 243, 257 (2007).

[225] Other authors have also noted substantial differences in loss mitigation practices by servicers that are not accounted for by differences in borrowers, types of mortgages and other observable factors. *See e.g.,* Sumit Agarwal *et al., Market-Based Loss Mitigation Practices for Troubled Mortgages Following the Financial Crisis,* at 5, (Fed. Reserve Bank of Chi., (Working Paper No. 2011–03, 2010) (''Agarwal *et al.''*).

[226] Specifically, the probability that a loan cures increases from .815 with the worst performing servicer (Servicer #2) to .8902 with a high-performing reference group of servicers. The figure .815 is the solution to $\ln[.8902/(1-.8902)]-.61=\ln[x/(1-x)]$, where $-.61$ is the regression coefficient on Servicer #2 given on page 265 and 8902 is discussed on page 263. Thus, the probability a loan that is 30 days late actually defaults decreases from .185 ($=1-.815$) to .1098 ($=1-.8902$), which is approximately a 41 percent reduction. The Bureau notes that these estimates illustrate the possible impact that improvements in servicing may have on avoidable default and foreclosure. While the model is estimated using appropriate control variables, the sample is not representative, and it is not clear how well the model would predict the effects of improvements in servicing in different situations.

[227] The Federal Reserve Bank of New York reports that approximately 1.5 percent of mortgages in its consumer credit panel transition from current to 30+ days late each quarter, so roughly 6 percent annually. This corresponds to over 3 million mortgages at the national level. *See* Fed. Reserve Bank of NY, *Quarterly Report on Household Debt and Credit,* at 13 (2012) *available at http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32012.pdf.*

corresponds to 80,000 mortgages (240,000 mortgages with current data). These defaults are avoidable with a change from the worst to the best servicing. Further, a substantial number of these defaults would likely go to foreclosure, perhaps 70 percent.[228]

The Bureau does not currently have data that would allow it to further monetize the cost of default and foreclosure on borrowers or other consumers. Some recent research that controls for economic conditions documents the persistent negative effects of foreclosure on borrower's credit scores.[229] Other work establishes substantial negative effects that foreclosed homes have on nearby homes.[230] As mentioned above, the negative externalities from foreclosure are another market failure addressed by the provisions of the final rule that may reduce avoidable foreclosure. Other research establishes that children tend to switch to lower performing schools after foreclosure, and ongoing research is examining the effects of housing instability on student outcomes.[231]

More generally, servicers obtain limited benefits from having (and complying with) policies and procedures reasonably designed to achieve the objectives stated in this provision of the final rule, other than where contractual requirements require them to perform certain duties and meet certain goals with respect to loss mitigation. Borrowers do not choose their servicer, except indirectly by choosing their lender, and have little recourse against either the servicer or the owner or assignee of the loan (for whom the servicer is the agent) for poor customer service. As a result, mortgage servicing is to a large extent a high-volume, low-margin business in which successful servicers attempt to keep costs down. While many servicers have and comply with policies and procedures similar to those required under § 1024.38, the mortgage crisis demonstrated that for some servicers the incentives to do so were lacking.

The Bureau is aware that servicers may incur additional costs as they come into compliance with the requirements in § 1024.38 and that some of these costs may be passed on to borrowers. However, the Bureau believes that the cost per borrower is likely to be small, as discussed below.

Finally, the Bureau observes that certain servicers may have implemented policies and procedures with respect to evaluating borrowers for loss mitigation options pursuant to the National Mortgage Settlement and Federal regulatory agency consent orders, as discussed in part II, above. Borrowers whose mortgage loans are serviced by such servicers may already receive certain benefits relating to loss mitigation evaluations as a result of such actions, and will thus receive fewer benefits as a result of this rule than they would have otherwise received. The Bureau believes that such borrowers will nevertheless benefit from the requirements in § 1024.38 because (1) many of the objectives of the policies and procedures required pursuant to § 1024.38 impose requirements beyond the National Mortgage Settlement and Federal regulatory agency consent orders and (2) the policies and procedures required by § 1024.38 may manage information that better facilitates such servicers complying with their obligations under the National Mortgage Settlement and Federal regulatory agency consent orders in a manner that improves loss mitigation evaluations for borrowers whose mortgage loans are serviced by such servicers. Additionally, the Bureau notes that the National Mortgage Settlement is an agreed on term sheet with a limited timeline. The national servicing standards established by the Bureau will not automatically expire after a set period of time.

Potential benefits and costs to covered persons. Certain servicers currently incur costs associated with the requirements in the general servicing policies, procedures and requirements, despite generally not receiving consequential feedback from borrowers to do so. Depository institutions already are subject to interagency guidelines relating to safeguarding the institution's safety and soundness that facilitate reasonable information management for purposes of mortgage servicing. Servicers that service mortgage loans subject to investor or guarantor loss mitigation requirements, such as requirements imposed on Fannie Mae, Freddie Mac, and Ginnie Mae, or servicers subject to regulatory consent orders or the national mortgage settlement, must already comply with policies regarding evaluation for a loss mitigation option.[232]

Servicers that do not already have policies and procedures that are reasonably designed to meet the objectives in § 1024.38 will incur the cost both of establishing such policies and procedures (which may include training staff and updating existing procedures) as well as on-going costs associated with such procedures. To the extent any entity currently follows such policies and procedures, these additional costs will already have been incurred

The rule uses an objectives-based approach to defining its requirements and provides flexibility in implementation. An objectives-based approach has the advantage of allowing different servicers to find the least costly way of achieving the required objectives. Thus, the rule requires servicers to have policies and procedures reasonably designed to achieve the objective of investigating complaints and providing information; it does not specify specific steps required for investigating different types of complaints or for providing different types of information. Similarly, the rule requires servicers to have policies and procedures reasonably designed to achieve the objective of facilitating periodic reviews of service providers; it

[228] In one study, only 30 percent of loans that were 90 days late and began a repayment plan were reinstated or paid in full during the period of the study. Presumably, loans that are 90 days late and never begin a repayment plan have an even lower success rate. *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs,* 11–12 & Tbl. 2 (Freddie Mac, Working Paper No. 08–01, 2008).

[229] *See* Kenneth P. Brevoort & Cheryl R. Cooper, *Foreclosure's Wake: The Credit Experiences of Individuals Following Foreclosure* (2010), available at: *http://www.federalreserve.gov/pubs/feds/2010/201059/201059pap.pdf.*

[230] Many recent studies document the negative effect of a foreclosed property on the homeowners in its vicinity. There are several reasons for this effect. Among them are displacement of demand that otherwise would have increased the neighborhood prices, reduced valuations of future sales if the buyers and/or the appraisers are using the sold foreclosed property as a comparable, vandalism, and disinvestment. Using the data on house transactions in Massachusetts from 1987 to 2009, a foreclosure lowers the price of a house within 0.05 miles by 1 percent. *See* John Y. Campbell *et al., Forced Sales and House Prices,* 101 Am. Econ. Rev. 2108 (2011). According to Fannie Mae data for the Chicago MSA, a foreclosure within 0.9 kilometers can decrease the price of a house by as much as 8.7 percent; however, the magnitude decreases to under 2 percent within five years of the foreclosure. *See* Zhenguo Lin *et al., Spillover Effects of Foreclosures on Neighborhood Property Values,* 38 J. Real Est. Fin. & Econ. 387 (2009). Research using Maryland data for 2006–2009 finds that a foreclosure results in a 28 percent increase in the default risk to its nearest neighbors (*see* Charles Towe and Chad Lawley, *The Contagion Effect of Neighboring Foreclosures,* 2011, Social Science Research Network Working Paper 1834805). Other papers document various magnitudes of the negative effect on nearby properties (*see* W. Scott Frame, *Estimating the Effect of Mortgage Foreclosures on Nearby Property Values: A critical review of the literature,* 95 Econ. Rev. Fed. Reserve Bank of Atlanta 1 (2010).

[231] A summary of recent and ongoing research is presented in Julia B. Isaacs, *The Ongoing Impact of Foreclosures on Children,* The Brookings Inst., April 2012.

[232] In addition, servicers are currently subject to record keeping requirements under current § 1024.17(l) of Regulation X. This will make it less costly for servicers to implement the changes in this rule since they should already have systems in place that can be adapted to the new requirements.

does not specify specific steps required for reviewing service providers.[233] Regarding implementation, a servicer can take into account the size, nature, and scope of its operations. In particular, a servicer may take into account the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints.

This advantage to regulated entities of objectives-based standards may be offset by costs to the regulated entity in at least two ways. First, a regulated entity may incur costs to measure and evaluate whether the entity is, in fact, achieving the objective required by the regulation. Second, a regulated entity may incur costs resulting from over-compensation to achieve an objective when the achievement of such objective depends on factors outside the control of the regulated entity. The general servicing policies, procedures, and requirements mandate policies and procedures, which are under the control of the servicer. The policies and procedures need only be reasonably designed to achieve the objectives, which will tend to mitigate the risks to servicers of over-complying to achieve objectives when the failure to achieve such objectives is based on factors beyond the servicer's control.

Finally, § 1024.38 imposes a record retention requirement and a servicing file requirement. Servicers must retain records that document actions taken by servicers with respect to a borrower's mortgage loan until one year after the date a mortgage loan is discharged or servicing is transferred. The Bureau believes that currently servicers generally retain this information at least until the mortgage loan is discharged or servicing is transferred. Further, this requirement replaces a previous document retention requirement in § 1024.17(l) requiring servicers to retain documents relating to borrower escrow accounts for five years, notwithstanding whether a mortgage loan was discharged or servicing was transferred. Because documents and information relating to a servicing file are necessary for on-going servicer operations, the Bureau believes the cost of this provision to servicers comes from the additional year that they may need to retain documents not related to escrow charges after a mortgage loan is discharged or servicing is transferred. This retention expense is incremental to the expense associated with retaining the information before the mortgage loan is discharged or servicing is transferred. Further, certain costs may be reduced relative to the pre-statutory baseline of retaining documents relating to escrow accounts for five years. Accordingly, the Bureau believes any expense relating to the document retention requirement is likely small.

Finally, servicers are required to maintain certain documents and data in a manner that facilitates compiling them into a servicing file within five days. Servicers may need to develop faster access to some of this information than they currently have, and some may need to document the location and methods of access of this information in a more unified way than they currently do. However, servicers do not have to maintain all of the information on a single system.[234] Further, the Bureau is mitigating the cost of this provision by not requiring servicers to comply with it with respect to information created prior to January 10, 2014. Thus, servicers do not have to improve access to legacy information that may be missing or inaccessible.

4. Requirements Regarding Early Intervention

Section 1024.39 establishes early intervention requirements with respect to certain delinquent borrowers. Servicers are required to establish or make good faith efforts to establish live contact with a borrower not later than the 36th day of a borrower's delinquency and inform the borrower about the availability of loss mitigation options if appropriate. Section 1024.39 also requires servicers to provide a written notice to borrowers not later than the 45th day of the borrower's delinquency. Provisions of the rule prescribe the content of the written notice and provide model clauses. However, servicers can comply with the content requirement by sending borrowers a single mailing that contains separate notices that collectively provide all the model clauses. Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from the requirements of § 1024.39.

Potential benefits and costs to consumers. The provisions on early intervention with delinquent borrowers are intended to spur communication between servicers and borrowers that facilitates borrower's avoidance of foreclosure. The benefits of § 1024.39 to delinquent borrowers depend on whether servicers already meet the requirements of § 1024.39, servicers are successful in establishing live contact with borrowers under the live contact requirement, and information provided on loss mitigation options during the live contact or in the written notice helps borrowers manage their default and avoid foreclosure.

A number of early intervention standards exist and are issued by private mortgage investors, the GSEs, or government agencies offering guarantees or insurance for mortgage loans, such as FHA, the VA, or the Rural Housing Service. Servicers of FHA and VA loans are generally required to take action within the first 20 days of a delinquency, such as making telephone calls, and sending written delinquency notifications. Similarly, servicers of loans purchased by the GSEs are encouraged to contact borrowers within several days of a delinquency. Freddie Mac recommends that servicers begin initial call campaigns on the third day of delinquency, and Fannie Mae recommends that servicers take similar actions with respect to borrowers having a high risk of default. Regarding written notification, Federal agencies and the GSEs have established requirements and recommended practices with respect to written notifications that are similar to the Bureau's final rule under § 1024.39(b). However, the Bureau believes that some GSE servicers may not provide written notifications to certain lower-risk delinquent borrowers until the 65th day of delinquency.

Comprehensive data is generally unavailable on the extent to which servicers already reach out to delinquent borrowers; and for those that do, when and by what means they do, and what information they provide to borrowers. The discussion below therefore generally provides a qualitative analysis for borrowers not currently receiving such communications from their servicers. Given the ubiquity of some type of early intervention requirement on servicers, the benefit of the rule depends on the extent to which it is superior to existing requirements.

The requirement that servicers establish or make good faith efforts to establish live contact with borrowers may benefit the borrowers who are required to be contacted under the

[233] *See* for example OMB's Circular A–4. ''Performance standards express requirements in terms of outcomes rather than specifying the means to those ends. They are generally superior to engineering or design standards because performance standards give the regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way.''

[234] The Bureau received numerous comments from industry describing the burden attributable to the proposed requirements for the servicing file. Many of such comments expressed that while servicers have the information for a serving file, they do not store such information grouped together. Such comments are discussed in part V with respect to § 1024.38(c)(2).

provision, possibly by increasing the efforts that servicers make to reach such borrowers. Older research shows that significant numbers of borrowers go to foreclosure without ever responding to the servicer.[235] While it is not possible to predict whether requiring servicers to make good faith efforts to establish live contact will change this particular result, the severity of the outcome makes it reasonable to ensure that borrowers are provided this type of effort by servicers. The requirements in § 1024.39 more generally ensure that those borrowers who would respond are informed about the availability of loss mitigation options where the servicer determines that it would be appropriate to provide such information to the borrower, and that all borrowers receive a written notice containing information on loss mitigation by the 45th day of a delinquency.

The Bureau also believes that such borrowers may benefit from the early intervention provisions to the extent that the provisions ensure that servicers inform borrowers of the availability of loss mitigation options shortly after delinquency, thus increasing the likelihood that borrowers take corrective action more quickly. In addition, one study using data from 2000 through 2006 found that the re-default rate was about 27 percent (15 percentage points) lower on repayment plans established when a loan was 30 days late instead of 60 days late.[236] Early corrective action benefits borrowers by reducing avoidable interest costs, limiting the impact on borrowers' credit reports (thereby expanding their access to less costly credit and other services that depend on credit reports), and facilitating household budgeting and planning (which may allow borrowers to save money).

Finally, it is essential to note that the repayment plans, loan modifications and other alternatives to default or foreclosure that servicers offer change regularly, often to make additional borrowers eligible. For example, a number of TARP funded housing programs have been developed since the initial HAMP first-lien modification program was implemented in April 2009. Programs now exist that provide principal reduction for HAMP-eligible borrowers with high loan-to-value ratios, provide temporary principal forbearance for unemployed borrowers, and provide incentives for short-sales.[237] Further, the eligibility criteria for these programs change regularly.[238] The changing set of alternatives to default and foreclosure and eligibility for these alternatives mean that delinquent borrowers who have not had recent contact with their servicer regarding the alternatives for which they qualify are probably uninformed or misinformed about the options available to them. The provisions for early intervention, together with provisions in §§ 1024.38(b)(2) and 1024.40(b)(1) that, in general, require that servicers maintain policies and procedures with respect to providing borrowers with accurate information about loss mitigation options, benefit borrowers who may not have otherwise been contacted by their servicer by providing them with accurate information regarding loss mitigation that they otherwise likely would lack.

The Bureau received one comment that stated that the early intervention requirements would impose costs on all borrowers, including those who will never use the service. Given the ubiquity of some type of early intervention requirement, as described above, and the likelihood that servicers who are servicing loans that they own make every effort to reach out to delinquent borrowers, the Bureau believes that the incremental costs to most servicers of the early intervention provisions under § 1024.39 are minimal. Thus, any incremental cost to most borrowers would be small. The Bureau also notes that borrowers may value early intervention requirements, whether or not they in fact ever receive such intervention, to the extent they believe they have a chance of becoming delinquent. As noted, for borrowers whose servicers are already subject to an early intervention requirement, the benefits of this provision would be reduced to that extent.

Potential benefits and costs to covered persons. For the reasons stated above, the Bureau believes that most servicers already comply with some type of early intervention requirement. To the extent that servicers already make efforts to establish live contact with borrowers and provide written notices to borrowers regarding loss mitigation options, servicers would likely incur minimal costs to conform to the time lines and content requirements under the final rule. These costs would generally consist of creating internal policies and procedures to implement the requirements, training personnel, and possibly modifying existing disclosures or establishing new disclosures. The Bureau has attempted to mitigate such costs by providing sample clauses in the rule. Services who are not subject to some type of early intervention requirement would of course incur greater costs, including for setting up policies and procedures, establishing disclosures, and potentially hiring more staff.

Regarding the written notice, the Bureau understands that many servicers use vendors who will be developing and providing similar disclosures to many other servicers in light of the new rules. Thus, the one-time costs of the new disclosures will be spread over many servicers. The Bureau is mitigating one-time burden of the written notice provision by providing servicers with model clauses. The model clauses provide servicers with examples of language explaining loss mitigation options that may be available, how borrowers can access housing counseling resources and encouraging the borrower to contact the servicer. The Bureau intends for the model clauses to provide servicers with examples of the level of detail that the Bureau expects servicers to provide in their written notice. The Bureau is mitigating the ongoing cost of the written notice provision by limiting the requirement to send the written notice to at most once every 180 days. The Bureau is further mitigating the ongoing cost by permitting servicers to incorporate the relevant portions of the written notice required under § 1024.39 into other disclosures, thus increasing the likelihood that servicers that are already providing loss mitigation disclosures will not need to provide additional disclosures.

5. Procedures for Continuity of Contact With Delinquent Borrowers

Section 1024.40 requires servicers to maintain policies and procedures that are reasonably designed to achieve certain objectives regarding continuity

[235] In one study using data from September 2005 through August 2007, Freddie Mac servicers reported that the borrower never responded to the servicer for 53.3 percent of the loans that went into foreclosure. *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 10 (Freddie Mac, Working Paper No. 08–01, 2008).

[236] *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs*k, at tbl. 2 (Freddie Mac, Working Paper No. 08–01, 2008). This statistic is merely suggestive of a benefit to early intervention, since borrowers who are willing to begin a repayment plan at 30 days may be more likely to become current even without a repayment plan.

[237] *See* Gen. Accounting Office, *Actions Needed by Treasury to Address Challenges in Implementing Making Home Affordable Programs,* Tbl. 1 (2011).

[238] For a discussion of recent changes, including the implementation of the new ''HAMP Tier 2'' alternative, *see* Making Home Affordable, Supplemental Directive 12–02, *Making Home Affordable Program- MHA Extension and Expansion,* (2012), *available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1202.pdf.*

of contact. The objectives include making personnel available, by telephone, to delinquent borrowers by the time the servicer has provided the borrower with the written notice regarding loss mitigation options required under § 1024.39(b), but in any case not later than the 45th day of delinquency. Servicers are also required to establish policies and procedures reasonably designed to ensure that the personnel they assign to delinquent borrowers perform an enumerated list of functions, where applicable, including providing the borrower with accurate information about loss mitigation options available to the borrower and actions the borrower must take to complete a loss mitigation application. Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from the requirements of § 1024.40.

Potential benefits and costs to consumers. The continuity of contact provisions are intended to ensure that borrowers in delinquency have access to servicer personnel capable of assisting the borrower with loss mitigation applications. Other regulators and the GSEs have established certain staffing standards for servicers to meet when they assist delinquent borrowers. The benefits to borrowers from the rule discussed below will be mitigated to the extent servicers already provide access to such servicer personnel. One study of complaints to the HOPE Hotline reported that over half (27,000 out of 48,000) were from borrowers who could not reach their servicers and obtain information about the status of their applications for HAMP modification.[239] Other complaints concerned lost documentation and the inability of borrowers to speak with representatives who were knowledgeable about the status of the borrowers' applications for loss mitigation. While certain servicers may nonetheless have provided delinquent borrowers with the services described in the continuity of contact provisions, such as, for example, access to personnel who could provide the borrower with accurate information about the status of a loss mitigation application, the mortgage crisis demonstrated that a number of servicers did not provide such services.

As discussed in part V, above, widespread reports of communication breakdowns between servicers and delinquent borrowers who present a heightened risk for default have revealed that one of the most significant impediments to the success of foreclosure mitigation programs is the inadequate manner by which servicer personnel at major servicers have provided assistance to these borrowers. While the Bureau does not have the data with which to quantify the effects, the inability of a borrower to speak with personnel knowledgeable about the status of a loss mitigation application creates delay in rectifying problems (including problems with lost documentation) that may lead to avoidable foreclosure. Similarly, the inability of borrowers to obtain a complete record of their payment histories with the servicer or of servicer personnel to access all documents the borrowers have submitted to the servicer in connection with an application for a loss mitigation option may impair the ability of borrowers to generally advocate for themselves regarding loss mitigation and possibly to slow or halt foreclosure. Conversely, the ability of borrowers to speak with personnel knowledgeable about loss mitigation options available to the borrower and the actions the borrower must take to be evaluated for such options makes it easier for borrowers to effectively pursue these options. These provisions therefore increase the chances that certain delinquent borrowers are able to obtain a loss mitigation plan and avoid the substantial costs foreclosure imposes on them, their households, and their neighbors, as discussed above.[240] The Bureau is not aware of costs to borrowers from these provisions.

Potential benefits and costs to covered persons. Servicers currently incur costs associated with the requirements regarding continuity of contact. As discussed in the proposal, above, in response to reported problems with respect to how servicers respond to delinquent borrowers, other regulators and the GSEs have responded by establishing staffing standards for servicers to meet when they assist delinquent borrowers. Other servicers may incur costs of creating internal policies and procedures to implement the requirements and training personnel. The Bureau recognizes that some servicers may also need to increase staffing time to comply with these requirements or transfer servicing to servicers who are already in compliance.

The rule mandates an objectives-based approach to the requirements for continuity of contact. This approach provides servicers with useful flexibility in managing the costs of compliance relative to mandating specific inputs or narrow operational requirements. Servicers that have adopted continuity of contact requirements have done so through different models and the Bureau has provided flexibility to allow servicers to adopt models that comply with the objectives of the continuity of contact requirements without highly prescriptive requirements.[241] The discussion of the merits of this approach that is provided in the analysis of the general servicing policies, procedures and requirements is applicable here.

6. Loss Mitigation Procedures

Section 1024.41 establishes requirements with respect to loss mitigation. The goal of § 1024.41 is to ensure that borrowers are protected from harm in connection with the process of evaluating a borrower for a loss mitigation option and proceeding to foreclosure. Under § 1024.41, servicers must, among other things, accept loss mitigation applications and evaluate complete applications for all loss mitigation options available to the borrower. Servicers must take these actions within a prescribed period of time and adhere to a prescribed framework for making offers of loss mitigation alternatives to borrowers. Servicers must give borrowers an opportunity to appeal rejection of complete loss mitigation applications in certain circumstances and must follow a prescribed framework with respect to these appeals.

Section 1024.41 also creates limitations with respect to starting and completing the foreclosure process. A servicer may not make the first notice or filing required for a foreclosure process if a borrower is not more than 120 days delinquent on the mortgage obligation. Further, if a borrower submits a timely and complete loss mitigation application, the servicer may not make the first notice or filing required for a foreclosure process until completing the requirements set forth in § 1024.41. If a servicer has started the foreclosure process, but a borrower submits a timely and complete loss mitigation application, a servicer is prohibited from proceeding to a foreclosure judgment, or order of sale, or

[239] *See* General Accounting Office, *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs,* at 15 (2010).

[240] *See* the general discussion of servicing operations and avoidable foreclosure in the analysis of the provisions on reasonable information management.

[241] U.S. Dep't of Treasury, *Making Contact: The Path to Improving Mortgage Industry Communication with Homeowners* (Dec. 2012), available at *http://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf.*

conducting a foreclosure sale, until completing the requirements set forth in § 1024.41.

Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from § 1024.41, except for the prohibition on referring to foreclosure in the first 120 days of delinquency and proceeding to a foreclosure sale if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

Potential benefits and costs to consumers. The analysis of the benefits to borrowers of § 1024.38 discussed the benefits to borrowers of the loss mitigation provisions collectively under the final rule. This analysis will not repeat that discussion, but focuses more specifically on key provisions of this section of the final rule. The benefits discussed below are mitigated to the extent that servicers are already in compliance with the provision of § 1024.41. For example servicers that are servicing loans subject to investor or guarantor loss mitigation requirements, such as requirements imposed by Fannie Mae, Freddie Mac, or government insurance programs, or servicers subject to regulatory consent orders or the national mortgage settlement, must already comply with policies regarding evaluation of a loss mitigation application for a loss mitigation option.

Restricting But Not Eliminating Dual Tracking

The loss mitigation provisions in § 1024.41 prevent servicers from commencing a foreclosure proceeding before the consumer has had a reasonable opportunity to submit a loss mitigation application or while a complete loss mitigation application is pending. As discussed in part V, this provision benefits borrowers by preventing foreclosure costs from accruing and by eliminating potentially confusing (and, as some commenters noted, discouraging) communications from servicers. Borrowers avoid costs of proceeding with the foreclosure process, including responsibility for attorneys' fees, legal filing costs, and services required (such as property preservation fees) occurring as a result of the foreclosure notwithstanding the concurrent evaluation of the borrower for a loss mitigation option. The administrative costs of foreclosure to borrowers are estimated, on average at $7,200.[242]

Servicers are allowed to commence a foreclosure proceeding in the period 120 days after delinquency if the borrower does not have a complete loss mitigation application pending. If a servicer has commenced a foreclosure proceeding after 120 days, it may proceed up to foreclosure sale regardless of whether the borrower subsequently submits a complete loss mitigation application. The servicer, however, is prohibited from moving for foreclosure judgment or order of sale or conducting a foreclosure sale before acting on a borrower's complete loss mitigation application that is submitted by certain deadlines in advance of foreclosure.

The potential loss of the prohibition on foreclosure referral after 120 days provides an incentive for borrowers to complete a loss mitigation application as quickly as possible. Establishing a loss mitigation plan within 120 days of delinquency reduces interest costs and limits the impact on borrowers' credit report. However, these future costs may not be salient to all consumers, and if these costs are heavily discounted they would provide little incentive to submit a loss mitigation application quickly. The Bureau notes that the borrower still has protections against foreclosure sale: a servicer may not complete the foreclosure process by proceeding to a foreclosure judgment or order of sale, or conducting a foreclosure sale, unless the servicer has completed the loss mitigation procedures in § 1024.41, described above.

As set forth in part V, above, with respect to § 1024.41, the Bureau considered, but ultimately rejected, a mandatory pause on foreclosure proceedings. The Bureau is concerned about higher costs to borrowers from a broader prohibition on referral to foreclosure or from a mandatory pause in foreclosure proceedings after the borrower submits a loss mitigation application. The tradeoff here is admittedly complex. Under the final rule, servicers (acting on the behalf of investors) are allowed to move all borrowers up to foreclosure sale, but cannot move for foreclosure or order of sale or conduct a foreclosure sale before acting on complete loss mitigation applications submitted by certain deadlines. If loss mitigation efforts ultimately succeed, borrowers generally pay the costs associated with the foreclosure process, not investors. If loss mitigation efforts ultimately fail, investors generally pay foreclosure costs, but investors benefit from being able to quickly recover the capital that remains.[243] In both cases, investors benefit from moving borrowers up to foreclosure sale.

Relative to the final rule, a mandatory pause would benefit borrowers by eliminating the foreclosure process costs in the case in which loss mitigation succeeds.[244] Servicers would not be able to move these borrowers closer to foreclosure. However, a mandatory pause would impose costs on investors in the case in which loss mitigation fails, by delaying foreclosure sales and capital recovery. These costs may be passed along to borrowers.

It is not possible to quantify these costs to borrowers. However, the Bureau believes that the foreclosure process costs under the final rule would likely be smaller than under a mandatory pause regime. A pause would likely delay a large number of foreclosure sales (beyond those already delayed by the prohibition on referral to foreclosure in the final rule) and temporarily reduce the return on a substantial amount of mortgage credit. This creates some risk of a perceptible increase in the cost of mortgage credit to at least certain borrowers.

Appeals

Section 1024.41 requires servicers to provide an appeals process to review denials of complete loss mitigation applications for loan modifications in certain circumstances. Improper denials may result from technical errors in the evaluation of applications, but they may also result when servicers fail to review borrowers for loss mitigation options authorized by investors or guarantors of mortgage loans. The Bureau believes that the appeals process may benefit borrowers by allowing servicers to identify and correct these (and other) improper denials. The Bureau notes that the National Mortgage Settlement and the California Homeowner Bill of Rights already provide for an appeals process related to denials of loan modifications. For borrowers and servicers covered by the National Mortgage Settlement or the California Homeowner Bill of Rights,

[242] Family Housing Fund, *Cost Effectiveness of Mortgage Foreclosure Prevention: Summary of Findings* (1998), *available at http://www.fhfund.org/_dnld/reports/MFP_1995.pdf.*

[243] This assumes that the foreclosure process itself does not change the probability that loss mitigation succeeds. The Bureau recognizes that this may not be true. Insofar as the foreclosure process reduces the probability that loss mitigation succeeds, servicers may benefit investors by trying to identify borrowers for this effect would be significant and not moving them to the brink of foreclosure.

[244] The Bureau believes that the final rule provides borrowers with sufficient protections against improper foreclosure sale. Thus, this analysis does not attribute additional consumer benefits to a mandatory pause in the foreclosure process due to additional protections against improper foreclosure sale.

the appeals process under § 1024.41 does not result in any benefits or costs.

The Bureau received one comment from a law firm that argued that an appeals process is unnecessary. The commenter argues that second review is unnecessary because penalties in existing federal guidelines (like those for HAMP) compel proper processing of loss mitigation applications. The Bureau notes that guidelines for administering federal programs, some of which will expire, have direct influence only on participating servicers and only for as long as the program exists. The evidence on servicer performance presented above and the basic analysis of servicer incentives suggest that guidelines are at best an uneven and temporary substitute for an evaluation process mandated by a rule and that a second evaluation may provide additional consumer benefits.

The same commenter argued that an appeals process would not benefit borrowers. The commenter cites research that in the view of the commenter shows that an appeals process would most likely just delay foreclosure.[245] The research shows that, controlling for numerous characteristics, cure rates for seriously delinquent borrowers are the same in both judicial foreclosure states and power-of-sale states; and cure rates in Massachusetts were unaffected after the passage of a law that provided a 90 day ''right-to-cure'' period for borrowers whose lenders initiated foreclosure proceedings on or after May 1, 2008.[246]

The Bureau recognizes the analytical strengths of the cited study. However, the Bureau questions the applicability of this research to predicting the impact of the appeals process provided for by § 1024.41. The simple halt to foreclosures in Massachusetts, which does not appear to have been coupled with mandates for review, is a poor analogy to the new appeals process in the rule. The lack of an effect on cure rates in judicial foreclosure states may be more analogous, since judicial review is likely to be at least as protective of consumers as an appeals process. Thus the research suggests that an appeals process would not have an effect on cure rates since judicial review did not.

First, it bears note that the costs of judicial foreclosure are likely far greater than the costs of the appeals process in the final rule. Assuming a borrower takes 14 days to accept or reject a loss mitigation option received on appeal, the entire appeals process could add as little 15 days (or as many as 44 days, depending on the servicer). The costs of preparing a loss mitigation application for reconsideration are likely small since the borrower has already incurred the greater cost of initial submission of the application. Further, the researchers discuss the substantial methodological difficulties (some of which they overcome) in isolating the causal effect of the additional protections in judicial foreclosure states. Overall, the Bureau believes that an appeals process may benefit borrowers by provide some borrowers with more options for loss mitigation, that some of these borrowers will avoid foreclosure as a result, and that the costs of this process are likely to be small.

Consideration for All Alternatives for Which Borrowers Are Eligible

The Bureau's loss mitigation provisions require the servicer to evaluate complete loss mitigation applications submitted by certain deadlines [247] for all loss mitigation options available to the borrower and to provide all of the loss mitigation options that the servicer intends to offer the borrower on a single notice.[248] The Bureau believes that in contrast to the process provided for under § 1024.41, current practice is closer to a sequential presentation of loss mitigation offers.[249] When options are presented sequentially, especially if there is some delay between offers, borrowers must choose or reject an option without knowing whether the incremental benefit of an unknown later offer would justify the delay. By contrast, the Bureau believes that borrowers are likely to choose and therefore have a greater likelihood of obtaining the most beneficial loss mitigation option available when all of the available options are presented simultaneously. When options are presented simultaneously, both the delay between offers and the uncertainty about future offers are eliminated.[250] The requirement for simultaneous presentation of offers under § 1024.41 is therefore likely to result in a benefit to borrower and an offsetting loss to investors.[251]

A more difficult question is the extent to which investors or servicers may change the offers (perhaps by changing the rules in loss mitigation waterfalls) as a result of having to present options simultaneously instead of sequentially.[252] The fact that servicers choose to present options sequentially when they could present all options at once suggests that servicers achieve better outcomes for themselves or investors when they present options sequentially. However, the Bureau acknowledges that it is difficult to predict how the set of alternatives over which borrowers decide may change in response to the rule. Further, the Bureau acknowledges that some borrowers—who might be confused by simultaneous presentation of offers and make poor choices or no choices—will achieve better outcomes when options are presented sequentially. Such borrowers are especially likely to benefit from sequential presentation if they are presented with the offer most beneficial to them first; however, servicers may not present this offer first.[253]

[245] Kristopher Gerardi, *et al., Do Borrower Rights Improve Borrower Outcomes? Evidence from the Foreclosure Process* (Fed. Reserve Bank of Atlanta Working Paper 2011–16, 2011).

[246] The authors find that judicial foreclosure extends the timeline to foreclosure. In Massachusetts, however, delays created by the right-to-cure period were compensated for with faster action in other parts of the foreclosure process, with no overall effect on the foreclosure timeline.

[247] The differing requirements for various timelines provide benefits and costs to covered persons. For a borrower who has not yet met a deadline, each deadline provides benefits both in the form of protections for the borrower. Depending on the timeline, a borrower will have the benefit of time to research loss mitigation options, assemble a loss mitigation application, benefit from the right to appeal a decision and benefit from certain disclosure from the servicer about the status of their application as well as information about the final decision. However, once a deadline has passed, such deadline may be a cost for a borrower in that a servicer may decide to no longer offer an option, whereas in the absence of any deadline they may have continued to offer such option.

[248] The notice must also state all loan modification options for which the servicer considered and denied the borrower.

[249] That is to say, borrowers are offered one loss mitigation alternative to accept or reject; and if they reject the alternative, they may be offered another one instead of proceeding to foreclosure sale. Bureau outreach indicates that options are generally presented sequentially. Further, the Bureau received comments indicating that borrowers are frequently evaluated for and presented with home retention options (if they qualify) before being considered for non-retention options.

[250] Even without delay between offers, certain borrowers may be less assertive in asking to see additional options or may not be clear on whether they can return to rejected options after seeing subsequent ones. Simultaneous presentation of offers removes these problems as well.

[251] The financial gain to the borrower would therefore be a transfer payment. The consideration of benefits and costs discusses transfer payments when they are significant and informative about the rule.

[252] In other words, the options that a servicer would present simultaneously to a borrower may differ from the options the servicer would present to the same borrower as she sequentially rejects options.

[253] One comment from industry stated that borrowers may be confused or discouraged when all options (retention and non-retention) are presented simultaneously and may stop communicating with the servicer. This commenter also stated that the servicer would also have to request a more expansive list of documents for review and this could slow down the initiation of the review process.

The Bureau acknowledges these concerns and the complexity of the general problem over which process provides consumers with greater benefits. However, the Bureau believes that the final rule creates requirements, such as the continuity of contact requirement and housing counselor information contained in the written early intervention notice, that reduce the likelihood that borrowers will be confused by simultaneous presentation of loss mitigation options. The Bureau believes that the ability of borrowers to make better decisions over the alternatives they are offered is likely to dominate any negative consequences from changes to the set of alternatives over which they decide as a result of the rule.

Potential benefits and costs to covered persons. Servicers currently incur costs associated with the requirements regarding loss mitigation. The Bureau has structured the timelines for borrowers to submit complete loss mitigation applications, and for servicers to evaluate loss mitigation applications, consistently with the National Mortgage Settlement, the California Homeowner Bill of Rights, and requirements currently imposed on servicers that service mortgage loans for the GSEs or government lending programs. Servicers that service mortgage loans subject to investor or guarantor loss mitigation requirements, such as requirements imposed by Fannie Mae, Freddie Mac, and Ginnie Mae, or servicers subject to regulatory consent orders or the national mortgage settlement, must already comply with policies regarding evaluation for a loss mitigation option.

Regarding dual tracking, as discussed above, the Bureau has provided servicers with valuable flexibility by requiring only a limited prohibition on referral to foreclosure. After 120 days of delinquency, servicers may initiate the foreclosure process unless they receive a complete loss mitigation application before they do so. Once they have so initiated foreclosure, they may continue with the foreclosure process even while the loss mitigation application is under review. This allows servicers to quickly recover the capital that remains should the prohibition on foreclosure sale be lifted.

Regarding the appeals process, the Bureau believes that some servicers already operate in a manner that meets the requirement in the rule. The National Mortgage Settlement and the California Homeowner Bill or Rights have an appeals process related to denials of loan modifications. For servicers that currently do not meet the rule's requirement, coming into compliance will likely entail moderate costs. The cost to the servicer of readying a loss mitigation application for review (*e.g.,* verifying all required documents are in the file, possibly creating electronic files or entering borrower information into software) should be less expensive for an appeal than for initial review. Further, assuming the borrower takes 14 days to accept or reject a loss mitigation option received on appeal, the servicer determines whether the full process takes 15 days or 44 days. On the other hand, servicers will also have to provide borrowers with continuity of contact during the appeal.[254]

The requirement to evaluate borrowers for all loss mitigation options available to the borrower will also impose costs on servicers. The Bureau recognizes that servicers generally do not evaluate borrowers for all loss mitigation options simultaneously. Thus, there will be an incremental cost arising from the cases in which the servicer and borrower would currently agree on an option and stop reviewing additional options. Based on industry comments, the Bureau believes that these additional options are likely to be short sale or other non-retention options. Thus, the number of borrowers who receive a home retention option in each year provides an estimate of the number of borrowers who will be evaluated for a non-retention option because of the rule. One large database of first-lien residential mortgages reports approximately 380,000 home retention options in the third quarter of 2012.[255] However, it is not possible to determine what the cost to servicers would be of evaluating these homeowners for the additional options.

G. Potential Specific Impacts of the Final rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Dodd-Frank Section 1026

Of the major provisions in this rulemaking, all insured depository institutions and credit unions with $10 billion or less engaged in servicing mortgage loans must comply with the provisions regarding error resolution (§ 1024.35), requests for information (§ 1024.36), and force-placed insurance (§ 1024.37). However, servicers that service 5,000 mortgage loans or less, and only service mortgage loans the servicer or an affiliate owns or originated, are exempt from all of the provisions in §§ 1024.38 through .41 (with a minor exception). The Bureau estimates that about 97 percent of insured depositories and credit unions with $10 billion or less in total assets service 5,000 mortgage loans or less. Some of these institutions may not qualify for the exemption because they may service some loans that they neither own nor originated. However, the Bureau believes that servicers that service loans that they neither own nor originated tend to service more than 5,000 loans, given the returns to scale in servicing technology. Thus, the Bureau believes that 97 percent of insured depositories and credit unions with $10 billion or less in total assets are likely to be exempt from §§ 1024.38 through .41, with a minor exception.[256]

Regarding §§ 1024.35 and 1024.36, the Bureau believes that the consideration of benefits and costs of covered persons presented above provides a largely accurate analysis of the impacts of the final rule on depository institutions and credit unions with $10 billion or less in total assets. The new written processes for error resolution and information requests have a broader scope and shorter timelines for response than the existing qualified written request process. However, as discussed above, the Bureau believes that the convenience of informal processes for asserting errors or requesting information, like email and phone calls, will limit the costs of these provisions to these institutions.

A number of credit unions and their trade associations commented that credit unions with under $10 billion in assets should be exempt from the provisions in §§ 1024.35 and .36. The commenters stated that these credit unions already effectively communicate with their members regarding requests for information and assertions of error. This comment was discussed above.

Regarding § 1024.37, the larger depositories and credit unions of those under $10 billion generally have contracts with force-placed insurance providers under which the providers would absorb the costs of the provisions. Thus, the Bureau believes

[254] The Bureau received one comment from a housing finance agency that noted that the proposed Dodd-Frank Act section 1022(b)(2) analysis did not discuss the costs and benefits of proposed § 1024.41(j) regarding other liens. The final rule does not include this provision.

[255] *See* Office of the Comptroller of Currency, Release 2012–178, *OCC Mortgage Metrics Report, Third Quarter 2012,* at 22 Tbl. 12 (2012).

[256] Even assuming none of the approximately 373 insured depositories and credit unions with assets between $1 billion and $10 billion qualify for the exemption, it would still be true that over 94 percent of insured depositories and credit unions with $10 billion or less in total assets would qualify for the exemption.

there is little impact of the provisions on these institutions. For smaller depository institutions or credit unions, the Bureau believes that providers may pass along certain costs to such institutions. The impact of these provisions on small depository institutions and credit unions, including a discussion of input from Small Entity Representatives in the Small Business Review Panel process, is discussed in further detail in the Regulatory Flexibility Analysis in part VIII, below. Based on feedback received from the Small Entity Representatives, the Bureau believes that small mortgage servicers engage in relatively little force-placement.

As discussed above, the Bureau believes that about 97 percent of insured depositories and credit unions with $10 billion or less in total assets are likely to be exempt from §§ 1024.38 through .41, with a minor exception. Of the small fraction that must comply, they will most likely be the relatively larger servicers that have substantial experience servicing loans for Fannie Mae, Freddie Mac, FHA, or the VA. Thus, they should already have policies and procedures and resources dedicated to complying with their requirements and there is substantial overlap between those requirements and the requirements of the rule. Compliance with the Bureau's final rule may entail costs of adjustment and costs for extending compliance to other loans in the servicing portfolio. However, the Bureau notes that 80 percent of all outstanding mortgages are guaranteed by one of these institutions, larger servicers use technology and specialized inputs that provide economies of scale in servicing, and larger servicers may also be able to shift certain costs to vendors. Overall, the Bureau believes that few financial service providers are likely to increase fees and charges or reduce servicing activity as a result of these additional costs to an extent that they significantly reduce consumer access to credit.

Finally, the Bureau notes that one comment letter from a bank trade association indicated that the Bureau's section 1022 analysis in the proposal did not adequately identify the types of costs or the amounts of those costs that banks would incur as part of the servicing rulemakings. The Bureau, however, disagrees that the requirements in the final rule, especially in light of the exemptions in §§ 1024.38 through .41, require changes on the scale described by the commenter relating to technology-related projects preformed by vendors. As described above, the small fraction of insured depositories and credit unions that must comply with all provisions of the final rule will most likely be the relatively larger servicers that have substantial experience servicing loans for Fannie Mae, Freddie Mac, FHA, or the VA. Thus, they should already have policies and procedures and resources dedicated to complying with their requirements, and there is substantial overlap between those requirements and the requirements of the rule.

2. Impact of the Provisions on Consumer Access to Credit and on Consumers in Rural Areas

The Bureau believes that the additional costs on servicers from the final rule are not likely to be extensive enough to significantly reduce consumer access to credit. The exemption of small servicers from many provisions of the final rule will help maintain consumer access to credit through these providers. Finally, the Bureau believes that the provisions that support the proper evaluation of borrowers for loss mitigation options may reduce the frequency with which borrowers are denied loan modifications, and thus access to credit.

All servicers will need to comply with the provisions regarding error resolution and requests for information and most of the provisions regarding force-placed insurance. The Bureau believes that the procedures regarding error resolution and requests for information are similar enough to those regarding qualified written requests that the additional one-time and ongoing costs will be small. The Bureau recognizes that the provisions regarding force-placed insurance policies likely impose one-time costs for new disclosures and may entail new procedures (*e.g.,* regarding the renewal notice). However, servicers obtain force-placed insurance on very few loans and small servicers may purchase force-placed insurance and charge the cost of the insurance to the borrower if the cost to the borrower of the force-placed insurance is less than the amount the small servicer would need to disburse from the borrower's escrow account to ensure that the borrower's hazard insurance premium is paid in a timely manner.

Small servicers are exempt from all of the provisions in §§ 1024.38 through .41, with a minor exception. The Bureau believes that most of the remaining, larger servicers have substantial experience servicing loans for Fannie Mae, Freddie Mac, FHA, or the VA. Thus, they should already have policies and procedures and resources dedicated to complying with their requirements that overlap with the requirements regarding general servicing policies, procedures and requirements, early intervention with delinquent borrowers, continuity of contact and loss mitigation. Compliance with the Bureau's final rule may entail costs of adjustment and costs for extending compliance to other loans in the servicing portfolio. However, the Bureau notes that 80 percent of all outstanding mortgages are guaranteed by one of these institutions, larger servicers use technology and specialized inputs that provide economies of scale in servicing, and larger servicers may also be able to shift certain costs to vendors. Overall, the Bureau believes that few financial service providers are likely to increase fees and charges or reduce servicing activity as a result of these additional costs to an extent that they significantly reduce consumer access to credit.

Consumers in rural areas may experience impacts from the final rule that are different in certain respects from the benefits experienced by consumers in general. Consumers in rural areas may be more likely to obtain mortgages from small local banks and credit unions that either service the loans in portfolio or sell the loans and retain the servicing rights. These servicers may already provide most of the benefits to consumers that the final rule is designed to provide. These servicers will benefit from the exemptions to the discretionary rulemakings by not incurring the costs associated with documenting compliance or modifying activities that the Bureau believes already provide substantial consumer protections. Borrowers in turn benefit, either as mortgagees or as customers at these insured depositories and credit unions, through lower fees and continued access to a lending and servicing model that they prefer.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (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.[257] The Bureau

[257] For purposes of assessing the impacts of the final rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification

Continued

also is subject to certain additional procedures under the RFA involving the convening of panel to consult with small business representatives prior to proposing a rule for which an IFRA is required.[258]

An entity is considered ''small'' if it has $175 million or less in assets for the banks, and $7 million or less in revenue for non-bank mortgage lenders, mortgage brokers, and mortgage servicers.[259] The Bureau did not certify that the rule would not have a significant economic impact on a substantial number of small entities. Thus, the Bureau convened a Small Business Review Panel to obtain advice and recommendations of representatives of the regulated small entities. The 2012 RESPA Servicing Proposal preamble included detailed information on the Small Business Review Panel.[260] The Panel's advice and recommendations are found in the Small Business Review Panel Final Report; [261] several of these recommendations were incorporated into the proposed rule. The 2012 RESPA Servicing Proposal preamble also included a discussion of each of the panel's recommendations in the section-by-section analysis for the proposed rule.

In the 2012 RESPA Servicing Proposal, the Bureau did not certify that the rule would not have a significant economic impact on a substantial number of small entities and therefor prepared an IRFA.[262] In the IRFA, the Bureau solicited comment on alternative means of compliance for small servicers with the proposed error resolution procedures and on whether the proposed rule would have any impact on the cost of credit for small entities. The Bureau did not receive comments in response to these requests. Elsewhere in the proposal, the Bureau sought comment on the small servicer exemption, specifically if a small servicer exemption should be established for any provisions of the proposed rules. These comments are addressed in the section-by-section analysis of each provision.

As discussed above, the Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from most of the requirements in §§ 1024.38 through .41. The Bureau also exempts small servicers in certain circumstances from the restriction described in § 1024.17(k)(5) that if borrower has an escrow account for hazard insurance, a servicer may not purchase force-placed insurance where the servicer could advance funds to the borrower's escrow account to ensure timely payment of the borrower's hazard insurance premium charges.[263] The Bureau believes that these exemptions remove a significant amount of the total compliance burden of the final rule that would otherwise fall on small servicers (as defined by the RFA). However, due to limited data with which to compute the remaining compliance burden on small servicers (as defined by the RFA), the Bureau is not certifying that the final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Bureau has prepared the following final regulatory flexibility analysis as required under section 604 of the RFA.

1. A Statement of the Need For, and Objectives of, the Rule

The Bureau is publishing this final rule to establish new regulatory protections for borrowers related to mortgage servicing. This rule is needed for the reasons discussed above in both the overview, the section-by-section analysis, and the Dodd-Frank Act section 1022(b) analysis above. The final rule amends Regulation X, among other things, to implement amendments to RESPA that were added by section 1463 of the Dodd-Frank Act to address harms related to mortgage servicing. Section 1463 of the Dodd-Frank Act requires servicers to provide new disclosures and to meet other standards with respect to on force-placed insurance, and it establishes obligations for servicers to respond to requests from borrower to correct errors or to provide certain information. Section 1463 of the Dodd-Frank Act also authorizes the Bureau, by regulation, to impose other obligations on servicers that the Bureau finds appropriate to carry out the consumer protection purposes of RESPA.

The amendments to Regulation X are intended to protect consumers by addressing seven servicer obligations: To correct errors asserted by mortgage loan borrowers; to provide information requested by mortgage loan borrowers; to meet certain procedural and other requirements regarding force-placed insurance; to maintain general servicing policies and procedures designed to achieve certain objectives; to engage in early intervention with delinquent borrowers; to provide delinquent borrowers with continuity of contact with servicer personnel who have access to the borrower's mortgage loan account; and to evaluate borrowers' applications for available loss mitigation options. These final rules also modify and streamline certain existing servicing-related provisions of Regulation X, including servicer requirements to provide disclosures to borrowers in connection with a transfer of mortgage servicing and to manage escrow accounts. These revisions include provisions on timely disbursements to maintain hazard insurance, and to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan.

This rulemaking has multiple objectives. The provisions on error resolution require servicers promptly to correct errors, to conduct a reasonable investigation and to provide the borrower with a written notice. The provisions on requests for information requires servicers promptly to provide the information requested or to conduct a reasonable search for the information and provide the borrower with a notice stating, among other things, that the information is not available to the servicer. The provisions on force-placed insurance are intended to avoid unwarranted costs and fees in connection with force-placed insurance. The provisions prohibit servicers from charging borrowers for force-placed insurance unless they have a reasonable basis to believe the borrower has failed to maintain hazard insurance on the property, require that charges related to force-placed insurance be bona fide and reasonable, and impose obligations on servicers to promptly cancel force-place insurance upon a demonstration that the

System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[258] 5 U.S.C. 609.

[259] *See* U.S. Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Oct. 1, 2012) *available at http://www.sba.gov/content/table-small-business-size-standards.* (''SBA Size Standards'').

[260] 77 FR 57200, 57285–57286 (Sept. 17, 2012).

[261] *See* U.S. Consumer Fin. Prot. Bureau, U.S. Small Bus. Admin., & Office of Mgmt. & Budget, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking* (2012) (''Small Business Review Panel Report''), *available at http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0002.*

[262] 77 FR 57200, 57286–57292 (Sept. 17, 2012).

[263] These rulemakings are the general servicing standards sections, the early intervention with delinquent borrowers requirement, the continuity of contact with delinquent borrowers requirement, and the loss mitigation procedures; however, regarding the loss mitigation procedures, these servicers are required to comply with (1) the prohibition on making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent and (2) a prohibition on proceeding with a foreclosure sale when a borrower is performing pursuant to the terms of a loss mitigation agreement.

borrower has hazard insurance in place and refund the borrower for force-place premiums for periods of duplicative coverage. These provisions will reduce instances of servicers charging borrowers for force-placed insurance they do not need or charging more than is or charging more than is bona fide and reasonable.

The provisions on general servicing standards are intended to address widespread problems reported across the mortgage servicing industry. The provisions require servicers to maintain policies and procedures reasonably designed to achieve the objectives relating to accessing and providing accurate information; properly evaluating loss mitigation applications; facilitating oversight of, and compliance by, service providers; facilitating transfer of information during servicing transfers; and informing borrowers of written error resolution and information request procedures. Compliance also requires servicers to retain records for a specified time period and maintain certain documents and data in a manner that facilitates compiling the documents and data into a servicing file within five days.

The provisions on early intervention with delinquent borrowers are intended to spur communication between servicers and borrowers early in a borrower's delinquency in order to facilitate borrower's avoidance of foreclosure. Early intervention will also likely benefit borrowers by reducing avoidable interest costs, limiting the impact on borrowers' credit reports, and facilitating household budgeting and planning.

The provisions on continuity of contact are intended to ensure that servicer personnel with access to information about a delinquent borrower are made available to the borrowers so that they can appropriately assist the borrower in exploring loss mitigation options.

Finally, the provisions on loss mitigation are intended to facilitate the review of borrowers for loss mitigation options. The provisions require servicers to undertake certain duties in connection with the evaluation of borrower applications for loss mitigation options. These servicers must evaluate any borrower who submits an application for all loss mitigation options available to the borrower and meet timelines with respect to the review process. The provisions further impose a foreclosure ban during the first 120 days after delinquency and impose timelines for the review of a timely submitted complete loss mitigation application. The provisions also provide borrowers with the right to appeal a servicer's denial of a complete loss mitigation application in certain circumstances.

2. Summary of Significant Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

In accordance with section 3(a) of the RFA, the Bureau prepared an IRFA. In the IFRA, the Bureau estimated the possible compliance costs for small entities with respect to each major component of the rule against a pre-statute baseline. The Bureau requested comments on the IRFA. An industry association submitted a comment letter that refers in passing to the Regulatory Flexibility Analysis. The comment raises three significant issues regarding the impact of the proposed rule on RFA small servicers. First, the commenter states that it would not be effective public policy to require servicers smaller than those in the top-50 to incur the costs of complying with the proposed rule. The commenter observes that the top-50 servicers service 80 percent of outstanding mortgage loans and compliance with the rule would impose significant costs on the well over 12,000 servicers that service the remaining 20 percent. The commenter states that the costs imposed on these 12,000 servicers would be disproportionate to their share of the market. Second, the commenter stated that neither the proposed Dodd-Frank Act section 1022 analysis nor the IRFA adequately identifies the types of costs or the amount of those costs that bank servicers will incur as a result of the servicing rulemakings. Third, the commenter states that given the servicing performance of community banks and the incentives that drive their high level of customer service, there is no demonstrated need to apply to ''small servicers'' those elements of the proposal that are not required by the Dodd-Frank Act.[264]

As discussed above in the Dodd-Frank Act section 1022 analysis and the section-by-section analysis, the Bureau recognizes that servicers that service relatively few loans, all of which they either originated or hold on portfolio, may have stronger incentives than other servicers to ensure loan performance or maintain a strong reputation in their local communities. Further, the Bureau understands the many small servicers, including the Small Entity Representatives, use a business model that involves frequent, intensive consumer contact, both to ensure loan performance and maintain a strong reputation in their local communities. In light of these favorable incentives, and to preserve access to small servicers, the Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from most of the requirements under sections §§ 1024.38 to 41.[265] The Bureau estimates that 98 percent of insured depositories and credit unions that service 10,000 loans or less (*i.e.,* the ones that service 5,000 loans or less), all of which the servicer or an affiliate owns or originated, will qualify for the exemption.[266] Thus, the Bureau believes that the exemption in the final rule provides an outcome that is largely consistent with the outcome the commenter recommends.

Regarding the specific comments, the Bureau notes that the consequences of compliance costs for covered persons depend on the size of these costs relative to other costs and the ability of covered persons to absorb or shift these costs. The consequences for consumers depend on these factors as well as the improvements in products and services from compliance by servicers. These consequences are not summarized by the share of aggregate costs imposed on a particular segment. The Bureau also notes that the fact that a large number of small servicers will require new and revised disclosures means that each vendor will likely spread the one-time costs of developing and validating disclosures over a large number of servicers.[267]

Second, the proposed Dodd-Frank Act section 1022 analysis and IRFA both briefly described the one-time and ongoing costs that bank servicers would incur as part of the servicing rulemaking. Both also provided limited quantification of the costs attributable to the rule, from a pre-statutory baseline, in light of the limited amount of data that was reasonably available. As discussed in the final Dodd-Frank Act

[264] The commenter does not define small servicer, but the commenter does request that the Bureau revise the loan threshold in § 1026.41(e)(4) to 10,000. The Bureau notes that about 200 insured depositories and credit unions service over 10,000 loans and others service some loans for others.

[265] The Bureau is also exempting these servicers from the amendment to § 1024.17(k)(5) requiring that a servicer advance funds to an escrow account when a borrower is more than 30 days delinquent.

[266] None of the approximately 178 insured depositories and credit unions that the Bureau estimates service between 5,001 and 10,000 loans would qualify for the exemption. On the other hand, for reasons discussed below, the Bureau believes that all of the insured depositories and credit unions that service 5,000 loans or less will qualify for the exemption.

[267] This point was made briefly in the proposed Section 1022 analysis (*see* 77 FR 57200, at 57369 (Sept.17, 2012) and is discussed further in the final Section 1022 analysis.

section 1022 analysis, the Bureau does not believe that the changes required of servicers in this rulemaking would impose the types of costs that the commenter describes.[268]

Finally, as discussed above, the Bureau carefully considered how to define small servicers for purposes of the exemption. The Bureau concluded after analysis of data that is reasonably available that the 5,000 mortgage loan threshold, coupled with the requirement to service only loans owned or originated, provides a reasonable balance between the goal of including a substantial number of servicers that make loans in their local communities or more generally have incentives to provide high levels of customer contact and information and excluding servicers that use a different business model. The Bureau further believes that it is appropriate for a definition of small servicers, for purposes of an exemption to servicing rules, to include conditions specifically associated with the incentives and business model of servicers, such as owning or originating all loans.

The Bureau received numerous comments describing in general terms the impact of the proposed rule on small servicers and the need for exemptions for small servicers from various provisions of the proposed rule. These comments, and the responses, are discussed in the section-by-section analysis above, and element 6–1 of this FRFA below.

3. Response to the Office of Advocacy of the Small Business Administration Comment

The Office of Advocacy at the Small Business Administration (Advocacy) provided a formal comment letter to the Bureau in response to the proposed rules on mortgage servicing. Among other things, this letter expressed concern about the following issues: Inadequate notice of the proposed rules, providing notice of information within 5 days, and the effective date of the regulation.

First, Advocacy expressed concern that small entities did not have adequate notice of the proposed rules, because although the proposed rules were posted on the Bureau Web site on August 10, 2012 the rules were not published in the **Federal Register** until September 17, 2012. Advocacy was concerned that small entities who rely on the **Federal Register** for notice of proposed rules did not have sufficient time to prepare comments in response to the proposed rule.

The Bureau believes that small entities were given adequate notice and had a full opportunity to comment on the proposed rule. The proposed servicing rules were press released and issued on the Bureau Web site a full 60 days before the close of the comment period.[269] The Bureau engaged in outreach to industry and other members of the public. Further, the Bureau believes that due to the recent attention on the industry, including the National Mortgage Settlement and the market changes, small entities were aware that the Dodd-Frank Act mandated changes to the servicing industry and that proposed rules would be forthcoming from the Bureau, particularly as trade associations have taken an active role in the rulemaking. The Bureau believes such trade associations helped to inform small entities of the proposed rulemaking.[270] In light of the foregoing, the Bureau believes that small entities were given adequate notice of the proposed rules, as evidenced by the number of small entities who submitted formal comments.

Second, Advocacy expressed concern about the requirement that servicers provide a written notice and documenting compliance under the alternative compliance mechanism for information requests where a servicer responds to a request for information within five days. The concern is about unnecessary procedures being triggered when a request for information has already been resolved.

The Bureau agrees that if a borrower requests information and is quickly provided the answer, additional procedures including notification that the request has been received may not be appropriate. The Bureau has restructured the requirement under the final rule that servicers adhere to information request requirements under § 1024.36 with respect to oral notices of errors. Instead of the proposed prescriptive procedures, oral information requests and error notifications are addressed in § 1024.38, General Servicing Policies, Procedures and Requirements. Thus, the Bureau has provided servicers with more flexibility regarding responses to information requests. Under the final rule, if a borrower calls with a question and is given an answer, no further actions would be required. Additionally, if a borrower submits a written request for information, and the servicer provides a written response within five days, the servicer is not also required to send a separate written response notifying the borrower that the request was received. The Bureau believes these amendments to the rule address the Advocacy's concern on this issue.

Third, Advocacy encouraged the Bureau to provide Small Entity Representatives with a sufficient amount of time for them to comply with the requirements of the proposal, and expressed this could take 18–24 months. A complete discussion of the effective date is found in the Overview above. While the Bureau understands the new rules will take time to implement, the Bureau also believes that consumers should have the benefit of the additional protections as soon as practical. In light of the comments received, the Bureau believes that 12 months is an appropriate implementation period. This time period is consistent with (1) the period requested by the vast majority of comments, (2) outreach conducted by the Bureau during development of the proposed rule with vendors and systems providers regarding timeframes for updating core systems, and (3) the implementation period for other requirements imposed by the Dodd-Frank Act or regulations issued by the Bureau that may have other impact on creditors, assignees, and servicers. Further, the Bureau believes that an approximately 12 month implementation period appropriately balances the needs of industry to appropriately adjust operations to implement the Final Servicing Rules with the goal of providing consumers the benefit of the protections implemented by the Final Servicing Rules as soon as practicable.

4. A Description of and An Estimate of the Number of Small Entities to Which the Rule Will Apply

As discussed in the Small Business Review Panel Report, for purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of SBA regulations and reference to the North American Industry Classification System (NAICS) classifications and size

[268] *See* part VII.B and the consideration of costs to covered persons from the revised § 1026.20(c) notice in part VII.D.1.

[269] *See* Press Release, Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrower* (Aug. 10, 2012) *available at http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/.*

[270] *See e.g.,* Nat'l Ass'n of Fed. Credit Unions, CFPB Proposes Mortgage Servicing Rule Changes, (Aug. 12, 2012), (''NAFCU Compliance Blog'') *available at http://www.nafcu.org/News/2012_News/August/CFPB_proposes_mortgage_servicing_rule_changes/.*

standards.[271] 5 U.S.C. 601(3). Under such standards, banks and other depository institutions are considered ''small'' if they have $175 million or less in assets, and for other financial businesses, the threshold is average annual receipts (*i.e.,* annual revenues) that do not exceed $7 million.[272]

During the Small Business Review Panel process, the Bureau identified five categories of small entities that may be subject to the proposed rule for purposes of the RFA: Commercial banks/savings institutions [273] (NAICS 522110 and 522120), credit unions (NAICS 522130), firms providing real estate credit (NAICS 522292), firms engaged in other activities related to credit intermediation (NAICS 522390), and small non-profit organizations. Commercial banks, savings institutions, and credit unions are small businesses if they have $175 million or less in assets. Firms providing real estate credit and firms engaged in other activities related to credit intermediation are small businesses if average annual receipts do not exceed $7 million.

A small non-profit organization is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Small non-profit organizations engaged in mortgage servicing typically perform a number of activities directed at increasing the supply of affordable housing in their communities. Some small non-profit organizations originate and service mortgage loans for low and moderate income individuals while others purchase loans or the mortgage servicing rights on loans originated by local community development lenders. Servicing income is a substantial source of revenue for some small non-profit organizations while others receive most of their income from grants or investments.

The following table provides the Bureau's estimate of the number and types of entities to which the rule will apply:

Table 1: Estimated number of affected entities and small entities by NAICS code and engagement in closed-end mortgage loan servicing

Category	NAICS	Total entites	Small entities	Entities engaged in mortgage loan servicing	Small entities engaged in mortgage loan servicing
Commercial banks & savings institutions	522110, 522120	7,081	3,779	6,975	3,714
Credit unions	522130	7,040	6,079	4,889	3,951
Real estate credit	522292	5,791	5,152	1,388	800
Other activities related to credit intermediation (includes loan servicing)	522390	5,494	5,319		

For commercial banks, savings institutions, and credit unions, the number of entities and asset sizes were obtained from December 2011 Call Report data as compiled by SNL Financial.[274] Banks and savings institutions are counted as engaging in mortgage loan servicing if they hold closed-end loans secured by one to four family residential property or they are servicing mortgage loans for others. Credit unions are counted as engaging in mortgage loan servicing if they have closed-end one to four family mortgages in portfolio, or hold real estate loans that have been sold but remain serviced by the institution.

For firms providing real estate credit and firms engaged in other activities related to credit intermediation, the total number of entities and small entities comes from the 2007 Economic Census. The total number of these entities engaged in mortgage loan servicing is based on a special analysis of data from the Nationwide Mortgage Licensing System and Registry (NMLS) and is current as of Q1 2011. The total equals the number of non-depositories that engage in mortgage loan servicing, including tax-exempt entities, except for those mortgage loan servicers (if any) that do not engage in any mortgage-related activities that require a State license. The estimated number of small entities engaged in mortgage loan servicing is based on predicting the likelihood that an entity's revenue is less than the $7 million threshold based on the relationship between servicer portfolio size and servicer rank in data from Inside Mortgage Finance.

Non-profits and small non-profits engaged in mortgage loan servicing would be included under real estate credit if their primary activity is originating loans and under other activities related to credit intermediation if their primary activity is servicing. The Bureau has not been able to separately estimate the number of non-profits and small non-profits engaged in mortgage loan servicing. These non-profits may list loan servicing income on the IRS Form 990 Statement of Revenue, but it is not possible to search public databases on non-profit entities according to what they list on the Statement of Revenue.

The Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from most of the provisions in § 1024.38–41. The Bureau estimates that all but one insured depository or credit union that meets the SBA asset threshold will qualify for the exemption. The Bureau's methodology for this estimate is straightforward in the case of credit unions. The credit union Call Report presents the number of mortgages held in credit union portfolios and the amount of assets. The Bureau could readily determine which credit union small servicers (as defined by the SBA asset threshold) serviced 5,000 mortgage loans or less. In contrast, the bank and thrift Call Report does not present the number of mortgages, only the aggregate unpaid principal balance, and the amount of assets. The Bureau developed estimates of the average unpaid principal balance at banks and thrifts of

[271] The current SBA size standards are found on SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards.*

[272] *See* SBA Size Standards.

[273] Savings institutions include thrifts, savings banks, mutual banks, and similar institutions.

[274] The Bureau has updated these figures from the Initial Regulatory Flexibility Analysis, which used December 2010 Call Report data as compiled by SNL Financial.

different sizes and use this with the information on aggregate unpaid principal balance to derive loan counts at each bank and thrift.[275] The Bureau could then determine which bank and thrift small servicers (as defined by the SBA asset threshold) serviced 5,000 mortgage loans or less.

It is not possible to observe whether the loans that servicers are servicing for others were originated by those servicers. However, the Bureau believes that all insured depositories and credit unions that meet both the SBA asset threshold and the loan count threshold likely qualify for the exception. In principle, these entities may not qualify for the exception because they do not meet the other conditions of the exception, *i.e.,* they service loans that they did not originate and do not own. The Bureau believes that this is extremely unlikely, however. First, most entities servicing loans they did not originate and do not own most likely view servicing as a stand-alone line of business. In this case they would most likely choose to service substantially more than 5,000 loans in order to obtain a profitable return on their investment in servicing. Additionally, the Bureau believes it is highly unlikely that insured depositories and credit unions with $175 million in assets or less choose to make this investment, preferring to use their assets to support other activities. Taking both factors into account, the Bureau believes that essentially all insured depositories and credit unions that meet the SBA threshold and the loan count condition qualify for the exception.

The Bureau does not have the data necessary to precisely estimate the number of small entity non-depositories that would be covered by the exemption.[276] To obtain a rough estimate, the Bureau notes that $7 million in servicing revenue would be generated from an aggregate unpaid principal balance of $2 billion.[277] The Bureau estimates that all but 4 percent of insured depositories and credit unions servicing an aggregate unpaid principal balance of $2 billion or less service 5,000 loans or less. Assuming a similar relationship between servicing revenue and loan counts holds for non-depository servicers, at least for relatively small depository and non-depository servicers, all but 4 percent of non-depository servicers would service 5,000 loans or less. This estimate and the limited data available imply that 768 (all but 4 percent of 800, or 32) non-depository servicers would service 5,000 loans or less. The Bureau considers these figures to be the best available approximations to the number of non-depository servicers that would and would not qualify for the exemption. However, the Bureau recognizes that these figures are rough.

5. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final rule does not impose new reporting requirements. The final rule does, however, impose new recordkeeping and compliance requirements on certain small entities. The requirements on small entities from each major component of the rule are presented below.

The Bureau discusses impacts against a pre-statute baseline. This baseline assumes compliance with the Federal rules that overlap with the final rule. The Bureau expects that the impact of the rule relative to the pre-statute baseline will be smaller than the impact would be if not for compliance with the existing Federal rules. In particular, certain ongoing costs regarding error resolution, early intervention and loss mitigation will have generally been incurred and budgeted for by servicers because they are already providing these services. These expenses will facilitate and thereby reduce the cost of compliance with the rule.

Recordkeeping Requirements

As discussed in detail in the section-by-section analysis above, the final rule amends the recordkeeping requirements imposed on servicers. The amendments to Regulation X eliminated the pre-existing requirement in § 1024.17(*l*) to keep records relating to escrow accounts for five years. The amendments also impose a new obligation in § 1024.38 to retain records that document actions taken by the servicer with respect to a borrower's mortgage account until one year after the date a mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer. In general, servicers will have to update their policies and procedures; additionally, servicers may have to update their systems, and increase storage capacity to ensure compliance.

Compliance Requirements

As discussed in detail in the section-by-section analysis above, the final rule imposes new compliance requirements on servicers. In general, servicers will have to update their policies and procedures; additionally, servicers may have to update their systems to ensure compliance.

(a) Force-Placed Insurance

Section 1024.37 prohibits servicers from charging a borrower for force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. Servicers must follow a procedure including sending two notices before imposing any charge on a borrower, and terminating force-placed insurance and refunding force-placed insurance premiums paid during any period during which the borrower's insurance coverage and the force-placed insurance coverage were each in effect. The final rule contains a provision prohibiting a servicer from purchasing force-placed insurance, with respect to a borrower who has established an escrow for hazard insurance, unless a servicer is unable to disburse funds from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges are paid in a timely manner. Servicers will have to update their policies and procedures to ensure compliance with these requirements, as well as update their systems to ensure the proper notices are sent. The Bureau is mitigating the burden by providing model forms.

[275] For banks and thrifts with under $10 billion in assets, the Bureau calculated the average unpaid principal balance of portfolio mortgages by state for credit unions with less than $1 billion in assets and applied the state specific figures to these banks and thrifts. For banks and thrifts with over $10 billion in assets, the Bureau applied the OCC's mortgage metrics estimate of $175,000. For securitized loans, the Bureau derived the average unpaid principal balance based upon the size of the securitized loan book using the FHFA's Home Loan Performance database, which ranged from $141,000 to $189,000.

[276] In the proposed rule, the Bureau stated that it was working to gather data from the Nationwide Mortgage Licensing System and Registry (NMLS) that would be additional to the data used in Table 1. The Bureau considered that this additional data might allow the Bureau to refine its estimate of the number of small entity non depositories that would be covered by a closely related exemption in the Bureau's companion proposed mortgage servicing rulemaking, the proposed 2012 TILA Mortgage Servicing Rule. The Bureau did obtain additional data from the NMLS. This data, however, does not contain information directly about mortgage servicing revenue and mortgage loans serviced and it has limited information with which to derive these amounts. The Bureau has therefore not used this additional NMLS data to estimate the number of small entity non-depositories that would be covered by the exemption in this final rule or in the final 2012 TILA Mortgage Servicing Rule.

[277] This calculation assumes the servicer receives 35 basis points on each dollar of unpaid principal balance. Typical annual servicing fees are 25 basis points for prime fixed-rate loans, 37.5 basis points for prime ARMs, 44 basis points for FHA loans, and 50 basis points for subprime loans ; *see* Larry Cordell *et al., The Incentives of Mortgage Servicers: Myths and Realities,* at 15 (Fed. Reserve Board, Working Paper No. 2008–46, 2008). The conclusion of the analysis would be the same regardless of which figure is used.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from the provision prohibiting servicers from purchasing force-placed insurance, with respect to a borrower who has established an escrow account for hazard insurance if the amount of the disbursement would be greater than the cost of the force-placed insurance. For the reasons explained above, the Bureau believes that all small servicers (as defined by the SBA) would likely be exempt from this provision when the cost of the force-placed insurance is less than the amount the servicer would need to disburse from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges were paid in a timely manner.

(b) Error Resolution and Response to Inquiries

Sections §§ 1024.35 and 1024.36 require servicers to follow procedures in resolving errors, and responding to inquiries, including acknowledging written requests from the borrower, investigating and correcting errors, and responding to the borrower. Servicers may need to develop compliance procedures and train staff and may need new or updated software and hardware in order to access the information required to address notices of error and inquiries.

(c) General Servicing Standards

Section § 1024.38 requires servicers to maintain policies and procedures that are reasonably designed to achieve certain objectives that related to: accessing and providing accurate information properly evaluating loss mitigation applications; facilitating oversight of, and compliance by, service providers; facilitating transfer of information during servicing transfers; and informing borrowers of written error resolution and information request procedures. Servicers will have to update their policies and procedures, and may have to update their information management systems.

To comply with these requirements, servicers may incur a cost to review and document their policies and procedures, obtain legal advice, train their staff to follow the policies and procedures, and monitor staff adherence to the policies and procedures, in addition to complying with expanded requirements. The rule mitigates all of these costs through the provision that the ''reasonableness'' of a servicer's policies and procedures would depend upon the size of the servicer and the nature and scope of its activities. Further, depository institutions already are subject to interagency guidelines relating to safeguarding the institution's safety and soundness that facilitate reasonable information management for purposes of mortgage servicing.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from these provisions. For the reasons explained above, the Bureau believes that all small servicers (as defined by the SBA) would likely qualify for this exemption.

(d) Early Intervention for Delinquent Borrowers

Section 1024.39 requires servicers to make contact with delinquent borrowers. Servicers must establish or make good faith efforts to establish live contact with a delinquent borrower on or before the 36th day of delinquency. Servicers must also provide certain written information to borrowers not later than 45th day of delinquency.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from these provisions. For the reasons explained above, the Bureau believes that all small servicers (as defined by the SBA) would likely qualify for this exemption.

(e) Continuity of Contact

Servicers are required to maintain policies and procedures that are reasonably designed (1) to achieve the objective that a servicer makes available, by telephone, personnel who can perform certain functions that assist delinquent borrowers, and (2) to ensure a servicer assigns such personnel by the time a servicer provides the written early intervention notice.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from these provisions. For the reasons explained above, the Bureau believes that all small servicers (as defined by the SBA) would likely qualify for this exemption.

(f) Loss Mitigation

Section 1024.41 requires servicers to follow certain procedures and timelines in processing loss mitigation applications. Servicers are required to receive and evaluate complete loss mitigation applications within certain timeframes, and to provide an appeal process, with an independent evaluation, for loss mitigation applications received within a specified timeframe and with respect to which the servicer denies a borrower's application for any trial or permanent modification program. The rule also imposes a foreclosure ban during the first 120 days after delinquency and imposes timelines if a borrower submits a complete loss mitigation application during this 120 day period or before a servicer initiates foreclosure.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from all of the requirements in this section of the final rule except (1) the prohibition on making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent and (2) a prohibition on proceeding with a foreclosure sale when a borrower is performing pursuant to the terms of a loss mitigation agreement. Given current foreclosure timelines and the infrequency of foreclosure by small servicers (as defined by the SBA), the Bureau does not believe that these requirements will significantly delay foreclosures by small servicers that may occur or impose significant other costs on them.

(g) Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement

Section 603(b)(4) of the RFA requires an estimate of the classes of small entities which will be subject to the requirement. The classes of small entities which will be subject to the reporting, recordkeeping, and compliance requirements of the proposed rule are the same classes of small entities that are identified above in part VII.B.4.

Section 603(b)(4) of the RFA also requires an estimate of the type of professional skills necessary for the preparation of the reports or records. The Bureau anticipates that the professional skills required for compliance with the proposed rule are the same or similar to those required in the ordinary course of business of the small entities affected by the proposed rule. Compliance by the small entities that will be affected by the proposed rule will require continued performance of the basic functions that they perform today: generating disclosure forms, addressing errors and providing information to borrowers, managing information about borrowers, contacting delinquent borrowers, providing continuity of contact for delinquent borrowers, and (as applicable) reviewing applications by borrowers for loss mitigation.

6–1. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

The Bureau understands the new provisions will impose certain costs on small entities, and has attempted to mitigate the burden where it can be done without unduly diminishing consumer protection. The section-by-section analysis of each provision contains a complete discussion of the following steps taken to minimize the burden.

Importantly, the Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from most of the requirements under 1024.38 to 1024.41. The Bureau is also exempting these servicers from the amendment to § 1024.17(k)(5) requiring that a servicer advance funds to an escrow account when a borrower is more than 30 days delinquent. The Bureau believes that these exemptions remove a significant amount of the total compliance burden of the final rule that would otherwise fall on small servicers as defined by the SBA. However, due to limited data with which to compute the remaining compliance burden on small servicers as defined by the SBA, the Bureau is providing this description of the *other* steps the agency has taken to minimize the economic impact on small entities.

(a) Force-Placed Insurance

Based on discussions with industry and the Small Entity Representatives, the Bureau understands that the force-placed insurance provision may not have the same impact on all small servicers. Some small servicers incur all of the costs associated with providing notices, tracking borrower coverage, and placing and terminating the insurance. For other small servicers, the force-placed insurance provider handles these activities and absorbs the costs or passes them on to the consumer indirectly through the insurance premium. Many small servicers already comply with most of the force-placed insurance provisions of the rule.

If small servicers are generally already comply with the force-placed insurance provisions of the proposed rule, then the impact of the rule will likely come from the one-time cost of developing disclosures that would meet the proposed disclosure requirements and the ongoing costs of providing information in the disclosures that they do not already provide.[278] In addition, some small servicers very rarely need to force-place insurance and therefore use informal procedures, such small servicers may need to develop written procedures to ensure they comply with the proposed rule. The Bureau believes the one-time cost of developing these policies will be minimal.

The Bureau attempted to mitigate the costs of the provisions addressing force-placed insurance. The Bureau attempted to mitigate costs by, for example, providing that a servicer is not required to send more than one force-placed renewal notice during any 12-month period. The Bureau attempted to mitigate the risk that borrower could cancel their own insurance and keep the refund,[279] by allowing servicers to advance premium payments for a borrower's hazard insurance in 30-day installments,[280] as recommended by the Small Business Review Panel Final Report. Finally, the Bureau modified the final rule by exempting small servicers in certain circumstances from the requirement that for a borrower who has escrowed for hazard insurance, a servicer may not purchase force-placed insurance where the servicer could advance funds to the borrower's escrow account to ensure timely payment of the borrower's hazard insurance premium charges.[281]

The Bureau believes that essentially all small insured depositories and credit unions (as defined by the SBA) would likely be exempt from this requirement provided that cost to the borrower of the force-placed insurance purchased by the small servicer is less than the amount the small servicer would need to disburse from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges were paid in a timely manner. As discussed above, the Bureau has only a rough estimate of the number of small non-depository servicers (as defined by the SBA) that would also be exempt under the same condition, but the estimate supports the view that vast majority would be exempt.

(b) Error Resolution and Response to Inquiries

Based on conversations with Small Entity Representatives, the Bureau understands that most small servicers already incur most of the costs that would be required to comply with the majority of the provisions. The Small Entity Representatives had no objection to the proposed response timeframes, they emphasized that their borrowers demanded immediate resolution of errors and response to inquiries and their high-touch customer service model was designed to meet the demands of these borrowers.

The Small Entity Representatives did generally object to the proposed written response requirements, stating that having to acknowledge and respond in writing to every notice of error or inquiry would be burdensome, particularly if the issue was resolved in the course of the initial phone call. In the final rule, the Bureau has amended the oral error resolution and inquiry response requirements such that servicers must only follow the prescriptive procedures in §§ 1024.35 and 1024.36 when the error notification or information request is received in writing.[282] Thus, if a servicer responds to an inquiry during the initial phone call, the servicer is not required to provide the acknowledgement notice. Further, a servicer who responds to a written error notification or information request within five days need not send an acknowledgment notification. The additional flexibility of this approach minimizes the burden on small servicers by allowing them to adopt process that work for their business model.

(c) Reasonable Information Management Policies and Procedures

The information management provisions require the servicer to maintain policies and procedures that are reasonably designed to achieve certain objectives. As clarified in comment 38(a)–1, servicers have flexibility in developing these policies and procedures in light of the size, nature, and scope of the servicer's operations. The flexibility minimizes the burden on small servicers.

The Small Entity Representatives appreciated the flexibility of the proposal and thought it was good that reasonableness depends on the size, nature, and scope of the entity. The Small Entity Representatives emphasized that small firms do not necessarily use automated or online systems to record and track all borrower communications. The Bureau does not believe such systems would be required by the rule.

(d) Early Intervention for Delinquent Borrowers

The Bureau believes that many small entities already incur most of the costs

[278] For example, one Small Entity Representative stated that its current notice does not include an estimate of force-placed insurance costs.

[279] Small Business Review Panel Report, at 22.

[280] See comment 17(k)(5)–3

[281] For purposes of this exemption, a small servicer is one that services 5,000 or fewer loans all of which it either originated or owns.

[282] The procedures for receiving an oral notification of error or information request were moved to § 1024.38 (General Servicing Standards); small servicers are exempt from this section.

that would be required to comply with the provision of the early intervention rule. At the Small Business Review Panel, Small Entity Representatives explained that they generally contact delinquent borrowers well before the 45th day of a borrower's delinquency.

In the final rule, the Bureau has increased flexibility around the satisfying the 36-day live contact requirement. As discussed in more detail in the section-by-section analysis of § 1024.39, the final rule provides servicers with more flexibility in satisfying the live contact requirement by relaxing the good faith efforts standard and allowing servicers to demonstrate compliance by providing written or electronic communication encouraging borrowers to establish live contact with their servicer and, if appropriate, providing oral, written, or electronic information notifying borrowers that loss mitigation options may be available. Commentary also explains, in general, that a servicer may exercise reasonable discretion in determining whether informing a borrower of the availability of loss mitigation is appropriate under the circumstances. This flexibility minimizes the burden on small servicers by not requiring them to send information to certain borrowers when they believe such information would be premature.

In addition, the Bureau has minimized the burden by providing flexible requirements with respect to the content of the written notice, which will help accommodate existing practices, and by not requiring a servicer to provide the written notice to a borrower more than once during any 180-day period. Further, the Bureau is permitting the written notice to be combined with other disclosures being sent by the 45th day of delinquency, which will accommodate existing practices. Finally the Bureau is providing model clauses for the written notice.

(e) Continuity of Contact

The Bureau believes that small servicers generally incur most of the costs that would be required to comply with the provisions for continuity of contact. The Small Entity Representatives generally stated that with their small staffs, everyone had access to files and would be able to assist borrowers in delinquency. The final rule requires that servicers maintain policies and procedures reasonably designed to, among other things, ensure that servicers assign personnel to assist delinquent borrowers when certain loss mitigation information is provided to borrowers (the final rule allows servicers some flexibility in determining when this information should be sent pursuant to § 1024.39), but in any event, not later than the 45th day of a borrower's delinquency. Thus, the final rule minimizes burden by not requiring servicers to establish access to continuity of contact for certain borrowers who may not require this assistance. Additionally, the final rule is modified to allow the servicers to terminate access to continuity of contact personnel if the borrower brings their loan back to current without going through formal loss mitigation procedures.

(f) Loss Mitigation

The final rule requires servicers to receive and evaluate loss mitigation applications and appeals. However, the final rule mitigates the cost of properly evaluating loss mitigation applications and appeals through the provisions that the ''reasonableness'' of a servicer's policies and procedures would depend upon the size of the servicer and the nature and scope of its activities.

6–2. Description of the Steps the Agency Has Taken To Minimize Any Additional Cost of Credit for Small Entities

Section 603(d) of the RFA requires the Bureau to consult with small entities regarding the potential impact of the proposed rule on the cost of credit for small entities and related matters. 5 U.S.C. 603(d). To satisfy these statutory requirements, the Bureau provided notification to the Chief Counsel on April 9, 2012 that the Bureau would collect the advice and recommendations of the same Small Entity Representatives identified in consultation with the Chief Counsel through the Small Business Review Panel process concerning any projected impact of the proposed rule on the cost of credit for small entities as well as any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities. The Bureau sought the advice and recommendations of the Small Entity Representatives during the Small Business Review Panel outreach meeting regarding these issues because, as small financial service providers, the Small Entity Representatives could provide valuable input on any such impact related to the proposed rule.

At the time the Bureau circulated the Small Business Review Panel outreach materials to the Small Entity Representatives in advance of the Small Business Review Panel outreach meeting, it had no evidence that the proposals under consideration would result in an increase in the cost of business credit for small entities. Instead, the summary of the proposals stated that the proposals would apply only to mortgage loans obtained by consumers primarily for personal, family, or household purposes and the proposals would not apply to loans obtained primarily for business purposes.

At the Panel Outreach Meeting, the Bureau asked the Small Entity Representatives a series of questions regarding cost of business credit issues. The questions were focused on two areas. First, the Small Entity Representatives from commercial banks/savings institutions, credit unions, and mortgage companies were asked whether, and how often, they extend to their customers closed-end mortgage loans to be used primarily for personal, family, or household purposes but that are used secondarily to finance a small business, and whether the proposals then under consideration would result in an increase in their customers' cost of credit. Second, the Bureau inquired as to whether, and how often, the Small Entity Representatives take out closed-end, home-secured loans to be used primarily for personal, family, or household purposes and use them secondarily to finance their small businesses, and whether the proposals under consideration would increase the Small Entity Representatives' cost of credit.

The Small Entity Representatives had few comments on the impact on the cost of business credit. While they took this time to express concerns that these regulations would increase their costs, they said these regulations would have little to no impact on the cost of business credit. When asked, one Small Entity Representative mentioned that at times people may use a home-secured loan to finance a business, which was corroborated by a different Small Entity Representative based on his personal experience with starting a business.

In the IRFA, the Bureau asked interested parties to provide data and other factual information regarding the use of personal home-secured credit to finance a business. The Bureau received only one comment on this issue. The commenter stated that more than 52 percent of the 27.9 million small businesses in the United States are home-based and close to 80 percent of small businesses file taxes as individuals. The commenter further stated that, according to the Small Business Administration, 73.2 percent

of small businesses in the United States are sole proprietors. Thus, in some instances, an increase in the cost of consumer credit is also an increase in the cost of business credit.[283]

The Bureau has taken numerous steps to minimize the costs of the rule, and therefore the impact of the rule, on the cost of consumer credit and the cost of credit for small entities. The Bureau believes that the small servicer exemption in the final rule will cover at least 12 percent of all mortgage loans, since this is just the fraction serviced by exempt insured depositories and credit unions; additional loans are serviced by exempt non-depositories. The Bureau believes it has also achieved significant cost reductions by eliminating the requirement to respond in writing to oral assertions of error and oral requests for information; eliminating the existence of a private right of action for certain provisions; providing flexibility in the general servicing standards provisions by having compliance depend on the size, nature and scope of the servicer's operations; and providing additional flexibility in the general servicing standards provisions and continuity of contact provisions by basing them on objectives. Commenters also stated that the proposed requirement in loss mitigation to identify other servicers with senior or subordinate liens would have been very costly. This requirement has been entirely removed and does not appear in the final rule. Nevertheless, the rule will certainly create new one-time and ongoing costs for servicers. Servicers may attempt to recover these costs by increasing penalties for missed payments or other charges outside of origination, in which case individuals who incur these charges may make much larger one-time payments than they do now. Over time, however, servicers may be able to shift some or all of the costs to originators. All of the additional costs of servicing could be met by an origination fee or an increment to the cost of credit equal to the additional cost of servicing multiplied by the expected number of years the loan would be serviced. This cost is likely to be small, but the Bureau recognizes that it may change over time with the number of delinquent borrowers.

The impact of an increase in the cost of mortgage loan servicing on other forms of consumer credit that may be used to fund a business, and on business credit itself, would be even smaller. If a lender has made optimal (profit maximizing) decisions in one line of business, a change in the costs of another line of business would not disrupt or alter the optimal decisions in the first line of business absent some shared inputs or platforms (''economies of scope'') or other important interdependencies that are not obvious in regards to consumer credit. This is especially clear if there is competition in the other line of business, in this case business credit lending, from firms that do not service mortgage loans and therefore did not experience a cost increase. Absent collusion, firms that did not experience an increase in the costs have the ability and the incentive to under-price any firm that attempts to pass along a cost increase.

In summary, the Bureau believes that the effect of the mortgage servicing rule on the cost of credit for small businesses is likely to be small. Further, this cost is likely to be especially small for the small business relying on a small business loan or consumer credit apart from a closed-end mortgage loan.

IX. Paperwork Reduction Act

The collection of information contained in this rule, and identified as such, has been submitted to OMB for review under section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA). Notwithstanding any other provision of the law, under the Paperwork Reduction Act, the Bureau may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid OMB control number. The control number for this collection is 3170–0027.

This rule amends 12 CFR Part 1024 (Regulation X). Regulation X currently contains collections of information approved by OMB, and the Bureau's OMB control number for Regulation X is 3170–0016. The collection title is: Real Estate Settlement Procedures Act (Regulation X) 12 CFR 1024.

On September 17, 2012, notice of the proposed rule was published in the **Federal Register** (77 FR 57199). The Bureau invited comment on: (1) Whether the proposed collection of information is necessary for the proper performance of the Bureau's functions, including whether the information has practical utility; (2) the accuracy of the Bureau's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The comment period for the proposed rule with respect to the proposed information collection expired on November 16, 2012. The Bureau did not receive any comments on the burden of the proposed information collection. However, the Bureau did receive comment on the more general consideration of certain costs in the proposed Dodd-Frank Act section 1022 analysis. This comment is addressed in the final Dodd-Frank Act section 1022 analysis above.

The title of this information collection is Mortgage Servicing Amendment (Regulation X). The frequency of response is *on occasion.* These information collection requirements benefit consumers and would be mandatory. *See* 12 U.S.C. 2601 *et seq.* Because the Bureau does not collect any information, no issue of confidentiality arises. The likely respondents would be federally-insured depository institutions (such as commercial banks, savings banks, and credit unions) and non-depository institutions (such as mortgage brokers, real estate investment trusts, private-equity funds, *etc.*) that service consumer mortgages.[284]

Under the rule, the Bureau accounts for the paperwork burden for respondents under Regulation X. Using the Bureau's burden estimation methodology, the Bureau believes the total estimated one-time industry burden for the approximately 12,643 respondents subject to the proposed rule would be approximately 37,000 hours for one time changes and 1.1 million hours annually. The estimated burdens in this PRA analysis represent averages for all respondents. The Bureau expects that the amount of time required to implement each of the changes for a given institution may vary based on the size, complexity, and practices of the respondent.

For purposes of this PRA analysis, the Bureau estimates that there are 11,255 depository institutions and credit unions subject to the proposed rule, and an additional 1,388 non-depository institutions. Based on discussions with industry, the Bureau assumes that all

[283] *Ex parte* communication with Tom Sullivan, U.S. Chamber of Commerce (Nov. 13, 2012), available at *http://www.regulations.gov/#!documentDetail;D=CFPB–2012-0034-0164.*

[284] For purposes of this PRA analysis, references to ''creditors'' or ''lenders'' shall be deemed to refer collectively to commercial banks, savings institutions, credit unions, and mortgage companies (*i.e.,* non-depository lenders), unless otherwise stated. Moreover, reference to ''respondents'' shall generally mean all categories of entities identified in the sentence to which this footnote is appended, except as otherwise stated or if the context indicates otherwise.

depository respondents except for one large entity and 95 percent of non-depository respondents (and 100 percent of small non-depository respondents) use third-party software and information technology vendors. Under existing contracts, vendors would absorb the one-time software and information technology costs associated with complying with the proposal for large- and medium-sized respondents but not for small respondents.

A. Information Collection Requirements

The Bureau is requiring six changes to the information collection requirements in Regulation X:

1. *Provisions regarding mortgage servicing transfer notices:* The Bureau's rule substantially reduces the length and complexity of the mortgage servicing transfer notice but expands coverage from closed-end first-lien mortgages to closed-end subordinate-lien mortgages as well. Additionally, the Bureau's rule imposes obligations on a transferor servicer who receives a misdirected payment during the 60 days after the effective date of a transfer.

2. *Provisions regarding the placement and termination of force-placed insurance, including three notices:* The Bureau's rule for force-placed insurance prohibits servicers from charging a borrower for force-placed insurance unless two notices are provided to the borrower beforehand. The first notice is required at least 45 days before charging the borrower for force-placed insurance, and the second notice is required at least 15 days before charging a borrower for force-placed insurance. In addition to the two notices, the Bureau is requiring servicers to provide borrowers a written notice before charging a borrower for renewing or replacing existing force-placed insurance on an annual basis.

3. *Provisions regarding error resolution and requests for information:* The Bureau's rule for error resolution includes a requirement on servicers generally to provide written acknowledgement of receipt of a notice of error and to provide a written response to the stated error, when that error was submitted in writing. The Bureau's requirements for response to information requests requires servicers to provide a written response acknowledging receipt of an information request when that request was submitted in writing. Servicers are also required to provide the borrower with the requested information or a written notification that the information requested is not available to the servicer.

4. *Requirements for early intervention with delinquent borrowers:* The Bureau's rule requires servicers to establish or make good faith efforts to establish live contact by the 36th day of a borrower's delinquency and, if appropriate, promptly notify borrowers about the availability of loss mitigation options. In addition, servicers must provide a written notice by the 45th day of a borrower's delinquency.

5. *General servicing policies, procedures, and requirements:* Under the Bureau's rule, servicers are required to maintain policies and procedures reasonably designed to achieve certain objectives set forth in the rule. Further, servicers are required to comply with two standard information management requirements, including a requirement that servicers retain documents with respect to the servicing of a mortgage loan until one year after a mortgage loan is paid in full or servicing for a mortgage loan is transferred.

6. *Requirements regarding loss mitigation:* Under the Bureau's rule, servicers are required to follow certain procedures when evaluating loss mitigation applications, including (1) providing a notice telling the borrower that the loss mitigation application was received and whether or not the application is complete, (2) providing a notice telling the borrower if the loss mitigation is approved, or denied (and, for denials of loan modification requests, a more detailed notice of the specific reason for denial and appeal rights), and (3) providing a notice of the appeal determination.

B. Analysis of the Bureau's Information Collection Requirements [285]

1. Mortgage Servicing Transfers

The Bureau's rule substantially reduces the length and complexity of the mortgage servicing transfer notice but expands coverage to closed-end second lien mortgages, in addition to closed-end first-lien mortgages. Additionally, the Bureau's rule imposes obligations on a transferor servicer who receives a misdirected payment during the 60 days after the effective date of a transfer.

Currently, lenders are required to notify closed-end first lien borrowers at origination whether their loan may be sold and the servicing transferred. Upon any mortgage transfer, the transferor servicer is required to provide written notice to the borrower notifying them of the transfer, while the transferee servicer is required to provide notification to the borrower that it will service the borrower's mortgage. The Bureau's provision substantially reduces the length and complexity of the existing mortgage servicing transfer disclosure. The Bureau is expanding coverage from closed-end first-lien mortgages to also include closed-end second lien mortgages.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours or vendor costs from creating software and information technology capability to produce the new disclosure. The Bureau estimates this one-time burden to be 30 minutes and $90, on average, for each respondent.[286]

Certain Bureau respondents will have ongoing burden in hours or vendor costs associated with the information technology used in producing the disclosure. All Bureau respondents will have ongoing vendor costs associated with distributing (*e.g.,* mailing) the disclosure. The Bureau estimates this ongoing burden to be two hours and $210, on average, for each respondent.

2. Force-Placed Insurance Disclosures

The Bureau's rule for force-placed insurance prohibits servicers from charging a borrower for force-placed insurance unless two notices are provided to the borrower beforehand. The first notice is required at least 45 days before a borrower is charged for force-placed insurance, and the second notice is required at least 15 days before a borrower is charged for force-placed insurance. In addition to the two notices, the Bureau requires servicers to provide borrowers a written notice before charging a borrower for renewing or replacing existing force-placed insurance on an annual basis.

The Bureau understands that the requirement that servicers provide borrowers with two written notices prior to charging borrowers for force-placed insurance reflects common practices (*i.e.,* ''usual and customary'' business practices) today for the majority of mortgage servicers. However, the Bureau understands that the requirement that servicers provide a written notice prior to charging borrowers for the renewal or replacement of existing force-place insurance does not reflect common practices.

[285] A detailed analysis of the burdens and costs described in this section can be found in the Paperwork Reduction Act Supporting Statement that corresponds with this final rule. The Supporting Statement is available at *www.reginfo.gov.*

[286] Dollar figures are vendor costs and do not include the dollar value of burden hours.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours or vendor costs from creating software and information technology capability to produce the new renewal disclosure. Further, while the Bureau considers borrower notifications of force-placed insurance prior to placement as the normal course of business, institutions may still have to incur one-time costs associated with modifying their existing disclosures to comply with the Bureau's proposed disclosure provisions. As a result, the Bureau's one-time burden incorporates these costs. The Bureau estimates this one-time burden to be 45 minutes and $90, on average, for each respondent.[287]

Certain respondents will have ongoing burden in hours or vendor costs associated with the information technology used in producing the disclosure. All respondents will have ongoing vendor costs associated with distributing (*e.g.,* mailing) the renewal disclosure. The Bureau estimates this ongoing burden to be 15 minutes and $24, on average, for each respondent.

3. Error Resolution and Requests for Information

The Bureau's requirements for error resolution and requests for information will require written acknowledgement of receiving a written notice of error or an information request, written notification of correction of error, and oral or written provision of the information requested by the borrower or a written notification that the information requested is not available to the servicer, and an internal record of engagement with the borrower, which are forms of information collection. All respondents will have a one-time burden under this requirement associated with reviewing the regulation of one hour per respondent.

Respondents will have ongoing burden in hours and/or vendor costs associated with the information technology used in producing the disclosure. All respondents will have ongoing vendor costs associated with distributing (*e.g.,* mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be 8 hours and $13, on average, for each respondent.

[287] Dollar figures are vendor costs and do not include the dollar value of burden hours.

4. Early Intervention With Delinquent Borrowers

An information collection will be created by the Bureau's requirement to require servicers to establish or make good faith efforts to establish live contact by the 36th day of a borrower's delinquency and, if appropriate, promptly notify borrowers about the availability of loss mitigation options. In addition, servicers must provide a written notice by the 45th day of a borrower's delinquency. Most respondents currently provide some form of delinquency notice, and thus the expenses associated with this information collection are from the one-time costs to incorporate the Bureau's required information.

Fannie Mae, Freddie Mac, FHA, and the VA generally recommend that all institutions that service any of their guaranteed mortgages perform duties similar to those set forth in the Bureau's provisions regarding early intervention with delinquent borrowers; the Bureau estimates that 80 percent of outstanding mortgages are guaranteed by one of these institutions. The Bureau estimates that 75 percent of loans that are not guaranteed by one of these institutions are serviced by a servicer that is currently providing delinquency notices that would comply with the proposal. The Bureau estimates the one-time burden to be 0.4 hours, on average, for each institution. The Bureau estimates the ongoing burden to be 45 minutes and $1, on average for each respondent.

5. General Servicing Policies Procedures, and Requirements

The final rule modifies the recordkeeping requirements imposed on servicers. As discussed above in part V, the final rule requires servicers to retain records that document actions taken with respect to a borrower's mortgage loan account until one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. This recordkeeping requirement replaces the systems of recordkeeping set forth in current § 1024.17(*l*), which requires servicers to retain copies of documents related to borrower escrow accounts for five years after the servicer last serviced the escrow account. *See* part V above, section-by-section analysis of §§ 1024.17(*l*) and 1024.38(c)(1).

The Bureau believes that any burden associated with the final rule's recordkeeping requirement will be minimal or *de minimis.* Under current rules, servicers must retain records related to borrower escrow accounts until five years after the servicer last serviced the escrow account, which is likely to be close in time to when a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. The final rule shortens the retention period for those records by four years, as the retention period set forth in the final rule ends one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. However, the final rule requires servicers to retain additional records, specifically records that document actions taken with respect to a borrower's mortgage loan account. Since the length of a mortgage loan varies, for example, the average life of a mortgage loan is currently less than 5 years, the length of the retention period required by the final rule will differ depending on individual circumstances and can be as short as one year.

The Bureau understands that servicers in the ordinary course of business retain both the records related to escrow accounts that servicers are required to retain by current rules and the additional records that the final rule requires servicers to retain (*i.e.* records that document actions taken with respect to a borrower's mortgage loan account) for the life of a mortgage loan. Therefore, any burden created by the final rule not subject to current business practices is limited to any incremental costs of retaining for one additional year any records that document actions taken with respect to a borrower's mortgage loan account that a servicer is not currently required to retain. This burden is mitigated by the reduction in the storage costs of documents related to escrow accounts due to the reduction of the required retention period for those documents by four years. In addition, the final rule clarifies that servicers need not maintain actual paper copies of the required records and may satisfy the requirement through a contractual right to access records possessed by another entity. *See* comment 38(c)(1)–1. This further reduces any burden associated with the final rule.

6. Loss Mitigation

Under the Bureau's rule, servicers are required to follow certain procedures when evaluating loss mitigation applications, including (1) providing a notice telling the borrower that the loss mitigation application was received, and whether or not the application is complete (2) providing a notice telling the borrower if the loss mitigation is approved, or denied (and, for denials of loan modification requests, a more detailed notice of the specific reason for denial and appeal rights), and, (3) if

necessary providing a notice of the appeal determination.

The loss mitigation provision will create an information collection by requiring servicers to notify borrowers who submit loss mitigation applications. Servicers may be required to send up to three notices per loss mitigation application. For incomplete applications, servicers will be required to notify the borrower that their application is incomplete and explain the steps needed to complete the application. For complete applications, the servicer is required to notify the borrower the complete application has been received, and to notify the borrower of their decision.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours or vendor costs from creating software and information technology costs associated with changes in the payoff statement disclosure. The Bureau estimates this one-time burden to be 1.4 hours, on average, for each respondent. The Bureau estimates the ongoing burden to be 928 hours and $1,575, on average, for each respondent.

B. Summary of Burden Hours

	Respondents	Disclosures Per Respondent	Hours burden per disclosure	Total burden hours	Total vendor costs
Ongoing:					
Notice of Mortgage Service Transfer	12,642	735	0.003	27,861	2,639,766
Force-Placed Insurance	12,642	86	0.003	3,261	309,020
Error Resolution & Response to Inquiries	12,642	45	0.170	97,187	162,642
Early intervention	1,023	31	0.253	7,975	9,070
Loss Mitigation	1,023	5,474	0.170	949,847	1,610,942
One-Time:					
Notice of Mortgage Service Transfer	12,642	1	0.3877624	5,000	1,170,000
Force-Placed Insurance	12,642	1	0.7362132	9,000	1,170,000
Error Resolution & Response to Inquiries	12,642	1	1.0853196	14,000	0
Early intervention	1,023	1	0.4	0	0
Loss Mitigation	1,023	1	1.4121212	1,000	0

Totals may not be exact due to rounding.

Between the proposed and final rule the Bureau improved its methodology for estimating the average unpaid principal balance of outstanding mortgages. In addition, the Bureau updated the institution counts from 2010 year-end to 2011 year-end figures.

List of Subjects in 12 CFR Part 1024

Condominiums, Consumer protection, Housing, Insurance, Mortgage servicing, Mortgagees, Mortgages, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends 12 CFR part 1024 as follows:

PART 1024—REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X)

■ 1. The authority citation for part 1024 is revised to read as follows:

Authority: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5532, 5581.

Subpart A—General

■ 2. Sections 1024.1 through 1024.5 are designated as subpart A under the heading set forth above.

■ 3. Section 1024.2(b) is amended by revising the definitions for ''Federally related mortgage loan'' or ''mortgage loan,'' ''Mortgage broker,'' ''Origination service,'' ''Public Guidance Documents,'' ''Servicer,'' and ''Servicing,'' to read as follows:

§ 1024.2 Definitions.

* * * * *

(b) * * *

Federally related mortgage loan means:

(1) Any loan (other than temporary financing, such as a construction loan):

(i) That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property, upon which there is either:

(A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or

(B) Located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and

(ii) For which one of the following paragraphs applies. The loan:

(A) Is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government;

(B) Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way:

(*1*) By the Secretary of the Department of Housing and Urban Development (HUD) or any other officer or agency of the Federal Government; or

(*2*) Under or in connection with a housing or urban development program administered by the Secretary of HUD or a housing or related program administered by any other officer or agency of the Federal Government;

(C) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage

Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors);

(D) Is made in whole or in part by a ''creditor,'' as defined in section 103(g) of the Consumer Credit Protection Act (15 U.S.C. 1602(g)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. For purposes of this definition, the term ''creditor'' does not include any agency or instrumentality of any State, and the term ''residential real estate loan'' means any loan secured by residential real property, including single-family and multifamily residential property;

(E) Is originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition, by a mortgage broker; or

(F) Is the subject of a home equity conversion mortgage, also frequently called a ''reverse mortgage,'' issued by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition.

(2) Any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property is a federally related mortgage loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(3) If the residential real property securing a mortgage loan is not located in a State, the loan is not a federally related mortgage loan.

* * * * *

Mortgage broker means a person (other than an employee of a lender) that renders origination services and serves as an intermediary between a borrower and a lender in a transaction involving a federally related mortgage loan, including such a person that closes the loan in its own name in a table-funded transaction.

* * * * *

Origination service means any service involved in the creation of a federally related mortgage loan, including but not limited to the taking of the loan application, loan processing, the underwriting and funding of the loan, and the processing and administrative services required to perform these functions.

* * * * *

Public Guidance Documents means **Federal Register** documents adopted or published, that the Bureau may amend from time-to-time by publication in the **Federal Register**. These documents are also available from the Bureau. Requests for copies of Public Guidance Documents should be directed to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552.

* * * * *

Servicer means a person responsible for the servicing of a federally related mortgage loan (including the person who makes or holds such loan if such person also services the loan). The term does not include:

(1) The Federal Deposit Insurance Corporation (FDIC), in connection with assets acquired, assigned, sold, or transferred pursuant to section 13(c) of the Federal Deposit Insurance Act or as receiver or conservator of an insured depository institution;

(2) The National Credit Union Administration (NCUA), in connection with assets acquired, assigned, sold, or transferred pursuant to section 208 of the Federal Credit Union Act or as conservator or liquidating agent of an insured credit union; and

(3) The Federal National Mortgage Corporation (FNMA); the Federal Home Loan Mortgage Corporation (Freddie Mac); the FDIC; HUD, including the Government National Mortgage Association (GNMA) and the Federal Housing Administration (FHA) (including cases in which a mortgage insured under the National Housing Act (12 U.S.C. 1701 *et seq.*) is assigned to HUD); the NCUA; the Farm Service Agency; and the Department of Veterans Affairs (VA), in any case in which the assignment, sale, or transfer of the servicing of the federally related mortgage loan is preceded by termination of the contract for servicing the loan for cause, commencement of proceedings for bankruptcy of the servicer, commencement of proceedings by the FDIC for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled), or commencement of proceedings by the NCUA for appointment of a conservator or liquidating agent of the servicer (or an entity by which the servicer is owned or controlled).

Servicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower.

* * * * *

■ 4. Section 1024.3 is revised to read as follows:

§ 1024.3 E-Sign applicability.

The disclosures required by this part may be provided 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.*).

■ 5. Section 1024.4 is amended by revising the section heading, paragraph (a)(1), removing paragraph (b), and redesignating paragraph (c) as paragraph (b).

The revisions read as follows:

§ 1024.4 Reliance upon rule, regulation, or interpretation by the Bureau.

(a) *Rule, regulation or interpretation.* (1) For purposes of sections 19(a) and (b) of RESPA (12 U.S.C. 2617(a) and (b)), only the following constitute a rule, regulation or interpretation of the Bureau:

(i) All provisions, including appendices and supplements, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the **Federal Register** by the Bureau and states that it is an ''interpretation,'' ''interpretive rule,'' ''commentary,'' or a ''statement of policy'' for purposes of section 19(a) of RESPA. Except in unusual circumstances, interpretations will not be issued separately but will be incorporated in an official interpretation to this part, which will be amended periodically.

* * * * *

■ 6. Section 1024.5 is amended by revising paragraph (b)(7) to read as follows:

§ 1024.5 Coverage of RESPA.

* * * * *

(b) * * *

(7) *Secondary market transactions.* A bona fide transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except with respect to RESPA (12 U.S.C. 2605) and subpart C of this part (§§ 1024.30–

1024.41). In determining what constitutes a *bona fide* transfer, the Bureau will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction (see § 1024.2).

Subpart B—Mortgage Settlement and Escrow Accounts

■ 7. Sections 1024.6 through 1024.20 are designated as subpart B under the heading set forth above.

■ 8. Section 1024.7 is amended by revising paragraph (f)(3) to read as follows:

§ 1024.7 Good faith estimate.

* * * * *

(f) * * *

(3) *Borrower-requested changes.* If a borrower requests changes to the federally related mortgage loan identified in the GFE that change the settlement charges or the terms of the loan, the loan originator may provide a revised GFE to the borrower. If a revised GFE is to be provided, the loan originator must do so within three business days of the borrower's request. The revised GFE may increase charges for services listed on the GFE only to the extent that the borrower-requested changes to the mortgage loan identified on the GFE actually resulted in higher charges.

* * * * *

■ 9. Section 1024.13 is amended by revising the section heading and paragraph (d) to read as follows:

§ 1024.13 Relation to State laws.

* * * * *

(d) A specific preemption of conflicting State laws regarding notices and disclosures of mortgage servicing transfers is set forth in § 1024.33(d).

■ 10. Section 1024.17 is amended by revising paragraphs (c)(8), (f)(2)(ii), (f)(4)(iii), (i)(2), (i)(4)(iii), adding paragraph (k)(5), removing paragraph (l), and redesignating paragraph (m) as paragraph (l).

The revisions and addition read as follows:

§ 1024.17 Escrow accounts.

* * * * *

(c) * * *

(8) *Provisions in federally related mortgage documents.* The servicer must examine the federally related mortgage loan documents to determine the applicable cushion for each escrow account. If any such documents provide for lower cushion limits, then the terms of the loan documents apply. Where the terms of any such documents allow greater payments to an escrow account than allowed by this section, then this section controls the applicable limits. Where such documents do not specifically establish an escrow account, whether a servicer may establish an escrow account for the loan is a matter for determination by other Federal or State law. If such documents are silent on the escrow account limits and a servicer establishes an escrow account under other Federal or State law, then the limitations of this section apply unless applicable Federal or State law provides for a lower amount. If such documents provide for escrow accounts up to the RESPA limits, then the servicer may require the maximum amounts consistent with this section, unless an applicable Federal or State law sets a lesser amount.

* * * * *

(f) * * *

(2) * * *

(ii) These provisions regarding surpluses apply if the borrower is current at the time of the escrow account analysis. A borrower is current if the servicer receives the borrower's payments within 30 days of the payment due date. If the servicer does not receive the borrower's payment within 30 days of the payment due date, then the servicer may retain the surplus in the escrow account pursuant to the terms of the federally related mortgage loan documents.

* * * * *

(4) * * *

(iii) These provisions regarding deficiencies apply if the borrower is current at the time of the escrow account analysis. A borrower is current if the servicer receives the borrower's payments within 30 days of the payment due date. If the servicer does not receive the borrower's payment within 30 days of the payment due date, then the servicer may recover the deficiency pursuant to the terms of the federally related mortgage loan documents.

* * * * *

(i) * * *

(2) *No annual statements in the case of default, foreclosure, or bankruptcy.* This paragraph (i)(2) contains an exemption from the provisions of § 1024.17(i)(1). If at the time the servicer conducts the escrow account analysis the borrower is more than 30 days overdue, then the servicer is exempt from the requirements of submitting an annual escrow account statement to the borrower under § 1024.17(i). This exemption also applies in situations where the servicer has brought an action for foreclosure under the underlying federally related mortgage loan, or where the borrower is in bankruptcy proceedings. If the servicer does not issue an annual statement pursuant to this exemption and the loan subsequently is reinstated or otherwise becomes current, the servicer shall provide a history of the account since the last annual statement (which may be longer than 1 year) within 90 days of the date the account became current.

* * * * *

(4) * * *

(iii) *Short year statement upon loan payoff.* If a borrower pays off a federally related mortgage loan during the escrow account computation year, the servicer shall submit a short year statement to the borrower within 60 days after receiving the payoff funds.

* * * * *

(k) * * *

(5) *Timely payment of hazard insurance.* (i) *In general.* Except as provided in paragraph (k)(5)(iii) of this section, with respect to a borrower whose mortgage payment is more than 30 days overdue, but who has established an escrow account for the payment for hazard insurance, as defined in § 1024.31, a servicer may not purchase force-placed insurance, as that term is defined in § 1024.37(a), unless a servicer is unable to disburse funds from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges are paid in a timely manner.

(ii) *Inability to disburse funds.* (A) *When inability exists.* A servicer is considered unable to disburse funds from a borrower's escrow account to ensure that the borrower's hazard insurance premiums are paid in a timely manner only if the servicer has a reasonable basis to believe either that the borrower's hazard insurance has been canceled (or was not renewed) for reasons other than nonpayment of premium charges or that the borrower's property is vacant.

(B) *When inability does not exist.* A servicer shall not be considered unable to disburse funds from the borrower's escrow account because the escrow account contains insufficient funds for paying hazard insurance premium charges.

(C) *Recoupment of advances.* If a servicer advances funds to an escrow account to ensure that the borrower's hazard insurance premium charges are

paid in a timely manner, a servicer may seek repayment from the borrower for the funds the servicer advanced, unless otherwise prohibited by applicable law.

(iii) *Small servicers.* Notwithstanding paragraphs (k)(5)(i) and (k)(5)(ii)(B) of this section and subject to the requirements in § 1024.37, a servicer that qualifies as a small servicer pursuant to 12 CFR 1026.41(e)(4) may purchase force-placed insurance and charge the cost of that insurance to the borrower if the cost to the borrower of the force-placed insurance is less than the amount the small servicer would need to disburse from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges were paid in a timely manner.

* * * * *

§ 1024.18 [Removed and Reserved]

■ 11. Section 1024.18 is removed and reserved.

§ 1024.19 [Removed and Reserved]

■ 12. Section 1024.19 is removed and reserved.

§ 1024.21 [Removed]

■ 13. Section 1024.21 is removed.

§ 1024.22 [Removed]

■ 14. Section 1024.22 is removed.

§ 1024.23 [Removed]

■ 15. Section 1024.23 is removed.

■ 16. Subpart C is added to read as follows:

Subpart C—Mortgage Servicing

Sec.
1024.30 Scope.
1024.31 Definitions.
1024.32 General disclosure requirements.
1024.33 Mortgage servicing transfers.
1024.34 Timely escrow payments and treatment of escrow account balances.
1024.35 Error resolution procedures.
1024.36 Requests for information.
1024.37 Force-placed insurance.
1024.38 General servicing policies, procedures, and requirements.
1024.39 Early intervention requirements for certain borrowers.
1024.40 Continuity of contact.
1024.41 Loss mitigation procedures.

Subpart C—Mortgage Servicing

§ 1024.30 Scope.

(a) *In general.* Except as provided in paragraph (b) and (c) of this section, this subpart applies to any mortgage loan, as that term is defined in § 1024.31.

(b) *Exemptions.* Except as otherwise provided in § 1024.41(j), §§ 1024.38 through 1024.41 of this subpart shall not apply to the following:

(1) A servicer that qualifies as a small servicer pursuant to 12 CFR 1026.41(e)(4);

(2) A servicer with respect to any reverse mortgage transaction as that term is defined in § 1024.31; and

(3) A servicer with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000.

(c) *Scope of certain sections.* (1) Section 1024.33(a) only applies to mortgage loans that are secured by a first lien.

(2) The procedures set forth in §§ 1024.39 through 1024.41 of this subpart only apply to a mortgage loan that is secured by a property that is a borrower's principal residence.

§ 1024.31 Definitions.

For purposes of this subpart:

Consumer reporting agency has the meaning set forth in section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a.

Day means calendar day.

Hazard insurance means insurance on the property securing a mortgage loan that protects the property against loss caused by fire, wind, flood, earthquake, theft, falling objects, freezing, and other similar hazards for which the owner or assignee of such loan requires insurance.

Loss mitigation application means an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option.

Loss mitigation option means an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower.

Master servicer means the owner of the right to perform servicing. A master servicer may perform the servicing itself or do so through a subservicer.

Mortgage loan means any federally related mortgage loan, as that term is defined in § 1024.2 subject to the exemptions in § 1024.5(b), but does not include open-end lines of credit (home equity plans).

Qualified written request means a written correspondence from the borrower to the servicer that includes, or otherwise enables the servicer to identify, the name and account of the borrower, and either:

(1) States the reasons the borrower believes the account is in error; or

(2) Provides sufficient detail to the servicer regarding information relating to the servicing of the mortgage loan sought by the borrower.

Reverse mortgage transaction has the meaning set forth in 12 CFR 1026.33(a).

Service provider means any party retained by a servicer that interacts with a borrower or provides a service to the servicer for which a borrower may incur a fee.

Subservicer means a servicer that does not own the right to perform servicing, but that performs servicing on behalf of the master servicer.

Transferee servicer means a servicer that obtains or will obtain the right to perform servicing pursuant to an agreement or understanding.

Transferor servicer means a servicer, including a table-funding mortgage broker or dealer on a first- lien dealer loan, that transfers or will transfer the right to perform servicing pursuant to an agreement or understanding.

§ 1024.32 General disclosure requirements.

(a) *Disclosure requirements.* (1) *Form of disclosures.* Except as otherwise provided in this subpart, disclosures required under this subpart must be clear and conspicuous, in writing, and in a form that a recipient may keep. The disclosures required by this subpart may be provided in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act, as set forth in § 1024.3. A servicer may use commonly accepted or readily understandable abbreviations in complying with the disclosure requirements of this subpart.

(2) *Foreign language disclosures.* Disclosures required under this subpart may be made in a language other than English, provided that the disclosures are made available in English upon a recipient's request.

(b) *Additional information; disclosures required by other laws.* Unless expressly prohibited in this subpart, by other applicable law, such as the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) or the Truth in Savings Act (12 U.S.C. 4301 *et seq.*), or by the terms of an agreement with a Federal or State regulatory agency, a servicer may include additional information in a disclosure required under this subpart or combine any disclosure required under this subpart with any disclosure required by such other law.

§ 1024.33 Mortgage servicing transfers.

(a) *Servicing disclosure statement.* Within three days (excluding legal public holidays, Saturdays, and Sundays) after a person applies for a first-lien mortgage loan, the lender, mortgage broker who anticipates using table funding, or dealer in a first-lien dealer loan shall provide to the person a servicing disclosure statement that states whether the servicing of the

mortgage loan may be assigned, sold, or transferred to any other person at any time. Appendix MS–1 of this part contains a model form for the disclosures required under this paragraph (a). If a person who applies for a first-lien mortgage loan is denied credit within the three-day period, a servicing disclosure statement is not required to be delivered.

(b) *Notices of transfer of loan servicing.* (1) *Requirement for notice.* Except as provided in paragraph (b)(2) of this section, each transferor servicer and transferee servicer of any mortgage loan shall provide to the borrower a notice of transfer for any assignment, sale, or transfer of the servicing of the mortgage loan. The notice must contain the information described in paragraph (b)(4) of this section. Appendix MS–2 of this part contains a model form for the disclosures required under this paragraph (b).

(2) *Certain transfers excluded.* (i) The following transfers are not assignments, sales, or transfers of mortgage loan servicing for purposes of this section if there is no change in the payee, address to which payment must be delivered, account number, or amount of payment due:

(A) A transfer between affiliates;

(B) A transfer that results from mergers or acquisitions of servicers or subservicers;

(C) A transfer that occurs between master servicers without changing the subservicer;

(ii) The Federal Housing Administration (FHA) is not required to provide to the borrower a notice of transfer where a mortgage insured under the National Housing Act is assigned to the FHA.

(3) *Time of notice.* (i) *In general.* Except as provided in paragraphs (b)(3)(ii) and (iii) of this section, the transferor servicer shall provide the notice of transfer to the borrower not less than 15 days before the effective date of the transfer of the servicing of the mortgage loan. The transferee servicer shall provide the notice of transfer to the borrower not more than 15 days after the effective date of the transfer. The transferor and transferee servicers may provide a single notice, in which case the notice shall be provided not less than 15 days before the effective date of the transfer of the servicing of the mortgage loan.

(ii) *Extended time.* The notice of transfer shall be provided to the borrower by the transferor servicer or the transferee servicer not more than 30 days after the effective date of the transfer of the servicing of the mortgage loan in any case in which the transfer of servicing is preceded by:

(A) Termination of the contract for servicing the loan for cause;

(B) Commencement of proceedings for bankruptcy of the servicer;

(C) Commencement of proceedings by the FDIC for conservatorship or receivership of the servicer or an entity that owns or controls the servicer; or

(D) Commencement of proceedings by the NCUA for appointment of a conservator or liquidating agent of the servicer or an entity that owns or controls the servicer.

(iii) *Notice provided at settlement.* Notices of transfer provided at settlement by the transferor servicer and transferee servicer, whether as separate notices or as a combined notice, satisfy the timing requirements of paragraph (b)(3) of this section.

(4) *Contents of notice.* The notices of transfer shall include the following information:

(i) The effective date of the transfer of servicing;

(ii) The name, address, and a collect call or toll-free telephone number for an employee or department of the transferee servicer that can be contacted by the borrower to obtain answers to servicing transfer inquiries;

(iii) The name, address, and a collect call or toll-free telephone number for an employee or department of the transferor servicer that can be contacted by the borrower to obtain answers to servicing transfer inquiries;

(iv) The date on which the transferor servicer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments. These dates shall either be the same or consecutive days;

(v) Whether the transfer will affect the terms or the continued availability of mortgage life or disability insurance, or any other type of optional insurance, and any action the borrower must take to maintain such coverage; and

(vi) A statement that the transfer of servicing does not affect any term or condition of the mortgage loan other than terms directly related to the servicing of the loan.

(c) *Borrower payments during transfer of servicing.* (1) *Payments not considered late.* During the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, if the transferor servicer (rather than the transferee servicer that should properly receive payment on the loan) receives payment on or before the applicable due date (including any grace period allowed under the mortgage loan instruments), a payment may not be treated as late for any purpose.

(2) *Treatment of payments.* Beginning on the effective date of transfer of the servicing of any mortgage loan, with respect to payments received incorrectly by the transferor servicer (rather than the transferee servicer that should properly receive the payment on the loan), the transferor servicer shall promptly either:

(i) Transfer the payment to the transferee servicer for application to a borrower's mortgage loan account, or

(ii) Return the payment to the person that made the payment and notify such person of the proper recipient of the payment.

(d) *Preemption of State laws.* A lender who makes a mortgage loan or a servicer shall be considered to have complied with the provisions of any State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of servicing of a loan if the lender or servicer complies with the requirements of this section. Any State law requiring notice to the borrower at the time of application or at the time of transfer of servicing of the loan is preempted, and there shall be no additional borrower disclosure requirements. Provisions of State law, such as those requiring additional notices to insurance companies or taxing authorities, are not preempted by section 6 of RESPA or this section, and this additional information may be added to a notice provided under this section, if permitted under State law.

§ 1024.34 Timely escrow payments and treatment of escrow account balances.

(a) *Timely escrow disbursements required.* If the terms of a mortgage loan require the borrower to make payments to the servicer of the mortgage loan for deposit into an escrow account to pay taxes, insurance premiums, and other charges for the mortgaged property, the servicer shall make payments from the escrow account in a timely manner, that is, on or before the deadline to avoid a penalty, as governed by the requirements in § 1024.17(k).

(b) *Refund of escrow balance.* (1) *In general.* Except as provided in paragraph (b)(2) of this section, within 20 days (excluding legal public holidays, Saturdays, and Sundays) of a borrower's payment of a mortgage loan in full, a servicer shall return to the borrower any amounts remaining in an escrow account that is within the servicer's control.

(2) *Servicer may credit funds to a new escrow account.* Notwithstanding paragraph (b)(1) of this section, if the borrower agrees, a servicer may credit

any amounts remaining in an escrow account that is within the servicer's control to an escrow account for a new mortgage loan as of the date of the settlement of the new mortgage loan if the new mortgage loan is provided to the borrower by a lender that:

(i) Was also the lender to whom the prior mortgage loan was initially payable;

(ii) Is the owner or assignee of the prior mortgage loan; or

(iii) Uses the same servicer that serviced the prior mortgage loan to service the new mortgage loan.

§ 1024.35 Error resolution procedures.

(a) *Notice of error.* A servicer shall comply with the requirements of this section for any written notice from the borrower that asserts an error and that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred. A notice on a payment coupon or other payment form supplied by the servicer need not be treated by the servicer as a notice of error. A qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error for purposes of this section, and a servicer must comply with all requirements applicable to a notice of error with respect to such qualified written request.

(b) *Scope of error resolution.* For purposes of this section, the term ''error'' refers to the following categories of covered errors:

(1) Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.

(2) Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.

(3) Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 CFR 1026.36(c)(1).

(4) Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner as required by § 1024.34(a), or to refund an escrow account balance as required by § 1024.34(b).

(5) Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.

(6) Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section 12 CFR 1026.36(c)(3).

(7) Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.

(8) Failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.

(9) Making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j).

(10) Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).

(11) Any other error relating to the servicing of a borrower's mortgage loan.

(c) *Contact information for borrowers to assert errors.* A servicer may, by written notice provided to a borrower, establish an address that a borrower must use to submit a notice of error in accordance with the procedures in this section. The notice shall include a statement that the borrower must use the established address to assert an error. If a servicer designates a specific address for receiving notices of error, the servicer shall designate the same address for receiving information requests pursuant to § 1024.36(b). A servicer shall provide a written notice to a borrower before any change in the address used for receiving a notice of error. A servicer that designates an address for receipt of notices of error must post the designated address on any Web site maintained by the servicer if the Web site lists any contact address for the servicer.

(d) *Acknowledgment of receipt.* Within five days (excluding legal public holidays, Saturdays, and Sundays) of a servicer receiving a notice of error from a borrower, the servicer shall provide to the borrower a written response acknowledging receipt of the notice of error.

(e) *Response to notice of error.* (1) *Investigation and response requirements.* (i) *In general.* Except as provided in paragraphs (f) and (g) of this section, a servicer must respond to a notice of error by either:

(A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or

(B) Conducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.

(ii) *Different or additional error.* If during a reasonable investigation of a notice of error, a servicer concludes that errors occurred other than, or in addition to, the error or errors alleged by the borrower, the servicer shall correct all such additional errors and provide the borrower with a written notification that describes the errors the servicer identified, the action taken to correct the errors, the effective date of the correction, and contact information, including a telephone number, for further assistance.

(2) *Requesting information from borrower.* A servicer may request supporting documentation from a borrower in connection with the investigation of an asserted error, but may not:

(i) Require a borrower to provide such information as a condition of investigating an asserted error; or

(ii) Determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation pursuant to paragraph (e)(1)(i)(B) of this section.

(3) *Time limits.* (i) *In general.* A servicer must comply with the requirements of paragraph (e)(1) of this section:

(A) Not later than seven days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the notice of error for errors asserted under paragraph (b)(6) of this section.

(B) Prior to the date of a foreclosure sale or within 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the notice of error, whichever is earlier, for errors asserted under paragraphs (b)(9) and (10) of this section.

(C) For all other asserted errors, not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the applicable notice of error.

(ii) *Extension of time limit.* For asserted errors governed by the time limit set forth in paragraph (e)(3)(i)(C) of this section, a servicer may extend the time period for responding by an additional 15 days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the 30-day period, the servicer notifies the borrower of the extension and the

reasons for the extension in writing. A servicer may not extend the time period for responding to errors asserted under paragraph (b)(6), (9), or (10) of this section.

(4) *Copies of documentation.* A servicer shall provide to the borrower, at no charge, copies of documents and information relied upon by the servicer in making its determination that no error occurred within 15 days (excluding legal public holidays, Saturdays, and Sundays) of receiving the borrower's request for such documents. A servicer is not required to provide documents relied upon that constitute confidential, proprietary or privileged information. If a servicer withholds documents relied upon because it has determined that such documents constitute confidential, proprietary or privileged information, the servicer must notify the borrower of its determination in writing within 15 days (excluding legal public holidays, Saturdays, and Sundays) of receipt of the borrower's request for such documents.

(f) *Alternative compliance.* (1) *Early correction.* A servicer is not required to comply with paragraphs (d) and (e) of this section if the servicer corrects the error or errors asserted by the borrower and notifies the borrower of that correction in writing within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving the notice of error.

(2) *Error asserted before foreclosure sale.* A servicer is not required to comply with the requirements of paragraphs (d) and (e) of this section for errors asserted under paragraph (b)(9) or (10) of this section if the servicer receives the applicable notice of an error seven or fewer days before a foreclosure sale. For any such notice of error, a servicer shall make a good faith attempt to respond to the borrower, orally or in writing, and either correct the error or state the reason the servicer has determined that no error has occurred.

(g) *Requirements not applicable.* (1) *In general.* A servicer is not required to comply with the requirements of paragraphs (d), (e), and (i) of this section if the servicer reasonably determines that any of the following apply:

(i) *Duplicative notice of error.* The asserted error is substantially the same as an error previously asserted by the borrower for which the servicer has previously complied with its obligation to respond pursuant to paragraphs (d) and (e) of this section, unless the borrower provides new and material information to support the asserted error. New and material information means information that was not reviewed by the servicer in connection with investigating a prior notice of the same error and is reasonably likely to change the servicer's prior determination about the error.

(ii) *Overbroad notice of error.* The notice of error is overbroad. A notice of error is overbroad if the servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower's account. To the extent a servicer can reasonably identify a valid assertion of an error in a notice of error that is otherwise overbroad, the servicer shall comply with the requirements of paragraphs (d), (e) and (i) of this section with respect to that asserted error.

(iii) *Untimely notice of error.* A notice of error is delivered to the servicer more than one year after:

(A) Servicing for the mortgage loan that is the subject of the asserted error was transferred from the servicer receiving the notice of error to a transferee servicer; or

(B) The mortgage loan balance was paid in full.

(2) *Notice to borrower.* If a servicer determines that, pursuant to this paragraph (g), the servicer is not required to comply with the requirements of paragraphs (d), (e), and (i) of this section, the servicer shall notify the borrower of its determination in writing not later than five days (excluding legal public holidays, Saturdays, and Sundays) after making such determination. The notice to the borrower shall set forth the basis under paragraph (g)(1) of this section upon which the servicer has made such determination.

(h) *Payment requirements prohibited.* A servicer shall not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to a notice of error.

(i) *Effect on servicer remedies.* (1) *Adverse information.* After receipt of a notice of error, a servicer may not, for 60 days, furnish adverse information to any consumer reporting agency regarding any payment that is the subject of the notice of error.

(2) *Remedies permitted.* Except as set forth in this section with respect to an assertion of error under paragraph (b)(9) or (10) of this section, nothing in this section shall limit or restrict a lender or servicer from pursuing any remedy it has under applicable law, including initiating foreclosure or proceeding with a foreclosure sale.

§ 1024.36 Requests for information.

(a) *Information request.* A servicer shall comply with the requirements of this section for any written request for information from a borrower that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and states the information the borrower is requesting with respect to the borrower's mortgage loan. A request on a payment coupon or other payment form supplied by the servicer need not be treated by the servicer as a request for information. A request for a payoff balance need not be treated by the servicer as a request for information. A qualified written request that requests information relating to the servicing of the mortgage loan is a request for information for purposes of this section, and a servicer must comply with all requirements applicable to a request for information with respect to such qualified written request.

(b) *Contact information for borrowers to request information.* A servicer may, by written notice provided to a borrower, establish an address that a borrower must use to request information in accordance with the procedures in this section. The notice shall include a statement that the borrower must use the established address to request information. If a servicer designates a specific address for receiving information requests, a servicer shall designate the same address for receiving notices of error pursuant to § 1024.35(c). A servicer shall provide a written notice to a borrower before any change in the address used for receiving an information request. A servicer that designates an address for receipt of information requests must post the designated address on any Web site maintained by the servicer if the Web site lists any contact address for the servicer.

(c) *Acknowledgment of receipt.* Within five days (excluding legal public holidays, Saturdays, and Sundays) of a servicer receiving an information request from a borrower, the servicer shall provide to the borrower a written response acknowledging receipt of the information request.

(d) *Response to information request.* (1) *Investigation and response requirements.* Except as provided in paragraphs (e) and (f) of this section, a servicer must respond to an information request by either:

(i) Providing the borrower with the requested information and contact information, including a telephone number, for further assistance in writing; or

(ii) Conducting a reasonable search for the requested information and providing the borrower with a written notification

that states that the servicer has determined that the requested information is not available to the servicer, provides the basis for the servicer's determination, and provides contact information, including a telephone number, for further assistance.

(2) *Time limits.* (i) *In general.* A servicer must comply with the requirements of paragraph (d)(1) of this section:

(A) Not later than 10 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives an information request for the identity of, and address or other relevant contact information for, the owner or assignee of a mortgage loan; and

(B) For all other requests for information, not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the information request.

(ii) *Extension of time limit.* For requests for information governed by the time limit set forth in paragraph (d)(2)(i)(B) of this section, a servicer may extend the time period for responding by an additional 15 days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the 30-day period, the servicer notifies the borrower of the extension and the reasons for the extension in writing. A servicer may not extend the time period for requests for information governed by paragraph (d)(2)(i)(A) of this section.

(e) *Alternative compliance.* A servicer is not required to comply with paragraphs (c) and (d) of this section if the servicer provides the borrower with the information requested and contact information, including a telephone number, for further assistance in writing within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving an information request.

(f) *Requirements not applicable.* (1) *In general.* A servicer is not required to comply with the requirements of paragraphs (c) and (d) of this section if the servicer reasonably determines that any of the following apply:

(i) *Duplicative information.* The information requested is substantially the same as information previously requested by the borrower for which the servicer has previously complied with its obligation to respond pursuant to paragraphs (c) and (d) of this section.

(ii) *Confidential, proprietary or privileged information.* The information requested is confidential, proprietary or privileged.

(iii) *Irrelevant information.* The information requested is not directly related to the borrower's mortgage loan account.

(iv) *Overbroad or unduly burdensome information request.* The information request is overbroad or unduly burdensome. An information request is overbroad if a borrower requests that the servicer provide an unreasonable volume of documents or information to a borrower. An information request is unduly burdensome if a diligent servicer could not respond to the information request without either exceeding the maximum time limit permitted by paragraph (d)(2) of this section or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances. To the extent a servicer can reasonably identify a valid information request in a submission that is otherwise overbroad or unduly burdensome, the servicer shall comply with the requirements of paragraphs (c) and (d) of this section with respect to that requested information.

(v) *Untimely information request.* The information request is delivered to a servicer more than one year after:

(A) Servicing for the mortgage loan that is the subject of the information request was transferred from the servicer receiving the request for information to a transferee servicer; or

(B) The mortgage loan balance was paid in full.

(2) *Notice to borrower.* If a servicer determines that, pursuant to this paragraph (f), the servicer is not required to comply with the requirements of paragraphs (c) and (d) of this section, the servicer shall notify the borrower of its determination in writing not later than five days (excluding legal public holidays, Saturdays, and Sundays) after making such determination. The notice to the borrower shall set forth the basis under paragraph (f)(1) of this section upon which the servicer has made such determination.

(g) *Payment requirement limitations.* (1) *Fees prohibited.* Except as set forth in paragraph (g)(2) of this section, a servicer shall not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to an information request.

(2) *Fee permitted.* Nothing in this section shall prohibit a servicer from charging a fee for providing a beneficiary notice under applicable State law, if such a fee is not otherwise prohibited by applicable law.

(h) *Servicer remedies.* Nothing in this section shall prohibit a servicer from furnishing adverse information to any consumer reporting agency or pursuing any of its remedies, including initiating foreclosure or proceeding with a foreclosure sale, allowed by the underlying mortgage loan instruments, during the time period that response to an information request notice is outstanding.

§ 1024.37 Force-placed insurance.

(a) *Definition of force-placed insurance.* (1) *In general.* For the purposes of this section, the term ''force-placed insurance'' means hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan that insures the property securing such loan.

(2) *Types of insurance not considered force-placed insurance.* The following insurance does not constitute ''force-placed insurance'' under this section:

(i) Hazard insurance required by the Flood Disaster Protection Act of 1973.

(ii) Hazard insurance obtained by a borrower but renewed by the borrower's servicer as described in § 1024.17(k)(1), (2), or (5).

(iii) Hazard insurance obtained by a borrower but renewed by the borrower's servicer at its discretion, if the borrower agrees.

(b) *Basis for charging borrower for force-placed insurance.* A servicer may not assess on a borrower a premium charge or fee related to force-placed insurance unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance.

(c) *Requirements before charging borrower for force-placed insurance.* (1) *In general.* Before a servicer assesses on a borrower any premium charge or fee related to force-placed insurance, the servicer must:

(i) Deliver to a borrower or place in the mail a written notice containing the information required by paragraph (c)(2) of this section at least 45 days before a servicer assesses on a borrower such charge or fee;

(ii) Deliver to the borrower or place in the mail a written notice in accordance with paragraph (d)(1) of this section; and

(iii) By the end of the 15-day period beginning on the date the written notice described in paragraph (c)(1)(ii) of this section was delivered to the borrower or placed in the mail, not have received, from the borrower or otherwise, evidence demonstrating that the borrower has had in place, continuously, hazard insurance coverage that complies with the loan contract's requirements to maintain hazard insurance.

(2) *Content of notice.* The notice required by paragraph (c)(1)(i) of this section shall set forth the following information:

(i) The date of the notice;

(ii) The servicer's name and mailing address;

(iii) The borrower's name and mailing address;

(iv) A statement that requests the borrower to provide hazard insurance information for the borrower's property and identifies the property by its physical address;

(v) A statement that the borrower's hazard insurance is expiring or has expired, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date, and that, if applicable, identifies the type of hazard insurance for which the servicer lacks evidence of coverage;

(vi) A statement that hazard insurance is required on the borrower's property, and that the servicer has purchased or will purchase, as applicable, such insurance at the borrower's expense;

(vii) A statement requesting the borrower to promptly provide the servicer with insurance information;

(viii) A description of the requested insurance information and how the borrower may provide such information, and if applicable, a statement that the requested information must be in writing;

(ix) A statement that insurance the servicer has purchased or purchases:

(A) May cost significantly more than hazard insurance purchased by the borrower;

(B) Not provide as much coverage as hazard insurance purchased by the borrower;

(x) The servicer's telephone number for borrower inquiries; and

(xi) If applicable, a statement advising the borrower to review additional information provided in the same transmittal.

(3) *Format.* A servicer must set the information required by paragraphs (c)(2)(iv), (vi), and (ix)(A) and (B) in bold text, except that the information about the physical address of the borrower's property required by paragraph (c)(2)(iv) of this section may be set in regular text. A servicer may use form MS–3A in appendix MS–3 of this part to comply with the requirements of paragraphs (c)(1)(i) and (2) of this section.

(4) *Additional information.* A servicer may not include any information other than information required by paragraphs (c)(2) of this section in the written notice required by paragraph (c)(1)(i) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal.

(d) *Reminder notice.* (1) *In general.* The notice required by paragraph (c)(1)(ii) of this section shall be delivered to the borrower or placed in the mail at least 15 days before a servicer assesses on a borrower a premium charge or fee related to force-placed insurance. A servicer may not deliver to a borrower or place in the mail the notice required by paragraph (c)(1)(ii) of this section until at least 30 days after delivering to the borrower or placing in the mail the written notice required by paragraph (c)(1)(i) of this section.

(2) *Content of the reminder notice.* (i) *Servicer receiving no insurance information.* A servicer that receives no hazard insurance information after delivering to the borrower or placing in the mail the notice required by paragraph (c)(1)(i) of this section must set forth in the notice required by paragraph (c)(1)(ii) of this section:

(A) The date of the notice;

(B) A statement that the notice is the second and final notice;

(C) The information required by paragraphs (c)(2)(ii) through (xi) of this section; and

(D) The cost of the force-placed insurance, stated as an annual premium, except if a servicer does not know the cost of force-placed insurance, a reasonable estimate shall be disclosed and identified as such.

(ii) *Servicer not receiving demonstration of continuous coverage.* A servicer that has received hazard insurance information after delivering to a borrower or placing in the mail the notice required by paragraph (c)(1)(i) of this section, but has not received, from the borrower or otherwise, evidence demonstrating that the borrower has had hazard insurance coverage in place continuously, must set forth in the notice required by paragraph (c)(1)(ii) of this section the following information:

(A) The date of the notice;

(B) The information required by paragraphs (c)(2)(ii) through (iv), (x), (xi), and (d)(2)(i)(B) and (D) of this section;

(C) A statement that the servicer has received the hazard insurance information that the borrower provided;

(D) A statement that requests the borrower to provide the information that is missing;

(E) A statement that the borrower will be charged for insurance the servicer has purchased or purchases for the period of time during which the servicer is unable to verify coverage;

(3) *Format.* A servicer must set the information required by paragraphs (d)(2)(i)(B) and (D) of this section in bold text. A servicer may use form MS–3B in appendix MS–3 of this part to comply with the requirements of paragraphs (d)(1) and (d)(2)(i) of this section. A servicer may use form MS–3C in appendix MS–3 of this part to comply with the requirements of paragraphs (d)(1) and (d)(2)(ii) of this section.

(4) *Additional information.* As applicable, a servicer may not include any information other than information required by paragraph (d)(2)(i) or (ii) of this section in the written notice required by paragraph (c)(1)(ii) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal.

(5) *Updating notice with borrower information.* If a servicer receives new information about a borrower's hazard insurance after a written notice required by paragraph (c)(1)(ii) of this section has been put into production, the servicer is not required to update such notice based on the new information so long as the notice was put into production a reasonable time prior to the servicer delivering the notice to the borrower or placing the notice in the mail.

(e) *Renewing or replacing force-placed insurance.* (1) *In general.* Before a servicer assesses on a borrower a premium charge or fee related to renewing or replacing existing force-placed insurance, a servicer must:

(i) Deliver to the borrower or place in the mail a written notice containing the information set forth in paragraph (e)(2) of this section at least 45 days before assessing on a borrower such charge or fee; and

(ii) By the end of the 45-day period beginning on the date the written notice required by paragraph (e)(1)(i) of this section was delivered to the borrower or placed in the mail, not have received, from the borrower or otherwise, evidence demonstrating that the borrower has purchased hazard insurance coverage that complies with the loan contract's requirements to maintain hazard insurance.

(iii) *Charging a borrower before end of notice period.* Notwithstanding paragraphs (e)(1)(i) and (ii) of this section, if not prohibited by State or other applicable law, if a servicer has renewed or replaced existing force-placed insurance and receives evidence demonstrating that the borrower lacked insurance coverage for some period of time following the expiration of the existing force-placed insurance (including during the notice period

prescribed by paragraph (e)(1) of this section), the servicer may, promptly upon receiving such evidence, assess on the borrower a premium charge or fee related to renewing or replacing existing force-placed insurance for that period of time.

(2) *Content of renewal notice.* The notice required by paragraph (e)(1)(i) of this section shall set forth the following information:

(i) The date of the notice;

(ii) The servicer's name and mailing address;

(iii) The borrower's name and mailing address;

(iv) A statement that requests the borrower to update the hazard insurance information for the borrower's property and identifies the borrower's property by its physical address;

(v) A statement that the servicer previously purchased insurance on the borrower's property and assessed the cost of the insurance to the borrower because the servicer did not have evidence that the borrower had hazard insurance coverage for the property;

(vi) A statement that:

(A) The insurance the servicer purchased previously has expired or is expiring, as applicable; and

(B) Because hazard insurance is required on the borrower's property, the servicer intends to maintain insurance on the property by renewing or replacing the insurance it previously purchased;

(vii) A statement informing the borrower:

(A) That insurance the servicer purchases may cost significantly more than hazard insurance purchased by the borrower;

(B) That such insurance may not provide as much coverage as hazard insurance purchased by the borrower; and

(C) The cost of the force-placed insurance, stated as an annual premium, except if a servicer does not know the cost of force-placed insurance, a reasonable estimate shall be disclosed and identified as such.

(viii) A statement that if the borrower purchases hazard insurance, the borrower should promptly provide the servicer with insurance information.

(ix) A description of the requested insurance information and how the borrower may provide such information, and if applicable, a statement that the requested information must be in writing;

(x) The servicer's telephone number for borrower inquiries; and

(xi) If applicable, a statement advising a borrower to review additional information provided in the same transmittal.

(3) *Format.* A servicer must set the information required by paragraphs (e)(2)(iv), (vi)(B), and (vii)(A) through (C) of this section in bold text, except that the information about the physical address of the borrower's property required by paragraph (e)(2)(iv) may be set in regular text. A servicer may use form MS–3D in appendix MS–3 of this part to comply with the requirements of paragraphs (e)(1)(i) and (2) of this section.

(4) *Additional information.* As applicable, a servicer may not include any information other than information required by paragraph (e)(2) of this section in the written notice required by paragraph (e)(1) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in same transmittal.

(5) *Frequency of renewal notices.* Before each anniversary of a servicer purchasing force-placed insurance on a borrower's property, the servicer shall deliver to the borrower or place in the mail the written notice required by paragraph (e)(1) of this section. A servicer is not required to provide the written notice required by paragraph (e)(1) of this section more than once a year.

(f) *Mailing the notices.* If a servicer mails a written notice required by paragraphs (c)(1)(i), (c)(1)(ii), or (e)(1) of this section, the servicer must use a class of mail not less than first-class mail.

(g) *Cancellation of force-placed insurance.* Within 15 days of receiving, from the borrower or otherwise, evidence demonstrating that the borrower has had in place hazard insurance coverage that complies with the loan contract's requirements to maintain hazard insurance, a servicer must:

(1) Cancel the force-placed insurance the servicer purchased to insure the borrower's property; and

(2) Refund to such borrower all force-placed insurance premium charges and related fees paid by such borrower for any period of overlapping insurance coverage and remove from the borrower's account all force-placed insurance charges and related fees for such period that the servicer has assessed to the borrower.

(h) *Limitations on force-placed insurance charges.* (1) *In general.* Except for charges subject to State regulation as the business of insurance and charges authorized by the Flood Disaster Protection Act of 1973, all charges related to force-placed insurance assessed to a borrower by or through the servicer must be bona fide and reasonable.

(2) *Bona fide and reasonable charge.* A bona fide and reasonable charge is a charge for a service actually performed that bears a reasonable relationship to the servicer's cost of providing the service, and is not otherwise prohibited by applicable law.

(i) *Relationship to Flood Disaster Protection Act of 1973.* If permitted by regulation under section 102(e) of the Flood Disaster Protection Act of 1973, a servicer subject to the requirements of this section may deliver to the borrower or place in the mail any notice required by this section and the notice required by section 102(e) of the Flood Disaster Protection Act of 1973 on separate pieces of paper in the same transmittal.

§ 1024.38 General servicing policies, procedures, and requirements.

(a) *Reasonable policies and procedures.* A servicer shall maintain policies and procedures that are reasonably designed to achieve the objectives set forth in paragraph (b) of this section.

(b) *Objectives.* (1) *Accessing and providing timely and accurate information.* The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer can:

(i) Provide accurate and timely disclosures to a borrower as required by this subpart or other applicable law;

(ii) Investigate, respond to, and, as appropriate, make corrections in response to complaints asserted by a borrower;

(iii) Provide a borrower with accurate and timely information and documents in response to the borrower's requests for information with respect to the borrower's mortgage loan;

(iv) Provide owners or assignees of mortgage loans with accurate and current information and documents about all mortgage loans they own;

(v) Submit documents or filings required for a foreclosure process, including documents or filings required by a court of competent jurisdiction, that reflect accurate and current information and that comply with applicable law; and

(vi) Upon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower's mortgage loan.

(2) *Properly evaluating loss mitigation applications.* The policies and procedures required by paragraph (a) of

this section shall be reasonably designed to ensure that the servicer can:

(i) Provide accurate information regarding loss mitigation options available to a borrower from the owner or assignee of the borrower's mortgage loan;

(ii) Identify with specificity all loss mitigation options for which borrowers may be eligible pursuant to any requirements established by an owner or assignee of the borrower's mortgage loan;

(iii) Provide prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option to servicer personnel that are assigned to assist the borrower pursuant to § 1024.40;

(iv) Identify documents and information that a borrower is required to submit to complete a loss mitigation application and facilitate compliance with the notice required pursuant to § 1024.41(b)(2)(i)(B); and

(v) Properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan and, where applicable, in accordance with the requirements of § 1024.41.

(3) *Facilitating oversight of, and compliance by, service providers.* The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer can:

(i) Provide appropriate servicer personnel with access to accurate and current documents and information reflecting actions performed by service providers;

(ii) Facilitate periodic reviews of service providers, including by providing appropriate servicer personnel with documents and information necessary to audit compliance by service providers with the servicer's contractual obligations and applicable law; and

(iii) Facilitate the sharing of accurate and current information regarding the status of any evaluation of a borrower's loss mitigation application and the status of any foreclosure proceeding among appropriate servicer personnel, including any personnel assigned to a borrower's mortgage loan account as described in § 1024.40, and appropriate service provider personnel, including service provider personnel responsible for handling foreclosure proceedings.

(4) *Facilitating transfer of information during servicing transfers.* The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer can:

(i) As a transferor servicer, timely transfer all information and documents in the possession or control of the servicer relating to a transferred mortgage loan to a transferee servicer in a form and manner that ensures the accuracy of the information and documents transferred and that enables a transferee servicer to comply with the terms of the transferee servicer's obligations to the owner or assignee of the mortgage loan and applicable law; and

(ii) As a transferee servicer, identify necessary documents or information that may not have been transferred by a transferor servicer and obtain such documents from the transferor servicer.

(iii) For the purposes of this paragraph (b)(4), transferee servicer means a servicer, including a master servicer or a subservicer, that performs or will perform servicing of a mortgage loan and transferor servicer means a servicer, including a master servicer or a subservicer, that transfers or will transfer the servicing of a mortgage loan.

(5) *Informing borrowers of the written error resolution and information request procedures.* The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer informs borrowers of the procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36.

(c) *Standard requirements.* (1) *Record retention.* A servicer shall retain records that document actions taken with respect to a borrower's mortgage loan account until one year after the date a mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer.

(2) *Servicing file.* A servicer shall maintain the following documents and data on each mortgage loan account serviced by the servicer in a manner that facilitates compiling such documents and data into a servicing file within five days:

(i) A schedule of all transactions credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account;

(ii) A copy of the security instrument that establishes the lien securing the mortgage loan;

(iii) Any notes created by servicer personnel reflecting communications with the borrower about the mortgage loan account;

(iv) To the extent applicable, a report of the data fields relating to the borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices; and

(v) Copies of any information or documents provided by the borrower to the servicer in accordance with the procedures set forth in § 1024.35 or § 1024.41.

§ 1024.39 Early intervention requirements for certain borrowers.

(a) *Live contact.* A servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options if appropriate.

(b) *Written notice.* (1) *Notice required.* Except as otherwise provided in this section, a servicer shall provide to a delinquent borrower a written notice with the information set forth in paragraph (a)(2) of this section not later than the 45th day of the borrower's delinquency. A servicer is not required to provide the written notice more than once during any 180-day period.

(2) *Content of the written notice.* The notice required by paragraph (b)(1) of this section shall include:

(i) A statement encouraging the borrower to contact the servicer;

(ii) The telephone number to access servicer personnel assigned pursuant to § 1024.40(a) and the servicer's mailing address;

(iii) If applicable, a statement providing a brief description of examples of loss mitigation options that may be available from the servicer;

(iv) If applicable, either application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer; and

(v) The Web site to access either the Bureau list or the HUD list of homeownership counselors or counseling organizations, and the HUD toll-free telephone number to access homeownership counselors or counseling organizations.

(3) *Model clauses.* Model clauses MS–4(A), MS–4(B), and MS–4(C), in appendix MS–4 to this part may be used to comply with the requirements of paragraph (a) of this section.

(c) *Conflicts with other law.* Nothing in this section shall require a servicer to communicate with a borrower in a manner otherwise prohibited by applicable law.

§ 1024.40 Continuity of contact.

(a) *In general.* A servicer shall maintain policies and procedures that

are reasonably designed to achieve the following objectives:

(1) Assign personnel to a delinquent borrower by the time the servicer provides the borrower with the written notice required by § 1024.39(b), but in any event, not later than the 45th day of the borrower's delinquency.

(2) Make available to a delinquent borrower, via telephone, personnel assigned to the borrower as described in paragraph (a)(1) of this section to respond to the borrower's inquiries, and as applicable, assist the borrower with available loss mitigation options until the borrower has made, without incurring a late charge, two consecutive mortgage payments in accordance with the terms of a permanent loss mitigation agreement.

(3) If a borrower contacts the personnel assigned to the borrower as described in paragraph (a)(1) of this section and does not immediately receive a live response from such personnel, ensure that the servicer can provide a live response in a timely manner.

(b) *Functions of servicer personnel.* A servicer shall maintain policies and procedures reasonably designed to ensure that servicer personnel assigned to a delinquent borrower as described in paragraph (a) of this section perform the following functions:

(1) Provide the borrower with accurate information about:

(i) Loss mitigation options available to the borrower from the owner or assignee of the borrower's mortgage loan;

(ii) Actions the borrower must take to be evaluated for such loss mitigation options, including actions the borrower must take to submit a complete loss mitigation application, as defined in § 1024.41, and, if applicable, actions the borrower must take to appeal the servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program offered by the servicer;

(iii) The status of any loss mitigation application that the borrower has submitted to the servicer;

(iv) The circumstances under which the servicer may make a referral to foreclosure; and

(v) Applicable loss mitigation deadlines established by an owner or assignee of the borrower's mortgage loan or § 1024.41.

(2) Retrieve, in a timely manner:

(i) A complete record of the borrower's payment history; and

(ii) All written information the borrower has provided to the servicer, and if applicable, to prior servicers, in connection with a loss mitigation application;

(3) Provide the documents and information identified in paragraph (b)(2) of this section to other persons required to evaluate a borrower for loss mitigation options made available by the servicer, if applicable; and

(4) Provide a delinquent borrower with information about the procedures for submitting a notice of error pursuant to § 1024.35 or an information request pursuant to § 1024.36.

§ 1024.41 Loss mitigation procedures.

(a) *Enforcement and limitations.* A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.

(b) *Receipt of a loss mitigation application.* (1) *Complete loss mitigation application.* A complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.

(2) *Review of loss mitigation application submission.* (i) *Requirements.* If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:

(A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and

(B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section. The notice to the borrower shall include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options.

(ii) *Time period disclosure.* The notice required pursuant to paragraph (b)(2)(i)(B) of this section must state that the borrower should submit the documents and information necessary to make the loss mitigation application complete by the earliest remaining date of:

(A) The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower;

(B) The date that is the 120th day of the borrower's delinquency;

(C) The date that is 90 days before a foreclosure sale; or

(D) The date that is 38 days before a foreclosure sale.

(c) *Evaluation of loss mitigation applications.* (1) *Complete loss mitigation application.* If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall:

(i) Evaluate the borrower for all loss mitigation options available to the borrower; and

(ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage loan.

(2) *Incomplete loss mitigation application evaluation.* (i) *In general.* Except as set forth in paragraph (c)(2)(ii) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation option for all loss mitigation options available to the borrower by offering a loss mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.

(ii) *Reasonable time.* Notwithstanding paragraph (c)(2)(i) of this section, if a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its

discretion, evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option. Any such evaluation and offer is not subject to the requirements of this section and shall not constitute an evaluation of a single complete loss mitigation application for purposes of paragraph (i) of this section.

(d) *Denial of loan modification options.* If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower pursuant to paragraph (c) of this section, a servicer shall state in the notice sent to the borrower pursuant to paragraph (c)(1)(ii) of this section:

(1) The specific reasons for the servicer's determination for each such trial or permanent loan modification option; and

(2) If applicable pursuant to paragraph (h) of this section, that the borrower may appeal the servicer's determination for any such trial or permanent loan modification option, the deadline for the borrower to make an appeal, and any requirements for making an appeal.

(e) *Borrower response.* (1) *In general.* Subject to paragraphs (e)(2)(ii) and (iii) of this section, if a complete loss mitigation application is received 90 days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the servicer provides the offer of a loss mitigation option to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the servicer provides the offer of a loss mitigation option to the borrower.

(2) *Rejection.* (i) *In general.* Except as set forth in paragraphs (e)(2)(ii) and (iii) of this section, a servicer may deem a borrower that has not accepted an offer of a loss mitigation option within the deadline established pursuant to paragraph (e)(1) of this section to have rejected the offer of a loss mitigation option.

(ii) *Trial Loan Modification Plan.* A borrower who does not satisfy the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan within the deadline established pursuant to paragraph (e)(1) of this section, shall be provided a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond the deadline established pursuant to paragraph (e)(1) of this section.

(iii) *Interaction with appeal process.* If a borrower makes an appeal pursuant to paragraph (h) of this section, the borrower's deadline for accepting a loss mitigation option offered pursuant to paragraph (c)(1)(ii) of this section shall be extended until 14 days after the servicer provides the notice required pursuant to paragraph (h)(4) of this section.

(f) *Prohibition on foreclosure referral.* (1) *Pre-foreclosure review period.* A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent.

(2) *Application received before foreclosure referral.* If a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (f)(1) of this section or before a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(ii) The borrower rejects all loss mitigation options offered by the servicer; or

(iii) The borrower fails to perform under an agreement on a loss mitigation option.

(g) *Prohibition on foreclosure sale.* If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(2) The borrower rejects all loss mitigation options offered by the servicer; or

(3) The borrower fails to perform under an agreement on a loss mitigation option.

(h) *Appeal process.* (1) *Appeal process required for loan modification denials.* If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale or during the period set forth in paragraph (f) of this section, a servicer shall permit a borrower to appeal the servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower.

(2) *Deadlines.* A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the offer of a loss mitigation option to the borrower pursuant to paragraph (c)(1)(ii) of this section.

(3) *Independent evaluation.* An appeal shall be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.

(4) *Appeal determination.* Within 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal. A servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.

(i) *Duplicative requests.* A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account.

(j) *Small servicer requirements.* A small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent. A small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

■ 18. The subject heading ''Appendix MS—Mortgage Servicing'' is added above appendix MS–1.

■ 19. Appendix MS–2 to part 1024 is revised to read as follows:

Appendix MS–2 to Part 1024

Notice of Servicing Transfer

The servicing of your mortgage loan is being transferred, effective [Date]. This means that after this date, a new servicer will be collecting your mortgage loan payments from you. Nothing else about your mortgage loan will change.

[Name of present servicer] is now collecting your payments. [Name of present servicer] will stop accepting payments received from you after [Date].

[Name of new servicer] will collect your payments going forward. Your new servicer will start accepting payments received from you on [Date].

Send all payments due on or after [Date] to [Name of new servicer] at this address: [New servicer address].

If you have any questions for either your present servicer, [Name of present servicer] or your new servicer [Name of new servicer], about your mortgage loan or this transfer, please contact them using the information below:

Current Servicer:	New Servicer:
[Name of present servicer]	[Name of new servicer]
[Individual or Department]	[Individual or Department]
[Telephone Number]	[Telephone Number]
[Address]	[Address]

[Use this paragraph if appropriate; otherwise omit.] Important note about insurance: If you have mortgage life or disability insurance or any other type of optional insurance, the transfer of servicing rights may affect your insurance in the following way:

_____

You should do the following to maintain coverage:

_____

Under Federal law, during the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by your old servicer on or before its due date may not be treated by the new servicer as late, and a late fee may not be imposed on you.

_____
[NAME OF PRESENT SERVICER]

_____
Date

[and] [or]

_____
[NAME OF NEW SERVICER]

_____
Date

■ 20. Appendix MS–3 is added to part 1024 to read as follows:

Appendix MS–3 to Part 1024

Model Force-Placed Insurance Notice Forms

Table of Contents

MS–3(A)—Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(c)(2)
MS–3(B)—Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(d)(2)(i)
MS–3(C)—Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(d)(2)(ii)
MS–3(D)—Model Form for Renewal or Replacement of Force-Placed Insurance Notice Containing Information Required By to § 1024.37(e)(2)

MS–3(A)—Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(c)(2)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: **Please provide insurance information for** [Property Address]

Dear [Borrower's Name]:

Our records show that your [hazard] [Insurance Type] insurance [is expiring] [expired], and we do not have evidence that you have obtained new coverage. **Because [hazard] [Insurance Type] insurance is required on your property, [we bought insurance for your property] [we plan to buy insurance for your property]**. You must pay us for any period during which the insurance we buy is in effect but you do not have insurance.

You should immediately provide us with your insurance information. [Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

The insurance we [bought] [buy]:

- **May be more expensive than the insurance you can buy yourself.**
- **May not provide as much coverage as an insurance policy you buy yourself.**

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(B)—**Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(d)(2)(i)**

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]

Subject: **Second and final notice—please provide insurance information for** [Property Address]

Dear [Borrower's Name]:

This is your **second and final notice** that our records show that your [hazard] [Insurance Type] insurance [is expiring] [expired], and we do not have evidence that you have obtained new coverage. **Because [hazard] [Insurance Type] insurance is required on your property, [we bought insurance for your property] [we plan to buy insurance for your property].** You must pay us for any period during which the insurance we buy is in effect but you do not have insurance.

You should immediately provide us with your insurance information. [Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

The insurance we [bought] [buy]:

- **[Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be more expensive than insurance you can buy yourself.**
- **May not provide as much coverage as an insurance policy you buy yourself.**

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(C)—Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(d)(2)(ii)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: **Second and final notice—please provide insurance information for** [Property Address]

Dear [Borrower's Name]:

We received the insurance information you provided, but we are unable to verify coverage from [Date Range].

Please provide us with insurance information for [Date Range] immediately.

We will charge you for insurance we [bought] [plan to buy] for [Date Range] unless we can verify that you have insurance coverage for [Date Range].

The insurance we [bought] [buy]:

- **Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be more expensive than insurance you can buy yourself.**
- **May not provide as much coverage as an insurance policy you buy yourself.**

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(D)—Model Form for Renewal or Replacement of Force-Placed Insurance Notice Containing Information Required By to § 1024.37(e)(2)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: Please update insurance information for [Property Address]

Dear [Borrower's Name]:

Because we did not have evidence that you had [hazard] [Insurance Type] insurance on the property listed above, we bought insurance on your property and added the cost to your mortgage loan account.

The policy that we bought [expired] [is scheduled to expire]. Because [hazard][Insurance Type] insurance] is required on your property, we intend to maintain insurance on your property by renewing or replacing the insurance we bought.

The insurance we buy:

• [Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be more expensive than insurance you can buy yourself.

• May not provide as much coverage as an insurance policy you buy yourself.

If you buy [hazard] [Insurance Type] insurance, you should immediately provide us with your insurance information.

[Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

■ 21. Appendix MS–4 is added to part 1024 to read as follows:

Appendix MS–4—Model Clauses for the Written Early Intervention Notice

MS–4(A)—Statement Encouraging the Borrower To Contact the Servicer and Additional Information About Loss Mitigation Options (§ 1024.39(b)(2)(i), (ii) and (iv))

Call us today to learn more about your options and instructions for how to apply. [The longer you wait, or the further you fall behind on your payments, the harder it will be to find a solution.]

[Servicer Name]

[Servicer Address]

[Servicer Telephone Number]

[For more information, visit [Servicer Web site] [and][or] [Email Address]].

MS–4(B)—Available Loss Mitigation Options (§ 1024.39(b)(2)(iii))

[If you need help, the following options may be possible (most are subject to lender approval):]

• [Refinance your loan with us or another lender;]

• [Modify your loan terms with us;]

• [Payment forbearance temporarily gives you more time to pay your monthly payment;] [or]

• [If you are not able to continue paying your mortgage, your best option may be to find more affordable housing. As an alternative to foreclosure, you may be able to sell your home and use the proceeds to pay off your current loan.]

MS–4(C)—Housing Counselors (§ 1024.39(b)(2)(v))

For help exploring your options, the Federal government provides contact information for housing counselors, which you can access by contacting [the Consumer Financial Protection Bureau at [Bureau Housing Counselor List Web site]] [the Department of Housing and Urban Development at [HUD Housing Counselor List Web site]] or by calling [HUD Housing Counselor List Telephone Number].

■ 22. Supplement I to part 1024 is added following the appendices to read as follows:

Supplement I to Part 1024—Official Bureau Interpretations

Introduction

1. *Official status.* This commentary is the primary vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation X. Good faith compliance with this commentary affords protection from liability under section 19(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2617(b).

2. *Requests for official interpretations.* A request for an official interpretation shall be in writing and addressed to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552. A request shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents. Except in unusual circumstances, such official interpretations will not be issued separately but will be incorporated in the official commentary to this part, which will be amended periodically. No official interpretations will be issued approving financial institutions' forms or statements. This restriction does not apply to forms or statements whose use is required or sanctioned by a government agency.

3. *Unofficial oral interpretations.* Unofficial oral interpretations may be provided at the discretion of Bureau staff. Written requests for such interpretations should be sent to the address set forth for official interpretations. Unofficial oral interpretations provide no protection under section 19(b) of RESPA. Ordinarily, staff will not issue unofficial oral interpretations on matters adequately covered by this part or the official Bureau interpretations.

4. *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.

5. *Comment designations.* Each comment in the commentary is identified by a number and the regulatory section or paragraph that the comment 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 § 1024.37(c)(1) are further divided by subparagraph, such as comment 37(c)(1)(i)–1. In other cases, comments have more general application and are designated, for example, as comment 40(a)–1. This introduction may be cited as comments I–1 through I–5.

Subpart A—General Provisions

[Reserved]

Subpart B—Mortgage Settlement and Escrow Accounts

[Reserved]

Section 1024.17 Escrow Accounts

17(k) Timely payments.

17(k)(5) Timely payment of hazard insurance.

17(k)(5)(ii) Ability to disburse funds.

17(k)(5)(ii)(A) When inability exists.

1. *Examples of reasonable basis to believe that a policy has been cancelled or not renewed.* The following are examples of where a servicer has a reasonable basis to believe that a borrower's hazard insurance policy has been canceled or not renewed for reasons other than the nonpayment of premium charges:

i. A borrower notifies a servicer that the borrower has cancelled the hazard insurance coverage, and the servicer has not received notification of other hazard insurance coverage.

ii. A servicer receives a notification of cancellation or non-renewal from the borrower's insurance company before payment is due on the borrower's hazard insurance.

iii. A servicer does not receive a payment notice by the expiration date of the borrower's hazard insurance policy.

17(k)(5)(ii)(C) Recoupment for advances.

1. *Month-to-month advances.* A servicer that advances the premium payment to be disbursed from an escrow account may advance the payment on a month-to-month basis, if permitted by State or other applicable law and accepted by the borrower's hazard insurance company.

Subpart C—Mortgage Servicing

§ 1024.30—Scope

30(b) Exemptions.

1. *Exemption for Farm Credit System institutions.* Pursuant to 12 CFR 617.7000, certain servicers may be considered ''qualified lenders'' only with respect to loans discounted or pledged pursuant to 12 U.S.C. 2015(b)(1). To the extent a servicer, as defined in RESPA, services a mortgage loan that has not been discounted or

pledged pursuant to 12 U.S.C. 2015(b)(1), and is not subject to the requirements set forth in 12 CFR 617, the servicer may be required to comply with the requirements of §§ 1024.38 through 41 with respect to that mortgage loan.

§ 1024.31—Definitions

Loss mitigation application.

1. *Borrower's representative.* A loss mitigation application is deemed to be submitted by a borrower if the loss mitigation application is submitted by an agent of the borrower. Servicers may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf.

Loss mitigation option.

1. *Types of loss mitigation options.* Loss mitigation options include temporary and long-term relief, including options that allow borrowers who are behind on their mortgage payments to remain in their homes or to leave their homes without a foreclosure, such as, without limitation, refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short-sale, deed-in-lieu of foreclosure, and loss mitigation programs sponsored by a locality, a State, or the Federal government.

2. *Available through the servicer.* A loss mitigation option available through the servicer refers to an option for which a borrower may apply, even if the borrower ultimately does not qualify for such option.

Qualified written request.

1. A qualified written request is a written notice a borrower provides to request a servicer either correct an error relating to the servicing of a mortgage loan or to request information relating to the servicing of the mortgage loan. A qualified written request is not required to include both types of requests. For example, a qualified written request may request information relating to the servicing of a mortgage loan but not assert that an error relating to the servicing of a loan has occurred.

2. A qualified written request is just one form that a written notice of error or information request may take. Thus, the error resolution and information request requirements in §§ 1024.35 and 1024.36 apply as set forth in those sections irrespective of whether the servicer receives a qualified written request.

Service provider.

1. Service providers may include attorneys retained to represent a servicer or an owner or assignee of a mortgage loan in a foreclosure proceeding, as well as other professionals retained to provide appraisals or inspections of properties.

§ 1024.33—Mortgage Servicing Transfers

33(a) Servicing disclosure statement.

1. *Terminology.* Although the servicing disclosure statement must be clear and conspicuous pursuant to § 1024.32(a)(1), § 1024.33(a)(1) does not set forth any specific rules for the format of the statement, and the specific language of the servicing disclosure statement in appendix MS–1 is not required to be used. The model format may be supplemented with additional information that clarifies or enhances the model language.

2. *Delivery to co-applicants.* If co-applicants indicate the same address on their application, one copy delivered to that address is sufficient. If different addresses are shown by co-applicants on the application, a copy must be delivered to each of the co-applicants.

3. *Lender servicing.* If the lender, mortgage broker who anticipates using table funding, or dealer in a first lien dealer loan knows at the time of making the disclosure whether it will service the mortgage loan for which the applicant has applied, the disclosure must, as applicable, state that such entity will service such loan and does not intend to sell, transfer, or assign the servicing of the loan, or that such entity intends to assign, sell, or transfer servicing of such mortgage loan before the first payment is due. In all other instances, a disclosure that states that the servicing of the loan may be assigned, sold, or transferred while the loan is outstanding complies with § 1024.33(a).

33(b) Notices of transfer of loan servicing.

Paragraph 33(b)(3).

1. *Delivery.* A servicer mailing the notice of transfer must deliver the notice to the mailing address (or addresses) listed by the borrower in the mortgage loan documents, unless the borrower has notified the servicer of a new address (or addresses) pursuant to the servicer's requirements for receiving a notice of a change of address.

33(c) Borrower payments during transfer of servicing.

33(c)(1) Payments not considered late.

1. *Late fees prohibited.* The prohibition in § 1024.33(c)(1) on treating a payment as late for any purpose would prohibit a late fee from being imposed on the borrower with respect to any payment on the mortgage loan. *See* RESPA section 6(d) (12 U.S.C. 2605(d)).

2. *Compliance with § 1024.39.* A transferee servicer's compliance with 1024.39 during the 60-day period beginning on the effective date of a servicing transfer does not constitute treating a payment as late for purposes of § 1024.33(c)(1).

§ 1024.34—Timely Escrow Payments and Treatment of Escrow Balances

Paragraph 34(b)(1).

1. *Netting of funds.* Section 1024.34(b)(1) does not prohibit a servicer from netting any remaining funds in an escrow account against the outstanding balance of the borrower's mortgage loan.

Paragraph 34(b)(2).

1. *Refund always permissible.* A servicer is not required to credit funds in an escrow account to an escrow account for a new mortgage loan and may, in all circumstances, comply with the requirements of § 1024.34(b) by refunding the funds in the escrow account to the borrower pursuant to § 1024.34(b)(1).

2. *Borrower agreement.* A borrower may agree either orally or in writing to a servicer's crediting of any remaining balance in an escrow account to a new escrow account for a new mortgage loan pursuant to § 1024.34(b)(2).

§ 1024.35—Error Resolution Procedures

35(a) Notice of error.

1. *Borrower's representative.* A notice of error is submitted by a borrower if the notice of error is submitted by an agent of the borrower. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring that a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. Upon receipt of such documentation, the servicer shall treat the notice of error as having been submitted by the borrower.

2. *Information request.* A servicer should not rely solely on the borrower's description of a submission to determine whether the submission constitutes a notice of error under § 1024.35(a), an information request under § 1024.36(a), or both. For example, a borrower may submit a letter that claims to be a ''Notice of Error'' that indicates that the borrower wants to receive the information set forth in an annual escrow account statement and asserts an error for the servicer's failure to provide the borrower an annual escrow statement. Such a letter may constitute an information request under

§ 1024.36(a) that triggers an obligation by the servicer to provide an annual escrow statement. A servicer should not rely on the borrower's characterization of the letter as a ''Notice of Error,'' but must evaluate whether the letter fulfills the substantive requirements of a notice of error, information request, or both.

35(b) Scope of error resolution.

1. *Noncovered errors.* A servicer is not required to comply with § 1024.35(d), (e) and (i) with respect to a borrower's assertion of an error that is not defined as an error in § 1024.35(b). For example, the following are not errors for purposes of § 1024.35:

i. An error relating to the origination of a mortgage loan;

ii. An error relating to the underwriting of a mortgage loan;

iii. An error relating to a subsequent sale or securitization of a mortgage loan;

iv. An error relating to a determination to sell, assign, or transfer the servicing of a mortgage loan. However, an error relating to the failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer is an error for purposes of § 1024.35.

2. *Unreasonable basis.* For purposes of § 1024.35(b)(5), a servicer lacks a reasonable basis to impose fees that are not bona fide, such as:

i. A late fee for a payment that was not late;

ii. A charge imposed by a service provider for a service that was not actually rendered;

iii. A default property management fee for borrowers that are not in a delinquency status that would justify the charge; or

iv. A charge for force-placed insurance in a circumstance not permitted by § 1024.37.

35(c) Contact information for borrowers to assert errors.

1. *Exclusive address not required.* A servicer is not required to designate a specific address that a borrower must use to assert an error. If a servicer does not designate a specific address that a borrower must use to assert an error, a servicer must respond to a notice of error received by any office of the servicer.

2. *Notice of an exclusive address.* A notice establishing an address that a borrower must use to assert an error may be included with a different disclosure, such as on a notice of transfer, periodic statement, or coupon book. The notice is subject to the clear and conspicuous requirement in § 1024.32(a)(1). If a servicer establishes an address that a borrower must use to assert an error, a servicer must provide that address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance from the servicer.

3. *Multiple offices.* A servicer may designate multiple office addresses for receiving notices of errors. However, a servicer is required to comply with the requirements of § 1024.35 with respect to a notice of error received at any such designated address regardless of whether that specific address was provided to a specific borrower asserting an error. For example, a servicer may designate an address to receive notices of error for borrowers located in California and a separate address to receive notices of errors for borrowers located in Texas. If a borrower located in California asserts an error through the address used by the servicer for borrowers located in Texas, the servicer is still considered to have received a notice of error and must comply with the requirements of § 1024.35.

4. *Internet intake of notices of error.* A servicer may, but need not, establish a process for receiving notices of error through email, Web site form, or other online intake methods. Any such online intake process shall be in addition to, and not in lieu of, any process for receiving notices of error by mail. The process or processes established by the servicer for receiving notices of error through an online intake method shall be the exclusive online intake process or processes for receiving notices of error. A servicer is not required to provide a separate notice to a borrower to establish a specific online intake process as an exclusive online process for receiving such notices of error.

35(e) Response to notice of error.

35(e)(1) Investigation and response requirements.

Paragraph 35(e)(1)(i).

1. *Notices alleging multiple errors; separate responses permitted.* A servicer may respond to a notice of error that alleges multiple errors through either a single response or separate responses that address each asserted error.

Paragraph 35(e)(1)(ii).

1. *Different or additional errors; separate responses permitted.* A servicer may provide the response required by § 1024.35(e)(1)(ii) for different or additional errors identified by the servicer in the same notice that responds to errors asserted by the borrower pursuant to § 1024.35(e)(1)(i) or in a separate response that addresses the different or additional errors identified by the servicer.

35(e)(3) Time limits.

35(e)(3)(i) In general.

Paragraph 35(e)(3)(i)(B).

1. *Foreclosure sale timing.* If a servicer cannot comply with its obligations pursuant to § 1024.35(e) by the earlier of a foreclosure sale or 30 days after receipt of the notice of error, a servicer may cancel or postpone a foreclosure sale, in which case the servicer would meet the time limit in § 1024.35(e)(3)(i)(B) by complying with the requirements of § 1024.35(e) before the earlier of 30 days after receipt of the notice of error (excluding legal public holidays, Saturdays, and Sundays) or the date of the rescheduled foreclosure sale.

35(e)(3)(ii) Extension of time limit.

1. *Notices alleging multiple errors; extension of time.* A servicer may treat a notice of error that alleges multiple errors as separate notices of error and may extend the time period for responding to each asserted error for which an extension is permissible under § 1024.35(e)(3)(ii).

35(e)(4) Copies of documentation.

1. *Types of documents to be provided.* A servicer is required to provide only those documents actually relied upon by the servicer to determine that no error occurred. Such documents may include documents reflecting information entered in a servicer's collection system. For example, in response to an asserted error regarding payment allocation, a servicer may provide a printed screen-capture showing amounts credited to principal, interest, escrow, or other charges in the servicer's system for the borrower's mortgage loan account.

35(g) Requirements not applicable.

35(g)(1) In general.

Paragraph 35(g)(1)(i).

1. *New and material information.* A dispute between a borrower and a servicer with respect to whether information was previously reviewed by a servicer or with respect to whether a servicer properly determined that information reviewed was not material to its determination of the existence of an error, does not itself constitute new and material information.

Paragraph 35(g)(1)(ii).

1. *Examples of overbroad notices of error.* The following are examples of notices of error that are overbroad:

i. Assertions of errors regarding substantially all aspects of a mortgage loan, including errors relating to all aspects of mortgage origination, mortgage servicing, and foreclosure, as well as errors relating to the crediting of substantially every borrower payment and escrow account transaction;

ii. Assertions of errors in the form of a judicial action complaint, subpoena, or discovery request that purports to

require servicers to respond to each numbered paragraph; and

iii. Assertions of errors in a form that is not reasonably understandable or is included with voluminous tangential discussion or requests for information, such that a servicer cannot reasonably identify from the notice of error any error for which § 1024.35 requires a response.

35(h) Payment requirements prohibited.

1. *Borrower obligation to make payments.* Section 1024.35(h) prohibits a servicer from requiring a borrower to make a payment that may be owed on a borrower's account as a prerequisite to investigating or responding to a notice of error submitted by a borrower, but does not alter or otherwise affect a borrower's obligation to make payments owed pursuant to the terms of a mortgage loan. For example, if a borrower makes a monthly payment in February for a mortgage loan, but asserts an error relating to the servicer's acceptance of the February payment, § 1024.35(h) does not alter a borrower's obligation to make a monthly payment that the borrower owes for March. A servicer, however, may not require that a borrower make the March payment as a condition for complying with its obligations under § 1024.35 with respect to the notice of error on the February payment.

§ 1024.36—Requests for Information

36(a) Information request.

1. *Borrower's representative.* An information request is submitted by a borrower if the information request is submitted by an agent of the borrower. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring that a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. Upon receipt of such documentation, the servicer shall treat the request for information as having been submitted by the borrower.

2. *Owner or assignee of a mortgage loan.* A servicer complies with § 1024.36(d) by responding to an information request for the owner or assignee of a mortgage loan by identifying the person on whose behalf the servicer receives payments from the borrower. Although investors or guarantors, including among others the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association, may be exposed to risks related to the mortgage loans held by a trust either in connection with an investment in securities issued by the trust or the issuance of a guaranty agreement to the trust, such investors or guarantors are not the owners or assignees of the mortgage loans solely as a result of their roles as such. In certain circumstances, however, a party such as a guarantor may assume multiple roles for a securitization transaction. For example, the Federal National Mortgage Association may act as trustee, master servicer, and guarantor in connection with a securitization transaction in which a trust owns a mortgage loan subject to a request. In this example, because the Federal National Mortgage Association is the trustee of the trust that owns the mortgage loan, a servicer complies with § 1024.36(d) by responding to a borrower's request for information regarding the owner or assignee of the mortgage loan by providing the name of the trust, and the name, address, and appropriate contact information for the Federal National Mortgage Association as the trustee. The following examples identify the owner or assignee for different forms of mortgage loan ownership:

i. A servicer services a mortgage loan that is owned by the servicer, or an affiliate of the servicer, in portfolio. The servicer therefore receives the borrower's payments on behalf of itself or its affiliate. A servicer complies with § 1024.36(d) by responding to a borrower's request for information regarding the owner or assignee of the mortgage loan with the name, address, and appropriate contact information for the servicer or the affiliate, as applicable.

ii. A servicer services a mortgage loan that has been securitized. In general, in a securitization transaction, a special purpose vehicle, such as a trust, is the owner or assignee of a mortgage loan. Thus, the servicer receives the borrower's payments on behalf of the trust. If a securitization transaction is structured such that a trust is the owner or assignee of a mortgage loan and the trust is administered by an appointed trustee, a servicer complies with § 1024.36(d) by responding to a borrower's request for information regarding the owner or assignee of the mortgage loan by providing the borrower with the name of the trust and the name, address, and appropriate contract information for the trustee. Assume, for example, a mortgage loan is owned by Mortgage Loan Trust, Series ABC–1, for which XYZ Trust Company is the trustee. The servicer complies with § 1024.36(d) by responding to a borrower's request for information regarding the owner or assignee of the mortgage loan by identifying the owner as Mortgage Loan Trust, Series ABC–1, and providing the name, address, and appropriate contact information for XYZ Trust Company as the trustee.

36(b) Contact information for borrowers to request information.

1. *Exclusive address not required.* A servicer is not required to designate a specific address that a borrower must use to request information. If a servicer does not designate a specific address that a borrower must use to request information, a servicer must respond to an information request received by any office of the servicer.

2. *Notice of an exclusive address.* A notice establishing an address that a borrower must use to request information may be included with a different disclosure, such as on a notice of transfer, periodic statement, or coupon book. The notice is subject to the clear and conspicuous requirement in § 1024.32(a)(1). If a servicer establishes an address that a borrower must use to request information, a servicer must provide that address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance from the servicer.

3. *Multiple offices.* A servicer may designate multiple office addresses for receiving information requests. However, a servicer is required to comply with the requirements of § 1024.36 with respect to an information request received at any such address regardless of whether that specific address was provided to a specific borrower requesting information. For example, a servicer may designate an address to receive information requests for borrowers located in California and a separate address to receive information requests for borrowers located in Texas. If a borrower located in California requests information through the address used by the servicer for borrowers located in Texas, the servicer is still considered to have received an information request and must comply with the requirements of § 1024.36.

4. *Internet intake of information requests.* A servicer may, but need not, establish a process for receiving information requests through email, Web site form, or other online intake methods. Any such online intake process shall be in addition to, and not in lieu of, any process for receiving information requests by mail. The process or processes established by the servicer for receiving information requests through an online intake

method shall be the exclusive online intake process or processes for receiving information requests. A servicer is not required to provide a separate notice to a borrower to establish a specific online intake process as an exclusive online process for receiving information requests.

36(d) Response to information request.

36(d)(1) Investigation and response requirements.

Paragraph 36(d)(1)(ii).

1. *Information not available.* Information is not available if:

i. The information is not in the servicer's control or possession, or

ii. The information cannot be retrieved in the ordinary course of business through reasonable efforts.

2. *Examples.* The following examples illustrate when information is available (or not available) to a servicer under § 1024.36(d)(1)(ii):

i. A borrower requests a copy of a telephonic communication with a servicer. The servicer's personnel have access in the ordinary course of business to audio recording files with organized recordings or transcripts of borrower telephone calls and can identify the communication referred to by the borrower through reasonable business efforts. The information requested by the borrower is available to the servicer.

ii. A borrower requests information stored on electronic back-up media. Information on electronic back-up media is not accessible by the servicer's personnel in the ordinary course of business without undertaking extraordinary efforts to identify and restore the information from the electronic back-up media. The information requested by the borrower is not available to the servicer.

iii. A borrower requests information stored at an offsite document storage facility. A servicer has a right to access documents at the offsite document storage facility and servicer personnel can access those documents through reasonable efforts in the ordinary course of business. The information requested by the borrower is available to the servicer assuming that the information can be found within the offsite documents with reasonable efforts.

36(f) Requirements not applicable.

36(f)(1) In general.

Paragraph 36(f)(1)(i).

1. A borrower's request for a type of information that can change over time is not substantially the same as a previous information request for the same type of information if the subsequent request covers a different time period than the prior request.

Paragraph 36(f)(1)(ii).

1. *Confidential, proprietary or privileged information.* A request for confidential, proprietary or privileged information of a servicer is not an information request for which the servicer is required to comply with the requirements of § 1024.36(c) and (d). Confidential, proprietary or privileged information may include information requests relating to, for example:

i. Information regarding management or profitability of a servicer, including information provided to investors in the servicer.

ii. Compensation, bonuses, or personnel actions relating to servicer personnel, including personnel responsible for servicing a borrower's mortgage loan account;

iii. Records of examination reports, compliance audits, borrower complaints, and internal investigations or external investigations; or

iv. Information protected by the attorney-client privilege.

Paragraph 36(f)(1)(iii).

1. *Examples of irrelevant information.* The following are examples of irrelevant information:

i. Information that relates to the servicing of mortgage loans other than a borrower's mortgage loan, including information reported to the owner of a mortgage loan regarding individual or aggregate collections for mortgage loans owned by that entity;

ii. The servicer's training program for servicing personnel;

iii. The servicer's servicing program guide; or

iv. Investor instructions or requirements for servicers regarding criteria for negotiating or approving any program with a borrower, including any loss mitigation option.

Paragraph 36(f)(1)(iv).

1. *Examples of overbroad or unduly burdensome requests for information.* The following are examples of requests for information that are overbroad or unduly burdensome:

i. Requests for information that seek documents relating to substantially all aspects of mortgage origination, mortgage servicing, mortgage sale or securitization, and foreclosure, including, for example, requests for all mortgage loan file documents, recorded mortgage instruments, servicing information and documents, and sale or securitization information and documents;

ii. Requests for information that are not reasonably understandable or are included with voluminous tangential discussion or assertions of errors;

iii. Requests for information that purport to require servicers to provide information in specific formats, such as in a transcript, letter form in a columnar format, or spreadsheet, when such information is not ordinarily stored in such format; and

iv. Requests for information that are not reasonably likely to assist a borrower with the borrower's account, including, for example, a request for copies of the front and back of all physical payment instruments (such as checks, drafts, or wire transfer confirmations) that show payments made by the borrower to the servicer and payments made by a servicer to an owner or assignee of a mortgage loan.

§ 1024.37—Force-Placed Insurance

37(a) Definition of force-placed insurance.

37(a)(2) Types of insurance not considered force-placed insurance.

Paragraph 37(a)(2)(iii).

1. *Servicer's discretion.* Hazard insurance paid by a servicer at its discretion refers to circumstances in which a servicer pays a borrower's hazard insurance even though the servicer is not required by § 1024.17(k)(1), (2), or (5) to do so.

37(b) Basis for charging force-placed insurance.

1. *Reasonable basis to believe.* Section § 1024.37(b) prohibits a servicer from assessing on a borrower a premium charge or fee related to force-placed insurance unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the loan contract's requirement to maintain hazard insurance. Information about a borrower's hazard insurance received by a servicer from the borrower, the borrower's insurance provider, or the borrower's insurance agent, may provide a servicer with a reasonable basis to believe that the borrower has either complied with or failed to comply with the loan contract's requirement to maintain hazard insurance. If a servicer receives no such information, the servicer may satisfy the reasonable basis to believe standard if the servicer acts with reasonable diligence to ascertain a borrower's hazard insurance status and does not receive from the borrower, or otherwise have evidence of insurance coverage as provided in § 1024.37(c)(1)(iii). A servicer that complies with the notification requirements set forth in § 1024.37(c)(1)(i) and (ii) has acted with reasonable diligence.

37(c) Requirements before charging borrower for force-placed insurance.

37(c)(1) In general.

Paragraph 37(c)(1)(i).

1. *Assessing premium charge or fee.* Subject to the requirements of

§ 1024.37(c)(1)(i) through (iii), if not prohibited by State or other applicable law, a servicer may charge a borrower for force-placed insurance the servicer purchased, retroactive to the first day of any period of time in which the borrower did not have hazard insurance in place.

Paragraph 37(c)(1)(iii).

1. *Extension of time.* Applicable law, such as State law or the terms and conditions of a borrower's insurance policy, may provide for an extension of time to pay the premium on a borrower's hazard insurance after the due date. If a premium payment is made within such time, and the insurance company accepts the payment with no lapse in insurance coverage, then the borrower's hazard insurance is deemed to have had hazard insurance coverage continuously for purposes of § 1024.37(c)(1)(iii).

2. *Evidence demonstrating insurance.* As evidence of continuous hazard insurance coverage that complies with the loan contract's requirements, a servicer may require a copy of the borrower's hazard insurance policy declaration page, the borrower's insurance certificate, the borrower's insurance policy, or other similar forms of written confirmation. A servicer may reject evidence of hazard insurance coverage submitted by the borrower if neither the borrower's insurance provider nor insurance agent provides confirmation of the insurance information submitted by the borrower, or if the terms and conditions of the borrower's hazard insurance policy do not comply with the borrower's loan contract requirements.

Paragraph 37(c)(2)(v).

1. *Identifying type of hazard insurance.* If the terms of a mortgage loan contract requires a borrower to purchase both a homeowners' insurance policy and a separate hazard insurance policy to insure against loss resulting from hazards not covered under the borrower's homeowners' insurance policy, a servicer must disclose whether it is the borrower's homeowners' insurance policy or the separate hazard insurance policy for which it lacks evidence of coverage to comply with § 1024.37(c)(2)(v).

37(d) Reminder notice.

37(d)(1) In general.

1. When a servicer is required to deliver or place in the mail the written notice pursuant to § 1024.37(d)(1), the content of the reminder notice will be different depending on the insurance information the servicer has received from the borrower. For example:

i. Assume that, on June 1, the servicer places in the mail the written notice required by § 1024.37(c)(1)(i) to Borrower A. The servicer does not receive any insurance information from Borrower A. The servicer must deliver to Borrower A or place in the mail a reminder notice, with the information required by § 1024.37(d)(2)(i), at least 30 days after June 1 and at least 15 days before the servicer charges Borrower A for force-placed insurance.

ii. Assume the same example, except that Borrower A provides the servicer with insurance information on June 18, but the servicer cannot verify that Borrower A has hazard insurance in place continuously based on the information Borrower A provided (*e.g.,* the servicer cannot verify that Borrower A had coverage between June 10 and June 15). The servicer must either deliver to Borrower A or place in the mail a reminder notice, with the information required by in § 1024.37(d)(2)(ii), at least 30 days after June 1 and at least 15 days before charging Borrower A for force-placed insurance it obtains for the period between June 10 and June 15.

37(d)(2) Content of reminder notice.

37(d)(2)(i) Servicer receiving no insurance information.

Paragraph 37(d)(2)(i)(D).

1. *Reasonable estimate of the cost of force-placed insurance.* Differences between the amount of the estimated cost disclosed under § 1024.37(d)(2)(i)(D) and the actual cost later assessed to the borrower are permissible, so long as the estimated cost is based on the information reasonably available to the servicer at the time the disclosure is provided. For example, a mortgage investor's requirements may provide that the amount of coverage for force-placed insurance depends on the borrower's delinquency status (the number of days the borrower's mortgage payment is past due). The amount of coverage affects the cost of force-placed insurance. A servicer that provides an estimate of the cost of force-placed insurance based on the borrower's delinquency status at the time the disclosure is made complies with § 1024.37(d)(2)(i)(D).

37(d)(4) Updating notice with borrower information.

1. *Reasonable time.* A servicer may have to prepare the written notice required by § 1024.37(c)(1)(ii) in advance of delivering or placing the notice in the mail. If the notice has already been put into production, the servicer is not required to update the notice with new insurance information received about the borrower so long as the written notice was put into production within a reasonable time prior to the servicer delivering or placing the notice in the mail. For purposes of § 1024.37(d)(4), five days (excluding legal holidays, Saturdays, and Sundays) is a reasonable time.

37(e) Renewal or replacing force-placed insurance.

37(e)(1) In general.

1. For purposes of § 1024.37(e)(1), as evidence that the borrower has purchased hazard insurance coverage that complies with the loan contract's requirements, a servicer may require a borrower to provide a form of written confirmation as described in comment 37(c)(1)(iii)–2, and may reject evidence of coverage submitted by the borrower for the reasons described in comment 37(c)(1)(iii)–2.

37(e)(1)(iii) Charging before end of notice period.

1. *Example.* Section 1024.37(e)(1)(iii) permits a servicer to assess on a borrower a premium charge or fee related to renewing or replacing existing force-placed insurance promptly after the servicer receives evidence demonstrating that the borrower lacked hazard insurance coverage in compliance with the loan contract's requirements to maintain hazard insurance for any period of time following the expiration of the existing force-placed insurance. To illustrate, assume that on January 2, the servicer sends the notice required by § 1024.37(e)(1)(i). At 12:01 a.m. on January 12, the existing force-placed insurance the servicer had purchased on the borrower's property expires and the servicer replaces the expired force-placed insurance policy with a new policy. On February 5, the servicer receives evidence demonstrating the borrower has hazard insurance effective since 12:01 a.m. on January 31. The servicer may charge the borrower for force-placed insurance covering the period from 12:01 a.m. January 12 to 12:01 a.m. January 31, as early as February 5.

Paragraph 37(e)(2)(vii).

1. *Reasonable estimate of the cost of force-placed insurance.* The reasonable estimate requirement set forth in § 1024.37(e)(2)(vii) is the same reasonable estimate requirement set forth in § 1024.37(d)(2)(i)(D). See comment 37(d)(2)(i)(D)–1 regarding the reasonable estimate.

37(g) Cancellation of force-placed insurance.

Paragraph 37(g)(2).

1. *Period of overlapping insurance coverage.* Section 1024.37(g)(2) requires a servicer to refund to a borrower all force-placed insurance premium charges and related fees paid by the borrower for any period of overlapping insurance coverage and remove from the

borrower's account all force-placed insurance charges and related fees for such period. A period of overlapping insurance coverage means the period of time during which the force-placed insurance purchased by a servicer and the hazard insurance purchased by a borrower were in effect at the same time.

Section 1024.38—General Servicing Policies, Procedures, and Requirements

38(a) Reasonable policies and procedures.

1. *Policies and procedures.* A servicer may determine the specific policies and procedures it will adopt and the methods by which it will implement those policies and procedures so long as they are reasonably designed to achieve the objectives set forth in § 1024.38(b). A servicer has flexibility to determine such policies and procedures and methods in light of the size, nature, and scope of the servicer's operations, including, for example, the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints.

2. *Procedures used.* The term ''procedures'' refers to the actual practices followed by a servicer for achieving the objectives set forth in § 1024.38(b).

38(b) Objectives.

38(b)(1) Accessing and providing timely and accurate information.

Paragraph 38(b)(1)(ii).

1. *Errors committed by service providers.* A servicer's policies and procedures must be reasonably designed to provide for promptly obtaining information from service providers to facilitate achieving the objective of correcting errors resulting from actions of service providers, including obligations arising pursuant to § 1024.35.

Paragraph 38(b)(1)(iv).

1. *Accurate and current information for owners or assignees of mortgage loans relating to loan modifications.* The relevant current information to owners or assignees of mortgage loans includes, among other things, information about a servicer's evaluation of borrowers for loss mitigation options and a servicer's agreements with borrowers on loss mitigation options, including loan modifications. Such information includes, for example, information regarding the date, terms, and features of loan modifications, the components of any capitalized arrears, the amount of any servicer advances, and any assumptions regarding the value of a property used in evaluating any loss mitigation options.

38(b)(2) Properly evaluating loss mitigation applications.

Paragraph 38(b)(2)(ii).

1. *Means of identifying all available loss mitigation options.* Servicers must develop policies and procedures that are reasonably designed to enable servicer personnel to identify all loss mitigation options available for mortgage loans currently serviced by the mortgage servicer. For example, a servicer's policies and procedures must be reasonably designed to address how a servicer specifically identifies, with respect to each owner or assignee, all of the loss mitigation options that the servicer may consider when evaluating any borrower for a loss mitigation option and the criteria that should be applied by a servicer when evaluating a borrower for such options. In addition, a servicer's policies and procedures must be reasonably designed to address how the servicer will apply any specific thresholds for eligibility for a particular loss mitigation option established by an owner or assignee of a mortgage loan (*e.g.,* if the owner or assignee requires that a servicer only make a particular loss mitigation option available to a certain percentage of the loans that the servicer services for that owner or assignee, then the servicer's policies and procedures must be reasonably designed to determine in advance how the servicer will apply that threshold to those mortgage loans). A servicer's policies and procedures must also be reasonably designed to ensure that such information is readily accessible to the servicer personnel involved with loss mitigation, including personnel made available to the borrower as described in § 1024.40.

Paragraph 38(b)(2)(v).

1. *Owner or assignee requirements.* A servicer must have policies and procedures reasonably designed to evaluate a borrower for a loss mitigation option consistent with any owner or assignee requirements, even where the requirements of § 1024.41 may be inapplicable. For example, an owner or assignee may require that a servicer implement certain procedures to review a loss mitigation application submitted by a borrower less than 37 days before a foreclosure sale. Further, an owner or assignee may require that a servicer implement certain procedures to re-evaluate a borrower who has demonstrated a material change in the borrower's financial circumstances for a loss mitigation option after the servicer's initial evaluation. A servicer must have policies and procedures reasonably designed to implement these requirements even if such loss mitigation evaluations may not be required pursuant to § 1024.41.

38(b)(4) Facilitating transfer of information during servicing transfers.

Paragraph 38(b)(4)(i).

1. *Electronic document transfers.* A transferor servicer's policies and procedures may provide for transferring documents and information electronically, provided that the transfer is conducted in a manner that is reasonably designed to ensure the accuracy of the information and documents transferred and that enables a transferee servicer to comply with its obligations to the owner or assignee of the loan and with applicable law. For example, a transferor servicer must have policies and procedures reasonably designed to ensure that data can be properly and promptly boarded by a transferee servicer's electronic systems and that all necessary documents and information are available to, and can be appropriately identified by, a transferee servicer.

2. *Loss mitigation documents.* A transferor servicer's policies and procedures must be reasonably designed to ensure that the transfer includes any information reflecting the current status of discussions with a borrower regarding loss mitigation options, any agreements entered into with a borrower on a loss mitigation option, and any analysis by a servicer with respect to potential recovery from a non-performing mortgage loan, as appropriate.

Paragraph 38(b)(4)(ii).

1. *Missing loss mitigation documents and information.* A transferee servicer must have policies and procedures reasonably designed to ensure, in connection with a servicing transfer, that the transferee servicer receives information regarding any loss mitigation discussions with a borrower, including any copies of loss mitigation agreements. Further, the transferee servicer's policies and procedures must address obtaining any such missing information or documents from a transferor servicer before attempting to obtain such information from a borrower. For example, assume a servicer receives documents or information from a transferor servicer indicating that a borrower has made payments consistent with a trial or permanent loan modification but has not received information about the existence of a trial or permanent loan modification agreement. The servicer must have policies and procedures reasonably designed to identify whether any such loan modification agreement

exists with the transferor servicer and to obtain any such agreement from the transferor servicer.

38(b)(5) Informing borrowers of written error resolution and information request procedures.

1. *Manner of informing borrowers.* A servicer may comply with the requirement to maintain policies and procedures reasonably designed to inform borrowers of the procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36 by informing borrowers, through a notice (mailed or delivered electronically) or a Web site. For example, a servicer may comply with § 1024.38(b)(5) by including in the periodic statement required pursuant to § 1026.41 a brief statement informing borrowers that borrowers have certain rights under Federal law related to resolving errors and requesting information about their account, and that they may learn more about their rights by contacting the servicer, and a statement directing borrowers to a Web site that provides a description of the procedures set forth in §§ 1024.35 and 1024.36. Alternatively, a servicer may also comply with § 1024.38(b)(5) by including a description of the procedures set forth in §§ 1024.35 and 1024.36 in the written notice required by § 1024.35(c) and § 1024.36(b).

2. *Oral complaints and requests.* A servicer's policies and procedures must be reasonably designed to provide information to borrowers who are not satisfied with the resolution of a complaint or request for information submitted orally about the procedures for submitting written notices of error set forth in § 1024.35 and for submitting written requests for information set forth in § 1024.36.

38(c) Standard requirements.

38(c)(1)Record retention.

1. Methods of retaining records. Retaining records that document actions taken with respect to a borrower's mortgage loan account does not necessarily mean actual paper copies of documents. The records may be retained by any method that reproduces the records accurately (including computer programs) and that ensures that the servicer can easily access the records (including a contractual right to access records possessed by another entity).

38(c)(2) Servicing file.

1. *Timing.* A servicer complies with § 1024.38(c)(2) if it maintains information in a manner that facilitates compliance with § 1024.38(c)(2) beginning on or after January 10, 2014. A servicer is not required to comply with § 1024.38(c)(2) with respect to information created prior to January 10, 2014. For example, if a mortgage loan was originated on January 1, 2013, a servicer is not required by § 1024.38(c)(2) to maintain information regarding transactions credited or debited to that mortgage loan account in any particular manner for payments made prior to January 10, 2014. However, for payments made on or after January 10, 2014, a servicer must maintain such information in a manner that facilitates compiling such information into a servicing file within five days.

2. *Borrower requests for servicing file.* Section 1024.38(c)(2) does not confer upon any borrower an independent right to access information contained in the servicing file. Upon receipt of a borrower's request for a servicing file, a servicer shall provide the borrower with a copy of the information contained in the servicing file for the borrower's mortgage loan, subject to the procedures and limitations set forth in § 1024.36.

Paragraph 38(c)(2)(iv).

1. *Report of data fields.* A report of the data fields relating to a borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices means a report listing the relevant data fields by name, populated with any specific data relating to the borrower's mortgage loan account. Examples of data fields relating to a borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices include fields used to identify the terms of the borrower's mortgage loan, fields used to identify the occurrence of automated or manual collection calls, fields reflecting the evaluation of a borrower for a loss mitigation option, fields used to identify the owner or assignee of a mortgage loan, and any credit reporting history.

§ 1024.39—Early Intervention Requirements for Certain Borrowers

39(a) Live contact.

1. *Delinquency.* A borrower is delinquent for purposes of § 1024.39 as follows:

i. Delinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee. For example, if a payment due date is January 1 and the amount due is not fully paid during the 36-day period after January 1, the servicer must establish or make good faith efforts to establish live contact not later than 36 days after January 1—*i.e.,* by February 6.

ii. A borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment is not delinquent for purposes of § 1024.39.

iii. During the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, a borrower is not delinquent for purposes of § 1024.39 if the transferee servicer learns that the borrower has made a timely payment that has been misdirected to the transferor servicer and the transferee servicer documents its files accordingly. *See* § 1024.33(c)(1) and comment 33(c)(1)–2.

iv. A servicer need not establish live contact with a borrower unless the borrower is delinquent during the 36 days after a payment due date. If the borrower satisfies a payment in full before the end of the 36-day period, the servicer need not establish live contact with the borrower. For example, if a borrower misses a January 1 due date but makes that payment on February 1, a servicer need not establish or make good faith efforts to establish live contact by February 6.

2. *Establishing live contact.* Live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency. Live contact with a borrower includes telephoning or conducting an in-person meeting with the borrower, but not leaving a recorded phone message. A servicer may, but need not, rely on live contact established at the borrower's initiative to satisfy the live contact requirement in § 1024.39(a). Good faith efforts to establish live contact consist of reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer.

3. *Promptly inform if appropriate.*

i. *Servicer's determination.* It is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances. The following examples demonstrate when a servicer has made a reasonable determination regarding the appropriateness of providing information about loss mitigation options.

A. A servicer provides information about the availability of loss mitigation options to a borrower who notifies a servicer during live contact of a material adverse change in the borrower's

financial circumstances that is likely to cause the borrower to experience a long-term delinquency for which loss mitigation options may be available.

B. A servicer does not provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.

ii. *Promptly inform.* If appropriate, a servicer may inform borrowers about the availability of loss mitigation options orally, in writing, or through electronic communication, but the servicer must provide such information promptly after the servicer establishes live contact. A servicer need not notify a borrower about any particular loss mitigation options at this time; if appropriate, a servicer need only inform borrowers generally that loss mitigation options may be available. If appropriate, a servicer may satisfy the requirement in § 1024.39(a) to inform a borrower about loss mitigation options by providing the written notice required by § 1024.39(b)(1), but the servicer must provide such notice promptly after the servicer establishes live contact.

4. *Borrower's representative.* Section 1024.39 does not prohibit a servicer from satisfying the requirements § 1024.39 by establishing live contact with and, if applicable, providing information about loss mitigation options to a person authorized by the borrower to communicate with the servicer on the borrower's behalf. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf.

39(b) Written notice.

39(b)(1) Notice required.

1. *Delinquency.* For guidance on the circumstances under which a borrower is delinquent for purposes of § 1024.39, see comment 39(a)–1. For example, if a payment due date is January 1 and the payment remains unpaid during the 45-day period after January 1, the servicer must provide the written notice within 45 days after January 1—*i.e.,* by February 15. However, if a borrower satisfies a late payment in full before the end of the 45-day period, the servicer need not provide the written notice. For example, if a borrower misses a January 1 due date but makes that payment on February 1, a servicer need not provide the written notice by February 15.

2. *Frequency of the written notice.* A servicer need not provide the written notice under § 1024.39(a) more than once during a 180-day period beginning on the date on which the written notice is provided. For example, a borrower has a payment due on March 1. The amount due is not fully paid during the 45 days after March 1 and the servicer provides the written notice within 45 days after March 1—*i.e.,* by April 15. If the borrower subsequently fails to make a payment due April 1 and the amount due is not fully paid during the 45 days after April 1, the servicer need not provide the written notice again during the 180-day period beginning on April 15.

3. *Borrower's representative.* See comment 39(a)–4.

4. *Relationship to § 1024.39(a).* The written notice required under § 1024.39(b)(1) must be provided even if the servicer provided information about loss mitigation and foreclosure previously during an oral communication with the borrower under § 1024.39(a).

39(b)(2) Content of the written notice.

1. *Minimum requirements.* Section 1024.39(b)(2) contains minimum content requirements for the written notice. A servicer may provide additional information that the servicer determines would be helpful or which may be required by applicable law or the owner or assignee of the mortgage loan.

2. *Format.* Any color, number of pages, size and quality of paper, size and type of print, and method of reproduction may be used, provided each of the statements required by § 1024.39(b)(2) satisfies the clear and conspicuous standard in § 1024.32(a)(1).

3. *Delivery.* A servicer may satisfy the requirement to provide the written notice by combining other notices that satisfy the content requirements of § 1024.39(b)(2) into a single mailing, provided each of the statements required by § 1024.39(b)(2) satisfies the clear and conspicuous standard in § 1024.32(a)(1).

Paragraph 39(b)(2)(iii).

1. *Number of examples.* Section 1024.39(b)(2)(iii) does not require that a specific number of examples be disclosed, but borrowers are likely to benefit from examples of options that would permit them to retain ownership of their home and examples of options that may require borrowers to end their ownership to avoid foreclosure. The servicer may include a generic list of loss mitigation options that it offers to borrowers. The servicer may include a statement that not all borrowers will qualify for the listed options.

2. *Brief description.* An example of a loss mitigation option may be described in one or more sentences. If a servicer offers a loss mitigation option comprising several loss mitigation programs, the servicer may provide a generic description of the option without providing detailed descriptions of each program. For example, if the servicer offers several loan modification programs, the servicer may provide a generic description of ''loan modification.''

Paragraph 39(b)(2)(iv).

1. *Explanation of how the borrower may obtain more information about loss mitigation options.* A servicer may comply with § 1024.39(b)(2)(iv) by directing the borrower to contact the servicer for more detailed information on how to apply for loss mitigation options. For example, a general statement such as, ''contact us for instructions on how to apply'' would satisfy the requirement to inform the borrower how to obtain more information about loss mitigation options. However, to expedite the borrower's timely application for any loss mitigation options, servicers may provide more detailed instructions, such as by listing representative documents the borrower should make available to the servicer (such as tax filings or income statements), and an estimate of how quickly the servicer expects to evaluate a completed application and make a decision on loss mitigation options. Servicers may also supplement the written notice required by § 1024.39(b)(1) with a loss mitigation application form.

39(c) Conflicts with other law.

1. *Borrowers in bankruptcy.* Section 1024.39 does not require a servicer to communicate with a borrower in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case. To the extent permitted by such law or court order, servicers may adapt the requirements of § 1024.39 in any manner that would permit them to notify borrowers of loss mitigation options.

§ 1024.40—Continuity of Contact

40(a) In general.

1. *Delinquent borrower.* A borrower is not considered delinquent if the borrower has refinanced the mortgage loan, paid off the mortgage loan, brought the mortgage loan current by paying all amounts owed in arrears, or if title to the borrower's property has been transferred to a new owner through, for example, a deed-in-lieu of foreclosure, a sale of the borrower's property, including, as applicable, a short sale, or

a foreclosure sale. For purposes of responding to a borrower's inquiries and assisting a borrower with loss mitigation options, the term ''borrower'' includes a person authorized by the borrower to act on the borrower's behalf. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example by requiring that a person who claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf.

2. *Assignment of personnel.* A servicer has discretion to determine whether to assign a single person or a team of personnel to respond to a delinquent borrower. The personnel a servicer assigns to the borrower as described in § 1024.40(a)(1) may be single-purpose or multi-purpose personnel. Single-purpose personnel are personnel whose primary responsibility is to respond to a delinquent borrower's inquiries, and as applicable, assist the borrower with available loss mitigation options. Multi-purpose personnel can be personnel that do not have a primary responsibility at all, or personnel for whom responding to a delinquent borrower's inquiries, and as applicable, assisting the borrower with available loss mitigation options is not the personnel's primary responsibility. If the delinquent borrower files for bankruptcy, a servicer may assign personnel with specialized knowledge in bankruptcy law to assist the borrower.

3. *Delinquency.* For purposes of § 1024.40(a), delinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee. *See* the example set forth in comment 39(a)–1.i.

§ 1024.41—Loss mitigation options.

41(b) Receipt of a loss mitigation application.

41(b)(1) Complete loss mitigation application.

1. *In general.* A servicer has flexibility to establish its own application requirements and to decide the type and amount of information it will require from borrowers applying for loss mitigation options.

2. *When an inquiry or prequalification request becomes an application.* A servicer is encouraged to provide borrowers with information about loss mitigation programs. If in giving information to the borrower, the borrower expresses an interest in applying for a loss mitigation option and provides information the servicer would evaluate in connection with a loss mitigation application, the borrower's inquiry or prequalification request has become a loss mitigation application. A loss mitigation application is considered expansively and includes any ''prequalification'' for a loss mitigation option. For example, if a borrower requests that a servicer determine if the borrower is ''prequalified'' for a loss mitigation program by evaluating the borrower against preliminary criteria to determine eligibility for a loss mitigation option, the request constitutes a loss mitigation application.

3. *Examples of inquiries that are not applications.* The following examples illustrate situations in which only an inquiry has taken place and no loss mitigation application has been submitted:

i. A borrower calls to ask about loss mitigation options and servicer personnel explain the loss mitigation options available to the borrower and the criteria for determining the borrower's eligibility for any such loss mitigation option. The borrower does not, however, provide any information that a servicer would consider for evaluating a loss mitigation application.

ii. A borrower calls to ask about the process for applying for a loss mitigation option but the borrower does not provide any information that a servicer would consider for evaluating a loss mitigation application.

4. *Diligence requirements.* Although a servicer has flexibility to establish its own requirements regarding the documents and information necessary for a loss mitigation application, the servicer must act with reasonable diligence to collect information needed to complete the application. Further, a servicer must request information necessary to make a loss mitigation application complete promptly after receiving the loss mitigation application. Reasonable diligence includes, without limitation, the following actions:

i. A servicer requires additional information from the applicant, such as an address or a telephone number to verify employment; the servicer contacts the applicant promptly to obtain such information after receiving a loss mitigation application; and

ii. Servicing for a mortgage loan is transferred to a servicer and the borrower makes an incomplete loss mitigation application to the transferee servicer after the transfer; the transferee servicer reviews documents provided by the transferor servicer to determine if information required to make the loss mitigation application complete is contained within documents transferred by the transferor servicer to the servicer.

5. *Information not in the borrower's control.* A loss mitigation application is complete when a borrower provides all information required from the borrower notwithstanding that additional information may be required by a servicer that is not in the control of a borrower. For example, if a servicer requires a consumer report for a loss mitigation evaluation, a loss mitigation application is considered complete if a borrower has submitted all information required from the borrower without regard to whether a servicer has obtained a consumer report that a servicer has requested from a consumer reporting agency.

41(c) Review of loss mitigation applications.

41(c)(1) Complete loss mitigation application.

1. *Definition of ''evaluation.''* The conduct of a servicer's evaluation with respect to any loss mitigation option is in the sole discretion of a servicer. A servicer meets the requirements of § 1024.41(c)(1)(i) if the servicer makes a determination regarding the borrower's eligibility for a loss mitigation program. Consistent with § 1024.41(a), because nothing in section 1024.41 should be construed to permit a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or provision of, any loss mitigation option, § 1024.41(c)(1) does not require that an evaluation meet any standard other than the discretion of the servicer.

2. *Loss mitigation options available to a borrower.* The loss mitigation options available to a borrower are those options offered by an owner or assignee of the borrower's mortgage loan. Loss mitigation options administered by a servicer for an owner or assignee of a mortgage loan other than the owner or assignee of the borrower's mortgage loan are not available to the borrower solely because such options are administered by the servicer. For example:

i. A servicer services mortgage loans for two different owners or assignees of mortgage loans. Those entities each have different loss mitigation programs. loss mitigation options not offered by the owner or assignee of the borrower's mortgage loan are not available to the borrower; or

ii. The owner or assignee of a borrower's mortgage loan has established pilot programs, temporary

programs, or programs that are limited by the number of participating borrowers. Such loss mitigation options are available to a borrower. However, a servicer evaluates whether a borrower is eligible for any such program consistent with criteria established by an owner or assignee of a mortgage loan. For example, if an owner or assignee has limited a pilot program to a certain geographic area or to a limited number of participants, and the servicer determines that a borrower is not eligible based on any such requirement, the servicer shall inform the borrower that the investor requirement for the program is the basis for the denial.

3. *Offer of a non-home retention option.* A servicer's offer of a non-home retention option may be conditional upon receipt of further information not in the borrower's possession and necessary to establish the parameters of a servicer's offer. For example, a servicer complies with the requirement for evaluating the borrower for a short sale option if the servicer offers the borrower the opportunity to enter into a listing or marketing period agreement but indicates that specifics of an acceptable short sale transaction may be subject to further information obtained from an appraisal or title search.

41(c)(2) Incomplete loss mitigation application evaluation.

41(c)(2)(i) In general.

1. *Offer of a loss mitigation option without an evaluation of a loss mitigation application.* Nothing in § 1024.41(c)(2)(i) prohibits a servicer from offering loss mitigation options to a borrower who has not submitted a loss mitigation application. Further, nothing in § 1024.41(c)(2)(i) prohibits a servicer from offering a loss mitigation option to a borrower who has submitted an incomplete loss mitigation application where the offer of the loss mitigation option is not based on any evaluation of information submitted by the borrower in connection with such loss mitigation application. For example, if a servicer offers trial loan modification programs to all borrowers who become 150 days delinquent without an application or consideration of any information provided by a borrower in connection with a loss mitigation application, the servicer's offer of any such program does not violate § 1024.41(c)(2)(i), and a servicer is not required to comply with § 1024.41 with respect to any such program, because the offer of the loss mitigation option is not based on an evaluation of a loss mitigation application.

2. Servicer discretion. Although a review of a borrower's incomplete loss mitigation application is within a servicer's discretion, and is not required by § 1024.41, a servicer may be required separately, in accordance with policies and procedures maintained pursuant to § 1024.38(b)(2)(v), to properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options available to the borrower pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Such evaluation may be subject to requirements applicable to loss mitigation applications otherwise considered incomplete pursuant to § 1024.41.

41(c)(2)(ii) Reasonable time.

1. *Significant period of time.* A significant period of time under the circumstances may include consideration of the timing of the foreclosure process. For example, if a borrower is less than 50 days before a foreclosure sale, an application remaining incomplete for 15 days may be a more significant period of time under the circumstances than if the borrower is still less than 120 days delinquent on a mortgage loan obligation.

41(d) Denial of loan modification options.

Paragraph 41(d)(1).

1. *Investor requirements.* If a trial or permanent loan modification option is denied because of a requirement of an owner or assignee of a mortgage loan, the specific reasons in the notice provided to the borrower must identify the owner or assignee of the mortgage loan and the requirement that is the basis of the denial. A statement that the denial of a loan modification option is based on an investor requirement, without additional information specifically identifying the relevant investor or guarantor and the specific applicable requirement, is insufficient. However, where an owner or assignee has established an evaluation criteria that sets an order ranking for evaluation of loan modification options (commonly known as a waterfall) and a borrower has qualified for a particular loan modification option in the ranking established by the owner or assignee, it is sufficient for the servicer to inform the borrower, with respect to other loan modification options ranked below any such option offered to a borrower, that the investor's requirements include the use of such a ranking and that an offer of a loan modification option necessarily results in a denial for any other loan modification options below the option for which the borrower is eligible in the ranking.

2. *Net present value calculation.* If a trial or permanent loan modification is denied because of a net present value calculation, the specific reasons in the notice provided to the borrower must include the inputs used in the net present value calculation.

3. *Other notices.* A servicer may combine other notices required by applicable law, including, without limitation, a notice with respect to an adverse action required by Regulation B (12 CFR 1002 *et seq.*) or a notice required pursuant to the Fair Credit Reporting Act, with the notice required pursuant to § 1024.41(d), unless otherwise prohibited by applicable law.

4. *Determination not to offer a loan modification option constitutes a denial.* A servicer's determination not to offer a borrower a loan modification available to the borrower constitutes a denial of the borrower for that loan modification option, notwithstanding whether a servicer offers a borrower a different loan modification option or other loss mitigation option.

41(f) Prohibition on foreclosure referral.

41(f)(1) Pre-foreclosure review period.

1. *First notice or filing required by applicable law.* The first notice or filing required by applicable law refers to any document required to be filed with a court, entered into a land record, or provided to a borrower as a requirement for proceeding with a judicial or non-judicial foreclosure process. Such notices or filings include, for example, a foreclosure complaint, a notice of default, a notice of election and demand, or any other notice that is required by applicable law in order to pursue acceleration of a mortgage loan obligation or sale of a property securing a mortgage loan obligation.

41(g) Prohibition on foreclosure sale.

1. *Dispositive motion.* The prohibition on a servicer moving for judgment or order of sale includes making a dispositive motion for foreclosure judgment, such as a motion for default judgment, judgment on the pleadings, or summary judgment, which may directly result in a judgment of foreclosure or order of sale. A servicer that has made any such motion before receiving a complete loss mitigation application has not moved for a foreclosure judgment or order of sale if the servicer takes reasonable steps to avoid a ruling on such motion or issuance of such order prior to completing the procedures required by § 1024.41, notwithstanding whether any such action successfully avoids a ruling on a dispositive motion or issuance of an order of sale.

2. *Proceeding with the foreclosure process.* Nothing in § 1024.41(g) prevents a servicer from proceeding with the foreclosure process, including

any publication, arbitration, or mediation requirements established by applicable law, when the first notice or filing for a foreclosure proceeding occurred before a servicer receives a complete loss mitigation application so long as any such steps in the foreclosure process do not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale, in violation of § 1024.41.

3. *Interaction with foreclosure counsel.* A servicer is responsible for promptly instructing foreclosure counsel retained by the servicer not to proceed with filing for foreclosure judgment or order of sale, or to conduct a foreclosure sale, in violation of § 1024.41(g) when a servicer has received a complete loss mitigation application, which may include instructing counsel to move for a continuance with respect to the deadline for filing a dispositive motion.

4. *Loss mitigation applications submitted 37 days or less before foreclosure sale.* Although a servicer is not required to comply with the requirements in § 1024.41 with respect to a loss mitigation application submitted 37 days or less before a foreclosure sale, a servicer is required separately, in accordance with policies and procedures maintained pursuant to § 1024.38(b)(2)(v) to properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options available to the borrower pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Such evaluation may be subject to requirements applicable to a review of a loss mitigation application submitted by a borrower 37 days or less before a foreclosure sale.

Paragraph 41(g)(3).

1. *Short sale listing period.* An agreement for a short sale transaction, or other similar loss mitigation option, typically includes marketing or listing periods during which a servicer will allow a borrower to market a short sale transaction. A borrower is deemed to be performing under an agreement on a short sale, or other similar loss mitigation option, during the term of a marketing or listing period.

2. *Short sale agreement.* If a borrower has not obtained an approved short sale transaction at the end of any marketing or listing period, a servicer may determine that a borrower has failed to perform under an agreement on a loss mitigation option. An approved short sale transaction is a short sale transaction that has been approved by all relevant parties, including the servicer, other affected lienholders, or insurers, if applicable, and the servicer has received proof of funds or financing, unless circumstances otherwise indicate that an approved short sale transaction is not likely to occur.

41(h) Appeal process.

Paragraph 41(h)(3).

1. *Supervisory personnel.* The appeal may be evaluated by supervisory personnel that are responsible for oversight of the personnel that conducted the initial evaluation, as long as the supervisory personnel were not directly involved in the initial evaluation of the borrower's complete loss mitigation application.

41(i) Duplicative requests.

1. *Servicing transfers.* A transferee servicer is required to comply with the requirements of § 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer. Documents and information transferred from a transferor servicer to a transferee servicer may constitute a loss mitigation application to the transferee servicer and may cause a transferee servicer to be required to comply with the requirements of § 1024.41 with respect to a borrower's mortgage loan account.

2. *Application in process during servicing transfer.* A transferee servicer must obtain documents and information submitted by a borrower in connection with a loss mitigation application during a servicing transfer, consistent with policies and procedures adopted pursuant to § 1024.38. A servicer that obtains the servicing of a mortgage loan for which an evaluation of a complete loss mitigation option is in process should continue the evaluation to the extent practicable. For purposes of § 1024.41(e)(1), 1024.41(f), 1024.41(g), and 1024.41(h), a transferee servicer must consider documents and information received from a transferor servicer that constitute a complete loss mitigation application for the transferee servicer to have been received by the transferee servicer as of the date such documents and information were provided to the transferor servicer.

Appendix MS—Mortgage Servicing Model Forms and Clauses

1. *In general.* This appendix contains model forms and clauses for mortgage servicing disclosures required by §§ 1024.33, 37, and 39. Each of the model forms is designated for uses in a particular set of circumstances as indicated by the title of that model form or clause. Although use of the model forms and clauses is not required, servicers using them appropriately will be in compliance with disclosure requirements of §§ 1024.33, 37, and 39. To use the forms appropriately, information required by regulation must be set forth in the disclosures.

2. *Permissible changes.* Servicers may make certain changes to the format or content of the forms and clauses and may delete any disclosures that are inapplicable without losing the protection from liability so long as those changes do not affect the substance, clarity, or meaningful sequence of the forms and clauses. Servicers making revisions to that effect will lose their protection from civil liability. Except as otherwise specifically required, acceptable changes include, for example:

i. Use of ''borrower'' and ''servicer'' instead of pronouns.

ii. Substitution of the words ''lender'' and ''servicer'' for each other.

iii. Addition of graphics or icons, such as the servicer's corporate logo.

Appendix MS–3—Model Force-Placed Insurance Notice Forms

1. Where the model forms MS–3(A), MS–3(B), MS–3(C), and MS–3(D) use the term ''hazard insurance,'' the servicer may substitute ''hazard insurance'' with ''homeowners' insurance'' or ''property insurance.''

Appendix MS–4—Model Clauses for the Written Early Intervention Notice

1. *Model MS–4(A).* These model clauses illustrate how a servicer may provide its contact information, how a servicer may request that the borrower contact the servicer, and how the servicer may inform the borrower how to obtain additional information about loss mitigation options, as required by § 1024.39(b)(2)(i), (ii), and (iv).

2. *Model MS–4(B).* These model clauses illustrate how the servicer may inform the borrower of loss mitigation options that may be available, as required by § 1024.39(b)(2)(iii), if applicable. A servicer may include clauses describing particular loss mitigation options to the extent such options are available. Model MS–4(B) does not contain sample clauses for all loss mitigation options that may be available. The language in the model clauses contained in square brackets is optional; a servicer may comply with the disclosure requirements of § 1024.39(b)(2)(iii) by using language substantially similar to the language in the model clauses, providing additional detail about the options, or by adding or substituting applicable loss mitigation options for options not represented in these model clauses, provided the information disclosed is accurate and clear and conspicuous.

3. *Model MS–4(C).* These model clauses illustrate how a servicer may provide contact information for housing counselors, as required by § 1024.39(b)(2)(v). A servicer may, at its option, provide the Web site and telephone number for either the Bureau's or the Department of Housing and Urban Development's housing counselors list, as provided by paragraphs § 1024.39(b)(2)(v).

Dated: January 17, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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Part III

Bureau of Consumer Financial Protection

12 CFR Part 1026

Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z); Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2012–0033]

RIN 3170–AA14

Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection is amending Regulation Z, which implements the Truth in Lending Act and the official interpretation to the regulation, which interprets the requirements of Regulation Z. This final rule implements provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding mortgage loan servicing. Specifically, this final rule implements Dodd-Frank Act sections addressing initial rate adjustment notices for adjustable-rate mortgages, periodic statements for residential mortgage loans, prompt crediting of mortgage payments, and responses to requests for payoff amounts. This final rule also amends current rules governing the scope, timing, content, and format of disclosures to consumers regarding the interest rate adjustments of their variable-rate transactions. Concurrently with the issuance of this final rule, the Bureau is amending Regulation X, which contains companion rules implementing amendments to the Real Estate Settlement Procedures Act of 1974.

DATES: This final rule is effective on January 10, 2014.

FOR FURTHER INFORMATION CONTACT:

Regulation Z (TILA): Whitney Patross, Attorney; Marta Tanenhaus or Mitchell E. Hochberg, Senior Counsels, Office of Regulations, at (202) 435–7700.

Regulation X (RESPA): Whitney Patross, Attorney; Jane Gao, Terry Randall or Michael Scherzer, Counsels; Lisa Cole or Mitchell E. Hochberg, Senior Counsels, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Bureau of Consumer Financial Protection (Bureau) is amending Regulation Z, which implements the Truth in Lending Act (TILA) and the official interpretation to the regulation (the 2013 TILA Servicing Final Rule). The final rule implements provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding mortgage loan servicing.[1] Specifically, this final rule implements Dodd-Frank Act sections addressing initial interest rate adjustment notices for adjustable-rate mortgages (ARMs), periodic statements for residential mortgage loans, prompt crediting of mortgage payments, and responses to requests for payoff amounts. This final rule also amends current rules governing the scope, timing, content, and format of disclosures to consumers occasioned by the interest rate adjustments of their variable-rate transactions. Concurrently with the issuance of this final rule, the Bureau is amending Regulation X, which contains companion rules implementing amendments to the Real Estate Settlement Procedures Act of 1974 (the 2013 RESPA Servicing Final Rule).

On August 10, 2012, the Bureau issued proposed rules that would have amended Regulation X, which implements RESPA,[2] as well as Regulation Z, which implements TILA,[3] regarding mortgage servicing requirements.[4] The Proposed Servicing Rules proposed to implement the Dodd-Frank Act amendments to TILA and RESPA with respect to, among other things, periodic mortgage statements, disclosures for ARMs, prompt crediting of mortgage loan payments, requests for mortgage loan payoff statements, error resolution, information requests, and protections relating to force-placed insurance. In the 2012 RESPA Servicing Proposal, the Bureau also proposed to use its authority to adopt requirements relating to servicer policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications.[5] The proposals sought to address fundamental problems that underlie many consumer complaints and recent regulatory and enforcement actions, as set forth in more detail below.

The Bureau is finalizing the Proposed Servicing Rules with respect to nine major topics, as summarized below, as well as certain technical and streamlining amendments. The goals of the Final Servicing Rules are to provide better disclosure to consumers of their mortgage loan obligations and to better inform consumers of, and assist consumers with, options that may be available for consumers having difficulty with their mortgage loan obligations. The amendments also address critical servicer practices relating to, among other things, correcting errors, imposing charges for force-placed insurance, crediting mortgage loan payments, and providing payoff statements. The Bureau's final rules are set forth in two separate notices because some provisions implement requirements that Congress imposed under TILA while other provisions implement requirements Congress imposed under RESPA.[6]

A. Major Topics in the Final Servicing Rules

1. Periodic billing statements (2013 TILA Servicing Final Rule). Creditors, assignees, and servicers must provide a periodic statement for each billing cycle containing, among other things, information on payments currently due and previously made, fees imposed, transaction activity, application of past payments, contact information for the servicer and housing counselors, and, where applicable, information regarding delinquencies. These statements must meet the timing, form, and content requirements provided in the rule. The rule contains sample forms that may be used. The periodic statement requirement generally does not apply to fixed-rate loans if the servicer provides a coupon book, so long as the coupon book contains certain information specified in the rule and certain other information specified in the rule is

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

[2] *See* Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrowers* (Aug. 10, 2012) available at *http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/*. The proposal was published in the **Federal Register** on September 17, 2012. 77 FR 57200 (Sept. 17 2012) (2012 RESPA Servicing Proposal).

[3] *See* Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrowers* (August 10, 2012) available at *http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/*. This proposal was also published in the **Federal Register** on September 17, 2012. 77 FR 57318 (Sept. 17, 2012) (2012 TILA Servicing Proposal; and, together with the 2012 RESPA Servicing Proposal, the Proposed Servicing Rules).

[4] The 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule are referred to collectively as the Final Servicing Rules.

[5] For ease of discussion, this notice uses the term ''discretionary rulemakings'' to refer to a set of regulations implemented using the Bureau's authorities under section 6(j), 6(k)(1)(E), or 19(a) of RESPA to expand requirements beyond those explicit in RESPA. The ''discretionary rulemakings'' include requirements relating to servicer policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications, as set forth in §§ 1024.38–1024.41.

[6] Note that TILA and RESPA differ in their terminology. Whereas Regulation Z generally refers to ''consumers'' and ''creditors,'' Regulation X generally refers to ''borrowers'' and ''lenders.''

made available to the consumer. The rule also includes an exemption for small servicers as discussed below.

2. Interest rate adjustment notices (2013 TILA Servicing Final Rule). Creditors, assignees, and servicers must provide a consumer whose mortgage has an adjustable rate with a notice between 210 and 240 days prior to the first payment due after the rate first adjusts. This notice may contain an estimate of the new rate and new payment. Creditors, assignees, and servicers also must provide a notice between 60 and 120 days before payment at a new level is due when a rate adjustment causes the payment to change. The current annual notice that must be provided for ARMs for which the interest rate, but not the payment, has changed over the course of the year is no longer required. The rule contains model and sample forms that servicers may use.

3. *Prompt payment crediting and payoff statements (2013 TILA Servicing Final Rule).* Servicers must promptly credit periodic payments from borrowers as of the day of receipt. A periodic payment consists of principal, interest, and escrow (if applicable). If a servicer receives a payment that is less than the amount due for a periodic payment, the payment may be held in a suspense account. When the amount in the suspense account covers a periodic payment, the servicer must apply the funds to the consumer's account. In addition, creditors, assignees, and servicers must provide an accurate payoff balance to a consumer no later than seven business days after receipt of a written request from the consumer for such information.

4. Force-placed insurance (2013 RESPA Servicing Final Rule). Servicers are prohibited from charging a borrower for force-placed insurance coverage unless the servicer has a reasonable basis to believe the borrower has failed to maintain hazard insurance, as required by the loan agreement, and has provided required notices. An initial notice must be sent to the borrower at least 45 days before charging the borrower for force-placed insurance coverage, and a second reminder notice must be sent no earlier than 30 days after the first notice. The rule contains model forms that servicers may use. If a borrower provides proof of hazard insurance coverage, the servicer must cancel any force-placed insurance policy and refund any premiums paid for overlapping periods in which the borrower's coverage was in place. The rule also provides that charges related to force-placed insurance (other than those subject to State regulation as the business of insurance or authorized by Federal law for flood insurance) must be for a service that was actually performed and must bear a reasonable relationship to the servicer's cost of providing the service. Where the borrower has an escrow account for the payment of hazard insurance premiums, the servicer is prohibited from obtaining force-place insurance where the servicer can continue the borrower's homeowner insurance, even if the servicer needs to advance funds to the borrower's escrow account to do so. The rule against obtaining force-placed insurance in cases in which hazard insurance may be maintained through an escrow account exempts small servicers, as discussed below, so long as any force-placed insurance purchased by the small servicer is less expensive to a borrower than the amount of any disbursement the servicer would have made to maintain hazard insurance coverage.

5. Error resolution and information requests (2013 RESPA Servicing Final Rule). Servicers are required to meet certain procedural requirements for responding to written information requests or complaints of errors. The rule requires servicers to comply with the error resolution procedures for certain listed errors as well as any error relating to the servicing of a mortgage loan. Servicers may designate a specific address for borrowers to use. Servicers generally are required to acknowledge the request or notice of error within five days. Servicers also generally are required to correct the error asserted by the borrower and provide the borrower written notification of the correction, or to conduct an investigation and provide the borrower written notification that no error occurred, within 30 to 45 days. Further, within a similar amount of time, servicers generally are required to acknowledge borrower written requests for information and either provide the information or explain why the information is not available.

6. General servicing policies, procedures, and requirements (2013 RESPA Servicing Final Rule). Servicers are required to establish policies and procedures reasonably designed to achieve objectives specified in the rule. The reasonableness of a servicer's policies and procedures takes into account the size, scope, and nature of the servicer's operations. Examples of the specified objectives include accessing and providing accurate and timely information to borrowers, investors, and courts; properly evaluating loss mitigation applications in accordance with the eligibility rules established by investors; facilitating oversight of, and compliance by, service providers; facilitating transfer of information during servicing transfers; and informing borrowers of the availability of written error resolution and information request procedures. In addition, servicers are required to retain records relating to each mortgage loan until one year after the mortgage loan is discharged or servicing is transferred, and to maintain certain documents and information for each mortgage loan in a manner that enables the servicers to compile it into a servicing file within five days. This section includes an exemption for small servicers as discussed below. The Bureau and prudential regulators will be able to supervise servicers within their jurisdiction to assure compliance with these requirements but there will not be a private right of action to enforce these provisions.

7. Early intervention with delinquent borrowers (2013 RESPA Servicing Final Rule). Servicers must establish or make good faith efforts to establish live contact with borrowers by the 36th day of their delinquency and promptly inform such borrowers, where appropriate, that loss mitigation options may be available. In addition, a servicer must provide a borrower a written notice with information about loss mitigation options by the 45th day of a borrower's delinquency. The rule contains model language servicers may use for the written notice. This section includes an exemption for small servicers as discussed below.

8. Continuity of contact with delinquent borrowers (2013 RESPA Servicing Final Rule). Servicers are required to maintain reasonable policies and procedures with respect to providing delinquent borrowers with access to personnel to assist them with loss mitigation options where applicable. The policies and procedures must be reasonably designed to ensure that a servicer assigns personnel to a delinquent borrower by the time a servicer provides such borrower with the written notice required by the early intervention requirements, but in any event, by the 45th day of a borrower's delinquency. These personnel should be accessible to the borrower by phone to assist the borrower in pursuing loss mitigation options, including advising the borrower on the status of any loss mitigation application and applicable timelines. The personnel should be able to access all of the information provided by the borrower to the servicer and provide that information, when appropriate, to those responsible for evaluating the borrower for loss mitigation options. This section includes an exemption for small servicers as discussed below. The

Bureau and the prudential regulators will be able to supervise servicers within their jurisdiction to assure compliance with these requirements but there will not be a private right of action to enforce these provisions.

9. Loss Mitigation Procedures (2013 RESPA Servicing Final Rule). Servicers are required to follow specified loss mitigation procedures for a mortgage loan secured by a borrower's principal residence. If a borrower submits an application for a loss mitigation option, the servicer is generally required to acknowledge the receipt of the application in writing within five days and inform the borrower whether the application is complete and, if not, what information is needed to complete the application. The servicer is required to exercise reasonable diligence in obtaining documents and information to complete the application.

For a complete loss mitigation application received more than 37 days before a foreclosure sale, the servicer is required to evaluate the borrower, within 30 days, for all loss mitigation options for which the borrower may be eligible in accordance with the investor's eligibility rules, including both options that enable the borrower to retain the home (such as a loan modification) and non-retention options (such as a short sale). Servicers are free to follow ''waterfalls'' established by an investor to determine eligibility for particular loss mitigation options. The servicer must provide the borrower with a written decision, including an explanation of the reasons for denying the borrower for any loan modification option offered by an owner or assignee of a mortgage loan with any inputs used to make a net present value calculation to the extent such inputs were the basis for the denial. A borrower may appeal a denial of a loan modification program so long as the borrower's complete loss mitigation application is received 90 days or more before a scheduled foreclosure sale.

The rule restricts ''dual tracking,'' where a servicer is simultaneously evaluating a consumer for loan modifications or other alternatives at the same time that it prepares to foreclose on the property. Specifically, the rule prohibits a servicer from making the first notice or filing required for a foreclosure process until a mortgage loan account is more than 120 days delinquent. Even if a borrower is more than 120 days delinquent, if a borrower submits a complete application for a loss mitigation option before a servicer has made the first notice or filing required for a foreclosure process, a servicer may not start the foreclosure process unless (1) the servicer informs the borrower that the borrower is not eligible for any loss mitigation option (and any appeal has been exhausted), (2) a borrower rejects all loss mitigation offers, or (3) a borrower fails to comply with the terms of a loss mitigation option such as a trial modification.

If a borrower submits a complete application for a loss mitigation option after the foreclosure process has commenced but more than 37 days before a foreclosure sale, a servicer may not move for a foreclosure judgment or order of sale, or conduct a foreclosure sale, until one of the same three conditions has been satisfied. In all of these situations, the servicer is responsible for promptly instructing foreclosure counsel retained by the servicer not to proceed with filing for foreclosure judgment or order of sale, or to conduct a foreclosure sale, as applicable.

This section includes an exemption for small servicers as defined above. However, a small servicer is required to comply with two requirements: (1) A small servicer may not make the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, and (2) a small servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a loss mitigation agreement.

All of the provisions in the section relating to loss mitigation can be enforced by individuals. Additionally, the Bureau and the prudential regulators can also supervise servicers within their jurisdiction to assure compliance with these requirements.

B. Scope of the Final Servicing Rules

The Final Servicing Rules have somewhat different scopes, with respect to the types of mortgage loan transactions covered and the loans that are exempted. With respect to the 2013 TILA Servicing Final Rule, certain requirements, specifically the periodic statement and ARM disclosure requirements, only apply to closed-end mortgage loans, whereas other requirements, specifically the requirements for crediting of payments and providing payoff statements, apply to both open-end and closed-end mortgage loans. Reverse mortgage transactions and timeshare plans are exempt from the periodic statement requirement. ARMs with terms of one year or less are exempt from the ARM disclosure requirements.

With respect to the 2013 RESPA Servicing Final Rule, certain requirements generally apply to federally related mortgage loans that are closed-end, with certain exemptions for loans on property of 25 acres or more, business-purpose loans, temporary financing, loans secured by vacant land, and certain loan assumptions or conversions. Open-end lines of credit (home equity plans) are generally exempt from the requirements in the 2013 RESPA Servicing Final Rule. The general servicing policies, procedure, and requirements, early intervention, continuity of contact, and loss mitigation procedures provisions are generally inapplicable to servicers of reverse mortgage transactions or to servicers of mortgage loans for which the servicers are also qualified lenders under the Farm Credit Act of 1971.

In the 2013 TILA Servicing Final Rule, the Bureau is exercising its authority under TILA to provide an exemption from the periodic statement requirement for small servicers, defined as servicers that service 5,000 mortgage loans or less and only service mortgage loans the servicer or an affiliate owns or originated (small servicers). In the 2013 RESPA Servicing Final Rule, the Bureau has elected not to extend to these small servicers most provisions of the Final Rule that are not being promulgated to implement specific mandates in the Dodd-Frank Act but are, instead, being issued by the Bureau, in the exercise of its discretion, pursuant to its general rulemaking authority under RESPA, as amended by the Dodd-Frank Act. The exemptions from the discretionary rulemakings include those relating to general servicing policies, procedures, and requirements; early intervention with delinquent borrowers; continuity of contact; and most of the requirements for evaluating and responding to loss mitigation applications. Further, the Bureau is not restricting small servicers from purchasing force-placed insurance for borrowers with escrow accounts for the payment of hazard insurance, so long as the cost to the borrower of the force-placed insurance obtained by a small servicer is less than the amount the small servicer would be required to disburse from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges were paid in a timely manner. Small servicers are required to comply with limited loss mitigation procedure requirements. These include (1) a prohibition on making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent and (2) a prohibition on making the first notice or filing or moving for foreclosure judgment or order of sale, or conducting a

foreclosure sale, when a borrower is performing pursuant to the terms of a loss mitigation agreement. The exemptions applicable to small servicers in the 2013 TILA Servicing Rule and the 2013 RESPA Servicing Rule are also being extended to Housing Finance Agencies, without regard to the number of mortgage loans serviced by any such agency, and these agencies are included within the definition of small servicer.

II. Background

A. Overview of the Mortgage Servicing Market and Market Failures

The mortgage market is the single largest market for consumer financial products and services in the United States, with approximately $10.3 trillion in loans outstanding.[7] Mortgage servicers play a vital role within the broader market by undertaking the day-to-day management of mortgage loans on behalf of lenders who hold the loans in their portfolios or (where a loan has been securitized) investors who are entitled to the loan proceeds.[8] Over 60 percent of mortgage loans are serviced by mortgage servicers for investors.

Servicers' duties typically include billing borrowers for amounts due, collecting and allocating payments, maintaining and disbursing funds from escrow accounts, reporting to creditors or investors, and pursuing collection and loss mitigation activities (including foreclosures and loan modifications) with respect to delinquent borrowers. Indeed, without dedicated companies to perform these activities, it is questionable whether a secondary market for mortgage-backed securities would exist in this country.[9] Given the nature of their activities, servicers can have a direct and profound impact on borrowers.

Mortgage servicing is performed by banks, thrifts, credit unions, and non-banks under a variety of business models. In some cases, creditors service mortgage loans that they originate or purchase and hold in portfolio. Other creditors sell the ownership of the underlying mortgage loan, but retain the mortgage servicing rights in order to retain the relationship with the borrower, as well as the servicing fee and other ancillary income. In still other cases, servicers have no role at all in origination or loan ownership, but rather purchase mortgage servicing rights on securitized loans or are hired to service a portfolio lender's loans.[10]

These different servicing structures can create difficulties for borrowers if a servicer makes mistakes, fails to invest sufficient resources in its servicing operations, or avoids opportunities to work with borrowers for the mutual benefit of both borrowers and owners or assignees of mortgage loans. Although the mortgage servicing industry has numerous participants, the industry is highly concentrated, with the five largest servicers servicing approximately 53 percent of outstanding mortgage loans in this country.[11] Small servicers generally operate in discrete segments of the market, for example, by specializing in servicing delinquent loans, or by servicing loans that they originate.[12]

Contracts between the servicer and the mortgage loan owner specify the rights and responsibilities of each party. In the context of securitized loans, the contracts may require the servicer to balance the competing interests of different classes of investors when borrowers become delinquent. Certain provisions in servicing contracts may limit the servicer's ability to offer certain types of loan modifications to borrowers. Such contracts also may limit the circumstances under which owners or assignees of mortgage loans can transfer servicing rights to a different servicer. Further, servicer contracts govern servicer requirements to advance payments to owners of mortgage loans, and to recoup advances made by servicers, including from ultimate recoveries on liquidated properties.

Compensation structures vary somewhat for loans held in portfolio and securitized loans,[13] but have tended to make pure mortgage servicing (where the servicer has no role in origination) a high-volume, low-margin business. Such compensation structures incentivize servicers to ensure that investment in operations closely tracks servicer expectations of delinquent accounts, and an increase in the number of delinquent accounts a servicer must service beyond that projected by the servicer strains available servicer resources. A servicer will expect to recoup its investment in purchasing mortgage servicing rights and earn a profit primarily through a net servicing fee (which is typically expressed as a constant rate assessed on unpaid mortgage balances), interest float on payment accounts between receipt and disbursement, and cross-marketing other products and services to borrowers. Under this business model, servicers act primarily as payment collectors and processors, and will have limited incentives to provide other customer service. Servicers greatly vary in the extent to which they invest in

[7] Inside Mortg. Fin., *Outstanding 1–4 Family Mortgage Securities, in* 2 The 2012 Mortgage Market Statistical Annual 7 (2012). For general background on the market and the recent crisis, *see* the 2012 TILA–RESPA Proposal available at *http://www.consumerfinance.gov/knowbeforeyouowe/* (last accessed Jan. 10, 2013).

[8] As of June 2012, approximately 36% of outstanding mortgage loans were held in portfolio; 54% of mortgage loans were owned through mortgage-backed securities issued by Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), together referred to as the government-sponsored enterprises (GSEs), as well as securities issued by the Government National Mortgage Association (Ginnie Mae); and 10% of loans were owned through private label mortgage-backed securities. *Strengthening the Housing Market and Minimizing Losses to Taxpayers, Hearing Before the S. Comm. on Banking, Housing and Urban Affairs* (2012)(Testimony of Laurie Goodman, Amherst Securities), available at *http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=53bda60f-64c1-43d8-9adf-a693c31eb56b&Witness_ID=b06f2fb1-59dd-4881-86cb-1082464d3119.* A securitization results in the economic separation of the legal title to the mortgage loan and a beneficial interest in the mortgage loan obligation. In a securitization transaction, a securitization trust is the owner or assignee of a mortgage loan. An investor is a creditor of the trust and is entitled to cash flows that are derived from the proceeds of the mortgage loans. In general, certain investors (or an insurer entitled to act on behalf of the investors) may direct the trust to take action as the owner or assignee of the mortgage loans for the benefit of the investors or insurers. *See, e.g.,* Adam Levitin & Tara Twomey, *Mortgage Servicing,* 28 Yale J. on Reg. 1, 11 (2011) (Levitin & Twomey).

[9] *See, e.g.,* Levitin & Twomey, at 11 (''All securitizations involved third-party servicers * * * [m]ortgage servicers provide the critical link between mortgage borrowers and the SPV and RMBS investors, and servicing arrangements are an indispensable part of securitization.'').

[10] *See, e.g.,* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755, 763 (2011) (''Thompson'').

[11] *See Top 100 Mortgage Servicers in 2012,* Inside Mortg. Fin., Sept. 28, 2012, at 13 (As of the end of the fourth quarter of 2011, the top five largest servicers serviced $5.66 trillion of mortgage loans).

[12] Fitch Ratings, *U.S. Residential and Small Balance Commercial Mortgage Servicer Rating Criteria,* at 14–15 (Jan. 31, 2011), *available at http://www.fitchratings.com.* (account required to access information).

[13] At securitization, the cash flow that was part of interest income is bifurcated between the loan and the mortgage servicing right (MSR). The MSR represents the present value of all the cash flows, both positive and negative, related to servicing a mortgage. Prime MSRs are largely created by the GSE minimum servicing fee rate, which is calculated as 25 basis points (bps) per annum. The servicing fee rate is typically paid to the servicer monthly and the monthly amount owed is calculated by multiplying the pro rata portion of the servicing fee rate by the stated principal balance of the mortgage loan at the payment due date. Accounting rules require that a capitalized asset be created if the ''compensation'' for servicing (including float/ancillary) exceeds ''adequate compensation.'' For loans held in portfolio, there is no bifurcation of the interest income from the loan. The owner of the loan simply negotiates pricing, terms, and standards with the servicer, which, at larger institutions, is typically a separate affiliate or subsidiary of the owner of the loans. Keefe, Bruyette & Woods, Inc., PowerPoint Presentation, *KBW Mortgage Matters: Mortgage Servicing Primer* (Apr. 2012).

customer service infrastructure. For example, servicer staffing ratios have varied between approximately 100 loans per full-time employee to over 4,000 loans per full time employee.[14] Servicers are generally not subject to market discipline from consumers because consumers have little opportunity to switch servicers. Rather, servicers compete to obtain business from the owners of loans—investors, assignees, and creditors—and thus competitive pressures tend to drive servicers to lower the price of servicing and scale their investment in providing service to consumers accordingly.

Servicers also earn revenue from fees assessed on borrowers, including fees on late payments, fees for obtaining force-placed insurance, and fees for services, such as responding to telephone inquiries, processing telephone payments, and providing payoff statements.[15] As a result, servicers have an incentive to look for opportunities to impose fees on borrowers to enhance revenues.

These attributes of the servicing market created problems for certain borrowers even prior to the financial crisis. For example, borrowers experienced problems with mortgage servicers even during regional mortgage market downturns that preceded the financial crisis.[16] There is evidence that borrowers were subjected to improper fees that servicers had no reasonable basis to impose, improper force-placed insurance practices, and improper foreclosure and bankruptcy practices.[17]

When the financial crisis erupted, many servicers—and especially the larger servicers with their scale business models—were ill-equipped to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they were required to process. Mortgage loan delinquency rates nearly doubled between 2007 and 2009 from 5.4 percent of first-lien mortgage loans to 9.4 percent of first-lien mortgage loans.[18] Many servicers lacked the infrastructure, trained staff, controls, and procedures needed to manage effectively the flood of delinquent mortgages they were forced to handle.[19] One study of complaints to the HOPE Hotline reported that over half of the complaints (27,000 out of 48,000) were from borrowers who could not reach their servicers and obtain information about the status of applications they had submitted for options to avoid foreclosure.[20]

Consumer harm has manifested in many different areas, and major servicers have entered into significant settlement agreements with Federal and State governmental authorities. For example, in April 2011, the Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System (Board), following on-site reviews of foreclosure processing at 14 federally regulated mortgage servicers, found significant deficiencies at each of the servicers reviewed. As a result, the OCC and the Board undertook formal enforcement actions against several major servicers for unsafe and unsound residential mortgage loan servicing practices.[21] These enforcement actions generally focused on practices relating to (1) filing of foreclosure documents without, for example, proper affidavits or notarizations; (2) failing to always ensure that loan documents were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time; (3) failing to devote sufficient financial, staffing, and managerial resources to ensure proper administration of foreclosure processes; (4) failing to devote adequate oversight, internal controls, policies and procedures, compliance risk management, internal audit, third-party management, and training to foreclosure processes; and (5) failing to oversee sufficiently outside counsel and other third-party providers handling foreclosure-related services.[22]

Other investigations of servicers have found similar problems. For example, the Government Accountability Office (GAO) has found pervasive problems in broad segments of the mortgage servicing industry impacting delinquent borrowers, such as servicers who have misled, or failed to communicate with, borrowers, lost or mishandled borrower-provided documents supporting loan modification requests, and generally provided inadequate service to delinquent borrowers. It has been recognized in Inspector General reports, and the Bureau has learned from outreach with mortgage investors, that servicers may be acting to maximize their self-interests in the handling of delinquent borrowers, rather than the interests of owners or assignees of mortgage loans.[23]

[14] Richard O'Brien, *High Time for High-Touch,* Mortg. Banking, Feb. 1, 2009, at 39. Industry participants generally indicated to the Bureau that servicers targeted a loan to employee ratio of 1,000–1,200 mortgage loans per full time employee for mortgage loans that are current, and 125—150 mortgage loans per full time employee for mortgage loans that are delinquent. Between 1992 and 2000, as servicers sought to make their operations more efficient, loans serviced per full time employee increased from approximately 700 loans in 1992 to over 1,200 loans by 2000. Michael A. Stegman et al., *Preventative Servicing is Good for Business and Affordable Homeownership Policy,* 18 Housing Pol'y Debate 243, 274 (2007). As an example of current mortgage servicing staffing levels, Ocwen services 162 mortgage loans per servicing employee. *See* Morningstar Credit Ratings, LLC, *Operational Risk Assessment—Ocwen Loan Servicing, LLC,* at 7 (2012) available at *http://www.ocwen.com/docs/Morningstar-Sept-2012.pdf.*

[15] *See, e.g.,* Bank of America, Mortgage Servicing Fees, available at *https://www8.bankofamerica.com/home-loans/mortgage-servicing-fees.go* (last accessed Jan. 11, 2013); Metro Credit Union, Mortgage Servicing Fee Schedule, available at *http://www.metrocu.org/home/fiFiles/static/documents/Mortgage_Servicing_Fee_Schedule.pdf* (last accessed Jan. 6, 2013); Acqura Loan Services, Mortgage Loan Servicing Fee Schedule, available at *http://www.acqurals.com/feeschedule.html* (last accessed Jan. 11, 2013); Sovereign Bank, FAQ—*What are the* Mortgage Loan Servicing Fees?, available at *https://customerservice.sovereignbank.com/app/answers/detail/a_id/22/~/what-are-the-mortgage-loan-servicing-fees%3F* (last accessed Jan. 11, 2013).

[16] *See Problems in Mortgage Servicing from Modification to Foreclosure: Hearings Before the S. Comm. on Banking, Hous., & Urban Affairs,* 111th Cong. 53–54 (2010) (statement of Thomas J. Miller, Iowa Att'y Gen.) (''Miller Testimony''). *See also,* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers,* 15 Housing Pol'y Debate 753 (2004), available at *http://ssrn.com/abstract=992095.*

[17] *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers,* 15 Housing Pol'y Debate 753 (2004), available at *http://ssrn.com/abstract=992095* (collecting cases).

[18] U.S. Census Bureau, *Table 1194: Mortgage Originations and Delinquency and Foreclosure Rates: 1990 to 2010,* in The 2012 Statistical Abstract of the United States, (2012), available at *http://www.census.gov/compendia/statab/2012/tables/12s1194.pdf* (last accessed Jan. 6, 2013).

[19] *See* U.S. Dep't of the Treasury, *Making Contact: The Path to Improving Mortgage Industry Communication with Homeowners,* at 3 (2012), *available at http://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf* (last accessed Jan. 6, 2013).

[20] *See* U.S. Gov't Accountability Office, GAO–10–634, *Troubled Asset Relief Program: Further Actions Needed To Fully and Equitably Implement Foreclosure Mitigation Programs,* at 15 (2010).

[21] Press Release, Office of the Comptroller of the Currency, NR 2011–47, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), available at *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html;* Press Release, Fed. Reserve Bd., *Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing* (April 13, 2011) (''Fed Press Release''), available at *http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm.* In addition to enforcement actions against major servicers, Federal agencies have also undertaken formal enforcement actions against major service providers to mortgage servicers.

[22] Press Release, Federal Reserve Bd., *Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing* (April 13, 2011), available at *http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm.* None of the servicers admitted or denied the OCC's or Federal Reserve Board's findings.

[23] *See, e.g.,* Jody Shenn, *PIMCO: This is who's actually going to be punished by the mortgage fraud settlement,* Bloomberg News, February 10, 2012; *cf.,* Office of Inspector Gen., Fed. Hous. Fin. Agency, *Evaluation of FHFA's Oversight of Fannie Mae's*

The mortgage servicing industry, however, is not monolithic. Some servicers provide high levels of customer service. Some of these servicers are compensated by investors in a way that incentivizes them to provide this level of service in order to optimize investor outcomes.[24] Other servicers provide high levels of customer service because they are servicing loans of their own retail customers within their local community or (in the case of credit unions) membership base. These servicers seek to provide other products and services to consumers—and to others within the community or membership base—and thus have an interest in preserving their reputations and relationships with their consumers. For example, as discussed further below, small servicers that the Bureau consulted as part of a process required under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) described their businesses as requiring a ''high touch'' model of customer service both to ensure loan performance and maintain a strong reputation in their local communities.[25]

B. The National Mortgage Settlement and Other Regulatory Requirements

In response to the unprecedented financial crisis and pervasive problems in mortgage servicing, including the systemic violation of State foreclosure laws by many of the largest servicers, State and Federal regulators have engaged in a number of individual servicing related enforcement and regulatory actions over the last few years and have begun discussions about comprehensive national standards.

For example, the Federal government, joined by 49 State Attorneys General,[26] entered into settlements with the nation's five largest servicers in February 2012 (the National Mortgage Settlement).[27] Exhibit A to each of the settlements is a Settlement Term Sheet, which sets forth standards that each of the five largest servicers must follow to comply with the terms of the settlement.[28] The settlement standards contained in the Settlement Term Sheet are sub-divided into the following eight categories: (1) Foreclosure and bankruptcy information and documentation; (2) third-party provider oversight; (3) bankruptcy; (4) loss mitigation; (5) protections for military personnel; (6) restrictions on servicing fees; (7) force-placed insurance; and (8) general servicer duties and prohibitions.

Apart from the National Mortgage Settlement, Federal regulatory agencies have also issued guidance on mortgage servicing and loan modifications,[29] conducted coordinated reviews of the nation's largest servicers,[30] and taken enforcement actions against individual companies.[31] Further, the Bureau and other Federal agencies have been engaged since spring 2011 in informal discussions about the potential development of national mortgage servicing standards through interagency regulations and guidance.

Servicers are currently required to navigate overlapping requirements governing their servicing responsibilities. Servicers must comply with requirements established by owners or assignees of mortgage loans. These include, as applicable, (1) servicing guidelines required by Fannie Mae, Freddie Mac, and Ginnie Mae; (2) government insured program guidelines issued by the Federal Housing Administration (FHA), Department of Veterans Affairs (VA), and the Rural Housing Service; (3) contractual agreements with investors (such as pooling and servicing agreements and subservicing contracts); and (4) bank or institution policies.

Servicers are also required to consider the impact of State and even local regulation on mortgage servicing. Significantly, New York, California, and Oregon have all adopted varying statutory or regulatory restrictions on mortgage servicers. For example, the Superintendent of Banks of the State of New York has repeatedly adopted short-term emergency regulations governing mortgage servicers on a continuous basis since July 2010.[32] These regulations impose obligations on servicers with respect to, among other things, consumer complaints and inquiries, statements of accounts, crediting of payments, payoff balances, and loss mitigation procedures.[33] The California Homeowner Bill of Rights, which was enacted in 2012, imposes requirements on servicers with respect to evaluations of borrowers for loss mitigation options before various foreclosure documents may be filed for California's non-judicial foreclosure

Transfer of Mortgage Servicing Rights from Bank of America to High Touch Servicers, at 12 (Sept. 18, 2012) (''FHA OIG MSR Report''). The Inspector General for FHFA observed that ''Fannie Mae may have had (what one of its executives described as) a 'misalignment of interests' with its servicers. As guarantor or loan holder, Fannie Mae could face significant losses from a default. However, a servicer earns only a fraction of a percent of the unpaid balance of a mortgage it services and, thus, the fees derived from any particular loan may not—at least for the servicer—provide adequate incentive to undertake anything more than the bare minimum of effort in order to prevent a default. This will typically include sending out delinquency notices to borrowers who have not made timely payments, telephoning delinquent borrowers, and, ultimately, initiating foreclosure proceedings.''

[24] For example, Fannie Mae rewards servicers that provide high levels of customer service by compensating them through (1) base servicing fees, (2) incentive payments for mortgage modifications, and (3) a performance payment based on the servicer's success as contrasted with that of a benchmark portfolio. *See* FHA OIG MSR Report at 12.

[25] *See* U.S. Consumer Fin. Prot. Bureau, Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking (Jun. 11, 2012) (''Small Business Review Panel Report''), available at *http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0002.*

[26] Oklahoma elected not to participate in the National Mortgage Settlement and executed a separate settlement with the servicers that are parties to the National Mortgage Settlement. *See* State of Oklahoma, Oklahoma Mortgage Settlement Fact Sheet (Feb. 9, 2012), available at *http://www.oag.ok.gov/oagweb.nsf/0/2737eec87426c427862579c10003c950/$FILE/Oklahoma%20Mortgage%20Settlement%20FAQs.pdf* (last accessed Jan. 10, 2013).

[27] The National Mortgage Settlement is available at: *http://www.nationalmortgagesettlement.com/.* The five servicers subject to the settlement are Bank of America, JP Morgan Chase, Wells Fargo, CitiMortgage, and Ally/GMAC.

[28] *See* Attys. Gen., *National Mortgage Settlement.*

[29] *See* Press Release, Fed. Res. Bd., *Federal Reserve Board releases action plans and engagement letter to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (May 24, 2012), *available at http://www.federalreserve.gov/newsevents/press/enforcement/20120524a.htm;* Press Release, Fed. Res. Bd., *Federal Reserve Board releases action plans for supervised financial institutions to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (Feb. 27, 2012), *available at http://www.federalreserve.gov/newsevents/press/enforcement/20120227a.htm;* Press Release, Office of the Comptroller of the Currency, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), *available at http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html.*

[30] *See* Fed. Res. Bd., *Federal Reserve Board releases action plans and engagement letter to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (May 24, 2012), *available at http://www.federalreserve.gov/newsevents/press/enforcement/20120524a.htm.*

[31] *See* Press Release, Fed. Res. Bd., Federal Reserve Board *releases action plans and engagement letter to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (May 24, 2012), available at *http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm;* Press Release, Fed. Res. Bd., Federal Reserve Board *releases action plans for supervised financial institutions to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (Feb. 27, 2012), available at *http://www.federalreserve.gov/newsevents/press/enforcement/20120227a.htm;* Press Release, Office of the Comptroller of the Currency, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), available at *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html.*

[32] New York State Department of Financial Services, Explanatory All Institutions Letter (October 7, 2012), available at *http://www.dfs.ny.gov/legal/regulations/emergency/banking/ar419lt.htm* (last accessed Dec. 7, 2012).

[33] 3 N.Y.C.R.R. 419.1 *et seq.*

process.[34] Further, Oregon implemented regulations on mortgage servicers not to engage in unfair or deceptive conduct by: assessing fees for payments made on or before a payment due date; assessing or collecting fees not authorized by a security instrument or mortgage, misrepresenting information relating to a loan modification or set forth in an affidavit, declaration, or other sworn statement detailing a borrower's default and the servicer's right to foreclose; failing to comply with certain provisions of RESPA; or failing to deal with a borrower in good faith.[35] Further, Massachusetts has recently proposed new regulations to protect consumers with respect to mortgage servicing practices, including with respect to loss mitigation procedures.[36]

C. TILA and Regulation Z

In 1968, Congress enacted TILA, 15 U.S.C. 1601 *et seq.,* based on findings that the informed use of credit resulting from consumers' awareness of the cost of credit would enhance economic stability and competition among consumer credit providers. One of the purposes of TILA is to promote the informed use of consumer credit by requiring disclosures about its costs and terms. TILA requires additional disclosures for loans secured by consumers' homes and permits consumers to rescind certain transactions secured by their principal dwellings when the required disclosures are not provided. Section 105(a) of TILA directs the Bureau (and formerly directed the Board) to prescribe regulations to carry out TILA's purposes and specifically authorizes the Bureau, among other things, to issue regulations that contain such additional requirements, classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for all or any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with TILA, or prevent circumvention or evasion thereof. *See* 15 U.S.C. 1604(a).

General rulemaking authority for TILA transferred to the Bureau in July 2011, other than for certain motor vehicle dealers in accordance with Dodd-Frank Act section 1029, 12 U.S.C. 5519. Pursuant to the Dodd-Frank Act and TILA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation Z, 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). 76 FR 79768 (Dec. 22, 2011). This rule did not impose any new substantive obligations but did make technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. The Bureau's Regulation Z took effect on December 30, 2011. The Official Interpretation interprets the requirements of the regulation and provides guidance in applying the rules to specific transactions. *See* 12 CFR part 1026, Supp. I.

Prior to the adoption of the Dodd-Frank Act, TILA set forth requirements on creditors that were implemented by servicers, including disclosures regarding interest rate adjustments on adjustable-rate mortgage loans. Regulation Z, which implements TILA, was amended by the Board to impose certain limited requirements directly on servicers, such as requirements to credit payments timely and provide payoff balances, as well as a prohibition on pyramiding of late fees.[37]

ARM rate adjustment disclosures. The Board adopted the rule that is current § 1026.20(c) in 1987, as part of a larger revision of Regulation Z.[38] In 2009, the Board proposed to revise regulations governing ARM disclosures as part of a larger revision of closed-end provisions in Regulation Z (2009 Closed-End Proposal). In that proposal, the Board said that, in 1987, it set the minimum time for providing notice of a rate adjustment at 25 days before the first payment at the new level is due to track the rules of the OCC and to provide creditors with flexibility in giving adjustment notices for a variety of ARMs.[39] It also noted that, as of 2009, neither the OCC nor any other Federal financial institution supervisory agency had any comprehensive disclosure requirements for ARMs.[40]

Prompt crediting and payoff statements. In 2008 the Board published a final rule amending Regulation Z to establish new regulatory protections for consumers in the residential mortgage market from unfair, abusive, or deceptive lending and servicing practices.[41] Among other protections, this rule established 12 CFR 226.36(c), prohibiting certain practices of servicers of consumer credit transactions secured by a consumers principal dwelling. This rule provided that no servicer shall: (1) Fail to credit a consumer's periodic payment as of the date received; (2) impose a late fee or delinquency charge where the late fee or delinquency charge is due only to a consumer's failure to include in a current payment a late fee or delinquency charge imposed on earlier payments; or (3) fail to provide an accurate payoff statement within a reasonable time of request.

D. The Dodd-Frank Act

The Dodd-Frank Act imposes certain new requirements related to mortgage servicing. As set forth above, some of these new requirements are amendments to TILA addressed in this final rule and others are amendments to RESPA, addressed in the 2013 RESPA Servicing Final Rule. Sections 1418, 1420, and 1464 amend TILA to include protections with respect to mortgage servicing. There are three new mortgage servicing requirements under TILA. First, for closed-end credit transactions secured by a consumer's principal residence, section 1418 of the Dodd-Frank Act adds a new section 128A to TILA. 15 U.S.C. 1638a. TILA section 128A states that, for hybrid ARMs with a fixed interest rate for an introductory period that adjusts or resets to an adjustable interest rate at the end of such period, a notice must be provided six months prior to the initial adjustment of the interest rate for closed-end credit transactions secured by a consumer's principal residence. Section 1418 of the Dodd-Frank Act permits the Bureau to extend this requirement to ARMs that are not hybrid ARMs.

Second, section 1420 of the Dodd-Frank Act, which adds section 128(f) to TILA, requires the creditor, assignee, or servicer of any residential mortgage loan to transmit to the consumer, for each billing cycle, a periodic statement that sets forth certain specified information in a conspicuous and prominent

[34] *See* Cal. Civ. Code § 2923.6.

[35] OAR 137–020–0805. Notably, Oregon's regulations initially implemented mortgage servicing requirements with respect to open-end lines of credit (home equity plans) and, further, required servicers to comply with GSE guidelines for loan modifications. Oregon suspended these requirements and reissued the rule as OAR 137–020–0805 on the basis that such suspension was necessary to facilitate compliance. *See* In the matter of: Suspension of OAR 137–020–0800 and Adoption of OAR 137–020–0805 (February 15, 2012), available at *http://www.oregonmla.org/WebsiteAttachments/Misc%20Events%20Attachments/OAR%20137-020-0805%202%2015%2012%20AG%20Servicing%20Rules%20(00540177).pdf* (last accessed Jan. 6, 2013).

[36] *See* Press Release, Massachusetts Division of Banks Proposes New Standards for Mortgage Servicing (Nov. 8, 2012), available at *http://www.mass.gov/ocabr/docs/dob/standards-for-mort-servicing2012.pdf* (last accessed Jan. 6, 2013).

[37] *See* 12 CFR 1026.36(c).

[38] 52 FR 48665 (Dec. 24, 1987).

[39] 74 FR 43232, 43269 (Aug. 26, 2009) (*citing* 52 FR 48665, 48668 (Dec. 24, 1987)).

[40] 74 FR 43232, 43272.

[41] 73 FR 44522 (July 30, 2008).

manner. 15 U.S.C. 1638(f). The statute also gives the Bureau the authority to require additional content to be included in the periodic statement. The statute provides an exemption to the periodic statement requirement for fixed-rate loans where the consumer is given a coupon book containing substantially the same information as the statement.

Third, section 1464 of the Dodd-Frank Act adds sections 129F and 129G to TILA, which generally codifies existing Regulation Z requirements for the prompt crediting of mortgage payments received by servicers in connection with consumer credit transactions secured by a consumer's dwelling and requirements for a creditor or servicer to send accurate and timely responses to consumer requests for payoff amounts for home loans. 15 U.S.C. 1639f, 1639g.

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]'' 12 U.S.C. 5512(b)(1). TILA and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, the Bureau proposed to exercise its authority under section 1022(b) of the Dodd-Frank Act to prescribe rules to carry out the purposes of TILA and title X and prevent evasion of those laws.

III. Summary of the Rulemaking Process

A. Outreach and Consumer Testing

The Bureau has conducted extensive outreach in developing the Final Servicing Rules. Prior to issuing the Proposed Servicing Rules on August 10, 2012, Bureau staff met with consumers, consumer advocates, mortgage servicers, force-placed insurance carriers, industry trade associations, other Federal regulatory agencies, and other interested parties to discuss various aspects of the statute, servicing industry operations, and consumer harm impacts. Outreach included meetings with numerous individual servicers to understand their operations and the potential benefits and burdens of the proposed mortgage servicing rules. As discussed above and in connection with section 1022 of the Dodd-Frank Act below, the Bureau has also consulted with relevant Federal regulators both regarding the Bureau's specific rules and the need for and potential contents of national mortgage servicing standards in general.

Further, the Bureau solicited input from small servicers through a Small Business Review Panel (Small Business Review Panel) with the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) and the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).[42] The Small Business Review Panel's findings and recommendations are contained in the Small Business Review Panel Report.[43] The Bureau has adopted recommendations provided by the participants on the Small Business Review Panel and includes below a discussion of such recommendations in connection with the applicable requirement.

Further, prior to the issuing the Proposed Servicing Rules on August 10, 2012, the Bureau engaged ICF Macro (Macro), a research and consulting firm that specializes in designing disclosures and consumer testing, to conduct one-on-one cognitive interviews regarding disclosures connected with mortgage servicing. During the first quarter of 2012, the Bureau and Macro worked closely to develop and test disclosures that would satisfy the requirements of the Dodd-Frank Act and provide information to consumers in a manner that would be understandable and useful. These disclosures related the ARM interest rate adjustment notices and the periodic statement disclosure set forth in this rule as well as the forced-placed insurance notices set forth in the 2013 RESPA Servicing Final Rule.

Macro conducted three rounds of one-on-one cognitive interviews with a total of 31 participants in the Baltimore, Maryland metro area (Towson, Maryland), Memphis, Tennessee, and Los Angeles, California. Participants were all consumers who held a mortgage loan and represented a range of ages and education levels. Efforts were made to recruit a significant number of participants who had trouble making mortgage payments in the last two years. During the interviews, participants were shown disclosure forms for periodic statements, ARM interest rate adjustment notices, and force-placed insurance notices. Participants were asked specific questions to test their understanding of the information presented in each of the disclosures, how easily they could find various pieces of information presented in each of the disclosures, and how they would use the information presented in each of the disclosures. The disclosures were revised after each round of testing.

After the Bureau issued the Proposed Servicing Rules, Macro conducted a fourth round of one-on-one cognitive interviews with eight participants in Philadelphia, Pennsylvania. Again, participants were consumers who held a mortgage loan and represented a range of ages and education levels. During the interviews, participants were asked to review two different versions of a servicing transfer notice and early intervention model clauses, which relate to requirements the Bureau is implementing under RESPA. Participants were asked specific questions to test their reaction to and understanding of the content of the servicing transfer notice and the early intervention model clauses. This process was repeated for each of the five clauses being tested. Specific findings from the consumer testing are discussed in detail throughout where relevant.[44]

One commenter, identifying itself as a research organization, observed that the consumer testing the Bureau has conducted with respect to the mortgage servicing disclosures follows the path of evidence-based decision-making. This commenter asserted, however, that the Bureau should consider undertaking steps in evaluating the proposed forms, including possibly undertaking additional testing because other consumer financial disclosures, including the forms the Bureau proposed with the 2012 TILA–RESPA Proposal, have gone through more testing. At the same time, however, the commenter observed that the decreased level of testing might be justified on various grounds, such as, for example, the fact that studies have found that small numbers of individuals can identify the vast majority of usability problems, the fact that the testing was done with participants familiar with mortgages, and the fact that the Bureau is working on a tight schedule to finalize rules by January 21, 2013 when statutory provisions would go into effect.

The Bureau believes that the testing it conducted is appropriate. The Bureau observes that the forms the Bureau proposed as part of the 2012 TILA–

[42] The Small Business Regulatory Enforcement Fairness Act of 1996 requires the Bureau to convene a Small Business Review Panel before proposing a rule that may have a significant economic impact on a substantial number of small entities. *See* Public Law 104–121, tit. II, 110 Stat. 847, 857 (1996) (as amended by Pub. L. 110–28, sec. 8302 (2007)).

[43] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking* (June 11, 2012) (''Small Business Review Panel Final Report''), available at *http://www.consumerfinance.gov.*

[44] ICF Int'l, Inc., *Summary of Findings: Design and Testing of Mortgage Servicing Disclosures* (Aug. 2012) (''Macro Report''), *available at http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0003.*

RESPA Proposal contained significantly more complicated financial information than the forms finalized as part of the current rulemakings. Additionally, the 2012 TILA–RESPA Proposal, when finalized, would substantially change consumers' mortgage shopping experience; by contrast, the Final Mortgage Servicing Rules are intended to improve, but not substantially alter, consumers' experience with their mortgage servicers. These differences, in terms of level of complication and degree of change from current practice, justify the different levels of resources the Bureau allocated to the two different testing projects. Lastly, Macro's findings show that there was notable consistency across the different rounds of testing in terms of participant comprehension that, in combination with the Bureau's expertise and knowledge of consumer understanding and behavior, gave the Bureau confidence to rely on the forms that were developed and refined through testing as a basis for the model forms included in the Final Servicing Rules.

The Bureau further emphasizes that it is not relying solely on the consumer testing to determine that any particular disclosure will be effective. The Bureau is also relying on its knowledge of, and expertise in, consumer understanding and behavior, as well as principles of effective disclosure design.

B. Small Business Regulatory Enforcement Fairness Act

As required by SBREFA, the Bureau convened a Small Business Review Panel to assess the impact of the possible rules on small servicers and to help the Bureau determine to what extent it may be appropriate to consider adjusting these standards for small servicers, to the extent permitted by law. Thus, on April 9, 2012, the Bureau provided Advocacy with the formal notification and other information required under section 609(b)(1) of the Regulatory Flexibility Act (RFA) to convene the panel.

In order to obtain feedback from small servicers, the Bureau, in consultation with Advocacy, identified five categories of small entities that may be subject to the proposed rule: Commercial banks/savings institutions, credit unions, non-depositories engaged primarily in lending funds with real estate as collateral, non-depositories primarily engaged in loan servicing, and certain non-profit organizations. The Bureau, in consultation with Advocacy, selected 16 representatives to participate in the Small Business Review Panel process from the categories of entities that may be subject to the Proposed Servicing Rules. The participants included representatives from each of the categories identified by the Bureau and comprised a diverse group of individuals with regard to geography and type of locality (*i.e.,* rural, urban, suburban, or metropolitan areas), as described in chapter 7 of the Small Business Review Panel Report.

On April 10, 2012, the Bureau convened the Small Business Review Panel. In order to collect the advice and recommendations of Small Entity Representatives, the Panel held an outreach meeting/teleconference on April 24, 2012 (Panel Outreach Meeting). To help the Small Entity Representatives prepare for the Panel Outreach Meeting, the Panel circulated briefing materials that summarized the proposals under consideration at that time, posed discussion issues, and provided information about the SBREFA process generally.[45] All 16 small entities participated in the Panel Outreach Meeting either in person or by telephone. The Small Business Review Panel also provided the Small Entity Representatives with an opportunity to submit written feedback until May 1, 2012. In response, the Small Business Review Panel received written feedback from five of the representatives.[46]

On June 11, 2012, the Small Business Review Panel submitted to the Director of the Bureau the written Small Business Review Panel Report, which includes the following: Background information on the proposals under consideration at the time; information on the types of small entities that would be subject to those proposals and on the participants who were selected to advise the Small Business Review Panel; a summary of the Panel's outreach to obtain the advice and recommendations of those participants; a discussion of the comments and recommendations of the participants; and a discussion of the Small Business Review Panel findings, focusing on the statutory elements required under section 603 of the RFA, 5 U.S.C. 609(b)(5).

In connection with issuing the Proposed Servicing Rules, the Bureau carefully considered the feedback from the small entities and the findings and recommendations in the Small Business Review Panel Report. The section-by-section analyses for the Final Servicing Rules discuss this feedback and the specific findings and recommendations of the Small Business Review Panel, as applicable. The SBREFA process provided the Small Business Review Panel and the Bureau with an opportunity to identify and explore opportunities to mitigate the burden of the rule on small entities while achieving the rule's purposes. It is important to note, however, that the Small Business Review Panel prepared the Small Business Review Panel Report at a preliminary stage of the proposal's development and that the report—in particular, the findings and recommendations—should be considered in that light. Any options identified in the Small Business Review Panel Report for reducing the proposed rule's regulatory impact on small entities were expressly subject to further consideration, analysis, and data collection by the Bureau to ensure that the options identified were practicable, enforceable, and consistent with RESPA, TILA, the Dodd-Frank Act, and their statutory purposes.

C. Summary of the Proposed Servicing Rule

The 2012 TILA Servicing Proposal would have amended Regulation Z to implement requirements relating to interest rate adjustment disclosures, periodic mortgage statements, payoff statements, and prompt crediting of payments. The 2012 TILA Servicing Proposal would have amended current § 1026.20(c) to revise the timeframe for providing the ARM adjustment notice from the current requirement of between 25 and 120 days before the first payment at a new level is due to between 60 and 120 days. The proposed rule also would have grandfathered existing ARMs that contractually will not be able to comply with the new timing, *i.e.,* those with look-back periods of less than 45 days. The proposed rule also would have required the disclosure required by current § 1026.20(c) to include additional information. Such additional information would have included: (1) A statement that the consumer's interest rate is scheduled to adjust, a statement that the adjustment may change the mortgage payment, the time period the current interest rate has been in effect, and the dates of the future rate adjustments, (2) the date when the new payment is due after the adjustment, (3) any interest rate or payment limits; any unapplied carryover interest and the earliest date it could be applied, (4) additional amortization information for negatively-amortizing and interest-only

[45] The Bureau posted these materials on its Web site and invited the public to email remarks on the materials. Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Outlines Borrower-Friendly Approach to Mortgage Servicing* (Apr. 9, 2012), *available at http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-outlines-borrower-friendly-approach-to-mortgage-servicing/* (last accessed Jan. 6, 2013).

[46] This written feedback is attached as appendix A to the Small Business Review Panel Report.

loans, and (5) the amount and expiration date of any prepayment penalty.

The proposed rule would also have implemented section 1418 of the Dodd-Frank Act by requiring creditors, assignees, or servicers to provide a new one-time notice to consumers six to seven months prior to the first time the interest rate of their adjustable-rate mortgages adjusts. The initial interest rate adjustment notices proposed in § 1026.20(d) would have included much of the same information listed above for proposed § 1026.20(c). The proposed notice in § 1026.20(d) would have disclosed additional information, including a list of alternatives consumers may pursue, including refinancing, renegotiation of loan terms, payment forbearance, and pre-foreclosure sales; contact information for the appropriate State housing finance agency; and information on how to access a list of government-certified counseling agencies and programs. The proposed rule would have included model and sample forms for the requirements in § 1026.20(c) and (d).

The 2012 TILA Servicing Proposal further would have required creditors, assignees, and servicers to provide consumers with a periodic statement. The proposed rule would have established requirements for the timing, form, content, and layout of the statement. The proposed rule also would have included sample forms. The proposed rule would have required that certain related pieces of information must be grouped together on the periodic statement. Moreover, the proposed rule would have clarified how periodic statements should be disclosed in particular situations. For example, the proposed rule would have clarified the disclosure of partial payments, funds held in a suspense or unapplied funds account, and payments for payment-option loans. Further, the proposed rule would have required that delinquent consumers receive important information in several places on the periodic statement, such as information regarding the overdue amount and any fees applied to the consumer's account. Finally, the proposed rules would have exempted certain products and servicers from the periodic statement requirement. Fixed-rate loans with coupon books that meet certain requirements, timeshares, and reverse mortgages would have been exempt from the periodic statement requirements. Further, small servicers as defined in the proposed rule (that is, servicers that service 1,000 mortgage loans or less and only service mortgage loans that the servicer or an affiliate owns or originated) would have been exempt from the periodic statement requirement.

The 2012 TILA Servicing Proposal would have imposed requirements on servicers with respect to the handling of partial payments from consumers. The proposed rule would have limited the application of the current prompt crediting provision, existing § 1026.36(c)(1)(i), to full contractual payments (as opposed to all payments). The proposed rule would have added a new provision, § 1026.36(c)(1)(ii), to address the handing of partial payments (anything less than a full contractual payment). The proposed rule would have implemented requirements on servicers to provide payoff statements, with modifications relating to the scope and timing of the requirement, and a limitation to written requests for payoff statements. Further, the proposed rule would have reorganized the requirements in § 1026.36(c).

D. Overview of the Comments Received

The Bureau received approximately 300 comments on the Proposed Servicing Rules. The comments came from individual consumers, consumer advocates, community banks, large bank holding companies, secondary market participants, credit unions, non-bank servicers, State and national trade associations for financial institutions in the mortgage business, local and national community groups, Federal and State regulators, academics, and others. Commenters provided feedback on all aspects of the Proposed Servicing Rules. Most commenters tended to focus on specific aspects of the proposals. Accordingly, in general, the comments are discussed below in the section-by-section analysis.

The majority of comments were submitted by mortgage servicers, industry groups representing servicers and businesses involved in the servicing industry. Large banks, community banks and credit unions, non-bank servicers, and industry trade associations submitted nearly all of these comments. The Small Business Administration Office of Advocacy submitted a comment and the remaining comments were submitted by vendors and attorney's representing industry interests. The Bureau also received a significant number of comments from consumer advocacy groups. The record also includes a 49-page comment by the Cornell e-Rulemaking Initiative synthesizing submissions of 144 registered participants to Cornell's Regulation Room project. Regulation Room is a pilot project designed to use different Web technologies and approaches to enhance public understanding and participation in Bureau rulemakings and to evaluate the advantages and disadvantages of these techniques. Finally, the Bureau also received comments from the Federal Housing Finance Agency, the GSEs, and from vendors and attorneys representing industry interests.

Industry commenters and their trade associations also provided comments regarding the rulemaking process, and those comments are addressed here.[47] In that regard, community banks and their trade associations stated that the Bureau should consider cumulative burden when writing regulations, setting comment deadlines, and effective dates. These commenters believed that the combination of the Bureau's rules as well as the impact of Basel III requirements with respect to accounting for mortgage servicing rights in Tier I capital may cause disruptions across all mortgage market segments. A community bank trade association indicated that community banks are likely to feel the impact of the rules more acutely, as they cannot take advantage of economies of scale in mitigating the compliance burden. A community bank trade association stated that the Bureau should consider the wide diversity among servicer business models and adapt regulations to preserve diversity within the servicing industry. The commenter emphasized that community banks have strong reputation and performance incentives to ensure that consumers are provided a high level of service.

A large bank and a number of trade association commenters stated that the Bureau should be cognizant of imposing

[47] Some commenters provided comments strictly with respect to the rulemaking process. One trade association commented that small servicers that participated in the Small Business Review Panel process did not have adequate time to prepare for the panel discussion and provide appropriate data, while another trade association commented that because the Bureau's proposed rules are lengthy and because some rules have overlapping comment periods, each of which has been limited to 60 days, the trade association has had difficulty dedicating staff to comment on the Bureau's proposals. As set forth in this section, the Bureau has conducted the rulemaking process, including the SBREFA process and the public comment period, in a manner that provided as much flexibility as possible to receive feedback from the SBREFA participants and public commenters in light of the deadlines required for the rulemaking. The Bureau assisted the SBA in calls and outreach with small entity participants to obtain any comments not set forth during the panel outreach with the small entity representatives. Further, with respect to public comments, the Bureau believes that the public had a meaningful opportunity to comment, which is evidenced by the significant number of comments received and their length. The Bureau offered 61 days from August 10, 2012 through October 9, 2012, for comment; and 22 days after the proposal was published in the **Federal Register** on September 17.

requirements and standards potentially inconsistent with those required by settlement agreements, consent orders, and GSE or government insurance program requirements. One commenter stated that the Bureau should consider preempting State law mortgage servicing requirements to provide legal and regulatory certainty to industry participants that are evaluating the future desirability of maintaining servicing operations. A number of trade associations stated that the Bureau should not issue regulations that would impose requirements substantially similar to the National Mortgage Settlement on mortgage servicers that are not parties to the National Mortgage Settlement.

The Bureau has considered each of these comments relating to the cumulative impact of mortgage regulation, including the mortgage servicing rules; the potential for inconsistent results with current servicing obligations, including State law and the National Mortgage Settlement; and comments regarding the diversity of servicing business models and servicer sizes. The Bureau's consideration of those comments is reflected below in the section-by-section analysis with respect to various determinations made in finalizing the 2012 TILA Servicing Proposal, including the determination to create clear requirements, the determination to maintain consistency with current servicing obligations, including those imposed by State law and the National Mortgage Settlement, and the consideration of exemptions for small servicers.

With respect to preemption of state law, the Final Servicing Rules generally do not have the effect of prohibiting state law from affording borrowers broader consumer protections relating to mortgage servicing than those conferred under the Final Servicing Rules. However, in certain circumstances, the effect of specific requirements of the Final Servicing Rules is to preempt certain limited aspects of state law. Specifically, as set forth in the 2013 RESPA Servicing Final Rule, § 1024.41(f) bars a servicer from making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, notwithstanding that state law may permit any such filing. Further, § 1024.33(d) incorporates a pre-existing provision in Regulation X that implements RESPA with respect to preemption of certain state law disclosures relating to mortgage servicing transfers. In other circumstances, the Bureau explicitly took into account existing standards (both State and Federal) and either built in flexibility or designed its rules to coexist with those standards. For example, as discussed in the 2013 RESPA Servicing Final Rule, the Bureau took into account the loss mitigation timelines and ''dual-tracking'' provisions in the National Mortgage Settlement and the California Homeowner Bill of Rights and designed timelines that are consistent with those standards. Similarly, in designing its early intervention provision the Bureau included a statement that nothing in that provision shall require a servicer to make contact with a borrower in a manner that would be prohibited under applicable law.

A number of commenters provided comments regarding language access and community blight. Two national consumer groups urged the Bureau to take action to remove barriers borrowers with limited English proficiency face with respect to understanding the terms of their mortgages because such barriers might make these borrowers more vulnerable to bad servicing practices. One national consumer group urged the Bureau to mandate translation of all notices, documents, and bills going to borrowers. Another national consumer group urged the Bureau to consider requiring servicers to provide disclosures and services in a borrower's preferred language, noting that it represents a population that speaks more than 100 different dialects. Finally, one commenter suggests that the Bureau should not only mandate disclosures in other languages but also should require servicers to provide language-capable staff to assist borrowers with limited English skills. With respect to neighborhood blight, a coalition of consumer advocacy groups and a consumer advocate that participated in outreach with the Bureau commented that the Bureau should consider implementing regulations to manage neighborhood blight by requiring servicers to maintain real estate owned (REO) property to decent, safe, and sanitary standards capable of purchase by borrowers with FHA financing.

Although some of these specific requests exceed the scope of the rulemaking, the Bureau takes seriously the important considerations of avoiding neighborhood blight and language access. The Bureau recognizes the challenges borrowers with limited English proficiency face in understanding the terms of their mortgage. The Bureau believes that servicers should communicate with borrowers clearly, including in the borrower's native language, where possible, and especially when lenders advertise in the borrower's native language. The Bureau conducted Spanish testing to support proposed rules and forms combining the TILA mortgage loan disclosure with the Good Faith Estimate (GFE) and statement required under RESPA. *See* 77 FR 54843. That testing underscores both the value of disclosures in other languages but also the challenges in translating forms using English terms of art into other languages to assure that the foreign-language version of the form effectively communicates the required information to its readers.

Although the Bureau has tested the disclosures it is adopting, it has not had the opportunity to test the disclosures in other languages. Accordingly, the Bureau is not imposing mandatory foreign language translation requirements or other language access requirements at this time with respect to the mortgage servicing disclosures and other requirements the Bureau is adopting. Although the Bureau declines at this time to implement requirements regarding language access, other than those currently in TILA, the Bureau will continue to consider language access generally in connection with developing disclosures and will consider further requirements on servicer communication with borrowers if appropriate. With respect to REO properties, the Bureau continues to consider whether regulations are appropriate to address the maintenance of properties owned by lenders and any potential resulting harm from community blight.

E. Other Dodd-Frank Act Mortgage-Related Rulemakings

In addition to the Final Servicing Rules, the Bureau is adopting several other final rules and issuing one proposal, all relating to mortgage credit, to implement requirements of title XIV of the Dodd-Frank Act. The Bureau is also issuing a final rule and planning to issue a proposal jointly with other Federal agencies to implement requirements for mortgage appraisals in title XIV. Each of the final rules follows a proposal issued in 2011 by the Board or in 2012 by the Bureau alone or jointly with other Federal agencies. Collectively, these proposed and final rules are referred to as the Title XIV Rulemakings.

- *Ability to Repay:* The Bureau recently issued a rule, following a May 2011 proposal issued by the Board (the Board's 2011 ATR Proposal),[48] to

[48] 76 FR 27390 (May 11, 2011).

implement provisions of the Dodd-Frank Act (1) requiring creditors to determine that a consumer has a reasonable ability to repay covered mortgage loans and establishing standards for compliance, such as by making a ''qualified mortgage,'' and (2) establishing certain limitations on prepayment penalties, pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411, 1412, and 1414. 15 U.S.C. 1639c. The Bureau's final rule is referred to as the 2013 ATR Final Rule. Simultaneously with the 2013 ATR Final Rule, the Bureau issued a proposal to amend the final rule implementing the ability-to-repay requirements, including by the addition of exemptions for certain nonprofit creditors and certain homeownership stabilization programs and a definition of a ''qualified mortgage'' for certain loans made and held in portfolio by small creditors (the 2013 ATR Concurrent Proposal). The Bureau expects to act on the 2013 ATR Concurrent Proposal on an expedited basis, so that any exceptions or adjustments to the 2013 ATR Final Rule can take effect simultaneously with that rule.

• *Escrows:* The Bureau recently issued a rule, following a March 2011 proposal issued by the Board (the Board's 2011 Escrows Proposal),[49] to implement certain provisions of the Dodd-Frank Act expanding on existing rules that require escrow accounts to be established for higher-priced mortgage loans and creating an exemption for certain loans held by creditors operating predominantly in rural or underserved areas, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461. 15 U.S.C. 1639d. The Bureau's final rule is referred to as the 2013 Escrows Final Rule.

• *HOEPA:* Following its July 2012 proposal (the 2012 HOEPA Proposal),[50] the Bureau recently issued a final rule to implement Dodd-Frank Act requirements expanding protections for ''high-cost mortgages'' under the Homeownership and Equity Protection Act (HOEPA), pursuant to TILA sections 103(bb) and 129, as amended by Dodd-Frank Act sections 1431 through 1433. 15 U.S.C. 1602(bb) and 1639. The Bureau also is finalizing rules to implement certain title XIV requirements concerning homeownership counseling, including a requirement that lenders provide lists of homeownership counselors to applicants for federally related mortgage loans, pursuant to RESPA section 5(c), as amended by Dodd-Frank Act section 1450. 12 U.S.C. 2604(c). The Bureau's final rule is referred to as the 2013 HOEPA Final Rule.

• *Loan Originator Compensation:* Following its August 2012 proposal (the 2012 Loan Originator Proposal),[51] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring certain creditors and loan originators to meet certain duties of care, including qualification requirements; requiring the establishment of certain compliance procedures by depository institutions; prohibiting loan originators, creditors, and the affiliates of both from receiving compensation in various forms (including based on the terms of the transaction) and from sources other than the consumer, with specified exceptions; and establishing restrictions on mandatory arbitration and financing of single premium credit insurance, pursuant to TILA sections 129B and 129C as established by Dodd-Frank Act sections 1402, 1403, and 1414(a). 15 U.S.C. 1639b, 1639c. The Bureau's final rule is referred to as the 2013 Loan Originator Final Rule.

• *Appraisals:* The Bureau, jointly with other Federal agencies,[52] is issuing a final rule implementing Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471. 15 U.S.C. 1639h. This rule follows the agencies' August 2012 joint proposal (the 2012 Interagency Appraisals Proposal).[53] The agencies' joint final rule is referred to as the 2013 Interagency Appraisals Final Rule. As discussed in that final rule, the agencies plan to issue a supplemental proposal addressing potential additional exemptions to the appraisal requirements. In addition, following its August 2012 proposal (the 2012 ECOA Appraisals Proposal),[54] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring that creditors provide applicants with a free copy of written appraisals and valuations developed in connection with applications for loans secured by a first lien on a dwelling, pursuant to section 701(e) of the Equal Credit Opportunity Act (ECOA) as amended by Dodd-Frank Act section 1474. 15 U.S.C. 1691(e). The Bureau's final rule is referred to as the 2013 ECOA Appraisals Final Rule.

The Bureau is not at this time finalizing proposals concerning various disclosure requirements that were added by title XIV of the Dodd-Frank Act, integration of mortgage disclosures under TILA and RESPA, or a simpler, more inclusive definition of the finance charge for purposes of disclosures for closed-end mortgage transactions under Regulation Z. The Bureau expects to finalize these proposals and to consider whether to adjust regulatory thresholds under the Title XIV Rulemakings in connection with any change in the calculation of the finance charge later in 2013, after it has completed quantitative testing, and any additional qualitative testing deemed appropriate, of the forms that it proposed in July 2012 to combine TILA mortgage disclosures with the good faith estimate (RESPA GFE) and settlement statement (RESPA settlement statement) required under the Real Estate Settlement Procedures Act, pursuant to Dodd-Frank Act section 1032(f) and sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively (the 2012 TILA–RESPA Proposal).[55] Accordingly, the Bureau already has issued a final rule delaying implementation of various affected title XIV disclosure provisions.[56]

Coordinated Implementation of Title XIV Rulemakings

As noted in all of its foregoing proposals, the Bureau regards each of the Title XIV Rulemakings as affecting aspects of the mortgage industry and its regulations. Accordingly, as noted in its proposals, the Bureau is coordinating carefully the Title XIV Rulemakings, particularly with respect to their effective dates. The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings generally will take effect on January 21, 2013, unless final rules implementing those requirements are issued on or before that date and provide for a different effective date. *See* Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note. In addition, some of the Title XIV Rulemakings are required by the Dodd-Frank Act to take effect no later than one year after they are issued. *Id.*

The comments on the appropriate effective date for this final rule are discussed in detail below in part VI of this notice. In general, however, consumer advocates requested that the Bureau put the protections in the Title XIV Rulemakings into effect as soon as

[49] 76 FR 11598 (Mar. 2, 2011).

[50] 77 FR 49090 (Aug. 15, 2012).

[51] 77 FR 55272 (Sept. 7, 2012).

[52] Specifically, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency.

[53] 77 FR 54722 (Sept. 5, 2012).

[54] 77 FR 50390 (Aug. 21, 2012).

[55] 77 FR 51116 (Aug. 23, 2012).

[56] 77 FR 70105 (Nov. 23, 2012).

practicable. In contrast, the Bureau received some industry comments indicating that implementing so many new requirements at the same time would create a significant cumulative burden for creditors. In addition, many commenters also acknowledged the advantages of implementing multiple revisions to the regulations in a coordinated fashion.[57] Thus, a tension exists between coordinating the adoption of the Title XIV Rulemakings and facilitating industry's implementation of such a large set of new requirements. Some have suggested that the Bureau resolve this tension by adopting a sequenced implementation, while others have requested that the Bureau simply provide a longer implementation period for all of the final rules.

The Bureau recognizes that many of the new provisions will require creditors to make changes to automated systems and, further, that most administrators of large systems are reluctant to make too many changes to their systems at once. At the same time, however, the Bureau notes that the Dodd-Frank Act established virtually all of these changes to institutions' compliance responsibilities, and contemplated that they be implemented in a relatively short period of time. And, as already noted, the extent of interaction among many of the Title XIV Rulemakings necessitates that many of their provisions take effect together. Finally, notwithstanding commenters' expressed concerns for cumulative burden, the Bureau expects that creditors actually may realize some efficiencies from adapting their systems for compliance with multiple new, closely related requirements at once, especially if given sufficient overall time to do so.

Accordingly, the Bureau is requiring that, as a general matter, creditors and other affected persons begin complying with the final rules on January 10, 2014. As noted above, section 1400(c) of the Dodd-Frank Act requires that some provisions of the Title XIV Rulemakings take effect no later than one year after the Bureau issues them. Accordingly, the Bureau is establishing January 10, 2014, one year after issuance of the Bureau's 2013 ATR, Escrows, and HOEPA Final Rules (*i.e.,* the earliest of the Title XIV Rulemakings), as the baseline effective date for most of the Title XIV Rulemakings. The Bureau believes that, on balance, this approach will facilitate the implementation of the rules' overlapping provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

The Bureau has identified certain rulemakings or selected aspects thereof, however, that do not present significant implementation burdens for industry. Accordingly, the Bureau is setting earlier effective dates for those final rules or certain aspects thereof, as applicable. Those effective dates are set forth and explained in the **Federal Register** notices for those final rules.

IV. Legal Authority

The final rule was issued on January 17, 2013, in accordance with 12 CFR 1074.1. The Bureau is issuing this final rule pursuant to its authority under TILA and the Dodd-Frank Act. Section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board. 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.'' [58] TILA is a Federal consumer financial law.[59] Accordingly, the Bureau has authority to issue regulations pursuant to TILA, including implementing the additions and amendments to TILA's mortgage servicing requirements made by title XIV of the Dodd-Frank Act.

Sections 1418, 1420 and 1464 of the Dodd-Frank Act create new requirements under TILA in new sections 128A, 128(f), and 129F and 129G, respectively. Section 1418 of the Dodd-Frank Act amends Regulation Z to require that certain disclosures be provided to consumers with hybrid adjustable-rate mortgages secured by the consumer's principal residence the first time the interest rate resets or adjusts. Additionally, the savings clause in TILA section 128A(c) allows the Bureau, among other things, to require this notice for adjustable-rate mortgage loans that are not hybrid adjustable-rate loans. Dodd-Frank Act section 1420 requires that a periodic statement be provided to consumers for each billing cycle of a consumer's closed-end mortgage secured by a dwelling, except for fixed-rate loans with coupon books containing substantially the same information. The statute contains a list of specific information that must be included in the periodic statement. Additionally, pursuant to TILA section 128(f)(1)(H), the periodic statement must include such other information as the Bureau may prescribe in regulations. Dodd-Frank Act section 1464 generally requires the prompt crediting of mortgage payments in connection with consumer credit transactions secured by a consumer's principal dwelling and an accurate timely response to requests for payoff amounts for home loans. The final rule, in addition to implementing these TILA provisions of the Dodd-Frank Act, amends the interest rate adjustment disclosures currently required by § 1026.20(c). The final rule also relies on the rulemaking and exception authorities specifically granted to the Bureau by TILA and the Dodd-Frank Act, including the authorities discussed below.

The Truth in Lending Act

TILA section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a), 15 U.S.C. 1604(a), directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. The purposes of TILA are ''to assure a meaningful disclosure of credit terms so that the consumers will be able to compare more readily the various credit terms available and avoid the uninformed use of credit'' and to protect consumers against inaccurate and unfair credit billing practices. TILA section 102(a); 15 U.S.C. 1601(a).

[57] Of the several final rules being adopted under the Title XIV Rulemakings, six entail amendments to Regulation Z, with the only exceptions being the 2013 RESPA Servicing Final Rule (Regulation X) and the 2013 ECOA Appraisals Final Rule (Regulation B); the 2013 HOEPA Final Rule also amends Regulation X, in addition to Regulation Z. The six Regulation Z final rules involve numerous instances of intersecting provisions, either by cross-references to each other's provisions or by adopting parallel provisions. Thus, adopting some of those amendments without also adopting certain other, closely related provisions would create significant technical issues, *e.g.,* new provisions containing cross-references to other provisions that do not yet exist, which could undermine the ability of creditors and other parties subject to the rules to understand their obligations and implement appropriate systems changes in an integrated and efficient manner.

[58] 12 U.S.C. 5581(a)(1).

[59] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include RESPA), Dodd-Frank section 1400(b), 15 U.S.C. 1601 note (defining ''enumerated consumer laws'' to include certain subtitles and provisions of title XIV).

Historically, TILA section 105(a) has served as a broad source of authority for rules that promote the informed use of credit and the avoidance of unfair credit billing practices through required disclosures and substantive regulation of certain practices. Dodd-Frank Act section 1100A additionally clarifies the Bureau's TILA section 105(a) authority by amending that section to provide express authority to prescribe regulations that contain ''additional requirements'' that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. This amendment clarified that the Bureau has the authority to exercise TILA section 105(a) to prescribe requirements beyond those specifically listed in the statute that meet the standards outlined in section 105(a). The Dodd-Frank Act also clarified the Bureau's rulemaking authority over certain high-cost mortgages pursuant to section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a) authority to make adjustments and exceptions to the requirements of TILA applies to all transactions subject to TILA, except with respect to the provisions of TILA section 129 [60] that apply to the high-cost mortgages referred to in TILA section 103(bb), 15 U.S.C. 1602(bb).

For the reasons discussed in this notice, the Bureau is adopting regulations to carry out TILA's purposes and such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance therewith. In developing these aspects of the rule pursuant to its authority under TILA section 105(a), the Bureau has considered the purposes of TILA, including ensuring meaningful disclosures, helping consumers avoid the uninformed use of credit, and protecting consumers against inaccurate and unfair credit billing practices. *See* TILA section 102(a); 15 U.S.C. 1601(a).

TILA section 105(f). Section 105(f) of TILA, 15 U.S.C. 1604(f), authorizes the Bureau to exempt from all or part of TILA any class of transactions if the Bureau determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. In exercising this authority, the Bureau must consider the factors identified in section 105(f) of TILA and publish its rationale at the time it proposes an exemption for public comment. Specifically, the Bureau must consider: (a) The amount of the loan and whether the disclosures, right of rescission, and other provisions provide a benefit to the consumers who are parties to such transactions, as determined by the Bureau; (b) The extent to which the requirements of this subchapter complicate, hinder, or make more expensive the credit process for the class of transactions; (c) The status of the consumer, including—(1) Any related financial arrangements of the consumer, as determined by the Bureau; (2) The financial sophistication of the consumer relative to the type of transaction; and (3) The importance to the consumer of the credit, related supporting property, and coverage under this subchapter, as determined by the Bureau; (d) Whether the loan is secured by the principal residence of the consumer; and (e) Whether the goal of consumer protection would be undermined by such an exemption.

For the reasons discussed in this notice, the Bureau is exempting certain transactions from the requirements of TILA pursuant to its authority under TILA section 105(f). In developing this final rule under TILA section 105(f), the Bureau has considered the relevant factors and determined that the proposed exemptions may be appropriate.

TILA section 122. Section 122 of TILA, 15 U.S.C. 1632, authorizes the Bureau to regulate, among other things, the form and content of disclosures for credit transactions made pursuant to Chapter 2 of TILA. Specifically, 122(a) requires that information required by this title must be disclosed clearly and conspicuously.

For the reasons discussed in this notice, the Bureau is requiring the provision of disclosures to consumers in certain forms and with certain content pursuant to its authority under TILA section 122. In developing this final rule under TILA section 122, the Bureau has considered the relevant factors and determined that the form and content requirements are appropriate.

Title X of the Dodd-Frank Act

Dodd-Frank Act section 1022(b). Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]'' 12 U.S.C. 5512(b)(1). TILA and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, in adopting this final rule, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules to carry out the purposes of TILA and title X and prevent evasion of those laws.

Dodd-Frank Act section 1032. Section 1032(a) of the Dodd-Frank Act provides that the Bureau ''may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' 12 U.S.C. 5532(a). The authority granted to the Bureau in Dodd-Frank Act section 1032(a) is broad, and empowers the Bureau to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.

Dodd-Frank Act section 1032(c) provides that, in prescribing rules pursuant to Dodd-Frank Act section 1032, the Bureau ''shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.'' 12 U.S.C. 5532(c). Accordingly, in developing the final rule under Dodd-Frank Act section 1032(a), the Bureau has considered available studies, reports, and other evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services. For the reasons discussed in this notice, the Bureau is issuing portions of this rule pursuant to its authority under Dodd-Frank Act section 1032(a).

In addition, Dodd-Frank Act section 1032(b)(1) provides that ''any final rule prescribed by the Bureau under this [section 1032] requiring disclosures may include a model form that may be used at the option of the covered person for provision of the required disclosures.'' 12 U.S.C. 5532(b)(1). Any model form issued pursuant to that authority shall contain a clear and conspicuous disclosure that, at a minimum, uses plain language that is comprehensible to consumers, uses a clear format and design, such as readable type font, and succinctly explains the information that must be communicated to the consumer.

[60] 15 U.S.C. 1639. TILA section 129 contains requirements for certain high-cost mortgages, established by the Home Ownership and Equity Protection Act (HOEPA), which are commonly called HOEPA loans.

Dodd-Frank Act section 1032(b)(2); 12 U.S.C. 5532(b)(2). As discussed in the section-by-section analysis of §§ 1026.20(c) and (d) and 1026.41, the Bureau is issuing model and sample forms for ARM interest rate adjustment notices and sample forms for periodic statements. As discussed in this notice, the Bureau is adopting these model forms pursuant to its authority under Dodd-Frank Act section 1032(b)(1). As required under Dodd-Frank Act section 1032(b)(3), the Bureau has validated model forms issued under Dodd-Frank Act section 1032(b) through consumer testing.

Dodd-Frank Act section 1405(b). Section 1405(b) of the Dodd-Frank Act provides that, ''[n]otwithstanding any other provision of [title 14 of the Dodd-Frank Act], in order to improve consumer awareness and understanding of transactions involving residential mortgage loans through the use of disclosures, the Bureau may, by rule, exempt from or modify disclosure requirements, in whole or in part, for any class of residential mortgage loans if the Bureau determines that such exemption or modification is in the interest of consumers and in the public interest.'' 15 U.S.C. 1601 note. Section 1401 of the Dodd-Frank Act, which amends TILA section 103(cc), 15 U.S.C. 1602(cc), generally defines residential mortgage loan as any consumer credit transaction that is secured by a mortgage on a dwelling or on residential real property that includes a dwelling other than an open-end credit plan or an extension of credit secured by a consumer's interest in a timeshare plan. Notably, section 1405(b) confers authority to ''modify or exempt from disclosure requirements,'' in whole or in part, applies to any class of residential mortgage loans if the Bureau determines that such exemption or modification is in the interest of consumers and in the public interest, and is not limited to a specific statute or statutes. Accordingly, Dodd-Frank Act section 1405(b) is a broad source of authority to modify or exempt the disclosure requirements of TILA.

In developing rules for residential mortgage loans under Dodd-Frank Act section 1405(b), the Bureau has considered the purposes of improving consumer awareness and understanding of transactions involving residential mortgage loans through the use of disclosures, and the interests of consumers and the public. For the reasons discussed in this notice, the Bureau is issuing portions of this rule pursuant to its authority under Dodd-Frank Act section 1405(b). See the section-by-section analysis of each section of this final rule for further elaboration on legal authority.

V. Section-by-Section Analysis

A. Regulation Z

Section 1026.17 General Disclosure Requirements

17(a) Form of Disclosures

17(a)(1)

Section 1026.17(a)(1) contains form requirements that govern many of the disclosures under subpart C of Regulation Z, including current ARM disclosures. The Bureau proposed revising the rule with regard to both the § 1026.20(c) ARM interest rate adjustment payment change notices and the § 1026.20(d) initial ARM interest rate adjustment notices.

Section 1026.17(a)(1) requires, among other things, that certain disclosures contain only information directly related to that disclosure. Section 1026.20(c) is not included in the list of rules governed by this general segregation requirement and commentary to § 1026.17(a)(1) confirms that § 1026.20(c) is not subject to this requirement.

The Bureau proposed revising § 1026.17(a)(1) and comment 17(a)(1)–2.ii to add § 1026.20(c) to the list of disclosures required to contain only information directly related to the disclosure and to include § 1026.20(c) among the subpart C disclosures required to be grouped together and segregated from other information. The Bureau stated that the purpose of the § 1026.20(c) payment change notices is to inform consumers of upcoming changes to their interest rate and mortgage payments and to give them time to explore alternatives. The Bureau stated that it believed that the current form requirements to which the § 1026.20(c) notices are subject were insufficient to highlight and emphasize important information consumers needed to make decisions about their adjustable-rate mortgages. The Bureau said that the revisions to § 1026.17(a)(1) and comment 17(a)(1)–2.ii would enhance consumers' awareness of this important information. The proposal also clarified that providers of § 1026.20(c) notices would have remained subject to the other § 1026.17(a)(1) form requirements, including that the disclosures be clear and conspicuous and in writing and that the disclosures could be provided electronically subject to compliance with Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.).

Although the Bureau received comments opposed to the revision of § 1026.20(c) in general, which are discussed below, the Bureau did not receive specific comments regarding its proposed changes to § 1026.17(a)(1). One bank did suggest that E-Sign Act not apply to the ARM disclosures such that they could be provided to consumers without their demonstrated consent, which the bank said was difficult to obtain. The Bureau notes that E-Sign Act requirements apply to current § 1026.20(c) as well as to the other disclosures required under subpart C. Further, TILA section 128A specifically requires the ARM initial interest rate notices to be provided to consumers in written form. The Bureau believes these requirements can ensure that consumers receive the required disclosures and therefore declines to scale back this consumer protection. For the reasons discussed above, the Bureau is adopting as proposed revised § 1026.17(a)(1) and comment 17(a)(1)–2.ii. Thus, the disclosures required by § 1026.20(c) must comply with the form requirements of § 1026.17(a)(1) as revised.

As with § 1026.20(c) above, the proposal clarified that providers of the § 1026.20(d) notices would have been subject to the same § 1026.17(a)(1) form requirements, including that the disclosures be clear and conspicuous, in writing, and that they be permitted to be provided electronically subject to compliance with the E-Sign Act. However, the final rule revises § 1026.17(a)(1) with respect to the delivery of the notices required by § 1026.20(d). TILA section 128A, as added by Dodd-Frank Act section 1418 and implemented in § 1026.20(d), requires that initial ARM interest rate adjustment notices be ''separate and distinct from all other correspondence to the consumer.'' Accordingly, the Bureau proposed that the § 1026.20(d) ARM initial interest rate adjustment notices must be provided to consumers separate and distinct from all other correspondence and, thus, that they would not be subject to the general segregation requirements of § 1026.17(a)(1). Proposed comment 20(d)(1)–2 interpreted the ''separate and distinct'' requirement as requiring the § 1026.20(d) notices to be provided to consumers in a separate envelope or as its own separate email apart from other servicer correspondence.

For the reasons discussed in the section-by-section analysis of § 1026.20(d) below, the Bureau is adopting comment 20(d)–3, which interprets the new TILA statutory language to require that § 1026.20(d)

notices be provided to consumers as a separate document, but permits it to be mailed in the same envelope or as a separate attachment in an email with other servicer correspondence. Accordingly, the final rule revises § 1026.17(a)(1) to require that § 1026.20(d) ARM notices be provided to consumers as a separate document, but not necessarily in a separate envelope or email. As a result of this change, both § 1026.20(c) and (d) are subject to revised § 1026.17(a)(1) and comment 17(a)(1)–2.i.

Legal Authority

The application of § 1026.17(a)(1), as modified, to § 1026.20(c) and (d) is authorized, in part, under TILA section 122, which requires that disclosures under TILA be clear and conspicuous, in accordance with regulations of the Bureau. The requirements are further authorized under TILA section 105(a) because the Bureau believes that the final rule's form requirements are necessary and proper to effectuate the purposes of TILA to assure a meaningful disclosure of credit terms, avoid the uninformed use of credit, and protect consumers against inaccurate and unfair credit billing practices by ensuring that consumers understand the content of the ARM notices.

TILA section 128A(b), as established by Dodd-Frank Act section 1418, specifically provides that the disclosures shall be in writing, separate and distinct from all other correspondence, which the Bureau interprets as consistent with the Regulation Z form requirements of § 1026.17(a)(1), as amended. In addition, the Bureau believes, consistent with Dodd-Frank Act section 1032(a), that the application of § 1026.17(a)(1) to § 1026.20(d) will ensure that the features of ARM loans are effectively disclosed to consumers in a manner that allows consumers to understand the information disclosed.

17(b) Time of Disclosures

Section 1026.17(b) generally establishes timing requirements for certain Regulation Z disclosures, among them rules with special timing requirements. The Bureau proposed revising § 1026.17(b) to add § 1026.20(d) to the list of variable-rate disclosure provisions with special timing requirements. This amendment would have alerted creditors, assignees, and servicers that, as with the § 1026.20(c) payment adjustment notices, there are timing requirements particular to the § 1026.20(d) initial interest rate adjustment notices. The Bureau received no comments regarding this revision and is adopting revised 1026.17(b).

17(c) Basis of Disclosures and Use of Estimates

17(c)(1)

Section 1026.17(c)(1) requires disclosures to reflect the terms of the legal obligation between the parties. Current comment 17(c)(1)–1 provides that, under this requirement, disclosures generally must reflect the credit terms to which the parties are legally bound as of the outset of the transaction but that, in the case of disclosures required by § 1026.20(c), the disclosures shall reflect the credit terms to which the parties are legally bound when the disclosures are provided. The Bureau proposed revising comment 17(c)(1)–1 to make clear that the disclosures required by § 1026.20(d), like those required by § 1026.20(c), must reflect the credit terms to which the parties are legally bound when the disclosures are provided, rather than at the outset of the transaction. The Bureau received no comments regarding this revision and is adopting revised comment 17(c)(1)–1.

Section 1026.18 Content of Disclosures

18(f) Variable Rate

Section 1026.18(f) sets forth the contents of disclosures required for certain variable-rate transactions. Comment 18(f)–1 clarifies that creditors electing to substitute § 1026.19(b) disclosures for § 1026.18(f)(1) disclosures, as permitted by § 1026.18(f)(1) and (3), may, but need not, also provide disclosures required by § 1026.20(c). Under current § 1026.20(c), disclosures are permissive in such cases because the § 1026.19(b) substitution is permitted only for variable-rate transactions not secured by the consumer's principal dwelling or variable-rate transactions secured by the consumer's principal dwelling, with a term of one year or less. These types of transactions are not covered by current § 1026.20(c). Thus, comment 18(f)–1 does not alter the legal requirements applicable to creditors. The clarification was included in the comment, however, because § 1026.20(c) cross-references § 1026.19(b) and applies to transactions covered by § 1026.19(b).

The Bureau proposed removing this reference to § 1026.20(c) from comment 18(f)–1 because it would no longer have been helpful because proposed § 1026.20(c) and (d) did not cross-reference § 1026.19(b) and defined their scope of coverage without reference to § 1026.19(b). Moreover, § 1026.20(c) and (d) would have applied to some ARMs with terms of one year or less, such that applying the current comment would have created an unwarranted exemption from the requirement to provide ARM notices to consumers with such ARMs. For these reasons, the Bureau proposed to remove the reference to § 1026.20(c) in comment 18(f)–1.

The Bureau received no comments on this issue. However, as discussed below in the section-by-section analysis of § 1026.20(c)(1)(ii) and (d)(1)(ii), the final rule expands the construction loan exemption to all ARMs with terms of one year or less, thereby eliminating any need to revise comment 18(f)(1)–1. Thus, the Bureau is not adopting the proposed revision of comment 18(f)(1)–1.

Section 1026.19 Certain Mortgage and Variable-Rate Transactions

19(b) Certain Variable-Rate Transactions

Section 1026.19(b) requires disclosures for consumers applying for certain variable-rate transactions. Comment 19(b)–4 explains that 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 § 1026.20(c) by virtue of § 1026.20(d). Consistent with the proposed removal of current § 1026.20(d), discussed below, which exempts creditors, assignees, and servicers from the requirements of § 1026.20(c) if they have complied with disclosure requirements of other Federal agencies, the Bureau proposed revising comment 19(b)–4 to remove the reference to § 1026.20(c) and (d). The Bureau is issuing this aspect of the final rule as proposed, having received no comment on this issue.

The Bureau proposed revising comment 19(b)-5.i.C to cross-reference other commentary that makes clear that § 1026.20(c) and (d) would not apply to ''price-level-adjusted 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. Having received no comments on the above proposed change, the Bureau is issuing this aspect of the final rule as proposed.

The Bureau proposed revising comment 19(b)(2)(xi)–1 to include a reference to § 1026.20(d). Pursuant to current § 1026.19(b)(2)(xi), disclosures regarding the type of information that will be provided in notices of interest rate adjustments and the timing of such notices must be provided to consumers applying for variable-rate transactions secured by the consumer's principal

dwelling with a term greater than one year. Current comment 19(b)(2)(xi)–1 clarifies that these disclosures include information regarding the content and timing of disclosures consumers will receive pursuant to current § 1026.20(c). The Bureau proposed adding to the comment a reference to § 1026.20(d), because those disclosures also would have been provided to consumers under the Bureau's proposed rule. The proposed comment also made conforming changes to the text suggested for describing the ARM notices to reflect the timing and content of the § 1026.20(c) and (d) disclosures. Having received no comments on this change, the Bureau is adopting comment 19(b)(2)(xi)–1 as proposed.

Section 1026.20 Disclosure Requirements Regarding Post-Consummation Events

20(c) Rate Adjustments with a Corresponding Change in Payment

Overview

Section 1026.20(c) requires that disclosures be provided to consumers with variable-rate mortgages each time an adjustment results in a corresponding payment change and at least once each year during which an interest rate adjustment is implemented without a corresponding payment change. The current rule does not differentiate between the content required for the non-payment change annual notice and the notices required each time the interest rate adjustment results in a corresponding payment change. Section 1026.20(c) also requires that adjustment notices disclose the following: (1) The current and prior interest rates for the loan; (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; and (5) the payment, if different from the payment due after adjustment, that would be required to amortize fully the loan at the new interest rate over the remainder of the loan term.

The Bureau proposed two major changes to § 1026.20(c). First, the Bureau proposed eliminating the non-payment change annual notice sent each year during which an interest rate adjustment is implemented without a corresponding payment change. As explained in more detail below, the Bureau stated that it believed that the Dodd-Frank Act amendments to TILA, and the Bureau's proposed amendments to Regulation Z that would implement those provisions, would provide consumers with much of the information contained in this annual notice, thereby greatly minimizing the need for its protections. Second, the Bureau's proposal would have amended current § 1026.20(c) by adding disclosures that the Bureau stated it believed would enhance protections for consumers with ARMs. The revisions to § 1026.20(c) also would have harmonized that section with the requirements the Bureau proposed for the initial ARM interest rate adjustment notice under § 1026.20(d), thereby promoting consistency between the Regulation Z ARM provisions.

The Bureau also would have revised the heading to § 1026.20 from ''Subsequent Disclosure Requirements'' to ''Disclosure Requirements Regarding Post-Consummation Events.'' The Bureau proposed revising the heading for clarification because interest rate adjustments occur post-consummation, but, under certain circumstances, the ARM notices required under § 1026.20(d) may be provided at consummation and thus are not ''subsequent disclosures''. See the section-by-section analysis of § 1026.20(d) below. The Bureau also proposed revising the heading to § 1026.20(c) from ''Variable-Rate Adjustments'' to ''Rate Adjustments with a Corresponding Change in Payment'' to clarify that, pursuant to the proposed revision of § 1026.20(c), the disclosure would have been required only when the interest rate adjustment caused a change in the mortgage payment.

Elimination of annual disclosure. The Bureau proposed to eliminate the § 1026.20(c) annual notice required when an ARM's interest rate adjusts one or more times over the course of a year without any corresponding payment change. The Bureau noted that consumers who receive the current non-payment change annual notice, such as consumers with ARMs with payment caps, would receive much of the same information in the periodic statement under proposed § 1026.41, discussed below. The periodic statement would have provided consumers with comprehensive information about their mortgages each billing cycle. The periodic statement would have included some of the same key information provided to consumers under the current § 1026.20(c) annual notice, such as the current interest rate and the date after which that rate would adjust. It also would have provided other information that might be useful to consumers receiving the § 1026.20(c) annual notice, including information about any prepayment penalty; allocation of the consumer's payment by principal, interest, and escrow; the amount of the outstanding principal; contact information for the relevant State housing finance authority; and information to access a list of Federally-certified homeownership counselors.

In light of the amount, type, and frequency of the information the Bureau proposed to provide in the periodic statement to consumers with ARMs subject to current § 1026.20(c), the Bureau proposed to eliminate the non-payment change annual notice as duplicative and potentially contributing to information overload that could deflect consumer attention away from the information received in other required disclosures. The Bureau solicited comments on the need, value, or use of retaining this annual notice required by § 1026.20(c) for consumers whose ARM interest rates adjust during the course of a year without resulting in corresponding payment changes.

The Bureau also proposed to remove current comments 20(c)(1)–1 and 20(c)(4)–1 which, among other things, address the content of the § 1026.20(c) non-payment change annual notice the Bureau proposed to eliminate. Comment 20(c)(1)–1 also explains, among other things, the meaning of the terms ''current'' and ''prior'' rates and that, in disclosing all other rates that applied during the period between notices, the creditor may disclose a range of the highest and lowest rates during that period. Comment 20(c)(4)–1, among other things, defines the term loan ''balance'' and explains that a ''contractual effect'' of a rate adjustment includes disclosure of any change in the term of the loan if the change resulted from the rate adjustment. The Bureau proposed removing these comments even though they also relate to the recurring disclosures that would have been required by proposed § 1026.20(c) for interest rate adjustments resulting in a corresponding payment change. The Bureau proposed replacing these comments with new commentary discussed below.

Many industry commenters, including a large bank and a national trade association, supported eliminating the § 1026.20(c) annual notice, which they characterized as costly and time consuming. One non-bank servicer, conversely, stated that the elimination of the annual notice did not provide any benefit for industry. A State enforcement agency and some consumer advocates supported discontinuation of the notice. Two comment letters from consumer groups recommended

retaining the annual notice but this was based on their understanding that the annual notice is required whether or not any interest rate adjustment over the course of the year caused a corresponding adjustment to the payment. The Bureau clarifies that the current rule requires an annual notice only when, over the course of a year, one or more interest rate adjustments have occurred *without* any payment change. These consumer groups pointed to payment-option ARMs, which one consumer group recommended be made illegal because they are inherently unfair, as a reason for retaining the annual notice. They said such loans can have multiple interest rate adjustments without a payment change and payment changes occur only when the loan resets, which can be infrequent (resets generally occur when the principal balance reaches some maximum, such as 125 percent of the original loan amount).

For the reasons set forth in the proposal, the Bureau is adopting § 1026.20(c) as proposed, with respect to the elimination of the non-payment change annual notice. With regard to concerns for consumers with payment-option ARMs, the Bureau believes that the comprehensive information that will be disclosed to consumers every billing cycle in the periodic statement the Bureau is adopting under § 1026.41—most notably the consumer's current interest rate and the date after which the interest rate will adjust and payment allocation information—provides information to such consumers that is superior to the information currently provided by the non-payment change annual notice under § 1026.20(c). The Bureau believes that the costs of requiring industry to provide both notices would outweigh the benefits consumers would garner from receiving this annual notice in addition to the periodic statement. The Bureau also notes that comment 20(c)(3)–1 recognizes that creditors, assignees, and servicers may provide consumers with the non-payment change annual notice voluntarily, in their own discretion.

Amendment of payment change disclosure. The Bureau proposed amending existing § 1026.20(c) as it relates to interest rate adjustments that result in a corresponding payment change. The proposed rule retained much of the content required in the current notice and added information that the Bureau stated it believed would help consumers better understand and manage their adjustable-rate mortgages. The revisions to current § 1026.20(c) would have harmonized that section with the requirements for the initial ARM interest rate adjustment notices the Bureau proposed in § 1026.20(d).[61] In addition, the revisions would have required the interest rate adjustment notice be provided earlier than is currently required. The Bureau noted that promoting consistency between the ARM disclosures required by § 1026.20(c) and (d) would reduce compliance burdens on industry and minimize consumer confusion.

A large servicer and several trade associations opposed the revision of § 1026.20(c), except for, as stated above, the Bureau's proposal to eliminate the non-payment change annual notice. These industry commenters questioned the Bureau's basis for revising a regulation they believed was not in need of improvement. Moreover, they noted that TILA section 128A, as established by Dodd-Frank Act section 1418, required the new § 1026.20(d) disclosure but did not mandate a revision of the existing ARM rule. In response to the proposal's reference to the Board's sweeping 2009 Closed-End Proposal, which proposed similar revisions to § 1026.20(c), these commenters pointed out that the Board never adopted a final rule. These commenters stated that the industry cost to revise the current disclosures, including compelling portfolio lenders to revise their proprietary product offerings, would outweigh the consumer benefits. They stated that the FHA, VA, and GSEs could not comply with the new timing requirements. One commenter stated that the current rule is superior to the one proposed by the Bureau. A few commenters stated that the ARM products that had contributed to the mortgage crisis have been largely removed from the market though refinancing or loan modification, thereby neutralizing any need to revise the current rule to provide heightened consumer protections. A research organization, a large bank, a trade association, and a credit union said that post-implementation testing was warranted to determine whether the Bureau's contention that consumers would be better informed as a result of receiving the revised § 1026.20(c) disclosures is correct. Further, three small banks stated that the Bureau's efforts to harmonize the two disclosures would not alleviate industry burden because the disclosures differed enough to require customized programming for each. Three comment letters from consumer groups, on the other hand, recommended expanding the content of the proposed § 1026.20(c) notice to include additional disclosures from the § 1026.20(d) notice, particularly the loss mitigation information.

The Bureau is adopting § 1026.20(c), with modifications to the revisions proposed by the Bureau. For the reasons stated above and throughout this final rule, the Bureau believes revision of the current rule furthers the purposes of TILA. Specifically, the Bureau believes the revision is appropriate and beneficial because consumers will better understand the costs and terms of adjustable-rate mortgages if they receive the ARM disclosures required by § 1026.20(c) and (d) in notices with consistent formatting and clear information. Further, consumers will be better able to make an informed use of credit if they receive this information with enough time to budget for any increase or to take appropriate action, such as pursuing refinancing or options offered by servicers relating to individual hardship. The Bureau believes that the additional time and clearer information provide benefits to consumers anticipating payment changes that outweigh the costs to servicers to implement these changes. Moreover, as discussed in the section-by-section analyses below, the Bureau believes that the § 1026.20(c) notice, which consumers may receive periodically, strikes an appropriate balance between disclosure of key information and overloading consumers with additional information that may or may not be applicable to their situations, such as loss mitigation options. For these reasons, the reasons set forth in the proposed rule, and the reasons discussed below in the analysis of each section of the rule, the Bureau is issuing its revision of § 1026.20(c).

Creditors, assignees, and servicers. The Bureau also proposed amending § 1026.20(c) to apply explicitly to creditors, assignees, and servicers. The Bureau stated that current § 1026.20(c) applied to creditors and existing comment 20(c)–1 clarified that the requirements of § 1026.20(c) also apply to subsequent holders, *i.e.,* assignees. Under the Bureau's proposal, the requirements of § 1026.20(c) would have applied to servicers, as well as to creditors and assignees. Proposed comment 20(c)–1 clarified, among other things, that a creditor, assignee, or servicer that no longer owned the mortgage loan or the mortgage servicing

[61] The Bureau worked with Macro to design and test model and sample forms (the model forms) for § 1026.20(d), but did not specifically test § 1026.20(c) model forms. Because of the similarity in the model forms for both rules, however, the results of the testing of § 1026.20(d) forms is relevant for § 1026.20(c) as well. Thus, throughout the section-by-section analysis below of § 1026.20(c), the Bureau refers to the testing results for § 1026.20(d), as appropriate.

rights would not have been subject to the requirements of § 1026.20(c).

In its proposal, the Bureau stated that it was appropriate to apply proposed § 1026.20(c) to servicers, as well as to creditors and assignees. The Bureau pointed out that many creditors and assignees do not service the loans they own and instead sell the mortgage servicing rights to a third party. The servicer is the party with which consumers have contact on an ongoing basis regarding their mortgages. Consumers send their payments to the servicer and communicate with the servicer regarding any questions or problems with their mortgages that may arise. Where the owner and the servicer are different entities, consumers may not know the identity of the owner and may not even realize that the servicer is not the owner of their mortgages. Moreover, it can be difficult for consumers to ascertain the identity of the creditor or assignee, even though servicers would have been required to identify the owner of a mortgage under the 2012 RESPA Servicing Proposal, pursuant to Dodd-Frank Act section 1463. The Bureau stated a similar rationale for its proposal that the requirements of § 1026.20(d) apply to assignees as well as to creditors and servicers.

For the reasons discussed above, proposed § 1026.20(c) would have required, as clarified by comment 20(c)–1, that any provision of subpart C governing § 1026.20(c) also would have applied to creditors, assignees, and servicers—even where the other provisions of subpart C referred only to creditors. The proposal also would have removed current comment 20(c)–1, which, among other things, referred to ''subsequent holders,'' in favor of consistent usage of the term ''assignee'' in proposed § 1026.20(c) and (d). It also would have removed comment 20(c)–3 as duplicative of the § 1026.17(c)(1) requirement that the disclosures reflect the terms of the parties' legal obligations.

A trade association and a non-bank servicer commented on this portion of the proposed rule. They stated that civil liability for violations of TILA is determined by TILA sections 130 and 131 and that civil liability cannot be extended to servicers beyond the scope authorized under TILA. A State enforcement agency, in the other hand, commented that consumers should be able to seek relief against servicers for violations of § 1026.20(c).

The Bureau is adopting the rule as proposed. The Bureau is adopting comment 20(c)–1, with added language clarifying that, (1) creditors, assignees, and servicers that own either the applicable ARM or the applicable mortgage servicing rights, or both, are subject to the requirements of § 1026.20(d) and (2) although the rule applies to creditors, assignees, and servicers, those parties may decide among themselves which of them will provide the required disclosures.

The Bureau notes that current § 1026.20(c) does not mention creditors, assignees, or servicers. Thus, although the commentary explicitly references creditors and subsequent holders, neither the existing rule nor its commentary expressly exclude servicers from its requirements. The Bureau believes it is logical and appropriate to apply the requirements of § 1026.20(c) to servicers, as well as creditors and assignees of a mortgage loan. It is widely recognized that, since the implementation of § 1026.20(c) approximately 25 years ago, servicers have been providing the required disclosures to consumers with ARMs, as opposed to the creditors or assignees of those loans that are not otherwise considered servicers. As noted above, the servicer is the party with which consumers have contact on an ongoing basis regarding their mortgages. Servicers receive consumers' payments. Consumers communicate with their servicers regarding questions or problems that may arise. Where the owner and the servicer are different entities, consumers may not know the identity of the owner and may not even realize that the servicer is not the owner of their mortgage. Thus, it is appropriate that servicers be included among the entities required to provide consumers with the disclosures under § 1026.20(c).

The Bureau further notes that the rule would have required creditors, assignees, and servicers to provide consumers with the disclosures required by § 1026.20(c) without referencing creditor, assignee, or servicer civil liability. Consistent with the proposal, the final rule and commentary set forth the obligations of creditors, assignees, and servicers but do not specifically address the issue of civil liability of any covered person in an action brought by a consumer. That issue is governed by TILA sections 130 and 131, and the Bureau's revisions do not purport to impose requirements inconsistent with TILA. For these reasons, and the reasons articulated in the proposal, the Bureau is adopting the final rule as proposed and comment 20(c)–1 as modified with regard to the application of § 1026.20(c) to creditors, assignees, and servicers.

As discussed in the legal authority section below, including servicers as covered persons under the requirements of § 1026.20(c) is authorized under, among other authorities, TILA section 105(a). Section 1026.20(c) is a servicing requirement and, as such, the Bureau believes that subjecting servicers to its requirements is necessary and proper to effectuate the purposes of TILA to assure a meaningful disclosure of credit terms, avoid the uninformed use of credit, and protect consumers against inaccurate and unfair credit billing practices. Also, TILA section 128(f), which applies to creditors, assignees, and servicers, provides authorization to include servicers within the scope of this rule. Finally, the Bureau notes that this revision of § 1026.20(c) is consistent with the scope of § 1026.20(d), such that both § 1026.20(c) and (d) now apply to creditors, assignees and servicers.

Loan modifications. A large bank and a national trade association recommended that the Bureau exempt loan modifications for financially-distressed consumers from the requirements of § 1026.20(c). They said that, among other reasons, requiring the notices in the context of a loan modification would delay execution of the loan modification by the 60 to 120 days advance notice required under the rule and that the § 1026.20(c) notice was not appropriate for loan modifications.

The Bureau notes that current § 1026.20(c) does not exempt loan modifications from its requirements. However, the Bureau agrees with this recommendation, and therefore, § 1026.20(c) limits coverage to interest rate adjustments pursuant to the ARM contract. Because interest rate adjustments occurring pursuant to a loan modification do not occur pursuant to the loan contract, they will not be subject to this rule and thus, will not delay execution of loan modification agreements. See comment 20(c)–2, which the Bureau is adopting in the final rule. The Bureau believes that an interest rate adjustment causing a payment change pursuant to a loan modification in a loss mitigation context does not require the consumer protections contemplated by § 1026.20(c). Such consumers have either agreed to the new interest rate prior to execution of the loan modification or are receiving the benefit of a lower rate and thus, are not at risk of payment shock. Because the loan modification is the actual result of pursuing alternatives to the payments otherwise required under their adjustable-rate mortgages, the advance notice afforded by the rule does not benefit such consumers.

For these reasons, as adopted, § 1026.20(c) exempts from its coverage interest rate changes occurring in the

context of a loan modification executed as a loss mitigation measure. Comment 20(c)–2 clarifies, however, that the requirements of § 1026.20(c) do apply to interest rate changes that occur subsequent to the execution of a loan modification agreement, if the interest rate changes occur pursuant to the terms of the ARM contract as modified.

Conversions. In its proposal, the Bureau also stated that § 1026.20(c) would apply to ARMs converting to fixed-rate mortgages when the adjustment to the interest rate resulted in a corresponding payment change. Providing this notice would have alerted consumers to their new interest rate and payment following conversion from an ARM to a fixed-rate mortgage. Proposed comment 20(c)–2 explained that, in the case of an open-end account converting to a closed-end adjustable-rate mortgage, § 1026.20(c) disclosures would not be required until the implementation of the first interest rate adjustment that resulted in a corresponding payment change post-conversion. The Bureau analogized the conversion to consummation. Thus, like other ARMs subject to the requirements of proposed § 1026.20(c), disclosures for these types of converted ARMs would not have been required until the first interest rate adjustment following the conversion which resulted in a corresponding payment change. The proposed rule would have been consistent with existing comment 20(c)–1 and proposed § 1026.20(d) regarding conversions.

A large bank and a national trade association requested that the Bureau clarify that the requirement of § 1026.20(c) to provide disclosures in the case of an ARM converting to a fixed-rate transaction does not apply to loan modifications made as part of loss mitigation efforts. Applying this measure to loan modifications, they stated, would harm the consumer by, among other things, needlessly delaying execution of the loan modification to comply with the rule. This recommendation is moot in view of the Bureau's decision to limit the scope of coverage of § 1026.20(c) to ARMs adjusting pursuant to the loan contract, thereby exempting all loan modifications executed as a loss mitigation measure from the requirements of § 1026.20(c).

A credit union stated that providing this disclosure would be redundant and confusing to consumers. The Bureau believes that consumers whose interest rates will change as a result of such conversions would benefit from receiving the § 1026.20(c) notice alerting them to the upcoming change, especially if the conversion occurs automatically under the loan contract. The Bureau is adopting proposed § 1026.20(c) without modification. The Bureau also is adopting comment 20(c)–3, originally proposed as 20(c)–2, which interprets § 1026.20(c) with regard to conversions. The final rule removes current comment 20(c)–1.

Legal Authority

The Bureau amends § 1026.20(c) pursuant to its authority under TILA section 105(a). For the reasons discussed in the section-by-section analysis of each of the amendments to § 1026.20(c), the Bureau believes that the amendments are necessary and proper to effectuate the purposes of TILA, including to assure a meaningful disclosure of credit terms, avoid the uninformed use of credit, and protect consumers against inaccurate and unfair credit billing practices, as well as to prevent circumvention or evasion of TILA. Section 1026.20(c) is further authorized under Dodd-Frank Act section 1405(b), which permits the Bureau to modify disclosure requirements where such modification is in the interest of consumers and the public. For the reasons discussed above and below, the Bureau believes that its modification of 1026.20(c) serves the interests of both consumers and the public.

Section 1026.20(c) also is authorized under TILA section 128(f), which requires that certain information enumerated in the statute be provided to consumers every billing cycle in a periodic statement and also confers on the Bureau the authority to require periodic disclosure of ''[s]uch other information as the Bureau may prescribe in regulations.'' Although TILA section 128(f) authorizes the Bureau to require that the content of periodic disclosures, such as those required by § 1026.20(c), be included in the periodic statement, for the reasons set forth above and below, the Bureau believes that providing this information as a separate disclosure would better serve consumers. Under § 1026.17(a), as discussed above, the § 1026.20(c) ARM payment adjustment notice must be separate and distinct from the periodic statement but may be provided to consumers together with the periodic statement and, depending on the mode of delivery, in the same envelope or as an additional email attachment. The Bureau also believes that the interest of consumers and the public interest are better served by receiving the § 1026.20(c) ARM notice, within the timeframe discussed below, each time ARM interest rate adjustments result in a corresponding payment change, rather than with each billing cycle of the periodic statement.

Further, the Bureau believes, consistent with Dodd-Frank Act section 1032(a), that the formatting requirements ensure that the features of the ARM loans covered by § 1026.20(c) are fully, accurately, and effectively disclosed to consumers in a manner that permits them to understand the costs, benefits, and risks associated with such loans, in light of their individual facts and circumstances.

20(c)(1) Coverage

20(c)(1)(i) In General

Proposed § 1026.20(c)(1)(i) defined an adjustable-rate mortgage or ARM, for purposes of § 1026.20(c), as a closed-end consumer credit transaction secured by the consumer's principal dwelling in which the annual percentage rate may increase after consummation. The proposed rule used the wording from the definitions of ''adjustable-rate'' and ''variable-rate'' mortgage in subpart C of Regulation Z to promote consistency within the regulation. Proposed comment 20(c)(1)(i)–1 explained that the definition of ''ARM'' meant ''variable-rate mortgage'' as that term is used elsewhere in subpart C of Regulation Z, except as would have been provided in proposed comment 20(c)(1)(ii)–3. Having received no comment on this issue, the Bureau is adopting the final rule and comment 20(c)(1)(i)–1 is adopted as proposed.

In its proposal, the Bureau noted that current § 1026.20(c) requires disclosures only for adjustments to the interest rate in variable-rate transactions subject to § 1026.19(b), which is limited to loans secured by the consumer's principal dwelling with a term of greater than one year. The Bureau proposed deleting the cross-reference to § 1026.19(b), which otherwise would have expanded the scope of § 1026.20(c) to include loans with terms of one year or less. Current § 1026.20(c) and comment 20(c)–1 would have been removed in favor of proposed § 1026.20(c)(1)(i) with regard to which loans are subject to the interest rate adjustment disclosures. Having received no comment on the proposed elimination of the cross-reference to § 1026.19(b), the Bureau is adopting the final rule as proposed.

The Bureau proposed using the terms ''adjustable-rate mortgage'' or ''ARM'' to replace the term ''variable-rate transaction'' in current § 1026.20(c). Proposed comment 20(c)(1)(i)–1 clarified that the term ''variable-rate transaction,'' as used in § 1026.19(b) and elsewhere in Regulation Z, was

synonymous with the term ''adjustable-rate mortgage'' or ''ARM,'' except where specifically distinguished. The Bureau proposed this revision because ''adjustable-rate mortgage'' and ''ARM'' are the terms commonly used for mortgages covered by current and proposed § 1026.20(c) and (d). Having received no comments on this topic, the Bureau is adopting the final rule as proposed.

Proposed comment 20(c)(1)(i)–1 also clarified that the requirements of § 1026.20(c)(1)(i) would not be limited to transactions financing the initial acquisition of the consumer's principal dwelling, but would apply to other closed-end ARM transactions secured by the consumer's principal dwelling, consistent with current comment 19(b)–1 and current § 1026.20(c). Having received no comments on this subject, the Bureau is adopting the final rule and comment 20(c)(1)(i)–1 as proposed.

20(c)(1)(ii) Exemptions

In General

Proposed § 1026.20(c)(1)(ii) set forth two exemptions from the disclosure requirements of § 1026.20(c). These exemptions applied to: (1) Construction loans with terms of one year or less; and (2) the first adjustment to an ARM if the first payment at the adjusted level was due within 210 days after consummation and the actual, not estimated, new interest rate was disclosed at consummation in the initial ARM interest rate adjustment notice that would have been required by proposed § 1026.20(d). Section 1026.20(d) also proposed the same construction loan exemption. Proposed comments 20(c)(1)(ii)–1 and –2 provided clarification of these exemptions, and proposed comment 20(c)(1)(ii)–3 clarified that certain loans are not ARMs if the interest rate or payment change is based on factors other than a change in the value of an index or a formula.

In response to comments received from industry representatives, the final rule expands the construction loan exemption to all ARMs with terms of one year or less. Industry commenters requested other exemptions from § 1026.20(c) that the Bureau declines to adopt, for the reasons discussed below.

Exemptions from the Rule

ARMs with terms of one year or less. The proposed rule would have included an exemption for construction ARMs with terms of one year or less. As set forth in the proposal, the Bureau said it believed that the frequent interest rate adjustments, multiple disbursements of funds, short loan term, and on-going communication between the creditor, assignee, or servicer and consumer distinguish construction loans from other ARMs. These loans are meant to function as bridge financing until the completion of construction and permanent financing can be put into place. The Bureau stated that consumers with construction ARMs were not at risk of payment shock as they may be with other ARMs where interest rates changed less frequently. Moreover, given the frequency of interest rate adjustments on construction loans, creditors, assignees, and servicers would have experienced difficulty complying with the proposed requirement to provide the notice to consumers between 60 and 120 days before the first payment at a new level was due for each adjustment that resulted in a corresponding payment change. The Bureau concluded that requiring § 1026.20(c) notices for these loans would not have provided a meaningful benefit to the consumer nor would it have improved consumers' awareness and understanding of their construction ARMs with terms of one year or less.

The Bureau solicited comments on whether there were other ARMs with terms of one year or less, and whether such ARMs should be exempt from the requirements of § 1026.20(c). If the time period of the advance notice for consumers required by the Bureau's proposal was not appropriate for these short-term ARMs, the Bureau solicited comments on what period would have been appropriate that also would have provided consumers with sufficient notice of the upcoming interest rate adjustment and new payment.

A number of commenters, including two large servicers, a home builder trade association, and a bank trade association, recommended that the Bureau expand the proposed short-term construction exemption to other short-term financing originated by consumers for consumer purposes. In addition to construction ARMs, such ARMs would include home improvement, bridge, and other short-term consumer loans. Commenters echoed the reasoning articulated above by the Bureau in favor of the construction loan exemption to support their recommendation to extend the exemption to all consumer ARMs with terms of one year or less. They reasoned that the short term and frequent creditor contact with consumers common to these loans insulates consumers from the payment shock risk occasioned by ARMs without these characteristics. Commenters also pointed out that the rate changes of such short-term ARMs are often tied to movement in an index, rather than a date certain, making compliance with the 60- to 120-day advance notice requirement virtually impossible to satisfy. One trade association also recommended the Bureau clarify that the exemption is restricted to ARMs taken out by consumers as opposed to those made directly to home builders and that the exemption extends to construction loans structured in a variety of ways.

The Bureau is persuaded that, as in the case of construction loans, the frequent interest rate adjustments, multiple disbursements of funds, short loan term, and on-going communication between the creditor, assignee, or servicer and the consumer distinguish these additional forms of short-term consumer financing from other ARMs. For the same reasoning underpinning the Bureau's decision to adopt an exemption for construction ARMs with terms of one year of less, the final rule exempts from the requirements of § 1026.20(c) all ARMs taken out by consumers with terms of one year or less. The Bureau notes that the ARM rules apply only to consumer loans and that comment 20(c)(1)(ii)–1, which the Bureau is adopting as proposed, applies the standards in current comment 19(b)–1 for determining the term of a construction loan and adds clarification regarding what other types of loans qualify for the expanded short-term ARM exemption.

New payment due for the first time within 210 days after consummation. The Bureau also proposed an exemption from the requirements of § 1026.20(c) for the first ARM adjustment causing a change in payment, if the first payment at the adjusted level was due within 210 days after consummation. As clarified by proposed comment 20(c)(1)(ii)–2, this exemption would have applied only if the exact interest rate, not an estimate, was disclosed at consummation. For ARMs adjusting within six months of consummation, which may be within 210 days before the first payment was due at the new level, the disclosures proposed by § 1026.20(d) would have been required at consummation. The Bureau reasoned that having received the exact amount of the new interest rate and payment at consummation and the recency of consummation would have obviated the need for the first § 1026.20(c) notice in this circumstance because consumers would have been apprised of the actual upcoming adjustment and payment change by receiving the § 1026.20(d) notice just months prior to its occurrence. Thus, the Bureau reasoned, providing § 1026.20(c) disclosures in these

circumstances would have been duplicative, would not have contributed to consumer awareness and understanding, and would not have provided a meaningful benefit to consumers. On the basis of this reasoning and in the absence of comments on this issue, the Bureau integrates this exemption in § 1026.20(c) and is adopting comment 20(c)(1)(ii)–2.

Non-ARM loans. Proposed comment 20(c)(1)(ii)–3 discussed other loans to which the rule would not have applied. Proposed comments 20(c)(1)(ii)–3 and 20(d)(1)(ii)–2 were consistent with regard to the loans which would not have been subject to the proposed ARM disclosure rules. Certain Regulation Z provisions treat some of these loans as variable-rate transactions, even if they are structured as fixed-rate transactions. The proposed comment clarified that, for purposes of § 1026.20(c), the following loans, if fixed-rate transactions, would not have been considered ARMs and therefore would not have been subject to ARM notices pursuant to § 1026.20(c): Shared-equity or shared-appreciation mortgages; price-level adjusted 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; graduated-payment mortgages or step-rate transactions; renewable balloon-payment instruments; and preferred-rate loans. The Bureau observed that the particular features of these types of loans might trigger interest rate or payment changes over the term of the loan or at the time the consumer pays off the final balance. However, the Bureau stated that these changes were based on factors other than a change in the value of an index or a formula. Because the enumerated loans would not have been ARMs under the proposed rule they would not have been covered by proposed § 1026.20(c) and, thus, would not have required disclosures.

The Bureau stated that proposed and current § 1026.20(c) were generally consistent with regard to the ARMs to which they would not apply. The principal difference was that current § 1026.20(c) applied to renewable balloon-payment instruments and preferred-rate loans, even if structured as fixed-rate transactions, while proposed § 1026.20(c) would not have applied to such loans. *See* § 1026.19(b) and comment 19(b)–5.i.A and B. Also, as discussed above, current § 1026.20(c) would not have applied to loans with terms of one year or less. This category included construction loans, which would have been exempted from coverage under proposed § 1026.20(c). The Bureau also noted that its proposed exemption for certain initial § 1026.20(c) ARM adjustments would have been inapplicable to the current rule because proposed § 1026.20(d) would not yet have been implemented to replace at consummation the disclosures required by current § 1026.20(c) for the first (and all ensuing) interest rate adjustments.

Like proposed comment 20(c)(1)(ii)–3, current comment 20(c)–2 clarifies that § 1026.20(c) does not apply to shared-equity or shared-appreciation mortgages or to price-level adjusted or other such indexed mortgages. The current rule cross-references § 1026.19(b) and applies to all variable-rate transactions covered by that rule. Comment 19(b)–4 explains that graduated-payment mortgages and step-rate transactions without variable-rate features are not subject to § 1026.19(b). Thus, these loans are not subject to current § 1026.20(c) nor would they have been subject to the proposed rule.

The current rule does not mention renewable balloon-payment instruments and preferred-rate loans, but current § 1026.20(c) applies to these loan products through the rule's cross-reference to § 1026.19(b) and therefore to comment 19(b)–5.i.A and B. As discussed above, under the Bureau's proposal, these loans would not have been considered adjustable-rate mortgages and therefore would not have been subject to the disclosures required in proposed § 1026.20(c). The Bureau explained that the particular features of these types of loans might trigger interest rate or payment changes over the term of the loan or at the time the consumer pays off the final balance but that these changes would have been based on factors other than a change in the value of an index or a formula. To illustrate that point, the Bureau explained that whether or when the interest rate would adjust for a preferred-rate loan with a fixed interest rate would likely not be knowable to the creditor, assignee, or servicer between 60 and 120 days in advance of the due date for the first payment at a new level after the adjustment. The Bureau went on to explain that this was because the loss of the preferred rate would have been based on factors other than a formula or change in the value of an index agreed to at consummation. The Bureau pointed out the Board had also proposed to remove renewable balloon-payment instruments and preferred-rate loans from coverage under § 1026.20(c) in its 2009 Closed-End Proposal.[62] The Bureau received no comments on this topic and, thus, is adopting the rule and comment 20(c)(1)(ii)–3 as proposed.

Requested Exemptions

No small servicer exemption or integration of ARM notices into the periodic statement. The proposed and final rules do not exempt small servicers from the requirements of § 1026.20(c) and (d), despite the recommendation for such an exemption from many community banks and credit unions and the trade associations representing them. Also, after considering comments received in response to its solicitation of whether § 1026.20(c) and (d) disclosures should be permitted to be integrated into the periodic statement, the Bureau is not adopting this measure. For a full discussion of the Bureau's consideration of these issues for both § 1026.20(c) and (d), see the section-by-section analysis of § 1026.20(d)(1)(ii) below as well as the regulatory flexibility analysis in part VIII.

Other exemptions requested. For a discussion of requests regarding payment-option ARMs and reverse mortgage ARMs, see the section-by-section analysis of § 1026.20(d)(1)(ii) below. One large bank recommended an exemption from the requirements of § 1026.20(c) for consumers in bankruptcy, because it said the § 1026.20(c) notice would be redundant and conflict with the timing of the interest rate adjustment required under Federal bankruptcy law 21 days in advance of the payment change. The Bureau declines to use its exception authority for this purpose. The Bureau notes that these ARMs are subject to the current rule and it does not agree that the requirements of § 1026.20(c) are redundant or conflict with bankruptcy law. On the contrary, providing the § 1026.20(c) notice earlier than the timeframe required under the bankruptcy law enhances consumer protection by providing these consumers with additional time to adjust to an increase in their mortgage payments.

A large bank requested exemption from the requirements of § 1026.20(c) when a consumer with an ARM has been referred to foreclosure, the servicer has determined that the consumer has abandoned the property at issue, or the servicer has received no payment nor had any contact with the consumer in more than six months. The Bureau notes that these ARMs are subject to the current rule and the commenter neither showed evidence of undue burden nor

[62] 74 FR 43232, 43264, 43387 (Aug. 26, 2009).

otherwise set forth reasoning justifying scaling back existing consumer protections. The Bureau believes that even consumers who have ceased making payments or abandoned the property can benefit from being alerted to and understanding the rate at which interest is accruing. Further, in some cases, the disclosures may cause consumers to take action to mitigate their losses.

20(c)(2) Timing and Content

Rate Adjustment Disclosures

Timing

Proposed § 1026.20(c)(2) would have required ARM disclosures to be provided to consumers between 60 and 120 days before the first payment at the adjusted level was due. Under current § 1026.20(c), notices must be provided to consumers between 25 and 120 days before the first payment at a new level is due. Thus, the proposed rule would have increased the minimum advance notice to consumers from 25 to 60 days before a new payment amount was due for the first time. The two circumstances under which the rule proposed a timeframe that differed from the proposed general rule are discussed below. Proposed comment 20(c)(2)–1 would have replaced current comment 20(c)–1 regarding timing.

60 to 120 day advance notice. Current § 1026.20(c) requires disclosure of the new interest rate and payment between 25 and 120 days before the first payment at the adjusted level is due. Under the proposed rule, the notice would have been required between 60 and 120 days before the first payment at the new level is due. The longer timeframe under the proposal, the Bureau explained, was intended to give consumers more time to adjust their finances to the actual amount of the increase in their mortgage payments caused by a rise in interest rates. Further, for consumers who were not able to make the higher payment, the longer timeframe would have provided additional time to refinance or take other loss mitigating actions. The Bureau stated that the current minimum time of 25 days did not give consumers sufficient time either to adjust their finances or to pursue meaningful alternatives such as refinancing, home sale, loan modification, forbearance, or deed-in-lieu of foreclosure. The Bureau cited research conducted for the years 2004 through 2007 suggesting that a requirement to provide ARM adjustment disclosures 60, rather than 25, days before the first payment at the adjusted level is due more closely reflects the time needed for consumers to refinance a loan.[63] In the current market, the Bureau said, the nation's biggest mortgage lenders take an average of more than 70 days to complete a refinance.[64]

The Bureau said that for most adjustable-rate mortgages, the proposed 60-day minimum timeframe would have provided sufficient time for creditors, assignees, and servicers to comply with the rule. Through outreach to servicers of adjustable-rate mortgages, the Bureau learned that, for most ARMs, servicers knew the index value from which the new interest rate and payment would be calculated at least 45 days before the date of the interest rate adjustment. Because interest on consumer mortgage credit generally is paid one month in arrears, this meant that, for most ARMs, servicers would know the index value approximately 75 days before the due date of the first new payment, depending on the number of days in the month during which interest began accruing at the new rate.

Creditors, assignees, and servicers generally refer to the date the adjusted interest rate goes into effect as the ''change date.'' The ''look-back period'' is the number of days prior to the change date on which the index value would be selected which would serve as the basis for the new interest rate and payment. In general, the Bureau observed, interest rate change dates occur on the first of the month to correspond with payment due dates. Thus, the due date for the new payment generally would fall on the first of the month following the change date.

Based on outreach conducted by the Bureau, it appeared that small servicers often sent out the payment change notices required by § 1026.20(c) on the same day the index value was selected. In that case, for a loan with a 45-day look-back period, the notice would be ready 45 days before the change date and, with an approximately 30-day billing cycle between the change date and the date the first payment at the new level would be due, the interest rate adjustment notice could be provided to the consumer approximately 75 days before the new payment was due. Under these circumstances, the servicer could comfortably comply with a rule requiring that notice be provided to consumers 60 days before the payment at a new level was due.

On the other hand, the Bureau observed in the proposed rule that many large creditors, assignees, and servicers conduct what is referred to as a ''verification period'' before sending out the notices required by § 1026.20(c). This verification period generally takes anywhere from three to ten days and involves confirming the index rate and other quality control measures to ensure the notices are correct.[65] In these cases, for a loan with a 45-day look-back period, the payment change notices could be provided between approximately 42 and 35 days prior to the change date, which was either 70 to 73 or 63 to 66 days before the new payment was due, depending on the verification period used and the length of the billing cycle. Under these circumstances, payment change notices could be provided to consumers within the 60-day period, even assuming a verification period of up to 13 days. For loans with the shortest verification period of three days, the payment change notice could be provided to consumers 70 days prior to payment due at a new level.

The Bureau therefore concluded that for most ARMs, creditors, assignees, and servicers could, consistent with their current practices, comply with the 60-day time period the Bureau proposed. The Bureau solicited comments about the proposed timing of the § 1026.20(c) notice, including the feasibility of applying the 60-day period to ARMs that have look-back periods of less than 45 days, whether a look-back period of 45 days or longer was feasible going forward for loan products that currently used shorter look-back periods and, if not, why not. The Bureau also solicited comments on the extent, if any, to which the relative length of the look-back period might affect the interest rate risk for the creditor, assignee, or servicer. It also queried about the operational changes that would be required to provide § 1026.20(c) notices at least 60 days before the first payment at a new level was due. Comment was requested on any factors that would hinder compliance with this timeframe. In light of technological and other advances since the promulgation in 1987 of current § 1026.20(c), the Bureau also solicited comments on whether, and if so why, lengthy verification periods were necessary and on the feasibility of reducing the length of these verification periods.

[63] Robert B. Avery et al., *The 2007 HMDA Data,* Fed. Reserve Bull., Dec. 23, 2008, at A107.

[64] Nick Timiraos & Ruth Simon, *Borrowers Face Big Delays in Refinancing Mortgages,* Wall St. J., May 9, 2012, at A1, *available at http://online.wsj.com/article/SB10001424052702303459004577364102737025584.html.*

[65] The Bureau noted that no creditor, assignee, or servicer it contacted used a system employing an automatic feed of information from the publisher of an index source. All data was entered and verified manually.

Three consumer groups and a research organization suggested modifying the proposed rule to allow advance notice of at least 70 to 90 days or more instead of the proposed 60 days advance notice. These entities stated that the proposed time was insufficient for consumers to take steps to ameliorate losses posed by a rise in ARM interest rates and payments. Because loan modifications and refinancings with existing lenders are likely to fail, said one consumer group, consumers should have additional advance warning to allow for consideration of additional loss mitigation applications with prospective lenders. The research organization noted that 60 days may be too short in a market, such as the current one, in which refinancing takes approximately 70 days.

The Bureau recognizes that longer advance notice provides consumers with more of an opportunity to adjust to an interest rate increase. The Bureau also realizes that, at least in today's market, certain types of transactions, such as refinancing or a home sale, often cannot be completed within 60 days. Nonetheless, the Bureau believes that the proposed 60-day notice effectively balances consumer protection considerations against the practical realities and costs that would be entailed in requiring even longer notice periods. Whether or not consumers can complete loss mitigating options pursued during this 60-day period, they can advance towards that goal and take measures to financially prepare for the payment change. Further, the advance notice shortens the time period in which consumers would have to pay at a higher level before completing a refinancing or other alternative. Also, 45-day look-back periods are the norm for ARM contracts and, once the grandfather period expires, their dominance in the market likely will grow as look-back periods of less than 45 days become obsolete. As discussed above, many entities servicing ARMs with look-back periods of less than 45 days would not be able to meet even the 70-day, let alone the 90-day or longer, deadline recommended. For these reasons, the final rule requires that the § 1026.20(c) ARM disclosures be provided to consumers at least 60, and not 70 or more, days in advance of the date the first payment at a new level is due after a rate adjustment. The portion of proposed comment 20(c)(2)–1 setting forth a scenario for providing the payment change notices for an ARM with a look-back periods of 45 days, is removed as unnecessary. The one industry commenter addressing the issue of verification periods, stated that no institution, large or small, should require a verification period in excess of three days.

Many industry commenters opposed the new timeframe as unworkable—even for ARMs with 45-day look-back periods. This opposition, however, appears to be based on the erroneous perception that the proposed rule would require them to provide the § 1026.20(c) notice between 60 and 120 days before *the interest rate adjustment date,* rather than before the *date the first payment at a new level is due.* As discussed above, in addition to an ARM's look-back period of 45 days, there is an additional 30 days before the new payment is due because interest for consumer mortgages generally is paid one month in arrears.

One small bank requested clarification as to whether ''provided'' means the date the notice is produced or mailed. Comment 20(c)(2)–1 is modified in the final rule to clarify that the requirement that § 1026.20(c) disclosures be provided to consumers within a certain timeframe means that the disclosures must be delivered or placed in the mail within that timeframe. Thus, creditors, assignees, and servicers need not calculate delivery or mailing time into the 60- to 120-day timeframe and those servicing ARMs with look-back periods of 45 days or longer can comply with the proposed timeframe. The final comment also is modified to clarify that the timeframe excludes courtesy, as well as grace, periods.

Some industry commenters opposed revision of § 1026.20(c), in part, on the grounds that, in their view, the current rule provides for sufficient notice to consumers, the Bureau had not shown that consumers need lengthier advance warning, and the additional advance warning was an insignificant change or would not provide sufficient time for consumers to refinance in any event. Two national trade groups and a credit union opposed the revision of the rule because, among other things, they claimed that the cost of an ARM product increases with the length of its look-back period. They also stated that it would be difficult and costly to change from the current to the proposed notice.

For the reasons articulated above in the proposed rule and for the following reasons, the Bureau is adopting § 1026.20(c) as proposed with regard to the advance notice requirements. The Bureau also is adopting comment 20(c)(2)–1, with modification to clarify, that ''provide'' means deliver or place in the mail and to clarify that the 60- to 120-day timeframe excludes any courtesy, as well as grace, period.

Through the first eight months of 2012, ARMs financed approximately 10 percent of the outstanding balance of new home-purchase.[66] Of the three million ARMs with outstanding balances at the end of October 2012, the Bureau was able to ascertain the length of the look-back period for the 1.9 million ARMs guaranteed by Freddie Mac, Fannie Mae, or Ginnie Mae.[67] Seventy-five percent of those ARMs have 45-day look-back periods. Thus, creditors, assignees, and servicers can comply with the new 60- to 120-day timeframe without changing the look-back periods of their ARMs for 75 percent of the approximately 2/3s of all outstanding ARMs for which the length of the look-back period is known.

The commenters stating that the cost of an ARM increases with the length of the look-back period did not submit any data to support this point. The Bureau's research found no causal relationship between the level of an ARM's margin and a 15-, 30- or 45-day look-back period, when controlling for consumer characteristics such as Loan-to-Value (LTV), credit score, and Debt-to-Income (DTI) ratios.[68] Thus, the Bureau believes it is unlikely that, for the minority of ARM products with look-back periods of 15 or 30 days, requiring that new ARMs incorporate a slightly longer look-back period will meaningfully impact the manner in which the product is priced. For example, it is unlikely that a creditor offering a 3/1 ARM could reasonably determine a substantial difference in valuation at origination between an interest rate adjustment 1,050 days in the future as opposed to 1,065 days in the future.

The Bureau disagrees with commenters stating that the current rule provides for sufficient notice to consumers, that the Bureau has not shown that consumers need lengthier advance warning, or that the additional advance warning would not provide sufficient time for consumers to pursue alternatives such as refinancing. Knowing the exact amount of their interest rate and payment between 60 and 120 days before the first new payment is due allows consumers more time to sell their homes or seek loss mitigating alternatives such as

[66] CoreLogic, TrueStandings Service, *available at http://www.corelogic.com/about-us/data.aspx#container-Mortgage* (data service accessible only through paid subscription) (reflects first-lien mortgage loans).

[67] Core Logic, TrueStandings Service.

[68] Fed. Hous. Fin. Agency (dataset derived from FHFA's Historical Loan Performance (HLP), a confidential supervisory database).

refinancing, loan modification, or deed-in-lieu of foreclosure—or at least to adjust their finances to an upcoming increase in rate and payment. The Bureau believes the current rule does not provide consumers with sufficient time to pursue these loss mitigation options. While each consumer electing to pursue alternatives may not be able to finalize a loss mitigation option by the time the first payment at the new level is due, increasing the minimum advance notice from 25 to 60 days provides consumers with enough time to at least make significant progress toward, if not complete, a refinancing or a loss mitigation option, or adjust their finances in anticipation of the increased payment. As a result, even for consumers who cannot complete an alternative within 60 days, the additional advance notice shortens the time period in which consumers would have to pay at a higher level before completing a refinancing or other alternative.

25 to 120 day advance notice permitted for some ARMs. As discussed above, in putting forward its proposal, the Bureau recognized that some ARMs have look-back periods shorter than 45 days. Specifically, the Bureau noted that ARMs backed by the FHA and VA have look-back periods of 15 or 30 days. The Bureau also noted that for some ARMs the adjustment is based on the published index as of the first business day of the month preceding the effective date of the interest rate change. Because the first day of that month may not fall on a business day, the look-back period may be less than 30 days, excluding any verification period. In two circumstances, the Bureau's proposal would have permitted a time period other than between 60 and 120 days.

First, the Bureau proposed to alter the timing requirements for ARMs adjusting for the first time within 60 days of consummation where the new interest rate disclosed at consummation pursuant to § 1026.20(d) was an estimate, rather than the actual rate that would go into effect when the ARM adjusts. (Under the proposal, if the actual rate had been disclosed at consummation, such loans would have been exempt from the rule pursuant to § 1026.20(c)(1)(ii)(B) The Bureau noted that compliance with the 60- to 120-day timeframe would not have been possible for such loans. For this reason, for such loans, the Bureau proposed that the § 1026.20(c) payment change notice be provided to consumers as soon as practicable, but not less than 25 days before the first payment at a new level was due. The Bureau received no comments on this altered timeframe and is adopting the rule as proposed.

Second, the Bureau proposed retention of the current timeframe of between 25 and 120 days before the first payment at the new level is due for ARMs with look-back periods of less than 45 days originated before July 21, 2013. The Bureau realized that the creditors, assignees, and servicers of existing ARMs with shorter look-back periods would not have been able to comply with the proposed timeframe and would need some time to adjust their products so that they could originate ARMs that could comply. Although this timeframe would have provided less advance notice to some consumers than generally provided under the proposed rule, the Bureau proposed to grandfather these ARMs to prevent altering existing contractual agreements regarding the look-back period. The Bureau made clear that after July 21, 2013, new ARMs would have had to be structured to permit compliance with the 60- to 120-day timeframe. The Bureau solicited comments regarding this proposed grandfather period. It also queried whether the proposed, or some other, expiration date for the grandfather time period would be preferable. Finally, the Bureau solicited comments on whether other ARMs should be allowed to comply with a 25- to 120-day notice period.

Many industry entities commented on the proposed grandfather period for ARMs with look-back periods of less than 45 days and on the issue of an effective date for the final TILA mortgage servicing rules in general and the ARM rules in particular. Two credit unions recommended against grandfathering; one stated that it was unnecessary and the other that it would create dual procedures for § 1026.20(c) notices. Two trade associations noted that their members would have to maintain bifurcated system functionalities for grandfathered versus non-grandfathered ARMs, which could lead to potential errors and reduced customer service. A large bank recommended allowing two timeframes for ARMs: the 60-day minimum advance notice for ARMs with look-back periods of 45 days or more and the 25-day minimum advance notice for ARMs with shorter look-back periods. That bank went on to say that no grandfather period was needed because, once government agencies no longer insured ARMs with look-back periods of less than 45 days, ARMs with short look-back periods would disappear. A large non-bank servicer agreed with the Bureau's proposed timing. One large bank recommended grandfathering ARMs where it would have to determine an index rate on a business day and thus, must look back 46 or 47 days. The Bureau notes that it received no other comments on this last point and refers to its analysis above illustrating how ARMs with look-back periods of 45 days or longer can comply with the proposed rule.

Industry commenters generally recommended an implementation period longer than one year. They stressed the added burden of having to simultaneously implement other Bureau-mandated rules. Generally, commenters said that one year was insufficient for servicers to design, develop, and implement the required system enhancements to provide the capability to generate the new automated 60-day ARM notices and to permit time for necessary adjustments by other parties, such as lenders, technology and form vendors, and attorneys. A large bank reported that these system changes would include reprogramming origination and servicing systems to board loans originated after the grandfather period. In general, commenters recommended an implementation period of between 18 to 30 months after publication of the final rule.

Many commenters recommended that the Bureau tie the grandfather period to the effective date of the final rule rather than impose a date certain. Several large- and medium-sized servicers and national industry trade groups recommended the Bureau grandfather all ARMs with look-back periods of less than 45 days until one year or longer after the GSEs, FHA, and VA issued final changes to their mortgage contracts. This way, they said, creditors could make the changes necessary to issue ARMs that could comply with requirements of § 1026.20(c). Other commenters requested tying the grandfather deadline to when investors in GSEs and government mortgage programs have completed the required changes to their guidelines because creditors, in turn, have to revise their products and work with investors to update their documents and guidelines. One large bank recommended an 18 to 24 month phase-in period, taking into account any additional time necessary for the FHA, VA, and GSEs to adjust their loan contracts, with a minimum of at least 12 months for compliance after they finalize the required changes. This bank suggested the alternative of making compliance voluntary 12 months after publication of the final rule in the **Federal Register** and mandatory by July 2014.

The Bureau understands that creditors originating loans insured by FHA and VA must satisfy the requirements established by those agencies. These creditors will not be able to originate FHA or VA ARMs with look back periods of 45 days or longer until those agencies modify their policies governing look-back periods. Based on discussions with those agencies, the Bureau has decided to grandfather ARMs with look-back periods of less than 45 days originated prior to one year after the effective date of the final rule. Thus, for such ARMs, the final rule provides a year beyond the one year implementation period for the transition to ARMs with look-back periods of 45 days or more.

Consultation with government agencies that guarantee ARMs with look-back periods of less than 45 days revealed, in addition to there being no substantive reason to retain those specific look-back periods, an expectation that they could complete their processes, including any required rulemaking, well within the grandfather period. In addition, the Bureau expects that any other investors or guarantors will make conforming changes to the look-back periods of their loan products by the time the grandfather period expires. In light of this, the Bureau believes that establishing a date certain for the expiration of the grandfather period is preferable to adopting an indeterminate period and pinning consumer protections to the indefinite future date. To provide consumers with the protections contemplated by § 1026.20(c) and for the reasons discussed above, the Bureau is extending the proposed grandfather period by 18 months such that § 1026.20(c) grandfathers ARMs with look-back periods of less than 45 days originated prior to one year after the effective date of the final rule, *i.e.,* such ARMs originated prior to January 10, 2015. See part VI below for a discussion of the effective date for the 2013 TILA Servicing Rule.

Four trade associations and a credit union recommended grandfathering all ARMs originated prior to the effective date of the rule. The Bureau believes that, for all the reasons discussed throughout the section-by-section analysis, consumers with ARMs originated prior to the effective date of the rule but which, after that date, have an interest rate adjustment with a corresponding payment change can benefit from the consumer protections afforded by § 1026.20(c) as much as consumers with ARMs originated after the effective date. In many of these cases, adjustments will occur a year or more after the effective date of the rule, exposing those consumers to the same risk of payment shock as those whose ARMs originate after the effective date. Therefore, once the final rule takes effect, except for ARMs with look-back periods of less than 45 days covered by the grandfather period, it applies to all ARMs with interest rate adjustments causing payment changes.

A large bank affiliate originating mortgage loans to clients of its affiliated wealth management businesses submitted comments in favor of retaining the 25- to 120-day compliance period to preserve short-term index loans, *i.e.,* ARMs with frequent interest rate adjustments. The commenter stated that these loans are in demand by certain sectors of the marketplace and offer benefits to those consumers. Because the interest rates of most short-term index loans adjust at least monthly, under the proposed 60- to 120-day timeframe, creditors would have no choice but discontinue such products.

The Bureau agrees with the commenter's rationale for preserving these frequently adjusting ARMs. Unlike most ARMs with interest rates that adjust annually or every three, five, seven, or ten years, short-term index loans adjust so often as to obviate the risk of payment shock. Consumers whose interest rates adjust monthly run little risk of surprise at a changed payment compared to consumers whose ARM interest rates have not adjusted for one, three, five, or seven years before the payment change. Moreover, each interest rate adjustment for such loans occurs only 30 days or so after the last adjustment, further insulating these consumers from the market fluctuations more likely to occur over the course of a year or more. In sum, short-term index ARMs are not the types of loans the Bureau intends to target with the requirement of § 1026.20(c) to provide consumers with between 60 and 120 days of advance notice prior to the first due date of a new payment after an interest rate adjustment causing a payment change. For the above-stated reasons, the final rule permits the notice required by § 1026.20(c) to be provided to consumers between 25 and 120 days before the first payment at new level is due after an interest rate adjustment for ARMs with a uniform schedule of interest rate adjustments occurring every 60 days or less, which, as clarified in comment 20(c)(2)–1, means ARMs that adjust regularly at a maximum of every 60 days and that this time period excludes any grace or courtesy periods.

The Bureau also proposed to alter the timing requirements for ARMs adjusting for the first time within 60 days of consummation where the interest rate disclosed at consummation was an estimate, rather than the actual interest rate. (Under the proposal, if the actual interest rate had been disclosed at consummation, such ARMs would have been exempted from the rule pursuant to proposed § 1026.20(c)(1)(ii)(2). The Bureau noted that creditors, assignees, and servicers of such ARMs would not have been able to comply with the 60-day timeframe. For such loans, the disclosures proposed by § 1026.20(c) would have had to be provided to consumers as soon as practicable, but not less than 25 days before a payment at a new level was due. The Bureau received no comments on this topic and is adopting the rule as proposed.

20(c)(2)(i)

Statement Regarding Changes to Interest Rate and Payment

For interest rate adjustments resulting in corresponding payment changes, proposed § 1026.20(c)(2)(i)(A) would have required creditors, assignees, and servicers to inform consumers that, under the terms of their adjustable-rate mortgage, the specific period in which their current interest rate has been in effect would end on a certain date and that their interest rate and mortgage payment will change on that date. This information, the Bureau stated, is similar to the pre-consummation disclosures required by current § 1026.19(b)(2)(i) and § 1026.37(j) as proposed in the 2012 TILA–RESPA Proposal. Proposed comment 20(c)(2)(ii)(A)–1 clarified that the current interest rate was the interest rate that would be in effect on the date of the disclosure.

Proposed § 1026.20(c)(2)(i)(B) would have required the ARM payment change notices to include the dates of the impending and future interest rate adjustments. Proposed § 1026.20(c)(2)(i)(C) also would have required disclosure of any other loan changes taking place on the same day of the rate adjustment, such as changes in amortization caused by the expiration of interest-only or payment-option features.

The Bureau explained that the first ARM model form it tested did not contain the statement informing consumers of impending and future changes to their interest rate and the basis for these changes. Although participants understood that their interest rate would adjust and this would affect their payment, they did not understand that these changes would occur periodically, subject to the terms of their mortgage contract. Inclusion of

this statement in the second round of testing successfully resolved this confusion. All but one consumer tested in rounds two and three of testing understood that, under the scenario presented to them, their interest rate would change on an annual basis.[69] In the absence of comments regarding this provision, the Bureau is adopting the final rule as proposed.

20(c)(2)(ii)

Table With Current and New Interest Rates and Payments

Proposed § 1026.20(c)(2)(ii) would have required disclosure of the following information in the form of a table: (A) The current and new interest rates; (B) the current and new periodic payment amounts and the date the first new payment is due; and (C) for interest-only or negatively-amortizing payments, the amount of the current and new payment allocated to interest, principal, and property taxes and mortgage-related insurance, as applicable. The information in this table would have appeared within the larger table containing all the required disclosures.

This table would have followed the same order as, and had headings and format substantially similar to, those in the table in model forms H–4(D)(1) and (2) in appendix H of subpart C. The Bureau stated that it confirmed through consumer testing that, when presented with information in a logical order, participants more easily grasped the complex concepts contained in the proposed § 1026.20(c) notice. For example, the form would have begun by informing consumers of the basic purpose of the notice: Their interest rate was going to adjust, when it would adjust, and the adjustment would change their mortgage payment. This introduction would have been immediately followed by a visual illustration of this information in the form of a table comparing consumers' current and new interest rates. Based on its consumer testing, the Bureau stated it believed that the understanding of the consumers tested was enhanced by presenting the information in a simple manner, grouped together by concept, and in a specific order that allows consumers the opportunity to build upon knowledge gained. For these reasons, the Bureau proposed that creditors, assignees, and servicers disclose the information in the table as set forth in model forms H–4(D)(1) and (2) in appendix H.

Proposed § 1026.20(c)(2)(ii) would have replaced current § 1026.20(c)(1) and (4), but would have retained the requirement to disclose the current and new interest rates and the amount of the new payment. Proposed § 1026.20(c)(2)(ii)(A) also would have required disclosure of the date when the consumer would have to start making the new payment and proposed comment § 1026.20(c)(2)(ii)(A)–1 would have clarified that the new interest rate would have had to be the actual rate, not an estimate. Proposed § 1026.20(c)(2)(ii) also replaced the language ''prior'' and ''current'' in the current rule with the terms ''current'' and ''new,'' respectively, and removed comment 20(c)(2)–1 which, among other things, used the terms ''prior'' and ''current.'' This change was designed to make clear that ''current'' meant the interest rate and payment in effect prior to the interest rate adjustment and ''new'' meant the interest rate and payment resulting from the interest rate adjustment.

Proposed comment 20(c)(2)(ii)(A)–1 defined the term ''current'' interest rate as the one in effect on the date of the disclosure. This more succinct definition replaced the lengthy definition of ''prior interest rates,'' which current comment 20(c)(1) defines as the interest rate disclosed in the last notice, as well as all other interest rates applied to the transaction in the period since the last notice, or, if there had been no prior adjustment notice, the interest rate applicable at consummation and all other interest rates applied to the transaction in the period since consummation.

In all rounds of testing, consumers were presented with model forms with tables depicting a scenario in which the interest rate and payment were projected to increase as a result of the adjustment. All participants in all rounds of testing understood that their interest rate and payment were projected to increase and when these changes would occur.[70]

Current ARM notices are not required to show the allocation of payments among principal, interest, and escrow accounts for any ARM. The Bureau proposed including this information in the table for interest-only and negatively-amortizing ARMs only. The Bureau stated it believed that providing the payment allocation would have helped consumers better understand the risk of these products by demonstrating that their payments would not have reduced the loan principal. The Bureau also said that providing the payment allocation would have helped consumers understand the effect of the interest rate adjustment, especially in the case of a change in the ARM's features coinciding with the interest rate adjustment, such as the expiration of an interest-only or payment-option feature. Because payment allocation might change over time, the rule would have required disclosure of the expected payment allocation for the first payment period during which the adjusted interest rate would have applied.

The Bureau explained that the notice disclosing an allocation of payment for interest-only or negatively-amortizing ARMs was not tested until the third round of testing. The notice tested set forth the following scenario to consumers: The first adjustment of a 3/1 hybrid ARM—an ARM with a fixed interest rate for three years followed by annual interest rate adjustments—with interest-only payments for the first three years. On the date of the adjustment, the interest-only feature would expire and the ARM would become amortizing. Only about half of the participants understood that their payments were changing from interest-only to amortizing. Participants generally understood the concept of allocation of payments but were confused by the table in the notice that broke out principal and interest for the current payment, but combined the two for the new amount. As a result, this table was revised so that separate amounts for principal and interest were shown for all payments.[71]

The Bureau recognized that certain Dodd-Frank Act amendments to TILA pose restrictions on the origination of non-amortizing and negatively-amortizing loans. For example, TILA section 129C requires creditors to determine that consumers have the ability to repay the mortgage loan before lending to them and that this assumes a fully-amortizing payment. The Bureau thought it possible that this law and its implementing regulation would restrict the origination of risky mortgages such as interest-only and negatively-amortizing ARMs.

The Bureau stated that other Dodd-Frank Act amendments to TILA, such as the proposed periodic statement provisions discussed below, would provide payment allocation information to consumers for each billing cycle. Thus, consumers with interest-only or negatively-amortizing loans, or those who might obtain such loans in the

[69] Macro Report, at vii.

[70] Macro Report, at vii.

[71] Macro Report, at vii–viii. The allocation table for interest-only and negatively-amortizing ARMs was revised after the third and final round of testing and is identical in both § 1026.20(c) and (d).

future, would receive information about the interest-only or negatively-amortizing features of their loans through the payment allocation information in the periodic statement. Also, as stated above, consumer testing showed that participants tested were confused by the allocation table. In view of these changes to the law and the outcome of consumer testing, the Bureau solicited comments on whether to include allocation information for interest-only and negatively-amortizing ARMs in the proposed table described above.

A trade association generally supported the tabular format, stating that consumer testing has repeatedly proven its effectiveness. A large bank recommended eliminating altogether the table with the current and new interest rates and payments because, it said, the table tested poorly with consumers and would confuse them as well as be duplicative of the proposed periodic statement. Other commenters recommended eliminating only the portion of the table disclosing allocation information for interest-only and negatively-amortizing ARMs while one large bank commended the Bureau for adding these disclosures to the § 1026.20(c) notice. Those commenters in favor of eliminating allocation information for these ARMs said the information was not fully consumer tested, would be based on projections that would confuse and distract consumers, and would require costly software upgrades. Most of these commenters recommended substituting the statement for interest-only and negatively-amortizing ARMs required by § 1026.20(c)(2)(vi) in place of the allocation information; one large bank suggested expanding the language in these statements as a substitute for the allocation information. The large bank also said the allocation information would confuse consumers because, in the case of a negatively-amortizing ARM, the portion allocated to principal would have to be expressed as a negative number. One trade association recommended allowing estimated escrow payments for the new payment allocation table, which is what the rule proposed and the Bureau is adopting in § 1026.20(c)(2)(ii)(C).

The Bureau is adopting § 1026.20(c)(2)(ii) as proposed for the reasons set forth in the proposal and those set forth below. The table is the centerpiece of the § 1026.20(c) disclosure and contains some of the disclosure's most important information: The consumers' upcoming new interest rate and payment set forth next to their current rate and payment, such that consumers can make comparisons. This information informs consumers of the exact amount of the new mortgage payment the consumer must make starting in the next few months and the table allows easy comparison with their current charges, helping consumers decide on how best to proceed. Also, the periodic statement will provide consumers with only part of the information in the table: The date after which the interest rate will adjust and the amount of the next payment. Moreover, the periodic statement generally would provide consumers with a month warning before a payment increase, rather than the minimum 60-day advance notice required by § 1026.20(c).

Because interest-only and negatively-amortizing ARMs pose more potential risk to consumers than conventional ARMs, the Bureau believes that providing consumers with the specific payment allocations for when their interest rates adjust will provide a comprehensible snapshot of the consequences of the upcoming adjustments and better enable those consumers to manage their mortgages. The table itself tested well with consumers; the allocation breakdown for the new payment for interest-only and negatively-amortizing ARMs did not test as well. As discussed above, the Bureau revised the model forms to address that problem. Moreover, the periodic statement contains a similar allocation table for the upcoming mortgage payment and testing of the periodic statement went well and raised no concerns regarding projected principal, interest, and escrow—including for payment-option loans.[72] In addition, as set forth in the periodic statement sample form in appendix H–30(C), the allocation of principal for negatively-amortizing loans is zero, and not a negative number.

Also, the proposed rule clearly set forth the bases upon which to make the projections for the allocation table for these ARMs, as well as for loan balances. See the section-by-section analysis of § 1026.20(c)(2)(v) below regarding loan balances. For certain consumers, such as those who are delinquent, who may choose to pay ahead, or who have payment-option ARMs, the projected amount may not prove to be the actual amount. However, servicers routinely project expected payment allocations and loan balances any time they provide consumers with a future payment amount, such as in the periodic statement. The Bureau also notes that the use of allocation tables showing projected payments is an established practice in Regulation Z, as illustrated, for example, in appendices H–4(E) and (F). Also, the Bureau expects the origination of these risky loans will continue to decline in light of the qualified mortgage rules implementing TILA section 129C, thereby reducing the burden on servicers to provide the § 1026.20(c) allocation table. For these reasons and the reasons set forth in the proposed rule, the Bureau is adopting the final rule as proposed. The Bureau is adopting comment 20(c)(2)(ii)(A)–1 with the additional clarification that creditors, assignees, and servicers may round the interest rate, pursuant to the requirements of the ARM contract.

20(c)(2)(iii)

Explanation of How the Interest Rate Is Determined

Proposed § 1026.20(c)(2)(iii) would have required the ARM disclosures to explain how the interest rate was determined. Consumer testing revealed that participants generally had difficulty understanding the relationship of the index, margin, and interest rate.[73] The Bureau said this was the reason it proposed a relatively brief and simple explanation that the new interest rate would be calculated by taking the published index rate and adding a certain number of percentage points, called the ''margin.'' Proposed § 1026.20(c)(2)(iii) also would have required disclosure of the specific amount of the margin.

The Bureau noted that the proposed explanation of how the consumer's new interest rate was determined, such as adjustment of the index by the addition of a margin, mirrored the pre-consummation disclosure required around the time of application by current § 1026.19(b)(2)(iii) and TILA section 128A requirements for initial interest rate disclosures. It also paralleled the pre-consummation disclosure of the index and margin in the 2012 TILA–RESPA Proposal. Proposed § 1026.20(c) also would have required disclosure of the index and published source of the index or formula, as required in other disclosures by § 1026.19(b)(2)(ii) and TILA section 128A.

The proposed rule would have replaced current § 1026.20(c)(2), which required disclosure of the index values upon which the ''current'' and ''prior'' interest rates are based. The Bureau said that it believed that providing consumers with index values is less valuable than providing them with their

[72] Macro Report, at 15.

[73] Macro Report, at viii.

actual interest rates. The Bureau also proposed removal of current comment 20(c)(2)–1, which addressed the requirement to disclose current and prior interest rate.

Consumer testing indicated that the explanation helped participants better understand the relationship between interest rate, index, and margin. As stated in the proposal, it also helped dispel the notion held by many consumers in the initial rounds of testing that creditors subjectively determined their new interest rate at each adjustment.[74] The Bureau stated that it believed the proposed rule and forms struck an appropriate balance between providing consumers with key information necessary to understand the basis of their ARM interest rate adjustment without overloading consumers with complex and confusing technical information.

The Bureau received one comment regarding the explanation of how the interest rate is determined. A large bank recommended including adjustments to the index other than the margin, such as the addition of previously unapplied carryover interest.[75] The Bureau points out that the proposed rule contemplated including the addition of previously unapplied carryover interest increase in the explanation of how the *new payment* is calculated. The Bureau notes that, in the proposed rule, the new payment explanation came after the explanation of how the new interest rate is calculated. The Bureau agrees with the commenter that logically, and for accuracy and completeness, any previously unapplied carryover interest added to the index and margin to formulate the new interest rate should be disclosed to the consumer in the explanation of how the interest rate is calculated, rather than initially disclosing it in the later explanation of how the new payment is calculated.

The Bureau also notes that proposed § 1026.20(c)(2)(iv) would have required, among other things, disclosure of any previously unapplied carryover interest at each adjustment, as applicable. The Bureau solicited comments regarding this proposed requirement.[76] A credit union and a State trade association recommended that the Bureau eliminate disclosure of carryover interest altogether, asserting that it is too complex and unnecessary for consumers to understand and it would distract consumers from other information contained in the § 1026.20(c)(2) notices. A large servicer suggested the alternative of including this information in the periodic statement instead of the ARM disclosure.

The Bureau does not agree with these commenters. To provide consumers with candid and accurate information about the adjustments to their adjustable-rate mortgages, the Bureau has decided to issue the final rule including disclosure of applicable information regarding carryover interest. Excluding this information would present consumers with an incomplete and incorrect portrait of their loan. Complexity is inherent in a disclosure dealing with indices, margins, adjusting interest rates, and changing payments. The Bureau has attempted to distill these complex concepts into their simplest elements without compromising substance. The Bureau hopes that consumers confused by the disclosure of the application of previously foregone interest rate increases, or any of the other complex concepts addressed in the § 1026.20(c) disclosure, will consult with the servicer, homeownership counselors or other housing finance professionals, or knowledgeable personal contacts.

Because the Bureau agrees with the large bank commenter that informing consumers of the application of carryover interest in the explanation of how their new interest rate is calculated is both logical and would improve the accuracy of the disclosure, the Bureau is adopting § 1026.20(c)(2)(iii) with the addition of information regarding the adjustments to the index other than the margin, such as the application of previously unapplied carryover interest. The final rule modifies the proposed rule by requiring disclosure of the *type and amount* of any adjustment to the index including, in addition to any margin, the application of previously foregone interest rate increases. Because the final rule requires disclosure of this information in § 1026.20(c)(2)(iii), the Bureau removes as repetitive the proposed disclosure in § 1026.20(c)(2)(v) of the *amounts* of the margin, applied carryover interest, or any other adjustment to the index. The Bureau also is issuing the rule with comment 20(c)(2)(v)(B)–1, which provides clarification about the application of previously foregone interest rate increases, or applied carryover interest.

20(c)(2)(iv)

Rate and Payment Limits and Unapplied Carryover Interest

Proposed § 1026.20(c)(2)(iv) would have required the disclosure of any limits on the interest rate or payment increases at each adjustment and over the life of the loan. It also would have required disclosure of the extent to which the creditor, assignee, or servicer had foregone any increase in the interest rate due to a limit, called unapplied carryover interest. Disclosure of rate limits is not required by the current rule. The Bureau stated that it believed that knowing the limitations of their ARM rates and payments would help consumers understand the consequences of each interest rate adjustment and weigh the relative benefits of pursuing alternatives. The Bureau gave the example that if an adjustment caused a significant increase in the consumer's payment, knowing how much more the interest rate or payment could increase would better inform the consumer's decision whether or not to seek alternative financing.

The Bureau pointed out that proposed § 1026.20(c)(2)(iv) would have required, as current § 1026.20(c)(3) requires, disclosure of the extent to which the creditor, assignee, or servicer had foregone an increase in the interest rate due to a limit, called unapplied carryover interest, and the earliest date such foregone interest rate increase could be applied. Proposed comment 20(c)(2)(iv)–1 regarding unapplied interest rate increases closely paralleled, and would have replaced, current comment 20(c)(3)–1. The comment would have explained that disclosure of foregone interest rate increases would apply only to transactions permitting interest rate carryover. It further would have explained that the amount of the foregone interest rate increase was the amount that, subject to rate caps, could be added to future interest rate adjustments to increase, or offset decreases in, the rate determined according to the index or formula.

The Bureau reported that the consumers tested had difficulty understanding the concept of interest rate carryover when it was introduced during the third round of testing. The Bureau attributed this difficulty to the simultaneous introduction of other complex notions, such as interest-only or negatively-amortizing features and the allocation of interest, principal, and escrow payments for such loans. However, the Bureau also simplified the

[74] Macro Report, at viii.

[75] Carryover interest, or foregone interest rate increases, is the amount of interest rate increase foregone at any ARM interest rate adjustment that, subject to rate caps, can be added to future interest rate adjustments to increase, or to offset decreases in, the rate determined by using the index or formula.

[76] Because the issue of carryover interest arose first in the context of the explanation of how the interest rate is determined, the Bureau addresses the issue in depth here rather than in the following section § 1026.20(c)(2)(iv), Rate and Payment Limits and Unapplied Carryover Interest.

explanation of carryover interest to address this possible confusion.[77]

In its proposed rule, the Bureau recognized that the disclosure of rate limits and unapplied carryover interest would have provided information that might help consumers better understand their ARMs. However, the Bureau stated that it was considering whether the assistance this information would have provided outweighed its potential distraction from other more key information. Also, as explained above, consumers had difficulty understanding the concept of carryover interest and the Bureau was concerned that this difficulty might diminish the effectiveness of its proposed § 1026.20(c) disclosures. The Bureau solicited comments on whether to include rate limits and unapplied carryover interest in the proposed § 1026.20(c) disclosures.

The Bureau received few comments regarding the proposed disclosure of rate limits and unapplied carryover interest. A credit union supported inclusion of the rate and payment limits in the § 1026.20(c) notice and a large bank servicer and a large non-bank servicer recommended against it. A large bank servicer commented that consumers do not need this information because they receive it at consummation and including it in the § 1026.20(c) notice would distract and confuse them. The non-bank servicer and a trade association said the unapplied carryover interest was unrelated to the interest rate adjustment and would confuse consumers. See the section-by-section analysis of § 1026.20(c)(2)(iii) above for a discussion of disclosure of applying previously foregone carryover interest.

In addition, a credit union and a State trade association recommended the Bureau eliminate disclosure of carryover interest altogether, asserting that it is too complex and unnecessary for consumers to understand and it would distract consumers from other information contained in the § 1026.20(c) notices. A large servicer suggested the alternative of including this information in the periodic statement instead of in the § 1026.20(c) notice.

Because most ARMs covered by this rule will adjust a year or more after consummation, the Bureau disagrees that information provided at consummation suffices to adequately inform consumers about carryover interest and rate limits. Moreover, carryover interest is an essential element in the determination of the new interest rate and payment. For these reasons and the reasons in the Bureau's proposed rule, the Bureau is adopting the final rule as proposed. The Bureau also is adopting proposed comment 20(c)(2)(iv)–1, with slight modifications to clarify the definition of carryover interest.

20(c)(2)(v)

Explanation of How the New Payment Is Determined

Proposed § 1026.20(c)(2)(v) would have required ARM disclosures to explain how the new payment was determined, including (A) the index or formula, (B) any adjustment to the index or formula, such as by addition of the margin or application of previously foregone interest, (C) the loan balance, and (D) the length of the remaining loan term. This explanation would have been consistent with the disclosures provided at the time of application pursuant to § 1026.19(b)(2)(iii). The Bureau also stated that it would have been consistent with the requirement in TILA section 128A to disclose the assumptions upon which the new payment is based, which the Bureau had proposed to implement in § 1026.20(d), and thus would have promoted consistency among Regulation Z ARM disclosures.

The current rule requires disclosure of the contractual effects of the adjustment. This includes the payment due after the adjustment is made and whether the payment has been adjusted. The proposed rule would have required disclosure of this information as well as the name of the index and any specific adjustment to the index, such as the addition of a margin or an adjustment due to carryover interest. Proposed comment 20(c)(2)(v)(B)–1 explained that a disclosure regarding the application of previously foregone interest would have been required only for transactions that permitted interest rate carryover. The proposed comment further explained that foregone interest was any percentage added or carried over to the interest rate because a rate cap prevented the increase at an earlier adjustment. As discussed above, the Bureau stated that it believed that this explanation would have helped consumers better understand how the index or formula and margin would determine their new payment and would have dispelled the notion held by many consumers in the initial rounds of testing that the creditor subjectively determined their new interest rate, and thus the new payment, at each adjustment.

The proposal would have required disclosure of both the loan balance and the remaining loan term expected on the date of the interest rate adjustment. The current rule requires disclosure of the loan balance but not the remaining loan term. The date of the balance differed slightly in proposed § 1026.20(c) from the current rule. Current comment 20(c)(4)–1 explains that the balance disclosed is the one that serves as the basis for calculating the new adjusted payment while the Bureau proposed disclosure of a more current balance, *i.e.,* the one expected on the date of the adjustment. Both the proposed rule and the current rule, as explained in current comment 20(c)(4)-1, provide for disclosure of any change in the term of the loan caused by the adjustment.

The Bureau stated that disclosure of the four key assumptions upon which the new payment would be based would have provided a succinct overview of how the interest rate adjustment works. It also would have demonstrated that factors other than the index could increase consumers' interest rates and payments. Disclosures of these factors, the Bureau said, would have provided consumers with a snapshot of the current status of their adjustable-rate mortgages and with basic information to help them make decisions about keeping their current loan or shopping for alternatives.

Current comment 20(c)(4)–1 clarifies that disclosure of certain information related to loans that are not fully amortizing is required. The Bureau proposed disclosure of similar information in § 1026.20(c)(2)(vi), discussed below.

Two commenters voiced concern over having to project an estimate of the loan balance, as required in the proposed rule. For a discussion of the use of projections of scheduled payments for interest-only and negatively-amortizing ARMs, as well as for the loan balance, see the section-by-section analysis of § 1026.20(c)(2)(ii) above. The Bureau did not receive any other specific comments regarding § 1026.20(c)(2)(v) apart from one community bank recommending against the inclusion of similar information in both the explanation of how the interest rate is calculated and the explanation of how the new payment is determined. The Bureau points out that the components of the interest rate calculation are also components of how the new payment is determined and therefore, the Bureau will retain these common components in § 1026.20(c)(2)(v). However, to avoid redundancy, the final rule does not require reiteration of the amount of the

[77] Macro Report, at viii–ix. ''If not for this rate limit, your estimated rate on [date] would be [x]% higher'' was replaced with ''We did not include an additional [x]% interest rate increase to your new rate because a rate limit applied.''

margin, applied carryover interest, or any other adjustment to the index.

For these reasons and the reasons articulated in the proposed rule, the Bureau is issuing § 1026.20(c)(2)(v) and comment 20(c)(2)(v)(B)–1 as proposed, except the final rule does not require disclosure of the specific amount of any adjustment to the margin, because that data is provided in the final rule under § 1026.20(c)(2)(iii).

20(c)(2)(vi)

Interest-Only and Negative-Amortization Statement and Payment

Proposed § 1026.20(c)(2)(vi) would have required § 1026.20(c) notices to include a statement regarding the allocation of payments to principal and interest for interest-only or negatively-amortizing ARMs. If negative amortization occurred as a result of the interest rate adjustment, the proposed rule would have required disclosure of the payment necessary to amortize fully such loans at the new interest rate over the remainder of the loan term. As the Bureau explained in proposed comment 20(c)(2)(vi)–1, for interest-only loans, the statement would have informed the consumer that the new payment would cover all of the interest but none of the principal owed and, therefore, would not reduce the loan balance. For negatively-amortizing ARMs, the statement would have informed the consumer that the new payment would cover only part of the interest and none of the principal, and therefore the unpaid interest would add to the balance. The current rule, clarified by current comment 20(c)(5)–1, requires disclosure of the payment necessary to amortize fully loans that become negatively-amortizing as a result of the adjustment but does not require the statement regarding amortization. Proposed § 1026.20(c)(2)(vi) and proposed comments 20(c)(2)(vi)–1 and 20(c)(2)(vi)–2 would have replaced the current rule and current comment 20(c)(5)–1.

Both current § 1026.20(c) and the Board's 2009 Closed-End Proposal to revise § 1026.20(c) include, for ARMs that become negatively amortizing as a result of the interest rate adjustment, disclosure of the payment necessary to amortize fully those loans at the new interest rate over the remainder of the loan term. However, the Bureau pointed to countervailing considerations regarding whether to include this information in proposed § 1026.20(c).

The Bureau recognized that certain Dodd-Frank Act amendments to TILA pose restrictions on the origination of non-amortizing and negatively-amortizing loans. For example, TILA section 129C requires creditors to make a reasonable and good faith determination that consumers have the ability to repay the mortgage loan before lending to them, and that in making such a determination the creditor generally must assess the consumer's ability to repay based upon a fully-amortizing payment. The Bureau thought it possible that this law and its implementing regulations would restrict the origination of risky mortgages such as interest-only and negatively-amortizing ARMs. The Bureau also noted that other Dodd-Frank Act amendments to TILA, such as TILA section 128(f), which, as implemented by proposed § 1026.41, would have included information about non-amortizing and negatively-amortizing loans in each billing cycle, such as an allocation of payments.

Thus, consumers with interest-only and negatively-amortizing ARMs, or those who may obtain such loans in the future, would receive certain information about the interest-only or negatively-amortizing features of their loans in another disclosure, although this would not include the payment required to amortize fully negatively-amortizing loans. Testing of the table showing the payment allocation of interest-only and negatively-amortizing ARMs indicated that consumers were confused by the concept of amortization. Thus, the Bureau said it would weigh the value of disclosing specific information regarding amortization, such as the payment needed to amortize fully negatively-amortizing ARMs against possible confusion to consumers. In view of these changes to the law and the outcome of consumer testing, the Bureau solicited comments on whether to include the payment required to amortize ARMs that would become negatively amortizing as a result of an interest rate adjustment.

Some industry commenters said that the statements regarding interest-only and negatively-amortizing ARMs should be disclosed instead of the proposed allocation information for these loans. *See* section-by-section analysis of § 1026.20(c)(2)(ii). Several consumer groups commended the Bureau for requiring the amortization statements but recommended additional warning language for negatively-amortizing ARMs, which they characterized as dangerous. The Bureau believes that the statements regarding amortization are clear and succinct and that additional warning language is not needed. Moreover, the Bureau points out that other new mortgage rules more directly address the risks posed by non-amortizing mortgage products.

The Bureau is modifying the wording of § 1026.20(c)(2)(vi) and comment 20(c)(2)(vi)–1 to clarify that § 1026.20(c) notices for ''interest-only ARMs'' as well as any other ARMs for which consumers are paying only interest, must include the statement discussed above regarding the amortization consequences of such payments. The Bureau also is modifying the language of § 1026.20(c)(2)(vi) to conform with the proposed language in comment 20(c)(2)(vi)–1 and the section-by-section analysis of the proposed rule regarding the amortization statements required for ARMs for which consumers pay only interest and for negatively-amortizing ARMs. The final rule requires § 1026.20(c) notices to disclose, for consumers whose ARM payments consist of only interest, that their payment will not be allocated to pay loan principal and will not reduce the loan balance or, for negatively-amortizing ARMs, that the new payment will not be allocated to pay loan principal and will pay only part of the interest, thereby adding to the balance of the loan. No comments were received regarding the § 1026.20(c)(2)(vi) requirement to disclose the amount necessary to amortize negatively-amortizing ARMs. For these reasons and those stated in the proposed rule, the Bureau is adopting the rule and comments 20(c)(2)(vi)–1 and –2 with the addition of the amortization language discussed above.

20(c)(2)(vii)

Prepayment Penalty

Proposed § 1026.20(c)(2)(vii) would have required disclosure of the circumstances under which any prepayment penalty could be imposed, such as selling or refinancing the principal dwelling, the time period during which such penalty could apply, and the maximum dollar amount of the penalty. The proposed rule would have cross-referenced the definition of prepayment penalty in § 1026.41(d)(7)(iv), the proposed periodic statements.

The Bureau reasoned that interest rate adjustments might cause payment shock or require consumers to pay their mortgage at a rate they might no longer be able to afford, prompting them to consider alternatives such as refinancing. To fully understand the implications of such actions, the Bureau stated that consumers should know whether prepayment penalties might apply. Under the proposed rule, such information would have included the maximum penalty in dollars that might

apply and the time period during which the penalty might be imposed. The Bureau stated that the dollar amount of the penalty, as opposed to a percentage, would be more meaningful to consumers.

The Bureau also proposed disclosure of any prepayment penalty in § 1026.20(d) ARM initial rate adjustment notices and in the periodic statements in proposed § 1026.41. Consumer testing of the periodic statement included a scenario in which a prepayment penalty applied. Most participants understood that a prepayment penalty applied if they paid off the balance of their loan early, but some participants were unclear whether it applied to the sale of the home, refinancing, or other alternative actions consumers could pursue in lieu of maintaining their adjustable-rate mortgages.[78] For this reason, the Bureau proposed to clarify the circumstances giving rise to a prepayment penalty which creditors, assignees, and servicers must disclose to the consumer in the payment change notice. The proposed forms included model language to alert consumers that a prepayment penalty might apply if they pay off their loan, refinance, or sell their home before the stated date.

The Bureau recognized that Dodd-Frank Act amendments to TILA, such as TILA section 129C and its implementing regulations, would significantly restrict a lender's ability to impose prepayment penalties. Other Dodd-Frank Act amendments to TILA, such as TILA section 128(f) and its implementing regulations, would have provided consumers with information about prepayment penalties in the periodic statement they receive each billing cycle. Thus, consumers who have ARMs with prepayment penalty provisions or who might obtain such loans in the future would generally receive information about them at frequent intervals in another disclosure. In view of these changes to the law, the Bureau solicited comments on whether to include information regarding prepayment penalties in § 1026.20(c).

A national trade association, a State trade association, a credit union, a large servicer, and a non-bank servicer recommended against inclusion of the prepayment penalty information. The primary reasons for their opposition was the onerousness of calculating the prepayment penalty and the burden of having dynamic information fields that would require calculating the prepayment penalty amount for each individual loan requiring a § 1026.20(c) notice. These commenters recommended use of more standardized static language in place of the dynamic fields. These commenters stated variously that the amount of a prepayment penalty is determined by a number of dynamic factors and there are variations on how to calculate it, servicers do not currently include prepayment penalty information on the file they send to their print vendors because many servicing systems are unable to calculate and store this information as it may be stored in a separate system, and this information may be computed by hand. The non-bank servicer pointed out that prepayment penalties are vanishing as a result of market forces and new regulations. It recommended listing the minimum finance charges as an example and disclosing the dollar amount of the prepayment penalty on the periodic statement instead of on ARM disclosures.

The Bureau is adopting the rule, with significant modification from the proposed rule. In the final rule, in place of requiring disclosure of the maximum dollar amount of the penalty, the consumer is directed by the required disclosure to contact the servicer for additional information, including the maximum amount of the prepayment penalty. Comment 20(c)(2)(vii)–1 clarifies that the creditor, assignee, or servicer has the option of either deleting this field entirely from the § 1026.20(c) disclosure for consumers who do not have prepayment penalties or retaining the field and inserting a word such as ''None'' after the prepayment penalty heading. Thus, the final rule retains information crucial for consumers to make decisions regarding whether or not to retain their ARMs in the face of an interest rate and payment increase while reducing the burden on industry by eliminating a field that was both dynamic and particularly difficult to calculate. The Bureau believes that encouraging consumers to contact the servicer for the exact dollar amount of the maximum penalty or for other questions, rather than including that information in the disclosure, does not significantly compromise consumer protection because contacting the servicer should yield the most up-to-date information as well as encourage contact with the servicer for consumers facing financial distress. The Bureau also notes that the periodic statement required by the final rule likewise does not contain specific information about any prepayment penalty other than its existence, if applicable. The Bureau also is changing the cross-reference for the definition of prepayment penalty from the periodic statement regulation to the definition set forth in the ATR rule.[79]

The Bureau believes, for the reasons stated above and in the proposed rule, that information about the prepayment penalty is important for consumers to take into account when considering alternatives to an interest rate and payment increase. For this reason, the Bureau is adopting the final rule and comment 20(c)(2)(vii)–1 with the modifications set forth above.

20(c)(3) Format

Payment Change Rate Adjustment Disclosures

See the section-by-section analysis of § 1026.17(a)(1) above for a discussion of the form requirements governing § 1026.20(c). The Bureau received no comments regarding its proposed changes to § 1026.17(a)(1) regarding form requirements governing § 1026.20(c).

A consumer group representing a constituency that speaks more than 100 different dialects recommended that the Bureau require that ARM disclosures be provided in languages other than English to ensure comprehension by mortgagors with limited English proficiency. To this end, the commenter suggested requiring creditors, assignees, and servicers to send a simple, multilingual notice each month for the first three months of the ARM loan asking consumers to indicate their preferred language.

While recognizing the value to consumers of limited English proficiency of receiving communications in their native language, the Bureau is issuing the final rule without this language requirement because the Bureau believes it would be difficult and costly to implement, particularly considering the number of languages in which creditors, assignees, and servicers would be required to provide § 1026.20(c) and (d) ARM notices. The Bureau notes that Regulation Z contemplates the use of languages other than English in § 1026.27. Under this provision, disclosures may be in a language other than English, provided that the disclosures are made available in English at the consumer's request. Thus, a creditor, assignee, or servicer *may* provide ARM disclosures in languages other than English, but the Bureau declines revising Regulation Z to *require* that they do so.

[78] Macro Report, at vi.

[79] *See* § 1026.32(b)(6)(i). NB: Certain provisions of the ATR definition apply specifically to FHA loans.

20(c)(3)(i)

All Disclosures in Tabular Form

Proposed § 1026.20(c)(3)(i) would have required that the § 1026.20(c) ARM adjustment disclosures be provided in the form of a table and in the same order as, and with headings and format substantially similar to, Forms H–4(D)(1) and (2) in appendix H to subpart C for interest rate adjustments resulting in a corresponding payment change.

The Bureau stated that the proposed ARM adjustment notice contains complex concepts challenging for consumers to understand. For example, consumer testing revealed that participants generally had difficulty understanding the relationship among index, margin, and interest rate.[80] They also had difficulty with the concepts of amortization and interest rate carryover.[81] As a starting point, the Bureau looked at the model forms developed by the Board for its 2009 Closed-End Proposal to amend § 1026.20(c). The Bureau then conducted its own consumer testing.

The proposal explained that the Bureau's testing showed that the consumers tested more readily understood these concepts when the information was presented to them in a simple manner and in the groupings contained in the model forms. The Bureau also observed that the participants more readily understood the concepts when they were presented in a logical order, with one concept presented as a foundation to understanding other concepts. For example, the form begins by informing consumers of the purpose of the notice: that their interest rate is going to adjust, when it will adjust, and that the adjustment will change their mortgage payment. This introduction is immediately followed by a table visually showing consumers' current and new interest rates. In another example, the proposed notice informs consumers about their index rate and margin before explaining how the new payment is calculated based on those factors, as well as other factors such as the loan balance and remaining loan term.

Based on its consumer testing, the Bureau stated that it believed understanding of participants was enhanced by presenting the information in this simple manner, grouped together by concept, and in a specific order that allows consumers the opportunity to build upon knowledge gained. For these reasons, the Bureau proposed that creditors, assignees, and servicers disclose the information required by § 1026.20(c) with headings, content, and format substantially similar to Forms H–4(D)(1) and (2) in appendix H to this part.

Over the course of consumer testing, the Bureau stated, participant comprehension improved with each successive iteration of the model form. As a result, the Bureau believes that displaying the information in tabular form can focus consumer attention and foster greater understanding. Similarly, the Bureau found that the particular content and order of the information, as well as the specific headings and format used, presented the information in a way that the consumers tested both could understand and from which they could benefit.

Although few industry commenters recommended specific changes to the order, headings, and format of the ARM model and sample forms, a large bank and a national trade association recommended that parties subject to the rule be permitted flexibility to account for loan products and customer situations not specifically addressed by the proposed rule and forms. These two commenters pointed to certain situations, including the following, as examples of circumstances in which flexibility to customize the forms would ensure accurate and full disclosure to the consumer: consumer bankruptcies and loans originated under certain State laws shielding consumers from personal liability; loans no longer having interest rate adjustments, such as ARMs converting to fixed-rate mortgages; creditors, assignees, and servicers choosing to send the annual § 1026.20(c) interest rate disclosure no longer required by the final rule; and payment-option and payment-rate ARMs. The national trade association stated that the proposed rule established rigid tables, configurations, substantive requirements, and order of presentation dictating the use of the sample and model forms in violation of TILA section 105(b) which, it said, specifically prohibits the Bureau from requiring use of a particular form. One commenter, a financial services compliance and risk management company, interpreted the proposed rule as mandating certain formatting requirements such as a reverse text data field and two-sided printing.

The Bureau's response to these comments is two-fold. First, the proposed rule's requirement that § 1026.20(c) disclosures be provided to consumers ''in the form of the table and in the same order as, and with headings and format substantially similar to'' the proposed model forms is consistent with established standards found throughout Regulation Z requiring tabular formatting as well as other conventions. For example, § 1026.6(b)(1), entitled ''Form of disclosures; tabular format for open-end (not home-secured) plans,'' requires creditors to provide account-opening disclosures ''in the form of a table with headings, content, and format substantially similar to'' the tables in a particular model form. Moreover, Regulation Z's Appendices G and H—Open-End and Closed-End Model Forms and Clauses sets forth the permissible changes to model forms, including the § 1026.20(c) model forms. Thus, the proposed rule does not depart from established Regulation Z standards and does not violate TILA.

Second, the proposed language referred to by commenters was not intended to strait-jacket creditors, assignees, and servicers into language inapplicable to non-standard customer situations and loan products. The ''substantially similar'' language was intended to allow disclosure providers the flexibility to develop, for example, forms that may be either one- or two-sided and that may, but need not, feature reverse text data fields.

For these reasons and those articulated in the proposed rule, the Bureau is adopting § 1026.20(c)(3)(i) and (ii) and comment 20(c)(3)(i)–1. While, as stated above, the formatting conventions in the final § 1026.20(c) disclosures do not depart from standard Regulation Z format requirements, the Bureau has added comment 20(c)(3)(i)–1 clarifying that creditors, assignees, and servicers may modify the § 1026.20(c) disclosures to account for certain circumstances or transactions that may not be addressed in the final rule or forms. Also, the final rule removes § 1026.20(c) model and sample forms from the Regulation Z provision prohibiting formatting alterations. *See* Appendices G and H—Open-End and Closed-End Model Forms and Clauses.

20(c)(3)(ii)

Format of Interest Rate and Payment Table

Proposed § 1026.20(c)(3)(ii) would have required tabular format for ARM payment change notices for, among other things, interest rates, payments, and the allocation of payments for loans that are interest-only and negatively-amortizing. This table would have been located within the table proposed by § 1026.20(c)(3)(i). This table would have been substantially similar to the one tested by the Board for its 2009 Closed-

[80] Macro Report, at viii.

[81] Macro Report, at viii–ix.

End Proposal to revise § 1026.20(c). The Bureau's proposal would have required the table to follow the same order as, and have headings and format substantially similar to, Forms H–4(D)(1) and (2) in appendix H of subpart C.

Disclosing the current interest rate and payment in the same table allows consumers to readily compare them with the adjusted rate and new payment. Consumer testing revealed that nearly all participants were readily able to identify the table and understand the table and its content.[82] The new interest rate and payment and date the first new payment is due is key information the consumer must know to commence payment at the new rate. For these reasons, the Bureau proposed locating this information prominently in the disclosure.

The Bureau is issuing the final rule as proposed in § 1026.20(c)(3)(ii). See the section-by-section analysis of § 1026.20(c)(3)(ii) for a discussion of comments received and the Bureau's rationale for the proposed format in the interest rate and payment table and changes made in the final rule.

20(d) Initial Rate Adjustment

Elimination of Current § 1026.20(d)

Current § 1026.20(d) permits creditors to substitute information provided in accordance with variable-rate subsequent disclosure regulations of other Federal agencies for the disclosures required by § 1026.20(c). In its 2009 Closed-End Proposal, the Board proposed amending the regulation that is now § 1026.20, including deleting this provision regarding substitution. The Board stated that, as of August 2009, there were ''[n]o comprehensive disclosure requirements for variable-rate mortgage transactions * * * in effect under the regulations of the other Federal financial institution supervisory agencies.'' [83] The Board explained that when it originally adopted the provision in 1987, as footnote 45c of § 226.20(c) of Regulation Z,[84] the regulations of other financial institution supervisory agencies—namely the OCC, the Federal Home Loan Bank Board (the FHLBB), and HUD—required subsequent disclosures for ARMs.[85]

The Bureau proposed removing the current content of § 1026.20(d) because it was not aware of any other Federal financial institution supervisory agency rules requiring comprehensive disclosure requirements for ARMs. The Bureau solicited comments on whether there was any reason to retain this provision, including whether the removal had implications for rights under the Alternative Mortgage Transaction Parity Act.

One non-bank servicer said that it opposed the elimination of the current content of § 1026.20(d), but did not offer a reason why. Based on the lack of reasoned opposition to the Bureau's proposal and the above-stated rationale, the Bureau is adopting the proposal, thereby removing this text from the final rule.

Legal Authority

For the reasons adduced above in the discussion of the legal authority underlying the Bureau's implementation of § 1026.20(c), the Bureau removes current § 1026.20(d) pursuant to its authority under TILA sections 105(a) and Dodd-Frank Act section 1405(b).

New Initial ARM Interest Rate Adjustment Disclosures

In place of current § 1026.20(d), the Bureau proposed to implement the initial ARM adjustment notice mandated by TILA section 128A, as added by Dodd-Frank Act section 1418. Under proposed § 1026.20(d), approximately six months before the initial adjustment of adjustable-rate mortgages, creditors, assignees, and servicers would have been required to provide consumers with key information about their ARM adjustment. The information disclosed would have included the new rate, the new payment, and options for pursuing alternatives to their ARM. This initial ARM adjustment notice would have harmonized with proposed revisions to the § 1026.20(c) ARM payment change notice. The Bureau stated its belief that promoting consistency between the ARM disclosure provisions of § 1026.20(c) and (d) would have reduced compliance burdens on industry and minimized consumer confusion.

Creditors, assignees, and servicers. Proposed § 1026.20(d) would have applied to creditors, assignees, and servicers. Proposed comment 20(d)–1 clarified that a creditor, assignee, or servicer that no longer owned the mortgage loan or the mortgage servicing rights would not have been subject to the requirements of § 1026.20(d). This language tracked, in part, the requirements of TILA section 128A that creditors and servicers must provide the initial ARM interest rate adjustment notices, but added assignees to the list of covered persons. The Bureau stated that applying the rule to creditors, but not assignees, would have resulted in inconsistent levels of consumer protection and differing obligations for similarly-situated owners of mortgage loans.

The Bureau reasoned that it is a common practice for creditors to sell many or all of the loans they originate rather than hold them in portfolio. In those cases, without adding assignees as covered persons, assignees' obligation to provide consumers with the § 1026.20(d) notice would be unclear. Thus, the Bureau reasoned, imposing requirements only on creditors or servicers might have particularly deleterious effects on consumers whose creditors assign their mortgage loans. The Bureau reasoned that the protections afforded under proposed § 1026.20(d) should not be determined by the happenstance of loan ownership or favor one sector of the mortgage market over another. For these reasons, the Bureau proposed to make assignees, along with creditors and servicers, subject to the requirements § 1026.20(d). For the same reasons, proposed § 1026.20(d) would have required, as clarified by comment 20(d)–1 that any provision of subpart C governing § 1026.20(d) also would have applied to creditors, assignees, and servicers—even where the other provisions of subpart C referred only to creditors.

The Bureau received no comments specifically on the proposed inclusion of assignees as parties covered under § 1026.20(d), although two commenters stated that servicers, as opposed to assignees, are not subject to civil liability under TILA. The Bureau points out that the proposed rule requires creditors, assignees, and servicers to provide consumers with the disclosures required by § 1026.20(d) without referencing creditor, assignee, or servicer civil liability. Consistent with the proposal, the final rule and commentary set forth the obligation of creditors, assignees, and servicers but do not specifically address the issue of civil liability of any covered person in an action brought by a consumer. That issue is governed by TILA and the Bureau's revisions do not purport to impose requirements inconsistent with the statute. See the section-by-section analysis of § 1026.20(c) above for further discussion of civil liability.

For these reasons, and the reasons articulated in the proposal, the Bureau is adopting the rule as proposed. The

[82] Macro Report, at vii.

[83] 74 FR 43232, 43272 (Aug. 26, 2009).

[84] Regulation Z was previously implemented by the Board at 12 CFR 226. In light of the general transfer of the Board's rulemaking authority for TILA to the Bureau, the Bureau adopted an interim final rule recodifying the Board's Regulation Z at 12 CFR 1026.

[85] 74 FR 43232, 43273 (*citing* 52 FR 48665, 48671 (Dec. 24, 1987)).

Bureau is adopting comment 20(d)–1, with added language clarifying that, (1) creditors, assignees, and servicers that own either the applicable ARM or the applicable mortgage servicing rights, or both, are subject to the requirements of § 1026.20(d) and (2) although the rule applies to creditors, assignees, and servicers, those parties may decide among themselves which of them will provide the required disclosures.

The extension of the requirement to assignees is authorized, among other authorities, under TILA section 105(a) because, for the reasons discussed above, it is necessary and proper to effectuate the purposes of TILA, including to assure a meaningful disclosure of credit terms and protect the consumer against unfair credit billing practices, and to prevent circumvention or evasion of TILA. The Bureau also uses its authority under Dodd-Frank Act section 1405(b) to extend the applicability of the initial ARM adjustment notices under TILA section 128A to assignees. As discussed above, this extension serves the interest of consumers and the public interest. Application of § 1026.20(d) to assignees is consistent with current § 1026.20(c) commentary clarifying that those disclosure requirements apply to subsequent holders. Subjecting creditors, assignees, and servicers to the requirements of § 1026.20(d) also promotes consistency with final § 1026.20(c) and § 1026.41 (the periodic statement), which likewise apply to creditors, assignees, and servicers.

Loan modifications. A large bank and a national trade association recommended that the Bureau exempt loan modifications for financially-distressed consumers from the requirements of § 1026.20(d). They said that, among other reasons, requiring the notices in the context of a loan modification would delay execution of the loan modification by the 210 to 240 days advance notice required under the rule and that the § 1026.20(d) notice was not appropriate for loan modifications.

The Bureau notes that § 1026.20(c), the existing Regulation Z rule regarding post-consummation ARM disclosures, does not exempt loan modifications from its requirements. However, the Bureau agrees with this recommendation, and therefore, § 1026.20(d) limits coverage to initial interest rate adjustments pursuant to the ARM contract. Because initial interest rate adjustments occurring pursuant to a loan modification do not occur pursuant to the ARM contract, they will not be subject to this rule and thus, will not delay execution of loan modification agreements. *See* comment 20(d)–2, which the Bureau is adopting in the final rule. The Bureau believes that an initial interest rate adjustment pursuant to a loan modification agreement in a loss mitigation context does not require the consumer protections contemplated by § 1026.20(d). Such consumers have either agreed to the new interest rate prior to execution of the loan modification or are receiving the benefit of a lower rate and thus, are not at risk of payment shock. Because the loan modification is the actual result of pursuing alternatives to the payments otherwise required under their adjustable-rate mortgages, the advance notice afforded by the rule does not benefit such consumers.

For these reasons, as adopted, § 1026.20(d) exempts from its coverage interest rate changes occurring in the context of a loan modification executed as a loss mitigation measure. Comment 20(d)–2 clarifies, however, that the requirements of § 1026.20(d) do apply to the initial interest rate adjustment that occurs subsequent to the execution of a loan modification agreement, if the interest rate adjustment occurs pursuant to the ARM contract as modified.

Form of delivery. Proposed § 1026.20(d) would have required that the initial ARM interest rate adjustment notices be provided to consumers in writing, separate and distinct from all other correspondence. Proposed comment 20(d)–2 explained that to satisfy this requirement, the notices would have had to be mailed or delivered separately from any other material. The proposed comment said that, in the case of mailing the disclosure, no material in the envelope other than the ARM notice would have been permitted. If provided electronically, the notice would have had to be the only content or attachment in the email. This proposed form of delivery would have contrasted with the Bureau's proposal for § 1026.20(c), which was subject to the less stringent segregation requirements of § 1026.17(a)(1), as it would have been amended by the Bureau's proposal. The proposed comment further explained that the notice proposed by § 1026.20(d) would have been allowed to be provided to consumers in electronic form with consumer consent, pursuant to the requirements of § 1026.17(a)(1). However, in recognition of the ambiguity of the statutory language of TILA section 128A(b), the Bureau solicited comments on whether consumer protection would be compromised by providing § 1026.20(d) notices as a separate document but in the same envelope or email correspondence with other messages from the creditor, assignee, or servicer.

Consumer groups generally applauded the Bureau for its proposed ARM disclosures and none responded to the Bureau's request for comments on this issue of delivery form. One large servicer supported the proposed interpretation of ''separate and distinct from all other correspondence.'' On the other hand, many industry groups recommended that the Bureau permit inclusion of the ARM notice in the same envelope or email with other servicer communications. These commenters included a large bank, two national credit union trade associations, one national and one State trade association, three credit unions, and a large non-bank servicer. They stated that consumers would be more attentive to the ARM notice if it accompanied the monthly statement consumers were used to receiving from the servicer. They also noted the higher cost of mailing the notice separately.

The Bureau is mindful of the ambiguity of the statutory language. ''Separate and distinct from all other correspondence'' reasonably can be interpreted to require a creditor, assignee, or servicer to provide the ARM payment change notice (1) as a separate document from all other correspondence, but in the same envelope or email or (2) in an envelope or email that does not contain any other material. The former interpretation is consistent with the form requirements of revised § 1026.17(a)(1), as discussed above in that section-by-section analyses of § 1026.17(a)(1).

The Bureau does not believe that consumer protection would be compromised by providing the § 1026.20(d) notice as a separate document in the same envelope or email with other servicer communications. Consumers may be more likely to open a monthly periodic statement than a stand-alone communication from their servicer. Moreover, including the § 1026.20(d) initial adjustment notice as a separate document and in the particular format required under the rule, sets it apart from the other materials. The Bureau also recognizes that requiring the notice to be sent separately would generate real incremental costs for industry without any clear benefit to consumers. Thus, the Bureau is issuing the final rule and comment 20(d)–3 with the adoption of this interpretation of the statutory language. However, § 1026.17(a)(1) permits, but does not mandate, that disclosures subject to its requirements be provided to the consumer as a separate document. For this reason, the

Bureau revises § 1026.17(a)(1) to require that the § 1026.20(d) initial interest rate disclosures be provided to consumers as a separate document. Thus, in the final rule, both § 1026.20(c) and (d) are subject to the requirements of § 1026.17(a)(1).

Timing. The Bureau's proposal for § 1026.20(d) generally followed the statutory requirement in TILA section 128A to provide consumers with the initial interest rate adjustment notice during the one-month period that ends six months before the interest rate in effect during the introductory period expires. Thus, the disclosure would have had to be provided six to seven months before the initial interest rate adjustment. The Bureau stated that the § 1026.20(d) disclosures were designed to avoid payment shock so as to put consumers on notice of upcoming adjustments to their adjustable-rate mortgages that may have resulted in higher payments. (The § 1026.20(c) notice, among other things, would have provided consumers with the exact amount of any payment change caused by an adjustment.) The six to seven month advance notice would have allowed sufficient time for consumers to consider their alternatives if the notice indicated there could be an increase in payment they could not have afforded. The proposal suggested refinancing as one alternative that consumers might consider. As set forth in the proposed rule, average timelines to complete a refinancing exceed 70 days.

The Bureau stated that, in the interest of consistency within Regulation Z, proposed § 1026.20(d) tied its timing requirement to the date, expressed in days rather than months, the first payment at a new level would have been due, rather than the date of the interest rate adjustment. The Bureau proposed this to maintain consistency with both current and proposed § 1026.20(c), which express time periods in days rather than months. Because interest on consumer mortgage credit generally is paid one month in arrears, for most ARMs, this would have added another approximately 30 days to the timeframe for delivery of the disclosures. Thus, the notices the Bureau proposed under § 1026.20(d) would have had to be provided to consumers seven to eight months in advance of payment at the adjusted rate. Measured in days, the initial interest rate adjustment disclosures would have been due at least 210, but not more than 240, days before the first payment at the adjusted level is due. By tying the timing of the disclosure to the date payment at a new level is due and calculating it in days rather than months, the Bureau stated that proposed § 1026.20(d) would have been more precise, because months can vary in length, and would have maintained consistency with the timing requirements of proposed § 1026.20(c). Proposed comment 20(d)–2 explained that the timing requirements would exclude any grace period. It also clarified that the date the first payment at the adjusted level would be due is the same as the due date of the first payment calculated using the adjusted interest rate.

Also, pursuant to TILA section 128A, consumers with ARMs adjusting for the first time within six months after consummation, must receive the § 1026.20(d) initial interest rate adjustment notices at consummation. The proposed rule tied the timing of this requirement to days rather than months and to the date the new payment is due rather than the date of the adjustment to insure both internal consistency and consistency with § 1026.20(c). Thus, the proposed rule required that consumers be provided with the initial interest rate adjustment notice at consummation if their ARMs would be adjusting for the first time within 210 days before the due date of the first adjusted payment.

A national trade association asked the Bureau to clarify whether the requirements of § 1026.20(d) are restricted to ARMs originated after the effective date of the final rule or whether they apply as well to existing ARMs that adjust for the first time after the effective date. Neither the proposal nor the final rule includes an exception or a grandfather period for ARMs originated prior to the effective date of the rule but which adjust for the first time after that date. Therefore, once the rule takes effect, it applies to all ARMs adjusting for the first time.

One large bank recommended that the § 1026.20(d) disclosures be provided to consumers 120 days, as opposed to at least 210 days, before the first payment at the adjusted level is due. Several commenters recommended limiting the notice to ARMs that adjust one, two, or more years after origination. As discussed above, the Dodd-Frank Act mandates the timeframe within which the disclosures must be provided to consumers, including specifically requiring the disclosures for ARMs adjusting soon after consummation. The Bureau believes the statutorily-required timeframe is appropriate to remind consumers of the upcoming initial interest rate adjustments and, as applicable, to potentially stave off payment shock and provide consumers with the time necessary to effectively pursue alternatives to their current mortgage. Also, the Bureau notes that, for ARMs adjusting within 180 days of consummation, providing the notice directly to consumers at consummation is less of a burden than mailing or delivering it at a later date. For the reasons set forth above, with regard to timing, the Bureau is adopting the final rule as proposed. The Bureau is adopting comment 20(d)–3, which was proposed comment 20(d)–2, with modification to clarify that ''provide'' means deliver or place in the mail and to clarify that the timeframe excludes any courtesy, as well as grace, periods.

Commenters recommending against adoption of proposed § 1026.20(d). A large number of industry commenters, including many small banks and national and State trade associations, recommended that the Bureau remove entirely the initial ARM interest rate notice from the final rule. In the alternative, some suggested providing a generic reminder warning consumers of the upcoming interest rate adjustment. Some commenters suggested adding to that general warning notice one or more of the following: the maximum interest rate and payment, an explanation of how the interest rate and payment is determined, and a statement encouraging consumers to direct any questions or concerns to their servicer. A large bank recommended a generic notice emphasizing and reminding consumers of the details of the adjustable-rate feature and referring them to their loan contracts for specific information. A credit union recommended eliminating the notice because, for some ARMs, it would come mere months after consummation. A few others suggested integrating the interest rate information into the periodic statement or escrow statement, although other commenters opposed this. See the discussion below of including the ARM interest rate adjustment information in the periodic statement. A research organization, a large bank, a trade association, and a credit union stated that post-implementation testing was warranted to determine if the Bureau's contention that consumers will be better informed as result of receiving the § 1026.20(d) disclosures is correct. A non-bank servicer recommended that the Bureau analyze statements and consumer responses post-implementation to ensure the relevance of all the information required to be provided to consumers.

Many of the commenters recommending against the adoption of the § 1026.20(d) requirements claimed that the cost of the § 1026.20(d) notices would outweigh its benefits. They said

that reprogramming their origination and servicing systems would be expensive and time consuming. Small banks expressed concern that their systems could not accommodate certain changes, such as distinguishing between initial and subsequent rate adjustments and maintaining different timeframes for both § 1026.20(c) and (d). Some stated that the § 1026.20(d) notice was unnecessary because consumers were informed at origination about interest rate adjustments. They also thought the § 1026.20(c) notice or the periodic statement was sufficient to warn consumers of upcoming interest rate changes. They said that those disclosure requirements or other Bureau measures, such as the qualified mortgage rule implementing TILA section 129C, would limit the amount an ARM could adjust. Other commenters said that providing the notice seven to eight months before the new payment is due is too early to have an effect on consumers. A trade association representing credit unions recommending combining the § 1026.20(c) and (d) notices and providing the unified notice between three and four months in advance of the initial interest rate adjustment.

A key concern among commenters was the use of estimates in the § 1026.20(d) notice. See immediately below, the small servicer discussion, regarding these same issues. Use of estimates, they predicted, would create confusion and lead to increased customer inquiries, inaccurate and late payments, unnecessary refinancings, and strategic defaults. A large bank stated that emphasizing that the calculation is an estimate risks diminishing the effectiveness of the notice. The large bank recommended the Bureau undertake more testing to ensure that the inclusion of estimates in § 1026.20(d) notice does not lead to consumer confusion, dissatisfaction, and frustration. One credit union said that its attempt to provide an estimated early warning disclosure resulted in customer confusion but a non-bank servicer said that its early warning notice achieved significant results and response rates. Some industry commenters also stated that estimates would be a poor predictor in a changing interest rate environment. A few commenters stated that providing estimates to consumers would create a legal risk, claiming there was no safe harbor if the estimates turn out to be less than the actual interest rate adjustment. Many commenters said that that the volume of information, especially inclusion of data not required by the Dodd-Frank Act and the number of dynamic fields required by the notice, would unreasonably burden industry and overload consumers.

In enacting TILA section 128A, Congress made a deliberate judgment that the first time an ARM interest rate adjusts poses particular risk to consumers, such that consumers need significant advance notice of those risks in order to be prepared to handle the anticipated mortgage payment. The Bureau observes that it is not uncommon for ARMs to have one interest rate for several or more years before the first adjustment, after which adjustments may occur on an annual basis. Thus, the initial interest rate adjustment is different in kind for consumers than subsequent adjustments which consumers are more likely to anticipate. The Bureau also notes that during the years prior to the financial crisis, a significant number of ARMs were originated with the underwriting predicated only on the initial monthly payments. While the Dodd-Frank Act ability-to-repay provisions address this by requiring that ARMs be underwritten based upon the ''fully-indexed rate,'' consumers are still subject to payment shock at the first adjustment if interest rates have risen since consummation. Thus, the Bureau concludes that the new initial interest rate disclosure can provide significant benefits for consumers. For these reasons, the Bureau rejects the suggestion that it create an exemption that would override TILA section 128A in its entirety. However, as discussed in the proposal, the Bureau has evaluated whether individual elements of the § 1026.20(d) notice further consumer protection compared to their potential burden on creditors, assignees, and servicers. In light of the comments received and further evaluation, the Bureau is modifying certain of the proposed requirements to alleviate burden, as discussed throughout the section-by-section analysis of this final rule.

With respect to the use of an estimated interest rate and payment in the § 1026.20(d) notice, the Bureau believes providing consumers with concrete amounts and an expected real-life scenario could benefit them significantly more than a generic warning that fails to give consumers an idea of what to expect when their interest rate adjusts for the first time. Consumer testing has underscored the participants tested understanding of the impact on them of a concrete amount as opposed to a generic assumption.

It is therefore appropriate to include estimates in the § 1026.20(d) disclosures. TILA section 128A(b)(3) explicitly contemplates the use of good faith estimates. The language and formatting of the § 1026.20(d) model forms clearly denote when the new payment amount and interest rate are estimates, and the disclosure informs consumers that the actual amounts will be provided to consumers two to four months before the date the first new payment is due, if the new payment will be different from the current payment. In light of the comments expressing concern about the potential to confuse or mislead consumers, the Bureau has reviewed the requirements and emphasized that those disclosures are estimates. Consumer testing confirmed that participants understood the use of estimates in the model forms. Creditors, assignees, and servicers should not expect liability resulting from consumer confusion as the use of estimates is clearly contemplated under the statute and regulation.

In addition, the Bureau believes that the goal of achieving greater consumer protection is potentially furthered by exercising its authority to modify certain aspects of the notice required by TILA section 128A. For example, the final rule does not require dynamic fields for contact information for specific homeownership counselors and counseling organizations and State housing finance authorities, as the statute mandates. The final rule also removes most of the information and all dynamic fields from the prepayment penalty disclosures. The Bureau also is exercising its exception authority to exempt from the requirements of § 1026.20(d) consumer ARMs with terms of one year or less. Moreover, the final rule clarifies the flexibility available to creditors, assignees, and servicers using the model forms. With these changes, and others, the Bureau believes that the requirements in § 1026.20(d) can provide protections for consumers consistent with the goals of TILA section 128A while avoiding imposing requirements that may have unintended consequences with respect to the cost or availability of credit. For these reasons, the Bureau is adopting the final rule with certain adjustments to the proposed § 1026.20(d) ARM initial interest rate adjustment notices, as set forth below.

Conversions. Proposed comment 20(d)–3 explained that, in the case of an open-end account converting to a closed-end adjustable-rate mortgage, § 1026.20(d) disclosures would not be required until the implementation of the initial interest rate adjustment post-conversion. The Bureau analogized the conversion to consummation. Thus, like other ARMs subject to the requirements

of proposed § 1026.20(d), disclosures for these types of converted ARMs would not have been required until the first interest rate adjustment following the conversion. The proposed rule would have been consistent with the § 1026.20(c) proposal for open-end accounts converting to closed-end adjustable-rate mortgages. The Bureau did not receive comments on the topic of open-end accounts converting to closed-end ARMs and is adopting the proposed rule and proposed comment 20(d)–3, renumbered as comment 20(d)–4, without change.

20(d)(1) Coverage

20(d)(1)(i) In General

Scope

Adjustable-rate mortgages defined. Proposed § 1026.20(d)(1)(i) defined an adjustable-rate mortgage or ARM, for purposes of § 1026.20(d), as a closed-end consumer credit transaction secured by the consumer's principal dwelling in which the annual percentage rate may increase after consummation. The proposed rule used the wording from the definitions of ''adjustable-rate'' and ''variable-rate'' mortgage in subpart C of Regulation Z to promote consistency within the regulation. Proposed comment 20(d)(1)(i)–1 explained that the definition of ''ARM'' meant ''variable-rate mortgage'' as that term is used elsewhere in subpart C of Regulation Z, except as would have been provided in proposed comment 20(d)(1)(ii)–2. Having received no comments on this issue, the Bureau is adopting the final rule and comment 20(d)(1)(i)–1 as proposed.

Proposed comment 20(d)(1)(i)–1 also clarified that the requirements of § 1026.20(d)(1)(i) would not be limited to transactions financing the initial acquisition of the consumer's principal dwelling, but would apply to other closed-end ARM transactions secured by the consumer's principal dwelling, consistent with current comment 19(b)–1 and proposed § 1026.20(c)(1)(i). Having received no comments on this subject, the Bureau is adopting the final rule and comment 20(d)(1)(i)–1 as proposed.

Applicable to closed-end transactions. In its proposal, the Bureau stated that it believed that TILA section 128A and the implementing disclosures in proposed 1026.20(d) primarily benefited consumers with closed-end adjustable-rate mortgages. In contrast, the Bureau said, open-end credit transactions secured by a consumer's dwelling (home equity plans) with adjustable-rate features were subject to distinct disclosure requirements under TILA and subpart B of Regulation Z that substitute for the proposed § 1026.20(c) and (d) disclosures. Therefore, as discussed below, the Bureau proposed to use its authority under TILA section 105(a) and (f) to exempt adjustable-rate home equity plans from the requirements of TILA section 128A and proposed § 1026.20(d).

The Bureau stated that section 127A of TILA and § 1026.40(b) and (d) of Regulation Z require the disclosure of specific information about home equity plans at the time an application is provided to the consumer. These disclosures include specific information about variable- or adjustable-rate plans, including, among other things, the fact that the plan has a variable- or adjustable-rate feature, the index used in making adjustments and a source of information about the index, an explanation of how the index is adjusted such as by the addition of a margin, and information about frequency of and limitations to changes to the applicable rate, payment amount, and index.[86] The required account opening disclosures for home equity plans also must include information about any variable- or adjustable-rate features, including the circumstances under which rates may increase, limitations on the increase, and the effect of any increase.[87]

Thus, the Bureau concluded, Regulation Z already contained a comprehensive scheme for disclosing to consumers the variable- or adjustable-rate features of home equity plans. The Bureau stated that requiring servicers to provide information about the index and an explanation of how the interest rate and payment would be determined, as required by TILA section 128A and proposed by § 1026.20(d), in connection with home equity plans would have been largely duplicative of the current disclosure regime and would have been confusing and unhelpful for consumers. Moreover, the Bureau reasoned, unlike closed-end adjustable-rate mortgages, consumers with home equity plans generally may draw from the adjustable-rate feature on the account at any time. Thus, providing the good faith estimate of the amount of the monthly payment that would apply after the interest rate adjustment, as required by TILA section 128A and proposed by § 1026.20(d), would not have be useful because the estimate would be based on the outstanding loan balance at the time the notice is given, which would change after the notice is given anytime the consumer withdraws funds.

Two other factors also supported the Bureau's use of the TILA section 105(a) exception authority to exclude home equity plans from the requirements of proposed § 1026.20(d). First, use of the term ''consummation'' in TILA section 128A supported the application of proposed § 1026.20(d) only to closed-end transactions. Regulation Z generally requires disclosures for closed-end credit transactions to be provided ''before consummation of the transaction.'' By contrast, Regulation Z generally requires account opening disclosures for open-end credit transactions to be provided ''before the first transaction is made under the plan.''[88] Because Regulation Z uses the term ''consummation'' in connection with closed-end credit transactions, use of the word ''consummation'' in Dodd-Frank Act section 1418 supported the Bureau's proposed exemption for open-end home equity plans from the requirements of § 1026.20(d). Second, the Bureau stated that Dodd-Frank Act section 1418 places TILA section 128A adjacent to the similarly numbered provision, TILA section 128, which is limited to ''Consumer Credit not under Open-End Credit Plans.'' In its proposal, the Bureau stated that Congress's placement of the new ARM disclosure requirement in a segment of TILA that applies only to closed-end credit transactions further supported the Bureau's proposal to exempt open-end credit transactions, in this case variable- or adjustable-rate home equity plans, from the requirements of that section.

The Bureau received no comments on this issue. For the reasons discussed in the proposal, the Bureau is adopting the final rule restricting the scope of § 1026.20(d) to closed-end transactions.

Savings clause. In the proposed rule, the Bureau noted that the statute's provisions applied to hybrid ARMs, defined as ''consumer credit transaction[s] secured by the consumer's principal residence with a fixed interest rate for an introductory period that adjusts or resets to a variable interest rate after such period.''[89] The proposal discussed the statute's ''savings clause,'' permitting the Bureau to require the initial interest rate adjustment notices set forth in TILA 128A(b) or ''other notices'' for ARMs other than hybrid ARMs. The Bureau proposed to use this

[86] *See* § 1026.40(d)(12).

[87] *See* § 1026.6(a)(1)(ii) and (a)(3)(vii).

[88] *Compare* § 1026.17(b) *with* § 1026.5(b)(1)(i).

[89] TILA section 128A. For example, a 3/1 hybrid ARM has a three-year introductory period with a fixed interest rate, after which the interest rate adjusts annually. ARMs that are not hybrid, on the other hand, have no period with a fixed rate of interest. Such ARMs commence with a rate that adjusts at set uniform intervals, such as 3/3 (adjusts every three years), 5/5 (adjusts every five years), etc.

authority generally to extend the disclosure requirements of proposed § 1026.20(d) to ARMs that were not hybrid. The Bureau stated that it believed this approach was necessary because both hybrid ARMs and those that are not hybrid would subject consumers to the same payment shock that the advance notice of the first interest rate adjustment was designed to address. As an example, the Bureau pointed out that 3/1 hybrid ARMs, where the initial interest rate is fixed for three years and then adjusts every year after that, and 3/3 ARMs, where the interest rate adjusts every three years, both adjust for the first time after three years and present the same potential payment shock to consumers holding either loan. The Bureau also pointed out that the same was true for 5/1 hybrid ARMs and 5/5 ARMs, 7/1 hybrid ARMs and 7/7 ARMs, 10/1 hybrid ARMs and 10/10 ARMs, etc. In sum, conventional ARMs and hybrid ARMs can have the same initial periods without an interest rate adjustment and thus, the same potential jump in their interest rates at the time of the first interest rate adjustment.

Many industry commenters, including large and small bank servicers and national and State trade associations, recommended against broadening the scope of § 1026.20(d) to ARMs that are not hybrid. A chief reason for their opposition was that including non-hybrid ARMs would go beyond the scope of the statute. However, they failed to mention that TILA section 128A(c) explicitly bestows authority on the Bureau to ''require the notice in 128A(b) or other notice consistent with this Act for adjustable-rate mortgage loans that are not hybrid adjustable-rate mortgage loans.''

Many small bank servicers and their trade associations recommended limiting the scope of the rule to hybrid ARMs. These commenters indicated that, because they viewed the notice required by TILA section 128A as confusing and unimportant to consumers, it would be advisable to limit it to as small a set of ARMs as possible. Other reasons these commenters opposed the expansion of the scope to ARMs that are not hybrid included the burden on industry to provide additional consumers with the initial ARM adjustment notice and that hybrid ARMs are considered riskier than other ARMs and typically have extended fixed-rate periods, thereby justifying the need for heightened consumer protection.

The Bureau believes it is appropriate to apply the requirements of § 1026.20(d) to all ARMs, not just hybrid ARMs. As discussed above, the Bureau has the authority to extend the requirements to all ARMs, pursuant to the savings clause in TILA section 128A. Further, the Bureau believes that consumers of non-hybrid ARMs may benefit from the same protections afforded to consumers of hybrid ARMs. Consumers experience the same payment shock at one, three, five, seven or ten years regardless of whether the interest rate calculation classifies it as a hybrid ARM or non-hybrid ARM. Accordingly, the Bureau believes that the underlying rationale for the requirements is equally applicable to all ARMs, whether hybrid or non-hybrid, and should be extended to all ARM consumers. Commenters have not demonstrated why consumers of hybrid ARMs, as opposed to consumers of non-hybrid ARMs, should receive uniquely greater protections or why the consumer benefits for non-hybrid ARMs would not exceed the costs of providing the notice. Nor have these commenters suggested why, once systems are put into place to provide the notice to consumers with hybrid ARMs, it would be burdensome to require the same notices for consumers with ARMs that are not hybrid. Rather, these commenters offer only general opposition to the requirements of § 1026.20(d) and, accordingly recommend a scope for the rule as prescribed and limited as possible. As set forth above, the Bureau is not persuaded by these comments and is adopting the final rule as proposed with regard to the application of § 1026.20(d) to all ARMs.

Legal Authority

For the reasons discussed above, the final rule's exemption of home equity plans from the requirements of TILA 128A and § 1026.20(d) is necessary and proper under TILA section 105(a) to further the consumer protection purposes of and facilitate compliance with TILA. As discussed above, the Bureau believes that the information contained in the § 1026.20(d) notice would not be meaningful to consumers with home equity plans that have adjustable-rate features and could lead to information overload and confusion for those consumers. The Bureau further is adopting the exemption for open-end transactions pursuant to its authority under TILA section 105(f). As discussed above, because open-end transactions are subject to their own regulatory scheme, such transactions are not structured in such a way as to garner benefit from the § 1026.20(d) disclosures and the placement of 128A in TILA indicates congressional intent to limit its coverage to closed-end transactions, the Bureau believes, in light of the factors in TILA section 105(f)(2), that requiring § 1026.20(d) notices for open-end accounts that have adjustable-rate features would not provide a meaningful benefit to consumers.

20(d)(1)(ii) Exemptions

In General

Proposed § 1026.20(d)(1)(ii) would have exempted construction loans with terms of one year or less from the disclosure requirements of § 1026.20(d). Section 1026.20(c) proposed the same exemption. Proposed comments 20(d)(1)(ii)–1 and –2 provided clarification, including clarifying that certain loans are not ARMs if the interest rate or payment change is based on factors other than a change in the value of an index or formula.

In response to comments received from industry representatives, as discussed below, the final rule expands the construction loan exemption to all ARMs with terms of one year or less. Industry commenters requested other exemptions from § 1026.20(d) that the Bureau declines to adopt.

No Small Servicer Exemption

In its proposed rule, the Bureau considered small servicer exemptions for both § 1026.20(c) and (d) and reached the preliminary conclusion that an exemption was not appropriate. The final rule reaffirms this conclusion and thus, small servicers are subject to the requirements of both § 1026.20(c) and (d).

Before issuing its proposed rules, the Bureau considered the arguments of small servicers in favor of a small servicer exemption from both § 1026.20(c) and (d). Small community banks and credit unions expressed their views to the Bureau in the context of the Small Business Review Panel convened in advance of the issuance of the 2012 TILA Servicing Proposal. In its proposed rule, the Bureau explained that the Small Entity Representatives which participated in the Small Business Review Panel expressed opposition to the requirement to provide § 1026.20(c) and (d) disclosures altogether. Specifically, they doubted the value of disclosing certain information in the ARM notices, such as the maximum interest rate and payment and the explanation of how the interest rate and payment are determined. The Small Entity Representatives also felt strongly that consumers would be confused by the § 1026.20(d) notices because consumers would receive the notice so far in advance that the

disclosure would contain estimates, rather than the actual amounts, of the interest rate and mortgage payment.[90] The Small Entity Representatives noted that, in addition to the requirement to provide initial interest rate adjustment notices under § 1026.20(d), they would be required to provide the actual interest rate and payment in the later § 1026.20(c) notice, if the initial interest rate adjustment resulted in a payment change. They expressed concerns about the one-time development costs and on-going costs associated with providing both the initial ARM adjustment notices and the potentially recurring notices under § 1026.20(c).[91]

After considering the views of the Small Entity Representatives and the recommendation of the Small Business Review Panel, the Bureau decided not to include a small servicer exemption from these sections of its proposed rule. The Bureau reasoned that small servicers were already subject to the requirement to provide notices pursuant to § 1026.20(c), so that continuing this requirement would not add incremental cost (other than the one-time cost of development to implement the changes proposed by the Bureau). The Bureau stated that the initial interest rate adjustment notice required by § 1026.20(d) served related but distinct purposes, such that eliminating it could harm consumers. The Bureau said that the § 1026.20(d) notice was designed to provide consumers with very early warning of their interest rate adjustment, so that consumers could begin exploring other options. Receiving the § 1026.20(c) notice with the actual interest rate and payment closer to the adjustment date, the Bureau said, would be valuable to the consumer both as a second warning and as a budgeting tool.

The Bureau also considered exempting small servicers from the requirements of § 1026.20(c) for an *initial* interest rate adjustment that caused a change in payment. To this end, the Bureau considered including the information required by proposed § 1026.20(c) in the periodic statement proposed by the Bureau in § 1026.41. The Bureau concluded that this option was unworkable in light of (1) the proposed exemption for small servicers from the periodic statement requirements and (2) the increased burden of the resulting programming complexity in the periodic statement.

The Bureau also pointed out that the amount of burden reduction from a § 1026.20(c) exemption from an initial interest rate adjustment would have been extremely minimal, given that small servicers still would have had to maintain systems to generate § 1026.20(c) notices for any subsequent interest rate adjustment resulting in a corresponding payment change. Thus, the Bureau concluded, exempting small servicers from providing a § 1026.20(c) notice for the first interest rate adjustment would not have provided significant burden reduction.

The Bureau also considered whether to exempt small servicers, creditors, and assignees from the requirements of § 1026.20(d). As discussed above, the Small Entity Representatives expressed concern that consumers would be confused by receiving estimates, rather than their actual new interest rate and payment.[92] However, the Bureau stated in its proposal that it believed the best approach to address this concern was to clarify the contents of the notice, rather than to eliminate it entirely. Congress had made a specific policy judgment that the early notice would benefit consumers. Moreover, the Bureau agrees that this measure poses important potential benefits to consumers. The Bureau went on to say that creating an exemption for small creditors, assignees, and servicers could have deprived certain consumers of the benefits that Congress had intended, specifically advance notice seven to eight months before the first payment at a new level would have been due reminding consumers of the upcoming adjustment and giving them time to weigh the potential impacts of a rate change and to explore alternative actions. An exemption also would have deprived those consumers who may become financially distressed due to the upcoming interest rate change from the loss mitigation information disclosed in the § 1026.20(d) notice.

The Bureau stated that, on balance, it did not believe that the § 1026.20(d) notice would have imposed a significant burden on small entities because of its one-time occurrence. Moreover, the notice was designed to be consistent with the § 1026.20(c) notice to, among other things, reduce the burden on industry. For these reasons and those stated above regarding the consumer benefits of proposed § 1026.20(d), the Bureau's proposed rule did not exempt small servicers from its requirements. The Bureau sought comments, in addition to the comments it received through the Small Business Review Panel process, on whether the burden imposed on small entities by the ARM requirements would outweigh its consumer protection benefits.

Many industry commenters echoed the rationales offered by the Small Entity Representatives in favor of a small servicer exemption from the ARM rules. These commenters included three national and four State trade associations with small servicers as constituents and two credit unions. Non-profit servicers and State housing finance authorities also requested exemption from the proposed ARM rules. A consumer group recommended against such exemptions, stating that small servicer failures have the same effect on consumers as those of large servicers. Many industry commenters did not address this issue.

Advocates of a small servicer exemption offered general arguments in favor of their position. These commenters requested the exemption in light of the ''high touch'' and personalized service business model used by small servicers. They pointed to Bureau representations that small bank servicers might be exempted from mortgage servicing rules aimed at correcting abuses in the market perpetrated by other servicers. Subjecting small servicers to the ARM rules, they predicted, would lead to the discontinuation of certain types of loans they hold in portfolio and increase the cost of credit, to the detriment of consumers in general and specifically to rural, minority, and middle class consumers. Existing rules are adequate, one commenter said, because refinancing and loan modifications have resolved the problems caused by the offending ARM products. Some commenters said that rules against unfair and abusive practices would provide adequate incentives for small servicers in place of the ARM rules.

In the final rule, for the reasons set forth above, the Bureau declines to exempt small servicers from the requirements of § 1026.20(c) and (d). In addition to the above-cited reasons, the Bureau notes that small servicers currently are subject to § 1026.20(c) and it sees no justification for scaling back existing consumer protections. Also, the Bureau is *revising* current § 1026.20(c), which is less burdensome to industry than if the Bureau was implementing a new rule. The Bureau also notes that the § 1026.20(c) notice is a limited notice, required only in the case of an interest rate adjustment causing a payment change. Moreover, the Bureau's final rule reduces industry burden by eliminating the annual notice small servicers currently are required to provide to all ARM holders whose interest rates change over the course of

[90] *See* Small Business Review Panel Report, at 20–21, 29–30.

[91] *See* Small Business Review Panel Report, at 20–21, 29–30.

[92] *See* Small Business Review Panel Report, at 21.

a year without effecting a payment change. Thus, the Bureau's final rule reduces the burden of compliance on small servicers in this respect, even absent an exemption. Also, as stated above, creditors, assignees, and servicers will have to provide the § 1026.20(c) payment change notice in any case, to inform consumers of the actual amount of their upcoming new mortgage payment. Due to the small servicer exemption from the periodic statement, their customers will otherwise not receive this information or be informed of their new mortgage payment.

As stated above, the § 1026.20(d) notice is a one-time notice and therefore, imposes less burden on small servicers than notices that may be more frequent, such as the § 1026.20(c) payment change notice. Moreover, the Bureau's efforts to make both ARM notices consistent with one another were intended to reduce the implementation burden on servicers, as well as to ease the burden on consumers to digest two forms that differ greatly from one another. For the reasons discussed above in the proposed rule and in the immediately preceding discussion titled *Commenters recommending against adoption of proposed § 1026.20(d),* the Bureau declines to extend an exemption from § 1026.20(d) for small creditors, assignees, and servicers.

Information Required by ARM Disclosures May Not Be Provided Instead in the Periodic Statement

In its proposal, the Bureau also solicited comments on whether creditors, assignees, and servicers should be permitted, or even required, to provide the information required by § 1026.20(c) and (d) in the periodic statement, in lieu of providing the ARM disclosures as separate notices. A large bank servicer, a non-bank servicer, and a State trade association opposed allowing or requiring combining the ARM disclosures with the periodic statements, asserting that the ARM interest rate adjustment information was too important to merge with or attach to the information in the periodic statement. They also warned about the challenge posed by complying with the timing requirements of the periodic statement and § 1026.20(c) and (d) in one combined disclosure. A credit union trade association supported the idea but requested that the Bureau provide a model form. Two credit unions and a large non-bank servicer supported the idea, citing decreased cost to industry and the higher likelihood of consumers reading the ARM information as reasons for their support.

The final rule does not permit integrating the ARM § 1026.20(c) and (d) notices into the periodic statement. The Dodd-Frank Act requires that the § 1026.20(d) notice be provided to consumers as a separate notice. Moreover, industry comments on the utility of combining these disclosures were sharply divided. Further, the Bureau is concerned that the volume and complexity of the information in the combined statement could overwhelm consumers and create greater programming burden on industry. Also, this measure would provide no benefit to small servicers exempt from the periodic statement. Finally, the Bureau does not believe that providing separate notices creates an appreciably greater burden on creditors, assignees, and servicers than providing them as an integrated notice, especially because the final rule permits § 1026.20(d) notices to be provided to consumers in the same envelope or email with other disclosures, pursuant to revised§ 1026.17(a)(1). See the section-by-section analysis of § 1026.17(a)(1) and § 1026.20(d) above for discussion of the form of delivery requirements for § 1026.20(d).

Accordingly, the Bureau declines to permit servicers to provide the information required by § 1026.20(c) and (d) in the periodic statement in lieu of providing the ARM disclosures. However, in the interest of ensuring that its disclosure rules and model forms are based on the best empirical data available, pursuant to its authority under Dodd-Frank Act section 1032(e), the Bureau invites interested creditors, assignees, and servicers to consider proposing a trial disclosure program to test the hypothesis that the disclosures required by § 1026.20(c) and (d) could be effectively integrated into the periodic statement without compromising consumer protections. The Bureau's proposed Policy to Encourage Trial Disclosure Programs sets forth how the Bureau intends to exercise its authority under Dodd-Frank Act section 1032(e) to permit creditors, assignees, and servicers, among others, to test alternative disclosures designed to improve consumer understanding.[93]

Exemptions From the Rule

ARMs with terms of one year or less. For the same reasons already discussed with respect to the payment change notices required by proposed § 1026.20(c), proposed § 1026.20(d) would have included an exemption for construction ARMs with terms of one year or less (except that that timeframe within which creditors, assignees, and servicers would have had difficulty complying was 210 to 240 days before the first payment is due after the initial adjustment). *See* section-by-section analysis of § 1026.20(c)(1)(ii). On the basis of the same comments and for the same reasons set forth in the section-by-section analysis of § 1026.20(c)(1)(ii), the Bureau concluded that requiring notices under § 1026.20(d) for construction as well as other ARMs with terms of one year or less would not provide a meaningful benefit to the consumer nor would it have improved consumers' awareness and understanding of their ARMs with terms of one year or less. Thus, the Bureau is adopting the rule with an exemption for all ARMs taken out by consumers with terms of one year or less. The Bureau notes that the ARM rules apply only to consumer loans and that proposed comment 20(d)(1)(ii)–1, which the Bureau is adopting as proposed, applies the standards in current comment 19(b)–1 for determining the term of a construction loan and adds clarification regarding what other types of loans qualify for the expanded short-term ARM exemption.

Non-ARM loans. Proposed comment 20(d)(1)(ii)–2 discussed other loans to which the rule would not have applied. Proposed comments 20(c)(1)(ii)–2 and 20(d)(1)(ii)–3 were consistent with regard to the loans which would not have been subject to the proposed ARM disclosure rules. Certain Regulation Z provisions treat some of these loans as variable-rate transactions, even if they are structured as fixed-rate transactions. The proposed comment clarified that, for purposes of § 1026.20(d), the following loans, if fixed-rate transactions, would not have been considered ARMs and therefore would not have been subject to ARM notices pursuant to § 1026.20(d): shared-equity or shared-appreciation mortgages; price-level adjusted 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; graduated-payment mortgages or step-rate transactions; renewable balloon-payment instruments; and preferred-rate loans. The Bureau observed that the particular features of these types of loans might trigger interest rate or payment changes over the term of the

[93] *See* 77 FR 74625 (Dec. 17, 2012), *https://www.federalregister.gov/articles/2012/12/17/2012-30159/policy-to-encourage-trial-disclosure-programs-information-collection.*

loan or at the time the consumer pays off the final balance. However, the Bureau stated that these changes were based on factors other than a change in the value of an index or a formula. For example, whether or when the interest rate would adjust for the first time for a preferred-rate loan with a fixed interest rate would likely not be knowable six to seven months in advance of the adjustment. This was because the loss of the preferred rate would have been based on factors other than a formula or change in the value of an index agreed to at consummation. The Bureau received no comments on this topic and, thus, is adopting the rule and commentary 20(d)(1)(ii)–2 as proposed.

Other Requested Exemptions

A payment-option ARM is one in which consumers may select among several payments each billing period, some of which may not amortize principal or may cause negative amortization. Typically, the loan contract allows for the ARM to ''recast'' or to require an increase in the mortgage payment upon reaching a certain negative amortization limit. A few commenters asked the Bureau either to exempt payment-option ARMs from the requirements of both § 1026.20(c) and (d) or to apply the 25- to 120-day advance notice requirement with regard to § 1026.20(c). One large bank asked for this exemption based on the difficulty of closely monitoring such loans to assess whether the next minimum periodic payment, which typically results in negative amortization because it does not cover all accrued interest, would cause the principal balance to exceed a contractual limit and trigger a recast of the periodic payment. That commenter indicated that it believed in certain circumstances the recast of the payment would also cause an interest rate adjustment.

The Bureau notes that payment option ARMs are subject to current § 1026.20(c) and the commenter's rationale does not justify scaling back existing consumer protections. Further, the Bureau understands from outreach with industry that the amount of unpaid principal triggers the reamortization of a payment-option loan without requiring an adjustment to the interest rate. Because there is no interest rate adjustment, § 1026.20(c) and (d) do not impose a requirement on creditors, assignees, and servicers to closely monitor such loans as presumed by the commenter. For these reasons, the payment-option ARMs are subject to the requirements of § 1026.20(c) and (d).

A number of industry commenters recommended exempting ARMs originated prior to the effective date of the rule. The Bureau believes that, for all the reasons discussed throughout the section-by-section analysis, consumers with ARMs originated prior to the effective date of the rule which adjust for the first time after that date could benefit from the consumer protections afforded by § 1026.20(d) as much as consumers with ARMs originated after the effective date. In many of these cases, the initial rate adjustment will occur a year or more after the effective date of the rule, exposing those consumers to the same risk of payment shock as those whose ARMs originate after the effective date. Therefore, once the final rule takes effect, it applies to all ARMs which have not yet adjusted for the first time.

Finally, a national trade association representing the reverse mortgage industry recommended an exemption from the requirements of both § 1026.20(c) and (d) for reverse mortgage ARMs. The trade association stated that most, if not all, reverse mortgages with a variable rate of interest are structured as open-end credit transactions. Because current § 1026.20(c) and final § 1026.20(c) and (d) apply only to closed-end transactions, those regulations are not applicable to most reverse mortgage ARMs. However, the trade association stated, applying the new ARM rules to reverse mortgages would stifle the industry's current efforts to develop a ''hybrid'' ARM reverse mortgage, which could be structured as a closed-end credit transaction. They articulated the same concerns raised by other industry commenters that the 210- to 240-day advance notice required by § 1026.20(d) would require disclosure of an *estimate* that will be inaccurate by the time the rate adjusts and, thus, will result in consumer confusion. They also questioned whether § 1026.20(d) notices would be required for closed-end reverse mortgages because they do not carry regular monthly payment obligations and that such a requirement would be meaningless to consumers with closed-end variable-rate reverse mortgages.

The Bureau believes that, if the reverse mortgage industry chooses to create a closed-end adjustable-rate product, consumers with those reverse mortgages, like those with other types of ARMs, would benefit from advance warning of interest rate adjustments to help them better manage their mortgages. For the reasons set forth in the section-by-section analysis of § 1026.20(d) below, the Bureau further believes that providing consumers with an estimate of their upcoming new interest rate, pursuant to § 1026.20(d), provides the important consumer protection benefit of alerting consumers to a potential interest rate increase and to provide sufficient time to pursue other alternatives. Finally, the Bureau notes that creditors, assignees, and servicers are permitted to modify the notices required by § 1026.20(c) and (d) to accommodate credit transactions outside of the norm covered by the rule, such as reverse mortgages. For the reasons discussed above and throughout this rule, the Bureau declines providing an exemption for reverse mortgage ARMs subject to the requirement of § 1026.20(c) and (d).

Legal Authority

The Bureau uses its authority under TILA section 105(a) to exempt short-term consumer ARMs with terms of one year or less from the requirements of TILA section 128A and § 1026.20(d). As explained above, the disclosure requirements of § 1026.20(d) would be confusing and difficult to comply with in the context of a short-term consumer loan. Thus, exempting such loans is necessary and proper under TILA section 105(a) to further the consumer protection purposes of TILA and facilitate compliance. The Bureau further exempts these loans pursuant to its authority under TILA section 105(f). For the reasons discussed above, the Bureau believes, in light of the factors in TILA section 105(f)(2), that requiring the § 1026.20(d) notice for consumer loans with terms of one year or less would not provide a meaningful benefit to consumers. Specifically, the Bureau considers that the exemption is proper irrespective of the amount of the loan or the status of the consumer (including related financial arrangements, financial sophistication, and the importance to the consumer of the loan). Finally, the non-ARM loans listed above, because they are not ARMs, are not subject to TILA section 128A or proposed § 1026.20(d) and therefore require no disclosures under the rule.

20(d)(2) Content

Initial Rate Adjustment Disclosures

In General

Statutorily-required content. TILA section 128A requires that the following content be included in the § 1026.20(d) initial rate adjustment notice: (1) Any index or formula used in adjusting or resetting the interest rate and a source of information about the index or formula; (2) an explanation of how the new rate and payment would be

determined, including how the index may be adjusted, such as by the addition of a margin; (3) a good faith estimate, based on accepted industry standards, of the amount of the resulting monthly payment after the adjustment or reset and the assumptions on which the estimate is based; (4) a list of alternatives that the consumers may pursue, including refinancing, renegotiation of loan terms, payment forbearance, and pre-foreclosure sales, as well as descriptions of actions the consumer must take to pursue these alternatives; (5) contact information for HUD- or State housing finance authority approved housing counselors or programs reasonably available; and (6) contact information for the State housing finance authority for the State where the consumer resides. In its proposal, the Bureau interpreted the explanation mandated by (2) above to require disclosure of any adjustment to the applicable index, including the amount of any margin and an explanation of what a margin is; the loan balance; the length of the remaining term of the loan; and any change in the term of the loan caused by the interest rate adjustment.

Good faith estimate. TILA section 128A requires that § 1026.20(d) interest rate adjustment disclosures include ''[a] good faith estimate, based on accepted industry standards * * * of the amount of the monthly payment that will apply after the date of the adjustment or reset, and the assumptions on which the estimate is based.'' In the proposed rule, the Bureau interpreted this statutory standard to require disclosure to consumers of the index rate or formula; any adjustment to the index or formula, such as the addition of a margin or carryover interest; the loan balance; and the remaining loan term because each of these elements are used to calculate the new payment.

The proposal also reasoned that most ARM contracts base the calculation of the new interest rate and payment on an index value published far closer to the date of the interest rate adjustment than those available during the 210 to 240 days before the first payment at a new level is due after an interest rate adjustment. See the section-by-section analysis of § 1026.20(c)(2) above for the discussion in the Bureau's proposal of the timeframe it generally would have required for ascertaining the index rate used to calculate the adjusted interest rate and new payment for the proposed ARM payment change notices. The Bureau thus concluded that it was unlikely creditors, assignees, and servicers would be able to disclose the actual new interest rate and payment in the initial ARM interest rate notices. The Bureau reasoned that, consistent with the language of the statute regarding estimates, proposed § 1026.20(d)(2) would have required estimates, labeled as such, if the new interest rate or any other calculation using the new interest rate were not known as of the date of the disclosure. *See also* proposed comment 20(d)(2)(iii)(A)–1.

The Bureau also interpreted the statutory good faith standard to require disclosure of the actual amounts, if they are available at the time the creditor, assignee, or servicer provides the initial ARM interest rate adjustment notices to consumers. The Bureau concluded that, because the notice was designed to alert consumers to upcoming changes to their mortgages and to provide consumers with the time needed to take ameliorative actions should the new interest rate and payment be too high, providing the actual new payment, if it were known, would benefit consumers. The Bureau stated that, across all rounds of consumer testing, most participants shown notices containing estimates of the new rate and payment understood that these amounts were estimates that could change before the first payment at a new level was due.[94]

Proposed § 1026.20(d) also would have required that any estimate be calculated using the index figure disclosed in the source of information described in § 1026.20(d)(2)(iii)(A) within 15 business days prior to the date of the disclosure. Linking the date of the notice to the date of the index value used to estimate the new interest rate and payment, the Bureau reasoned, would have prevented confusion as to the recency of the index value. Pursuant to the timeframe discussion above in the section-by-section analysis of § 1026.20(c)(2), the 15-day period would have allowed creditors, assignees, and servicers sufficient time to calculate the estimates and perform any necessary quality control measures before providing the § 1026.20(d) notices to consumers.

The Bureau received no comments on these aspects of the good faith estimate requirement and is adopting the final rule as proposed. See also the section-by-section analysis of § 1026.20(d) above for a discussion of industry opposition to the use of estimates in the § 1026.20(d) notice.

Additional content. In addition to the content explicitly required under the statute, the Bureau proposed, as discussed in more detail below, to require the ARM initial interest rate adjustment notices to include the date of the disclosures; the telephone number of the creditor, assignee, or servicer; statements specifying that the consumer's interest rate was scheduled to adjust pursuant to the terms of the loan, that the adjustment might effect a change in the mortgage payment, the specific time period the current interest rate had been in effect, the dates of the upcoming and future interest rate adjustments, and any other changes to loan terms, features, or options that would take effect on the same date as the interest rate adjustment; the due date of the first payment after the adjustment; for interest-only or negatively-amortizing payments, the amount of the current and new payment allocated to principal, interest, and taxes and insurance in escrow, as applicable; a statement regarding payment allocation for interest-only and negatively-amortizing loans, including the payment required to amortize fully an ARM that became negatively-amortizing as a result of the interest rate adjustment; any interest rate or payment limits and any foregone interest; if the new interest rate or new payment provided was an estimate, a statement that another disclosure containing the actual new interest rate and payment would be provided within a specified time period if the actual interest rate adjustment resulted in a corresponding payment change; and the amount and expiration date of any prepayment penalty.

Many industry commenters recommended that the Bureau eliminate certain of the content required by the Dodd-Frank Act and refrain from including other content not statutorily-required. The Bureau directs readers to the specific content sections below for discussion of comments received and the Bureau's decisions with regard to the final rule. The Bureau notes that it is exercising its exception authority in the final rule to modify the proposed requirements regarding contact information for homeownership counselors and counseling organizations and State housing finance authorities and the prepayment penalty.

Legal Authority

As discussed above, TILA section 128A(b) expressly requires much of the content included in the initial interest rate disclosures. The Bureau is implementing these statutory requirements pursuant to its authority under TILA section 105(a). The additional content is likewise authorized under TILA section 105(a). As further discussed below, the additional content is necessary and

[94] Macro Report, at viii.

proper to assure that consumers understand the consequences of the upcoming ARM interest rate adjustments and have sufficient time to adjust their behavior accordingly, thereby avoiding the uninformed use of credit and protecting consumers against inaccurate and unfair credit billing practices. The additional content is further authorized under Dodd-Frank Act section 1032 by assuring that the key features of consumers' adjustable-rate mortgage, over the term of the ARM, are ''fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand [its] costs, benefits, and risks.'' The additional information better informs consumers of the implications of interest-rate adjustments before they happen and thus enables them to weigh their options going forward. For the same reasons, the Bureau believes, consistent with Dodd-Frank Act section 1405(b), that the additional content improves consumer awareness and understanding of their residential ARM loans and is thus in the interest of consumers and in the public interest. The additional content is also consistent with TILA section 128A(b) itself, which provides a non-exclusive list of required content, thereby statutorily contemplating additional content.

20(d)(2)(i)

Date of the Disclosure

Proposed § 1026.20(d)(2)(i) would have required inclusion of the date of the disclosure in the initial ARM adjustment notices. To group together all data directly related to the ARM itself, proposed § 1026.20(d)(3)(ii) would have required that the date appear outside of and above the table described in proposed § 1026.20(d)(3)(i).

Proposed comment 20(d)(2)(i)–1 explained that the date on the notice would have been the date the creditor, assignee, or servicer generated the notice. Proposed § 1026.20(d)(2) would have required that date to be within 15 business days after publication of the index level used to calculate the adjusted interest rate and new payment, if it was an estimated and not actual adjusted interest rate and new payment. Because, under the proposal, consumers would have received the disclosures so far in advance, the Bureau expected estimates would have been used in most cases. As stated above, tying the date of the disclosure to the publication date of the index level, the Bureau concluded, would prevent consumer confusion as to the recency of the index value upon which the estimated interest rate and new payment was based.

The Bureau received no comment on this topic. The Bureau is adopting the final rule as proposed.

20(d)(2)(ii)

Statement Regarding Changes to Interest Rate and Payment

Proposed § 1026.20(d)(2)(ii)(A) would have required the initial ARM interest rate adjustment notices to include a statement alerting consumers that, under the terms of their adjustable-rate mortgage, the specific period in which their current interest rate has been in effect would end on a certain date, that their interest rate might change on that date, and that any change in their interest rate might result in a change to their mortgage payment. This information, the Bureau said, is similar to the pre-consummation disclosures required by current § 1026.19(b)(2)(i) and § 1026.37(j) as proposed in the 2012 TILA–RESPA Proposal. Proposed comment 20(d)(2)(iii)(A)–1 clarified that the current interest rate was the interest rate that would be in effect on the date of the disclosure.

Proposed § 1026.20(d)(2)(ii)(B) would have required the initial ARM interest rate adjustment notices to include the dates of the impending and future interest rate adjustments. Proposed § 1026.20(d)(2)(ii)(C) also would have required disclosure of any other loan changes taking place on the same day as the adjustment, such as changes in amortization caused by the expiration of interest-only or payment-option features.

The Bureau explained that the first ARM model form tested did not contain the statement informing consumers of impending and future changes to their interest rate and the basis for these changes. Although participants understood that their interest rate would adjust and their payment might change as a result, they did not understand that these changes would occur periodically, subject to the terms of their mortgage contract. Inclusion of this statement in the second round of testing successfully resolved this confusion. All but one consumer tested in rounds two and three of testing understood that, under the scenario presented to them, their interest rate would change on an annual basis.[95] In the absence of comments regarding this provision, the Bureau is adopting the final rule as proposed.

[95] Macro Report, at vii.

20(d)(2)(iii)

Table With Current and New Interest Rates and Payments

Proposed § 1026.20(d)(2)(iii) would have required disclosure of the following information in the form of a table: (A) The current and new interest rates; (B) the current and new periodic payment amounts and the date the first new payment is due; and (C) for interest-only or negatively-amortizing payments, the amount of the current and new payment allocated to interest, principal, and property taxes and mortgage-related insurance, as applicable. The information in this table would have appeared within the larger table containing the other required disclosures, except for the date of the disclosure. Proposed comment 20(d)(iii)(A)–1 would have clarified the difference between the current and new interest rate.

This table would have followed the same order as, and had headings and format substantially similar to, those in the table in model forms H–4(D)(3) and (4) in appendix H of subpart C. The Bureau stated that it confirmed through its consumer testing that, when presented with information in a logical order, participants more easily grasped the complex concepts contained in the proposed § 1026.20(d) notice. For example, the form would have begun by informing consumers of the basic purpose of the notice: Their interest rate was going to adjust, when it would adjust, and the adjustment could change their mortgage payment. This introduction would have been immediately followed by a visual illustration of this information in the form of a table comparing consumers' current and new interest rates. Based on its consumer testing, the Bureau stated that it believed that the understanding of the consumers tested was enhanced by presenting the information in a simple manner, grouped together by concept, and in a specific order that allows consumers the opportunity to build upon knowledge gained. For these reasons, the Bureau proposed that creditors, assignees, and servicers disclose the information in the table as set forth in model forms H–4(D)(3) and (4) in appendix H.

In all rounds of testing, consumers were presented with model forms with tables depicting a scenario in which the interest rate and payment were projected to increase as a result of the adjustment. All participants in all rounds of testing understood that their interest rate and payment were

projected to increase and when these changes would occur.[96]

The Bureau proposed including allocation information in the table for interest-only and negatively-amortizing ARMs only. The Bureau stated it believed that providing the payment allocation information would have helped consumers better understand the risk of these products by demonstrating that their payments would not have reduced the loan principal. The Bureau also said that providing the payment allocation would have helped consumers understand the effect of the interest rate adjustment, especially in the case of a change in the ARM's features coinciding with the first interest rate adjustment, such as the expiration of an interest-only or payment-option feature. Because payment allocation might change over time, the rule would have required disclosure of the expected payment allocation for the first payment period during which the adjusted interest rate would have applied.

The Bureau explained that the notice disclosing an allocation of payment for interest-only or negatively-amortizing ARMs was not tested until the third round of testing. The notice tested set forth the following scenario to consumers: The first adjustment of a 3/1 hybrid ARM—an ARM with a fixed interest rate for three years followed by annual interest rate adjustments—with interest-only payments for the first three years. On the date of the adjustment, the interest-only feature would expire and the ARM would become amortizing. Only about half of the participants understood that their payments were changing from interest-only to amortizing. Participants generally understood the concept of allocation of payments but were confused by the table in the notice that broke out principal and interest for the current payment, but combined the two for the new amount. As a result, this table was revised so that separate amounts for principal and interest were shown for all payments.[97]

The Bureau recognized that certain Dodd-Frank Act amendments to TILA pose restrictions on the origination of non-amortizing and negatively-amortizing loans. For example, TILA section 129C requires creditors to determine that consumers have the ability to repay the mortgage loan before lending to them and that this assumes a fully-amortizing payment. The Bureau thought it possible that this law and its implementing regulations would restrict the origination of risky mortgages such as interest-only and negatively-amortizing ARMs.

The Bureau stated that other Dodd-Frank Act amendments to TILA, such as the proposed periodic statement provisions discussed below, would provide payment allocation information to consumers for each billing cycle. Thus, consumers with interest-only or negatively-amortizing loans, or those who might obtain such loans in the future, would receive information about the interest-only or negatively-amortizing features of their loans through the payment allocation information in the periodic statement. Also, as stated above, consumer testing showed that participants tested were confused by the allocation table. In view of these changes to the law and the outcome of consumer testing, the Bureau solicited comments on whether to include allocation information for interest-only and negatively-amortizing ARMs in the proposed table described above.

A trade association generally supported the tabular format, stating that consumer testing has repeatedly proven its effectiveness. A large bank recommended eliminating altogether the table with the current and new interest rates and payments because, it said, the table tested poorly with consumers and would confuse them as well as be duplicative of the proposed periodic statement. Other commenters recommended eliminating only the portion of the table disclosing allocation information for interest-only and negatively-amortizing ARMs while one large bank commended the Bureau for adding these disclosures to the § 1026.20(c) notice. Those commenters in favor of eliminating allocation information for these ARMs said the information was not fully consumer tested, would be based on projections that would confuse and distract consumers, and would require costly software upgrades. Most of these commenters recommended substituting the statement for interest-only and negatively-amortizing ARMs required by § 1026.20(d)(2)(vii) in place of the allocation information; one large bank suggested expanding the language in these statements as a substitute for the allocation information. This large bank also said the allocation information would confuse consumers because, in the case of a negatively-amortizing ARM, the portion allocated to principal would have to be expressed as a negative number. One trade association recommended allowing estimated escrow payments for the new payment allocation table, which is what the rule proposed and the Bureau is adopting in § 1026.20(d)(2)(iii)(C).

The Bureau is adopting § 1026.20(d)(2)(iii) as proposed for the reasons set forth in the proposal and those set forth below. The table is the centerpiece of the § 1026.20(d) disclosure and contains some of the disclosure's most important information: The consumers' upcoming new interest rate and payment set forth next to their current rate and payment, such that consumers can make comparisons. This information informs consumers of the exact or estimated amount of the new mortgage payment they must pay starting in seven to eight months and the table allows easy comparison with their current charges, helping consumers decide on how best to proceed. Also, the periodic statement will provide consumers with only part of the information in the table: The date after which the interest rate will adjust and the amount of the next payment. Moreover, the periodic statement generally would provide consumers with a month warning before a payment increase, rather than the minimum 210-day advance notice required by § 1026.20(d).

Because interest-only and negatively-amortizing ARMs pose more potential risk to consumers than conventional ARMs, the Bureau believes that providing consumers with the actual or estimated payment allocations for when their interest rates adjust will provide a comprehensible snapshot of the projected consequences of the upcoming adjustments and better enable those consumers to manage their mortgages. The table itself tested well with consumers; the allocation breakdown for the new payment for interest-only and negatively-amortizing ARMs did not test as well. As discussed above, the Bureau revised the model forms to address that problem. Moreover, the periodic statement contains a similar allocation table for the upcoming mortgage payment and testing of the periodic statement went well and raised no concerns regarding projected principal, interest, and escrow—including for payment-option loans.[98] In addition, as set forth in the periodic statement sample form in appendix H–30(C), the allocation of principal for negatively-amortizing loans is zero, and not a negative number.

Also, the proposed rule clearly set forth the bases upon which to make the projections for the allocation table for

[96] Macro Report, at vii.

[97] Macro Report, at vii–viii. The allocation table for interest-only and negatively-amortizing ARMs was revised after the third and final round of testing and is identical in the final rule in § 1026.20(c) and (d).

[98] Macro Report, at 15.

these ARMs, as well as for loan balances. See the section-by-section analysis of § 1026.20(d)(2)(vi) below regarding loan balances. For certain consumers, such as those who are delinquent, who may choose to pay ahead, or who have payment-option ARMs, the projected amount may not prove to be the actual amount. However, servicers routinely project expected payment allocations and loan balances any time they provide consumers with a future payment amount, such as in the periodic statement. The Bureau also notes that the use of allocation tables showing projected payments is an established practice in Regulation Z, as illustrated, for example, in appendices H–4(E) and (F). Also, the Bureau expects the origination of these risky loans will continue to decline in light of the qualified mortgage rules implementing TILA section 129C, thereby reducing the burden on servicers to provide the § 1026.20(d) allocation table. For these reasons and the reasons set forth in the proposed rule, the Bureau is adopting the final rule as proposed. The Bureau is adopting comment 20(d)(2)(iii)(A)–1 with the additional clarification that the new payment, if calculated from an estimated interest rate, will also be an estimate and that creditors, assignees, and servicers may round the interest rate, pursuant to the requirements of the ARM contract.

20(d)(2)(iv)

Explanation of How the Interest Rate Is Determined

TILA section 128A mandates that the initial interest rate adjustment notices include any index or formula used in making adjustments to or resetting the interest rate, and a source of information about the index or formula. Accordingly, proposed § 1026.20(d)(2)(iv)(A) would have required disclosure of the index and published source of the index or formula. This disclosure requirement mirrored the pre-consummation disclosure required around the time of application by current rule § 1026.19(b)(2)(iii). Section 1026.37(j), proposed in the 2012 TILA–RESPA Proposal, likewise would require disclosure of the index name prior to consummation.

TILA section 128A also mandates that the initial interest rate disclosures include an explanation of how the new interest rate and payment would be determined, including an explanation of any adjustment to the index, such as by the addition of a margin. Proposed § 1026.20(d)(2)(iv) would have required § 1026.20(d) notices to include an explanation of how the new interest rate would have been determined. The Bureau noted that this disclosure requirement was consistent with the pre-consummation disclosure requirements of current rule § 1026.19(b)(2)(iii). The 2012 TILA–RESPA Proposal's 1026.37(j) likewise would require disclosure prior to consummation of the amount of the margin expressed as a percentage.

Consumer testing revealed that participants generally had difficulty understanding the relationship of the index, margin, and interest rate.[99] The Bureau said this was the reason it proposed a relatively brief and simple explanation that the new interest rate would be calculated by taking the published index rate and adding a certain number of percentage points, called the ''margin.'' Proposed § 1026.20(d)(2)(iii) also would have required disclosure of the specific amount of the margin.

Consumer testing indicated that the explanation helped participants better understand the relationship between the interest rate, index, and margin. As stated in the proposal, it also helped dispel the notion held by many of the consumers in the initial rounds of testing that creditors subjectively determined their new interest rate at each adjustment.[100] The Bureau stated that it believed the proposed rule and forms struck an appropriate balance between providing consumers with key information necessary to understand the basis of their ARM interest rate adjustments without overloading consumers with complex and confusing technical information.

Other than a comment regarding the application of previously unapplied carryover interest, or applied carryover interest, to the calculation of the new interest rate, which is relevant to § 1026.20(c) and not (d), the Bureau did not receive any comments on the explanation of how the interest rate is determined. In response to that comment, the Bureau modified the proposed rule to include the type and amount, rather than just the type, of any adjustment to the index and removed disclosure of the amount of any adjustment from the ensuing requirement to explain how the new payment is determined. In this way, consumers are informed of the existence and amounts of all elements used to calculate their new interest rates, rather than learning about the amount further on in the disclosure. See the section-by-section analysis of § 1026.20(c)(2)(iii) above for further discussion of this modification.

20(d)(2)(v)

Rate and Payment Limits and Unapplied Carryover Interest

Proposed rule § 1026.20(d)(2)(v) would have required the disclosure of any limits on the interest rate or payment increases at each adjustment and over the life of the loan. The Bureau stated that it believed that knowing the limitations of their ARM rates and payments would help consumers understand the consequences of each interest rate adjustment and weigh the relative benefits of the alternatives that would have been disclosed under proposed § 1026.20(d)(2)(viii). The Bureau gave the example that if an adjustment caused a significant increase in the consumer's payment, knowing how much more the interest rate or payment could increase would better inform the consumer's decision on whether or not to seek alternative financing.

Proposed § 1026.20(d)(2)(v) also would have required disclosure of the extent to which the creditor, assignee, or servicer had foregone any increase in the interest rate due to a limit, called unapplied carryover interest, and the earliest date such foregone interest could be applied. Proposed comment 20(d)(2)(v)–1 would have explained that disclosure of foregone interest rate increases would apply only to transactions permitting interest rate carryover. It further would have explained that the amount of foregone interest rate increase at the initial adjustment was the amount that, subject to rate caps, could be added to future interest rate adjustments to increase, or offset decreases in, the rate determined according to the index or formula.

The Bureau reported that the consumers tested had difficulty understanding the concept of interest rate carryover when it was introduced during the third round of testing. The Bureau attributed this difficulty to the simultaneous introduction of other complex notions, such as interest-only or negatively-amortizing features and the allocation of interest, principal, and escrow payments for such loans. In response, the Bureau simplified the explanation of carryover interest to address this possible confusion.[101]

In its proposed rule, the Bureau recognized that the disclosure of rate

[99] Macro Report, at viii.

[100] Macro Report, at viii.

[101] Macro Report, at viii–ix. ''If not for this rate limit, your estimated rate on [date] would be [x]% higher'' was replaced with ''We did not include an additional [x]% interest rate increase to your new rate because a rate limit applied.''

limits and unapplied carryover interest would have provided information that might help consumers better understand their ARMs. However, the Bureau stated that it was considering whether the assistance this information would have provided outweighed its potential distraction from other more key information. Also, as explained above, consumers had difficulty understanding the concept of carryover interest and the Bureau was concerned that this difficulty might diminish the effectiveness of the proposed § 1026.20(d) disclosures. The Bureau solicited comments on whether to include rate limits and unapplied carryover interest in the proposed § 1026.20(d) disclosures.

The Bureau received few comments regarding the proposed disclosure of rate limits and unapplied carryover interest. A credit union supported inclusion of the rate and payment limits in the § 1026.20(d) notice and a large bank servicer and a large non-bank servicer recommended against it. A large bank servicer commented that consumers do not need this information because they receive it at consummation and including it in the § 1026.20(d) notice would distract and confuse them. The non-bank servicer and a trade association said the unapplied carryover interest was unrelated to the interest rate adjustment and would confuse consumers. See the section-by-section analysis of § 1026.20(c)(2)(iii) and 20(c)(2)(iv) above for a discussion of unapplied interest rate increases.

In addition, a credit union and a State trade association recommended the Bureau eliminate disclosure of carryover interest altogether, asserting that it is too complex and unnecessary for consumers to understand and it would distract consumers from other information contained in the § 1026.20(d) notices. A large servicer suggested the alternative of including this information in the periodic statement instead of the § 1026.20(d) notice.

Because most ARMs covered by this rule will adjust a year or more after consummation, the Bureau disagrees that information provided at consummation suffices to adequately inform consumers about carryover interest and rate limits. Moreover, carryover interest is an essential element in the determination of the new interest rate and payment. For these reasons and the reasons in the Bureau's proposed rule, the Bureau is adopting the final rule as proposed. The Bureau also is adopting proposed comment 20(d)(2)(v)–1, with slight modifications to clarify the definition of carryover interest.

20(d)(2)(vi)

Explanation of How the New Payment Is Determined

TILA section 128A mandates that the initial interest rate notices include an explanation of how the new interest rate and payment would be determined, including an explanation of how the index was adjusted, such as by the addition of a margin. Proposed § 1026.20(d)(2)(vi) would have implemented this statutory provision by requiring the content discussed below. The proposed disclosure would have been consistent with the disclosures required at the time of application pursuant to current § 1026.19(b)(2)(iii). The Bureau also stated that its proposal was consistent with content proposed in § 1026.20(c) and thus would have promoted consistency in Regulation Z ARM disclosures.

Proposed § 1026.20(d)(2)(vi) would have required ARM disclosures to explain how the new payment was determined, including (A) the index or formula, (B) any adjustment to the index or formula, such as by addition of the margin, (C) the loan balance, (D) the length of the remaining loan term, and (E) if the new interest rate or new payment provided was an estimate, a statement that another disclosure containing the actual new interest rate and new payment would be provided to the consumer between two and four months prior to the date the first new payment would be due, if the interest rate adjustment would cause a corresponding change in payment, pursuant to § 1026.20(c).

The proposal would have required disclosure of both the loan balance and the remaining loan term expected on the date of the interest rate adjustment. The proposed rule also would have required disclosure of any change in the term of the loan caused by the adjustment. As discussed in proposed § 1026.20(d)(2)(iv) above, the Bureau stated its belief that this explanation would have helped consumers better understand how these factors determine their new payment and would have dispelled the notion held by many consumers in the initial rounds of testing that, at each adjustment, the creditor subjectively determined their new interest rate, and thus the new payment. The Bureau stated that disclosure of the four key assumptions upon which the new payment would be based would have provided a succinct overview of how the interest rate adjustment works. It also would have demonstrated that factors other than the index could increase consumers' interest rates and payments. Disclosures of these factors, the Bureau said, would have provided consumers with a snapshot of the current status of their adjustable-rate mortgages and with basic information to help them make decisions about keeping their current loan or shopping for alternatives. As set forth above, if an estimated new interest rate and new payment were used, consumers would have been informed by a statement in the § 1026.20(d) notice that they would receive another disclosure containing their actual new interest rate and new payment between two and four months in advance of the due date of their first new payment—if the interest rate adjustment would result in a corresponding payment change.

Two commenters voiced concern over having to project an estimate of the loan balance, as required in the proposed rule. For a discussion of the use of projections of scheduled payments for interest-only and negatively-amortizing ARMs, as well as for the loan balance, see the section-by-section analysis of § 1026.20(d)(2)(iii) above. The final rule adds emphasis regarding the use of estimates in the § 1026.20(d) model forms to further alert consumers to their use, including that a recent index rate is used in the calculation of the new interest rate and payment and underlining of the word ''estimate.'' The Bureau did not receive other specific comments regarding § 1026.20(d)(2)(vi) apart from one community bank recommending against the inclusion of similar information in both the explanation of how the interest rate is calculated and the explanation of how the new payment is determined. The Bureau points out that the components of the interest rate calculation are also components of how the new payment is determined and therefore, the Bureau will retain these common components in § 1026.20(d)(2)(vi). However, to avoid redundancy, the final rule does not require reiteration of the amount of the margin or any other adjustment to the index.

For these reasons and the reasons articulated in the proposed rule, the Bureau is adopting § 1026.20(d)(2)(vi) and comment 20(d)(2)(vi)–1 as proposed, except the final rule does not require disclosure of the specific amount of any adjustment to the margin, because that data is provided in the final rule under § 1026.20(d)(2)(iv).

20(d)(2)(vii)

Interest-Only and Negative-Amortization Statement and Payment

Proposed § 1026.20(d)(2)(vii) would have required § 1026.20(d) notices to include a statement regarding the

allocation of payments to principal and interest for interest-only or negatively-amortizing ARMs. If negative amortization occurred as a result of the interest rate adjustment, the proposed rule would have required disclosure of the payment necessary to amortize fully such loans at the new interest rate over the remainder of the loan term. As the Bureau explained in proposed comment 20(d)(2)(vii)–1, for interest-only loans, the statement would have informed the consumer that the new payment would cover all of the interest but none of the principal owed and, therefore, would not reduce the loan balance. For negatively-amortizing ARMs, the statement would have informed the consumer that the new payment would cover only part of the interest and none of the principal, and therefore the unpaid interest would add to the balance.

See the section-by-section analysis of § 1026.20(c)(2)(vi) above for a discussion of the Board's 2009 Closed-End Proposal to revise current § 1026.20(c) with regard to non-amortizing and negatively-amortizing loans and Dodd-Frank amendments to TILA that pose restrictions on the origination of non-amortizing and negatively-amortizing loans. In view of these changes to the law and the outcome of its consumer testing, the Bureau solicited comments on whether to include the payment required to amortize ARMs that would become negatively amortizing as a result of an interest rate adjustment.

Some industry commenters said that the statements regarding interest-only and negatively-amortizing ARMs should be disclosed instead of the proposed allocation information for these loans. *See* section-by-section analysis of § 1026.20(d)(2)(iii). Several consumer groups commended the Bureau for requiring the amortization statements but recommended additional warning language for negatively-amortizing ARMs, which they characterized as dangerous. The Bureau believes that the statements regarding amortization are clear and succinct and that additional warning language is not needed. Moreover, the Bureau points out that other new mortgage rules more directly address the risks posed by non-amortizing mortgage products.

The Bureau is modifying the wording of § 1026.20(d)(2)(vii) and comment 20(d)(2)(vii)–1 to clarify that § 1026.20(d) notices for ''interest-only ARMs'' as well as any other ARMs for which consumers are paying only interest, must include the statement discussed above regarding the amortization consequences of such payments. The Bureau also is modifying the language of § 1026.20(d)(2)(vii) to conform with the proposed language in comment 20(d)(2)(vii)–1 and the section-by-section analysis of the proposed rule regarding the amortization statements required for ARMs for which consumers pay only interest and for negatively-amortizing ARMs. The final rule requires § 1026.20(d) notices to disclose, for consumers whose ARM payments consist of only interest, that their payment will not be allocated to pay loan principal and will not reduce the loan balance or, for negatively-amortizing ARMs, that the new payment will not be allocated to pay loan principal and will pay only part of the interest, thereby adding to the balance of the loan. No comments were received regarding the § 1026.20(d)(2)(vii) requirement to disclose the amount necessary to amortize negatively-amortizing ARMs. For these reasons and those stated in the proposed rule, the Bureau is adopting the rule and comments 20(d)(2)(vii)–1 and –2 with the addition of the amortization language discussed above.

20(d)(2)(viii)

Prepayment Penalty

Proposed § 1026.20(d)(ix) would have required disclosure of the circumstances under which any prepayment penalty could be imposed, such as selling or refinancing the principal dwelling, the time period during which such penalty could apply, and the maximum dollar amount of the penalty. The proposed rule would have cross-referenced the definition of prepayment penalty in § 1026.41(d)(7)(iv), the proposed rule for periodic statements.

The Bureau reasoned that interest rate adjustments might cause payment shock or require consumers to pay their mortgage at a rate they might no longer be able to afford, prompting them to consider alternatives such as refinancing. To fully understand the implications of such actions, the Bureau stated that consumers should know whether prepayment penalties might apply. Under the proposed rule, such information would have included the maximum penalty in dollars that might apply and the time period during which the penalty might be imposed. The Bureau stated that the dollar amount of the penalty, as opposed to a percentage, would be more meaningful to consumers.

The Bureau also proposed disclosure of any prepayment penalty in § 1026.20(c) ARM payment change notices and in the periodic statements proposed by § 1026.41. Consumer testing of the periodic statement included a scenario in which a prepayment penalty applied. Most participants understood that a prepayment penalty applied if they paid off the balance of their loan early, but some participants were unclear whether it applied to the sale of the home, refinancing, or other alternative actions consumers could pursue in lieu of maintaining their adjustable-rate mortgages.[102] For this reason, the Bureau proposed to clarify the circumstances giving rise to a prepayment penalty which creditors, assignees, and servicers must disclose to the consumer in the initial rate adjustment notice. The proposed forms included model language to alert consumers that a prepayment penalty might apply if they pay off their loan, refinance, or sell their home before the stated date.

See the section-by-section analysis of § 1026.20(c)(2)(vii) for a discussion of Dodd-Frank Act amendments to TILA that would significantly restrict a lender's ability to impose prepayment penalties. In view of these changes to the law, the Bureau solicited comments on whether to include information regarding prepayment penalties in § 1026.20(d). See the section-by-section analysis of § 1026.20(c)(2)(vii) for a discussion of comments received regarding the proposed prepayment penalty disclosure.

The Bureau is adopting the rule, with significant modification from the proposed rule. The final rule is renumbered as § 1026.20(d)(2)(viii). In the final rule, in place of requiring disclosure of the maximum dollar amount of the penalty, the consumer is directed by the required disclosure to contact the servicer for additional information, including the maximum amount of the prepayment penalty. Comment 20(d)(2)(viii)–1 clarifies that the creditor, assignee, or servicer has the option of either deleting this field entirely from the § 1026.20(d) disclosure for consumers who do not have prepayment penalties or retaining the field and inserting a word such as ''None'' after the prepayment penalty heading. Thus, the final rule retains information crucial for consumers to make decisions regarding whether or not to retain their ARMs in the face of an interest rate and payment increase while reducing the burden on industry by eliminating a field that was both dynamic and particularly difficult to calculate. The Bureau believes that encouraging consumers to contact the

[102] Macro Report, at vi.

servicer for the exact dollar amount of the maximum penalty or for other questions, rather than including that information in the disclosure, does not significantly compromise consumer protection because contacting the servicer should yield the most up-to-date information as well as encourage contact with the servicer for consumers facing financial distress. The Bureau also notes that the periodic statement required by the final rule likewise does not contain specific information about any prepayment penalty other than its existence, as applicable. The Bureau also is changing the cross-reference for the definition of prepayment penalty from the periodic statement regulation to the ATR rule.[103]

The Bureau believes, for the reasons stated above and in the proposed rule, that information about the prepayment penalty is important for consumers to take into account when considering alternatives to an interest rate and payment increase. For this reason, the Bureau is adopting the final rule and comment 20(d)(2)(viii)–1 with the modifications set forth above.

20(d)(2)(ix)

Telephone Number of Creditor, Assignee, or Servicer

Proposed § 1026.20(d)(2)(x) would have required disclosure of the telephone number of the creditor, assignee, or servicer for consumers to call if they anticipated having problems affording the new payment. The Bureau received no comments on this topic and is issuing the final rule as proposed, renumbered as § 1026.20(d)(2)(ix).

20(d)(2)(x)

Alternatives

TILA section 128A mandates that the initial interest rate adjustment notices include a list of alternatives consumers may pursue before adjustment or reset and descriptions of the actions consumers must take to pursue these alternatives. These alternatives are refinancing, renegotiation of loan terms, payment forbearance, and pre-foreclosure sales. Proposed § 1026.20(d)(2)(viii) would have required disclosure in § 1026.20(d) initial ARM interest rate notices of the four alternatives set forth in the statute. Proposed comment § 1026.20(d)(2)(viii)–1 interpreted the rule to require simple, commonly used terms when possible in the model forms to describe the alternatives.

The proposed model forms presented the list as possibilities for consumers seeking alternatives to the projected upcoming changes to their interest rate and payment. The proposed forms also explained that the alternatives may be possible and that most of them were subject to approval by the lender. All consumers tested in the first and second rounds of testing were able to identify the list of alternatives.[104]

In its proposal, the Bureau said that the list of alternatives generally and concisely described the actions consumers would have to take to pursue these alternatives, such as contacting their lender or another lender. The Bureau proposed to require disclosure of this concise list of alternatives in lieu of a more detailed account of actions consumers could take to maximize the effectiveness of the disclosure without weighing it down with information that may not add significant value.

A national trade association and a non-bank servicer recommended eliminating the loss mitigation options in their entirety from the § 1026.20(d) disclosure. The trade association recommended that the Bureau exercise its exception authority to reverse the statutory mandate requiring inclusion of the loss mitigation options in the disclosure. In the alternative, the trade association recommended the Bureau remove proposed § 1026.20(d)(2)(viii) in favor of a provision encouraging consumers facing financial difficulty to contact the servicer to discuss possible loan modification and forbearance options or to permit servicers to include disclaimers about the accuracy of the required information. Chief among the reasons fueling the national trade association's opposition to including proposed § 1026.20(d)(2)(viii) in the final rule was its concern that the conditional and disclaimer language[105] of the provision would be insufficient to prevent the false impression that some or all of these loss mitigation options would be available to consumers or that they could choose among the options. Both commenters suggested the proposed language could create a moral hazard encouraging consumers to default. The trade association concluded that the provision will encourage unnecessary defaults, unfulfilled expectations, and dissatisfaction with the servicer. The non-bank servicer also stated that it would be insulting to consumers to assume that the interest rate adjustment would cause financial distress.

The Bureau declines to remove the loss mitigation options from the final rule. Disclosure of the loss mitigation options is expressly required by TILA section 128A(b)(4) and the Bureau believes presenting consumers with concrete and constructive possible responses to payment shock and financial distress, as set forth in the statute, could significantly benefit consumers. However, the Bureau believes that the proposed forms may have given unwarranted prominence to four alternatives. The Bureau believes that it is logical and may be beneficial to consumers to consolidate all of the loss mitigation information, including information about homeownership counselors and counselor organizations, State housing finance authorities, and the four alternatives, in one place in the disclosure. The Bureau is mindful that the information on alternatives will benefit only the portion of the consumers receiving the § 1026.20(d) disclosure that anticipate financial problems in the face of the higher payment that may occur with their first ARM adjustment. The Bureau also believes that the conditional and cautionary language the proposed model forms used in presenting those alternatives that require lender approval and that may not be available to consumers is sufficient and meets its goal of providing consumers with clear and succinct disclosures. The Bureau is adding emphasis to the conditional language in the final model forms by printing the word ''may'' in bold font.

To enhance consumer understanding, the Bureau is modifying the final rule by requiring that the alternatives be expressed in simple and clear terms. Because of this addition to the final rule, the Bureau is removing proposed comment 20(d)(2)(viii)–1 interpreting the rule to require the non-technical language in the model forms describing the alternatives.

For these reasons and the reasons articulated by the Bureau in the proposed rule, the Bureau is adopting § 1026.20(d)(2)(viii) as the final rule, with some modification and renumbered as § 1026.20(d)(2)(x). As an alternative to prominently locating the four options in the middle of the disclosure, in the § 1026.20(d) model forms, the Bureau places them at the end of the disclosure, co-located with the other loss mitigation information disclosed in the forms, *i.e.,* the homeownership counselor and State housing finance authority access information and contact information to call the servicer in case of anticipated

[103] *See* § 1026.32(b)(6)(i), published in a separate final rule (CFPB–2012–0037). NB: Certain provisions of the ATR definition apply specifically to FHA loans.

[104] Macro Report, at viii.

[105] The proposed § 1026.20(d) model forms stated: ''The following options may be possible (most are subject to lender approval).''

problems paying at the estimated new rate.

20(d)(2)(xi)

Contact Information for Government Agencies and Counseling Agencies or Programs

State Housing Finance Authorities

TILA section 128A(b)(6) requires the initial interest rate adjustment notices to include the mailing and internet addresses, and telephone number of the State housing finance authority,[106] as defined in section 1301 of Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), for the State in which the consumer resides. Proposed § 1026.20(d)(2)(xi) would have implemented this statutory mandate by requiring inclusion of this information in the initial interest rate adjustment notices. Two other mortgage servicing rulemakings proposed by the Bureau, the periodic statement, *see* below, and the early intervention for delinquent borrowers in the 2012 RESPA Servicing Proposal, also would have required contact information for the State housing finance authority. However, those proposals would have required the contact information for the State in which the property is located rather than in which the consumer resides, because the scope of those proposed rules is not limited to a consumer's principal dwelling. The Bureau sought comment on how to address any compliance difficulties posed by this inconsistency. The Bureau did not believe this inconsistency of language would be problematic because, logically, the consumer's principal dwelling would be located in the State in which the property is located.

Commenters addressing this inconsistency recommended that the Bureau provide the contact information for the State in which the property is located to maintain consistency among the Regulation Z and Regulation X mortgage rules. The Bureau agrees with this recommendation because, as stated above, TILA section 128A applies to consumer credit transactions secured by the consumer's principal residence, such that the State in which the property is located and the consumer's State of residence are the same. However, this issue of consistency is mooted by the Bureau's decision to use its exception authority to issue the final rule requiring § 1026.20(d) notices to direct consumers to a Bureau Web site from which they can locate contact information for the appropriate State housing finance authority, in place of including the specific contact information in the notice itself. See the Legal Authority discussion below for the bases for this modification of the rule.

Those who commented on the statutory requirement to include contact information for State housing finance authorities recommended that the Bureau issue the final rule removing this information entirely from the § 1026.20(d) notice. Alternatively, commenters recommended (1) modifying the model forms to clarify that these entities may not provide homeownership counseling or (2) directing consumers to a Web site where they could find contact information for the appropriate State housing finance authority.

State housing finance authorities (SHFAs) and the organizations representing them uniformly recommended against the statutory mandate to include SHFA contact information in the § 1026.20(d) notice. While always willing to help distressed homeowners, they said, not all SHFAs provide counseling and they expressed concern that the referral might misdirect consumers away from entities more likely to provide the appropriate assistance. SHFAs voiced concern that the increase in consumer inquiries expected as a result of including their contact information in the § 1026.20(d) notices would tax their already limited resources. Industry commenters pointed out the cost burden of this dynamic field, which would require customization of the form by State and constant monitoring of changes to this information.

The Bureau believes that issuing its final rule requiring § 1026.20(d) notices to refer consumers to the Bureau Web site to find contact information for the appropriate SHFA, rather than including specific contact information in the disclosure itself, does not compromise consumer protection. The unanimity of SHFA commenters and their representatives favoring elimination of SHFA contact information from the notice provides sufficient proof to the Bureau that consumer protection would be better served by this modification of the proposed rule. The Bureau also notes that no consumer advocacy organizations commented on this issue and that the final rule resolves industry concerns on this topic.

Counseling Agencies or Programs

TILA section 128A also mandates that the initial interest rate adjustment notices include the names, mailing and internet addresses, and telephone numbers of counseling agencies or programs reasonably available to the consumer that have been certified or approved and made publicly available by HUD or a State housing finance authority. The 2013 HOEPA Final Rule, which implements the Dodd-Frank Act protections for ''high-cost'' mortgage loans, requires, among other things, that consumers get homeownership counselors and counseling organizations prior to obtaining a high-cost mortgage.[107] It also implements other housing-counseling-related requirements unrelated to HOEPA that are included in the Dodd-Frank Act, such as requiring lenders to provide a list of homeownership counselors to applicants for federally related mortgage loans.[108]

The Bureau proposed the alternative approach, with regard to the initial ARM interest rate adjustment notices, of using its exception authority to require creditors, assignees, and servicers simply to provide the Web site address and telephone number to access either the Bureau list or the HUD list of homeownership counselors and counseling organizations instead of requiring contact information for a list of specific counseling agencies or programs.[109] For the reasons set forth in the proposal and below, the Bureau is adopting this proposed measure with regard to the Web site access to homeownership counselor resources. In addition, the Bureau is issuing the final rule modifying the proposed requirement to include both HUD and Bureau telephone numbers to access homeownership counselor information in favor of requiring disclosure only of the HUD telephone number because the Bureau believes the HUD telephone number provides adequate access to approved counseling resources.

The ARM notice required by proposed § 1026.20(d) contains, in a limited amount of space, a significant amount of important technical information about the upcoming initial interest rate adjustment of the consumer's ARM and the potential implications of that

[106] NB: The statutory language refers to ''State housing finance authorities'' but these entities may be named ''authority'' or ''agency.'' The Bureau views these terms as interchangeable for purposes of this discussion.

[107] *See* § 1026.34(a)(5).

[108] The list provided to consumers pursuant to this requirement must be obtained through a Bureau Web site or data made available by the Bureau or HUD. *See* § 1024.20(a)(1)(i).

[109] The HUD list is available at *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm* and the HUD toll-free number is 800–569–4287. The Bureau list will be available by the effective date of this final rule at *http://www.consumerfinance.gov/*.

adjustment. Including too much information could overwhelm consumers and minimize the value of the other information contained in the notice. Also, not all consumers would benefit from the counselor information, although it would provide an important benefit for those consumers who face financial difficulties if their initial interest rate adjustment may cause their mortgage payments to significantly increase. Finally, importing updated information from the Bureau or HUD Web site would involve more programming and upkeep burden than simply listing one of the agencies' Web sites and the HUD telephone number.

Providing consumers with the Web site address for either the Bureau or HUD list of homeownership counselors and counseling organization and the HUD telephone number would streamline the disclosure and present clear and concise information for the consumer to use. Directing consumers to the actual list would allow them to choose a conveniently-located program or agency and find other programs or agencies if those contacted initially could not help the consumer. The Bureau sought comment on whether this proposal struck an appropriate balance, and on the benefits and burdens to both consumers and industry of requiring inclusion of a list of several individual homeownership counselors in the initial ARM interest rate adjustment notice.

Industry commenters uniformly supported the provision to provide information for consumers on how to access homeownership counselor information rather than requiring inclusion of the contact information for specific homeownership counselors in the § 1026.20(d) disclosure and the Bureau received no comments from other sectors. A few servicers stated that a distressed consumer's first action should be to call the servicer and, in response, the Bureau notes that the first entry in the loss mitigation portion of the model form encourages consumers to call their servicer.

The Bureau is adopting the final rule as proposed with regard to homeownership counselors and counseling organizations, except that it also is removing the requirement to include both a HUD and Bureau telephone number to access contact information for homeownership counselors and counseling information in favor of requiring disclosure only of the HUD telephone number. The Bureau believes that its approach regarding the homeownership counselor disclosures appropriately balances consumer and industry interests.

Legal Authority

The Bureau is relying on its authority under TILA sections 105(a) and (f) and Dodd-Frank Act section 1405(b) to exempt creditors, assignees, and servicers from the requirement in TILA section 128A to include contact information for SHFAs and specific government-certified counseling agencies or programs reasonably available to the consumer in the initial ARM interest rate adjustment notice. TILA section 105(a) and Dodd-Frank Act section 1405(b) also authorize the Bureau to instead require that the initial ARM interest rate adjustment notice contain information directing consumers to the Bureau list or HUD list of homeownership counselors and counseling organizations, the HUD telephone number, and the Bureau Web site from which consumers can locate the appropriate State housing finance authority. For the reasons discussed above, the Bureau believes that the exemption and addition is necessary and proper under TILA section 105(a) both to effectuate the purposes of TILA—to promote the informed use of credit and protect consumers against inaccurate and unfair credit billing practices—and to facilitate compliance. Moreover, the Bureau believes, in light of the factors in TILA section 105(f), that disclosure in the § 1026.20(d) notice of the contact information for SHFAs and government-certified counseling agencies or programs reasonably available to the consumer specified in TILA section 128A would not provide a meaningful benefit to consumers. Specifically, the Bureau considers that the exemption is proper irrespective of the amount of the loan and the status of the consumer (including related financial arrangements, financial sophistication, and the importance to the consumer of the loan). Moreover, in the estimation of the Bureau, the exemptions would simplify the initial ARM adjustment notice, provide consumers with the appropriate information to locate homeownership counselors and counseling organizations, if needed, and improve the information provided to the consumer, thus furthering the consumer protection purposes of TILA. In addition, consistent with section 1405(b) of the Dodd-Frank Act, the Bureau believes that modification of the requirements in TILA section 128A would improve consumer awareness and understanding and is in the interest of consumers and in the public interest.

20(d)(3) Format

Initial Rate Adjustment Disclosures

See the section-by-section analysis of § 1026.17(a)(1) above for a discussion of the form requirements governing § 1026.20(d). The Bureau received no comments regarding its proposed changes to § 1026.17(a)(1) regarding form requirements governing § 1026.20(d), but it did receive significant response to the proposed implementation of the ''separate and distinct'' standard. In the final rule, the Bureau interprets the ''separate and distinct'' standard as permitting the initial interest rate adjustment notices to be provided in the same envelope or email with other servicer material, but only if it is a stand-alone document. *See* further discussion in the section-by-section analysis of § 1026.20(d) above. The Bureau is issuing § 1026.17(a) with conforming changes. See the discussion in the section-by-section analysis of § 1026.17(c). See the section-by-section analysis of § 1026.20(c)(3) above for a discussion regarding ARM disclosures in languages other than English.

Legal Authority

In addition, as described below, § 1026.20(d)(3) imposes additional form requirements for initial ARM adjustment notices. For the reasons described below, these requirements are authorized under TILA section 105(a) and Dodd-Frank Act sections 1032(a) and 1405(b). As discussed in the section-by-section analysis of each of the sections of § 1026.20(d)(3), the Bureau believes, consistent with TILA section 105(a), that the formatting requirements are necessary and proper to effectuate the purposes of TILA, to assure a meaningful disclosure of credit terms, to avoid the uninformed use of credit, and to protect consumers against inaccurate and unfair credit billing practices. Further, the Bureau believes, consistent with Dodd-Frank Act section 1032(a), that the formatting requirements ensure that the features of the ARM loans covered by § 1026.20(d) are fully, accurately, and effectively disclosed to consumers in a manner that permits them to understand the costs, benefits, and risks associated with such loans, in light of their individual facts and circumstances. Moreover, consistent with Dodd-Frank Act section 1405(b), the Bureau believes that modification of the disclosure requirements of TILA section 128A(b) to require the format discussed below will improve consumer awareness and understanding of residential mortgage loans transactions involving ARMs, and

is thus in the interest of consumers and in the public interest.

20(d)(3)(i)

All Disclosures in Tabular Form, Except the Date

Proposed § 1026.20(d)(3)(i) would have required that, except for the date of the notice, the initial ARM adjustment disclosures be provided in the form of a table and in the same order as, and with headings and format substantially similar to, Forms H–4(D)(3) and (4) in appendix H to subpart C for initial interest rate adjustments.

See the section-by-section analysis of § 1026.20(c)(3)(i) for a discussion of the rationale in the proposed rule for providing the § 1026.20(c) and (d) disclosures in tabular form to consumers and of the comments the Bureau received regarding the required tabular format. The Bureau's response to these comments is two-fold. First, the proposed rule's requirement that § 1026.20(d) disclosures be provided to consumers ''in the form of the table and in the same order as, and with headings and format substantially similar to'' the proposed model forms is consistent with established standards found throughout Regulation Z requiring tabular formatting as well as other conventions. For example, § 1026.6(b)(1), entitled ''Form of disclosures; tabular format for open-end (not home-secured) plans,'' requires creditors to provide account-opening disclosures ''in the form of a table with headings, content, and format substantially similar to'' the tables in a particular model form. Moreover, Regulation Z's Appendices G and H—Open-End and Closed-End Model Forms and Clauses sets forth the permissible changes to model forms, including the § 1026.20(d) model forms. Thus, the proposed rule does not depart from established Regulation Z standards and does not violate TILA.

Second, the proposed language referred to by commenters was not intended to strait-jacket creditors, assignees, and servicers into language inapplicable to non-standard customer situations and loan products. The ''substantially similar'' language was intended to allow disclosure providers the flexibility to develop, for example, forms that may be either one- or two-sided and that may, but need not, feature reverse text data fields.

For these reasons and those articulated in the proposed rule, the Bureau is adopting 1026.20(d)(3)(i), (ii), and (iii) and comment 20(d)(3)(i)–1. While, as stated above, the formatting conventions in the final § 1026.20(d) disclosures do not depart from standard Regulation Z format requirements, the Bureau has added comment 20(d)(3)(i)–1 clarifying that creditors, assignees, and servicers may modify the § 1026.20(d) disclosures to account for certain circumstances or transactions that may not be addressed in the final rule or forms. Also, the final rule removes § 1026.20(d) model and sample forms from the Regulation Z provision prohibiting formatting alterations. *See* Appendices G and H—Open-End and Closed-End Model Forms and Clauses.

20(d)(3)(ii)

Format of Date of Disclosure

Proposed § 1026.20(d)(3)(ii) would have required that the date of the disclosure appear outside of and above the table required by § 1026.20(d)(3)(i). As discussed above with respect to paragraph 20(d)(2)(i), the date would have been segregated because it is not information specific to the consumer's adjustable-rate mortgage. Having received no comments on this topic, the Bureau is adopting the rule as proposed.

20(d)(3)(iii)

Format of Interest Rate and Payment Table

Proposed § 1026.20(d)(3)(iii) would have required tabular format for initial ARM interest rate adjustment notices for, among other things, interest rates, payments, and the allocation of payments for loans that are interest-only or are negatively amortizing. This table would have been located within the table proposed by § 1026.20(d)(3)(i). This table would have been substantially similar to the one tested by the Board for its 2009 Closed-End Proposal to revise § 1026.20(c). The Bureau's proposal would have required the table to follow the same order as, and have headings and format substantially similar to, Forms H–4(D)(3) and (4) in appendix H of subpart C.

Disclosing the current interest rate and payment in the same table allows consumers to readily compare them with the estimated or actual adjusted rate and new payment. Consumer testing revealed that nearly all participants were readily able to identify and understand the table and its contents.[110] The estimated or actual new interest rate and payment and date the first new payment is due is key information the consumer must know to commence payment at the new rate. For these reasons, the Bureau proposed locating this information prominently in the disclosure.

The Bureau is issuing the final rule as proposed in § 1026.20(d)(3)(iii). See the section-by-section analysis of § 1026.20(c)(iii) for a discussion of comments received and the Bureau's rationale for the proposed format in the interest rate and payment table and changes made in the final rule.

Section 1026.36 Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

36(c) Servicing Practices

Section 1464 of the Dodd-Frank Act generally codified provisions in existing Regulation Z with respect to the crediting of consumer payments and providing payoff statements. The Bureau proposed to implement these statutory requirements through relatively minor changes to Regulation Z as discussed below. Pursuant to the Dodd-Frank Act and current § 1026.36(c), a servicer must promptly credit payments, must not engage in the pyramiding of late fees, and must provide a consumer with a payoff statement at the consumer's request. The Bureau proposed amending Regulation Z to implement the new statutory requirements, and to address the related issue of the handling of partial payments.

36(c)(1)(i) Periodic Payments

Section 1464(a) of the Dodd-Frank Act established new TILA section 129F(a), which essentially codified existing Regulation Z § 1026.36(c)(1)(i) with regard to prompt crediting of mortgage loan payments. The statute and the existing regulation both provide generally that no servicer shall 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.

Proposed § 1026.36(c)(1)(i) would have required a servicer to promptly credit a ''full contractual payment.'' A full contractual payment would have been defined to mean the amount owed for principal, interest, and escrow (if applicable), but not late fees. The Bureau engaged in outreach and found that many servicers already apply payments that cover principal, interest, and escrow (if applicable) without deducting late fees.

In general, commenters supported the prompt crediting of full payments; however commenters expressed concerns over the definition of a full payment and requested clarification

[110] Macro Report, at vii.

regarding the implication of this rule in certain circumstances.

Several industry commenters and one State Attorney General's office commented that a definition of ''full contractual payment'' that excluded late fees would encourage consumers to ignore payment of late fees, would purport to redefine the terms of the underlying security instrument, and would potentially impact the servicer's ability to collect fees to which they were contractually entitled. An industry commenter indicated that the proposed rule reflected industry practice and was not necessary, whereas another suggested that if late fees were not included in the definition of full contractual payment, there should be a message reminding consumers of their late fee obligation.

Several commenters also sought clarification regarding the implications of the requirement in certain circumstances. Specifically, a consumer advocate commenter requested clarification regarding the impact on non-payment of escrowed amounts for force-placed insurance and property taxes. Several industry commenters requested clarification regarding the application of the rule when a mortgage loan has been accelerated or is in foreclosure, and urged an exemption for such scenarios. In addition, the Bureau received one comment expressing concern about posting payments on weekends, and one comment requesting that payments only be posted on the same business day, not the same calendar day. Finally, a number of community banks, credit unions, small servicers and their trade associations requested an exemption for small servicers from all provisions of the proposed rules.

As stated in the proposal, the Bureau believes that if a consumer submits sufficient funds to cover principal, interest and escrow, those funds should be applied regardless of whether there are outstanding late fees. The rule was not intended to redefine existing contractual terms of the underlying security. While servicers must apply full payments that are sufficient to cover principal, interest and escrow, servicers may still charge and collect late fees if such payments are not timely made. The Bureau initially proposed to define the amount due in any period for principal, interest, and escrow as a ''full contractual payment'' to reflect the amount due in a period pursuant to the contractual obligation. However, in light of the concern that the regulation may be interpreted as redefining a consumer's contractual obligation, the Bureau is adopting instead the term ''periodic payment'' in place of ''full contractual payment'' to refer to the amount owed by the consumer for principal, interest, and escrow during any billing cycle. Thus, if a consumer submits an amount sufficient to constitute a periodic payment (that is, enough to cover the amounts due for principal, interest, and escrow), that payment must be promptly credited to a consumer's account.

Because the definition of ''periodic payment'' is intended to reflect the consumer's contractual obligation, to the extent a consumer's mortgage loan has been accelerated (such that the periodic payment constitutes the total amount owed for all principal and interest), or that certain obligations for force-placed insurance or delinquent taxes have been paid through the escrow account, those amounts may be appropriately accounted for within this definition of a periodic payment. With regard to defining the periodic payment, the Bureau believes it is appropriate to include amounts owed for escrow in the periodic payment. The 2013 RESPA Servicing Final Rule imposes greater requirements on servicers with respect to advances for maintaining insurance for escrowed borrowers and the Bureau believes it is appropriate and consistent with most security instruments to include escrow in the periodic payment.

The Bureau does not believe the rule will prevent collection of late fees or impose operational challenges on servicers regarding the timing for crediting payments. Although a servicer may not delay crediting of a payment until a late fee has been paid, nothing in the rule prevents a servicer from charging and collecting a late fee where appropriate. The Bureau does not believe it is appropriate to mandate a statement to the consumer regarding the consumer's obligation to pay a late fee; however, a servicer may undertake appropriate actions, including potentially through a message on the periodic statement, to collect late fees.[111] With respect to comments regarding operational difficulties of crediting payments on a specific day, the Bureau observes that payment must be credited on the day 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. The Bureau believes this allows servicers sufficient flexibility because, if it is operationally infeasible to post a payment on the day received, payments may be processed on a later day so long as that later posting does not result in a charge to the consumer or in the reporting of negative information to a consumer reporting agency. Accordingly, the Bureau finalizes the rule as proposed, with a minor adjustment to replace the term ''full contractual payment'' with the term ''periodic payment.'' Additionally, to dispel any impression that existing comment 36(c)(1)(i) 2 is inconsistent with the final rule, the Bureau is amending the comment to clarify that it concerns the method in which payments are credited.

Small Servicers

Finally, the Bureau does not believe an exemption for small servicers from the prompt crediting requirement is appropriate. Small servicers are already required to promptly credit payments under the current requirements of Regulation Z. Outreach with small servicers indicates that such servicers are generally already in compliance with the prompt crediting requirements. Further, in the course of the Bureau's outreach efforts, small servicers told the Bureau that they do not use suspense accounts, choosing instead to credit partial payments or return the payments. These practices continue to be allowed, as clarified in comment 36(c)(1)(ii)–1.

36(c)(1)(ii) Partial Payments

Section 1464 of the Dodd-Frank Act and existing Regulation Z do not define what constitutes a ''payment'' for purposes of the prompt crediting requirement. Outreach to consumer and industry stakeholders revealed that partial payments are currently handled in a variety of ways: Some servicers do not accept partial payments, some servicers apply partial payments, and some servicers send partial payments to a suspense or unapplied funds account. Previously, there were no Federal regulations that governed such accounts; thus, the Bureau proposed to address partial payments in proposed § 1026.36(c)(1)(ii).

Proposed § 1026.36(c)(1)(ii) provided specific rules regarding the handling of partial payments and suspense accounts. New paragraph 36(c)(1)(ii) would have required, consistent with the proposed periodic statement requirements in § 1026.41 discussed below, that if a servicer holds a partial payment, meaning any payment less than a full contractual payment, in a suspense or unapplied funds account, the servicer must disclose on the periodic statement the amount of funds held in such account. Additionally, proposed § 1026.36(c)(1)(ii) would have provided that if a servicer were to hold

[111] *See* § 1026.41 and comment 1026.41(c)–2.

a partial payment in a suspense or unapplied funds account, once there are sufficient funds in the account to cover a full contractual payment, the servicer would have had to apply those funds to the oldest outstanding payment due.

The proposed regulation would have left servicers significant flexibility in the handling of partial payments in accordance with contractual terms and other applicable law, for instance by rejecting the payment, crediting it immediately, or holding it in a suspense account. However, the proposed rule also would have ensured greater consistency in the handling of suspense accounts by requiring certain procedures around partial payments.

The Bureau believed this proposed approach would have clarified servicers' obligations in processing both full payments and partial payments, as well as ensured that all payments would be properly applied. The proposed disclosures would have helped consumers understand that their partial payments are being held in a suspense account rather than having been applied, as well as when those partial payments would be applied. Additionally, requiring application when a full payment accumulates would have provided protection to consumers, as well as reduced the outstanding principal balance on certain consumer loans.

The majority of commenters appreciated the rule's flexibility in handling partial payments; however, some consumer-advocate commenters felt that all payments, including partial payments, should be immediately credited to the consumer's account. Two of these commenters felt this was particularly important in the case of daily accrual loans. Comments also revealed there was some confusion about the proposed rule; in particular, there was confusion about whether the use of suspense accounts would have been *permitted* or *required.*

Consumer advocate commenters requested that the Bureau require further procedures for the handling of partial payments to avoid arbitrariness in the handling and crediting of these payments, and to ensure there is no ambiguity or uncertainty for either consumers or institutions. The Bureau also received comments directly addressing the question of whether, if payments are returned (rather than placed in a suspense account or applied), they must be returned within a specific period of time. Some commenters suggested a specific period of time, and one commenter felt that further regulation on this topic is not required. Additionally, the Bureau received one comment requesting clarification on how the periodic statement exemptions would affect the partial payments disclosure, one comment requesting confirmation that the new provisions addressing suspense accounts would not be in conflict with existing Regulation Z § 226.21, and several comments requesting an exemption from the prompt crediting provisions when a consumer is in bankruptcy.

Finally, commenters disagreed on the provision requiring application to the oldest outstanding delinquency—some agreed with this provision because they felt it would advance the date of delinquency one cycle, while other consumer advocate commenters felt it would be more consumer-friendly to mandate that servicers apply the payment to the most recent payment due. These commenters also stated the proposed provision would conflict with certain State laws.

The Bureau is adopting as the final rule all the proposed provisions addressing partial payments, except for the clause requiring to which outstanding payment an accumulated complete periodic payment must be applied. The Bureau is clarifying in the final rule that if sufficient funds accrue in any suspense or unapplied funds account to cover a periodic payment, such funds must be treated as a periodic payment received.

The Bureau has carefully considered the comments suggesting that all payments, including partial payments and particularly partial payments for daily accrual loans, should be promptly credited. The Bureau recognizes that the statutory language does not address partial payments, but the Bureau also notes that the statute codified existing language from Regulation Z, which has been widely interpreted to allow partial payments to be sent to suspense accounts.

The Bureau also considered the burden that requiring prompt crediting of partial payments could impose on servicers. Requiring servicers to credit every payment that a consumer sends in during the month could create problems in payment processing operations. Additionally, this could create immense accounting difficulties; for example, if a consumer were to send in a few dollars the servicer would have to determine the proper allocation of those funds. Finally, this would create complications for servicers when consumers are severely delinquent. Certain State laws require a period of time between the last accepted payment and foreclosure. Constant application of partial payments could prevent servicers from being able to foreclose on property, even when such foreclosure would otherwise be appropriate. The Bureau also considered the potential benefit to consumers. While the Bureau agrees that holding payments in a suspense account rather than applying them could increase the cost of interest for daily interest accrual loans, the Bureau notes that this cost to consumers is limited due to the requirement to apply the funds once a full payment has accrued. Thus, requiring application of partial payments would provide at best only a limited benefit to consumers. In light of the small benefit to consumers, and larger burden on servicers, the Bureau does not believe it is appropriate to require prompt application of partial payments. The Bureau notes that while the final rule *allows* servicers to place partial payments received into a suspense account, it does not *require* servicers to place partial payments in suspense accounts.[112] The Bureau believes that suspense accounts are best addressed by allowing services discretion as to whether to use such accounts but requiring that funds held in any such account be disclosed in the periodic statement, and, when sufficient funds accrue for a full payment, that they be promptly applied, as in the proposed rule. The Bureau believes many of the more detailed aspects of suspense accounts are already addressed by existing law and contracts (for example, the Bureau observes that the order of application of funds is often determined by the contract between the parties), and does not believe it is necessary to impose additional regulation on suspense accounts at this time.

In response to the request for clarification as to how the periodic statement exemptions (*see* § 1026.41(e)) affect the partial payments disclosure, the Bureau notes that, under both proposed and final § 1026.36(c)(1)(ii)(A), the disclosure is required only ''if a periodic statement is required.'' Thus, servicers not required to send periodic statements are exempt from the provision requiring disclosure of the amount of funds held in the suspense account on the periodic statement. Further, the Bureau does not believe there would be a conflict between the provisions addressing suspense accounts and existing § 1026.21. Section 1026.21 requires the creditor to take certain actions when a

[112] *See* comment 36(c)(1)(ii)–1: A servicer may take any of the following actions when a partial payment is received: They may credit the partial payment on receipt, they may hold the payment in a suspense or unapplied funds account, or they may return the payment.

credit balance in excess of $1 is created. Because funds are only sent to a suspense account when a partial payment is received (and funds must be applied when a full payment occurs), a suspense account would not be used if there was a credit balance. Thus, the Bureau believes there is no conflict between these provisions.

The Bureau believes the prompt crediting provisions should remain in effect, even when a consumer is in a bankruptcy or trial modification scenario. While the Bureau understands the requirement that the pre-petition and post-petition accounts must be kept separate during a bankruptcy, the Bureau believes that if sufficient funds accrue in either account to make a periodic payment due, those funds should be applied. Further, the Bureau believes that consumers in the bankruptcy scenario should have full payments promptly credited. Similarly, the Bureau believes that if a consumer makes a payment sufficient to cover the principal, interest and escrow due under a trial modification plan, these funds should be applied. If a consumer were to make a payment insufficient to cover these expenses, the servicer would also have the options of returning the payment, or sending the payment to a suspense account.

The Bureau carefully considered the concerns about the requirement that a full payment must be applied to the oldest outstanding delinquency may cause conflict with certain State law requirements. This provision was intended to prevent extended delinquencies and collection of multiple late fees. However, further research has shown this problem is mitigated through other means, including the prohibition on pyramiding of late fees. Further, the Bureau has become aware that requiring application to the oldest outstanding delinquency may indeed conflict with State law. In light of these factors, the Bureau believes this provision would provide only minimal benefits; thus the Bureau is removing the language that would have required to which outstanding time period full payments would have been applied be applied. Thus, § 1026.36(c)(1)(ii) is adopted as proposed, except for the provision requiring to which outstanding payment an accumulated periodic payment must be applied.

Legal Authority

The required disclosures on the periodic statement are authorized under TILA section 128(f), which requires creditors, assignees, and servicers to send statements for each billing cycle that includes certain information, including ''[s]uch other information as the Bureau may prescribe in regulations.''

In addition, the Bureau interprets the language in TILA section 129F(a), that servicers must ''credit'' payments as of the date of receipt, except when a delay in crediting does not result in ''any charge'' to the consumer to authorize the requirement that partial payments held in suspense accounts be credited when a full periodic payment accumulates. Failure to credit such payments would result in a charge to the consumer by extending the duration of the delinquency. To the extent not required under TILA section 129F(a), the Bureau believes this requirement regarding crediting of funds is authorized under TILA section 105(a). As explained above, the Bureau believes the requirement is necessary and proper to effectuate the purpose of TILA to protect consumers against inaccurate and unfair credit billing practices by ensuring that funds held in a suspense account are promptly applied when sufficient funds accumulate in such an account to cover a full periodic payment.

36(c)(1)(iii) Non-Conforming Payments

TILA section 129F(b) codified the treatment of non-conforming payments in current § 1026.36(c)(2). The proposal did not make any substantive changes to this provision, but redesignated the section as new § 1026.36(c)(1)(iii).

The Bureau noted that payments held in a suspense or unapplied funds account, as addressed in proposed § 1026.36(c)(1)(ii), discussed above, would not be considered to have been ''accepted'' by the servicer. Thus, under the proposal, partial payments retained in suspense or unapplied funds accounts would be treated as payments that have not been accepted and thus are not subject to § 1026.36(c)(1)(iii); as opposed to non-conforming payments that have been accepted that are subject to proposed § 1026.36(c)(1)(iii), and thus must be credited within five days of receipt.

Two commenters expressed concern about non-conforming payments, stating that prompt crediting should be contingent on consumers making payments to the servicer's proper address or through authorized channels (e.g., payment by phone, online or ACH). The Bureau agrees, but believes this concern is adequately addressed by the existing provisions on non-conforming payments, which remain unchanged. The final rule adopts the provisions on non-conforming payments as proposed.

36(c)(2) No Pyramiding of Late Fees

The proposed rule would have prohibited a servicer from assessing a late fee or delinquency charge for a payment if (1) such a fee or charge is attributable solely to failure of the consumer to pay a late fee or delinquency charge on an earlier payment; and (2) the payment is otherwise a periodic payment received on the due date, or within any applicable grace period. This requirement is substantially similar to existing paragraph 36(c)(1)(ii) and the Bureau did not propose any substantive changes to the existing requirement but rather simply redesignated the requirement as new paragraph 36(c)(2). A consumer advocate commented that, in addition to prohibiting pyramiding of late fees, the regulation should prohibit assessing a late fee for nonpayment of any other fee owed. The Bureau observes that because the proposal was not intended to enact any substantive changes to the prohibition on pyramiding late fees and the Bureau accordingly did not solicit comment on how the prohibition might be altered, the comment exceeds the scope of the rulemaking. Accordingly, the rule is finalized as proposed.

36(c)(3) Payoff Statements

Dodd-Frank Act section 1464(b) established TILA section 129G, which requires that a creditor or servicer send an accurate payoff balance to the consumer within a reasonable time, but in no case more than seven business days, after the receipt of a written request for such balance from or on behalf of the consumer. This provision generally codified existing § 1026.36(c)(1)(iii) of Regulation Z regarding provision of payoff statements, but with four substantive changes. First, while existing Regulation Z only applies the requirement to servicers, the statute applies the requirement to both servicers and creditors. The Bureau proposed extending the requirement to assignees as well. Second, the statute applies the prompt response requirement to ''home loans,'' rather than consumer credit transactions secured by the consumer's principal dwelling. The Bureau proposed to interpret use of the term ''home loans'' to expand the scope of the Regulation Z requirement from consumer credit transactions secured by *principal* dwellings to consumer credit transactions secured by *any* dwelling.[113]

[113] The statute requires a payoff balance be provided in response to a *borrower's* request, the Bureau interprets ''borrower'' (a term not used

Third, the statute and the proposed rule limit the reasonable time for responding to a request for a payoff balance to not more than seven business days; by contrast, existing comment 36(c)(1)(iii)–1 generally created a five business day safe harbor for responding, but noted that it might be reasonable to take longer to respond in certain circumstances. Fourth, consistent with TILA section 129G, the proposed rule would have required a prompt response only to written requests for payoff amounts, while the existing regulation requires a prompt response to all such requests, including, for example, oral requests.

Comments on the proposed rule on payoff balances focused on the scope, timing and procedures for requesting a payoff balance. With respect to the scope of the proposed rule, a credit union trade association urged that the Bureau retain the limitation to loans secured by a principal dwelling because of the potential impact of the application of the rule to home equity lines of credit (HELOCs).

Numerous industry commenters indicated that the requirement that a payoff balance must be provided no more than seven business days after the request was problematic because additional time may be needed to provide payoff statements in a variety of situations, such as for reverse mortgages; loans in delinquency, bankruptcy or foreclosure; loans that have shared appreciation features; loans with payoff requests from unverified third parties; and circumstances in which an act of God makes compliance within seven business days impossible. One credit union commenter stated that the seven business day requirement is unreasonable in light of the volume of mail processed by that institution. Further, a trade association requested flexibility where the creditor, assignee or servicer relies on a payment that was later dishonored or that the consumer reversed. A number of commenters also requested clarification regarding the seven business day requirement in light of the 2012 HOEPA Proposal for a payoff statement to be provided within five business days.

Finally, commenters disagreed regarding whether a creditor, assignee or servicer should only be required to provide a payoff statement in response to a written request. Some consumer advocate commenters felt that an oral request should still be sufficient to require a payoff balance; however, an industry commenter strongly supported limiting the payoff statement requirements to written requests. One credit union trade association commenter requested standardized requirements regarding submission of payoff balance requests and a housing finance agency commenter questioned whether the information requests provision of the 2012 RESPA Servicing Proposal could be used to submit a payoff request. Finally, three commenters asked the Bureau to consider how the payoff statement provisions would interact with timelines of State and local law.

The Bureau is adopting the proposed rule as the final rule, with modifications to the timing requirements. Specifically, the Bureau believes it is appropriate in certain scenarios to allow creditors, assignees or servicers more time than seven business days to respond to a request for a payoff balance.

The Bureau believes the requirements of the rule regarding the scope and procedures for requesting a payoff statement are necessary and appropriate to implement the statutory provisions. With respect to the scope, Congress reviewed the prior regulation, which defined the scope as ''a consumer credit transaction secured by a principal dwelling.'' [114] Congress chose to require prompt crediting of payments only ''in connection with a consumer credit transaction secured by a consumer's principal dwelling'' but expanded the payoff provisions to apply to any ''home loan.'' [115] For these reasons, the Bureau believes it is appropriate to interpret TILA section 129G to include HELOCs and other open-ended lines of credit secured by a consumer's dwelling in the payoff statement requirement.

Similarly, limitations on the requirement to provide a payoff statement only in response to written requests reflects Congress's clear change in the language from the existing regulation. Creditors, assignees or servicers are permitted, however, to continue providing payoff statements in response to an oral request, even if such requests do not trigger the regulatory payoff statement request requirements.

The Bureau carefully considered the comments requesting more time in certain scenarios, and recognizes that it may not always be feasible to provide a payoff statement within seven days. Thus, the final rule includes the following exemption: When it is not feasible to provide a payoff statement because a loan is in bankruptcy or foreclosure, because the loan is a reverse mortgage or shared appreciation mortgage, or because of the occurrence of natural disasters or other similar circumstances, the payoff statement must be provided within a reasonable time. Regarding third party authorization, the Bureau believes that the seven day timeline does not begin until a request is received from a verified party. Thus, if a creditor, assignee or servicer must verify authorization for a third party, they will have seven days from when a *verified* request is received to provide the payoff statement, and the need for verification should not cause a problem with providing the payoff balance within the allotted time line.

Finally, the Bureau acknowledges there may be State or local laws addressing the timeline for payoff statements which allow 3 to 21 days; however the Bureau does not believe this will cause a direct conflict with the timeline of the final rule. The timeline for payoff statements states the maximum time within which a payoff statement must be provided, so creditors, assignees or servicers could comply with both State law timelines and this rule's timelines by providing the payoff statement within the shorter of the two timelines. The Bureau believes that State laws allowing a longer period of time do not prohibit the creditor, assignee or servicer from providing a payoff statement within seven business days. Thus, there is no direct conflict with State law on this issue, and any inconsistency with State or local laws should not present a problem.

The Bureau does not believe further regulation on procedures around payoff balances is necessary. A payoff balance request is any request from a consumer, or appropriate party acting on behalf of the consumer, which inquires into the total amount outstanding on the loan, or the amount needed to pay off the loan. While such requests are most often made when a consumer is refinancing their loan, payoff balance requests are not limited to this context. If a request is sent to the wrong address and not received by the creditor, assignee or servicer, they would not be required to respond. Upon receipt of a payoff balance request, the creditor, assignee or servicer must provide the amount required to pay off the mortgage loan; such information must be provided within seven business days. The payoff statement may be sent electronically or by fax in place of physical delivery. Finally, an issue was raised about whether a payoff statement was accurate when a payoff statement relied on a payment that was later dishonored. The Bureau is not making any changes to the requirements of the accuracy of the

elsewhere in TILA) to have the same meaning as ''consumer.''

[114] *See* existing Regulation Z § 1026.36 (c)(1).

[115] *See* TILA section 129G.

statement. The Bureau believes payoff statements should be issued according to the best information available at the time, and if a payment is later dishonored, recovery of that amount by adding the amount to the payoff balance should not be barred by the issuance of a payoff statement which assumed that the payment would be honored.

The Bureau received comments on interactions between the proposed rule on payoff statements and other rules on mortgage servicing. First, the Bureau considered if requests for payoff balances are subject to the oral information request obligation contained in the 2012 RESPA Servicing Proposal. Although a payoff balance request is essentially a request for information, there are subtle distinctions between the two, including that consumers may request payoff statements through a variety of channels, and servicers have been able to charge a fee for a payoff statement. The Bureau has decided to maintain a separate payoff balance request rule, and exempt payoff balance requests from the information request provision of the 2013 RESPA Final Rule.

Second, the Bureau acknowledges that the timeline for payoff balance requests required under HOEPA is shorter than the timeline for payoff requests required under proposed § 1026.36(c)(3). However, the Bureau has decided that this difference does not warrant reducing the length of the timeline required under the final rule. Congress made a clear decision to require payoff statements under general circumstances within seven business days, as indicated by their changing the timeline from the existing regulation text when that text was codified in Dodd-Frank Act section 1464. Congress likewise made a clear decision that payoff statements for loans under HOEPA should be provided within five business days, as indicated by the language in Dodd-Frank Act section 1433(d). Additionally, the Bureau notes these different timelines are not in conflict—any creditor, assignee or servicer could comply with both by providing the payoff balance within five business days. Because of the clear intent of Congress and the lack of direct conflict between the timelines, the Bureau has decided to finalize the provision as proposed.

Although the statute requires a creditor or servicer to *send* the payoff statement, the final rule uses the term ''provide'' in place of ''send.'' The Bureau believes the terms have the same meaning in this context, but ''provide'' conforms with existing language in Regulation Z.

The Bureau is finalizing the rule as proposed, with the addition of the following clause: when a creditor, assignee, or servicer, as applicable, is not able to provide the statement within seven business days of such a request because a loan is in bankruptcy or foreclosure, because the loan is a reverse mortgage or shared appreciation mortgage, or because of natural disasters or other similar circumstances, the payoff statement must be provided within a reasonable time.

Small Servicers

A number of community banks, credit unions, small servicers and their trade associations requested an exemption for small servicers from all the proposed provisions in the 2012 TILA Servicing Proposal. The Bureau considered if a small servicer exemption would be appropriate for the requirement on payoff statements. The Bureau noted that the final rule is very similar to the existing rule, which small servicers are already in compliance with, as evidenced by Small Entity Representative comments in the Small Business Review Panel.[116] In light of this, the Bureau does not believe a small servicer exemption to the payoff statement provision would be appropriate.

Legal Authority

The extension of the requirement to assignees is authorized, among other authorities under TILA section 105(a) because, for the reasons discussed above, it is necessary and proper to effectuate the purposes of TILA, including to assure a meaningful disclosure of credit terms and protect the consumer against unfair credit billing practices, and to prevent circumvention or evasion of TILA. The Bureau also uses its authority under Dodd-Frank Act section 1405(b) to extend the applicability of the payoff statement requirements under TILA section 129G to assignees. As discussed above, this extension serves the interest of consumers and the public interest. Subjecting creditors, assignees, and servicers to the requirements of § 1026.36(c)(3) also promotes consistency with final § 1026.20(c) and § 1026.20(d) (ARMs disclosures), which likewise apply to creditors, assignees, and servicers.

The exemption to the payoff statement requirement, which allows payoff statements to be provided within a reasonable time when seven business days is not feasible due to certain circumstances, is necessary and proper under TILA section 105(a) to facilitate compliance. For the reasons discussed above, under certain circumstances it would not be feasible to provide a payoff statement within seven business days. In addition, the Bureau believes, in light of the factors set forth in TILA section 105(f), that this exemption will have minimal effect on the consumer protection benefits of the payoff statement provision. Specifically, the Bureau considers that the exemption is proper irrespective of the amount of the loan, the status of the consumer (including related financial arrangements, financial sophistication, and the importance to the consumer of the loan), or whether the loan is secured by the principal residence of the consumer.

Section 1026.41 Periodic Statements for Residential Mortgage Loans

Section 1420 of the Dodd Frank Act established TILA section 128(f) requiring periodic statements for mortgage loans. The Bureau proposed implementing the requirements on periodic statements in § 1026.41. The statute requires the periodic statement to disclose seven items of information (the amount of the principal obligation, current interest rate and reset date if applicable, information on prepayment penalties and late fees, contact information for the servicer, and homeownership counselor information), as well as such other information as the Bureau may prescribe in regulations.[117] In developing the proposed rule, the Bureau believed the periodic statement would provide the greatest value to consumers by also providing information regarding upcoming payment obligations and the application of past payments, a list of recent transaction activity, additional account information, and delinquency information. Thus, the Bureau proposed pursuant to TILA section 128(f)(1)(H) that each periodic statement also include this additional information. Additionally, the proposed regulation set forth requirements regarding the timing and form of the periodic statement and established exemptions to the requirement to provide a periodic statement.

Under TILA section 128(f)(1), the requirement to provide a periodic statement applies to creditors, assignees, and servicers of residential mortgage loans. The Bureau interprets this to mean that the consumer must only receive one periodic statement each billing cycle, but creditors, assignees,

[116] *See* Small Business Review Panel Report, at 27, 32.

[117] TILA section 128(f)(1).

and servicers would all be responsible for ensuring that the consumer receives a periodic statement that meets the requirements of § 1026.41. To increase readability, proposed § 1026.41 used the term ''servicer'' to describe the entities covered by the proposed requirement, and defined ''servicer'' to mean creditors, assignees, or servicers for the purposes of § 1026.41. This terminology was also used in the section-by-section analysis of proposed § 1026.41. Proposed comment 41(a)–3 clarified that only one periodic statement must be sent to the consumer each billing cycle, while the creditor, assignee and servicer are subject to the periodic statement requirement, they may decide among themselves who will send the statement. The Bureau's interpretation of the statute would not apply the ongoing periodic statement requirements to an entity that originated the loan, but has sold both the loan and the servicing rights and no longer has any connection to the loan.

The proposed periodic statement carefully balanced the need to provide consumers with sufficient information against the risk of overwhelming consumers with too much information. The proposed requirements were designed to make the statement easy to read, whether provided in a paper form or electronically. The Bureau believed that imposing a requirement that information be grouped into defined categories would present the information in a logical format, while allowing servicers flexibility in customizing the statement. Thus, the proposed regulations discussed below required the following groupings of information:

- *The Amount Due:* The most prominent disclosure on the statement would be the amount due. The due date of the payment and information on the late fee were also included in this grouping.
- *Explanation of Amount Due:* This grouping would include a breakdown of the amount due, showing allocation to principal, interest, and escrow. This grouping would also provide the total sum of any fees or charges imposed, and any amount of past due payment.
- *Past Payment Breakdown:* This grouping would include a breakdown of how previous payments were applied.
- *Transaction Activity:* This grouping would be a list of any activity that credits or debits the outstanding account balance, for example, charges imposed or payments received.

The periodic statement would have also included the following information:

- Certain messages as required at certain times (for example, information on funds held in a suspense or unapplied funds account).
- Contact information for the servicer.
- Account information as required by the statute, including the amount of the principal obligation, current interest rate, and when it might change (if applicable), information on prepayment penalties (if applicable) and late fees, contact information for the servicer, and homeownership counselor information.
- Finally, additional delinquency information would be required when a consumer is more than 45 days delinquent on his or her loan. Each of these disclosures is discussed below.

41(a) In general

Proposed § 1026.41(a) stated the general requirement that, for a closed-end consumer credit transaction secured by a dwelling, a creditor, assignee, or servicer must transmit to the consumer for each billing cycle a periodic statement meeting the timing, form, and content requirements of § 1026.41, unless an exemption applies.

Periodic Statements Overall

While many commenters were supportive of the periodic statements, some commenters had concerns about certain requirements, and some commenters requested the Bureau not require periodic statements at all. Such industry commenters felt that some of the information was unnecessary, and the rest of the information was available through other channels, including the original loan documents, Web sites with information on the loan, existing disclosures, formal information request procedures, and informal channels. These commenters also expressed concern that the Bureau was expanding the required content of the periodic statement beyond that which was specifically required in the Dodd-Frank Act, and that there was too much information on the periodic statement, resulting in a disclosure that was too busy and confusing to the consumer.

Commenters sought clarification about the periodic statement in the context of loans that have been accelerated, sent to foreclosure, or that are in the bankruptcy process. Several commenters contended that statements should not be required when loans have been accelerated or sent to foreclosure. Commenters presented opposing views about loans in bankruptcy—some consumer advocate commenters felt it was essential that statements be provided to consumers in bankruptcy to ensure they are kept informed on the status of their loan and have a record of the account, while other industry commenters insisted that providing statements for loans in bankruptcy might cause confusion or violate court orders or the Fair Debt Collection Practices Act (FDCPA). One commenter added that if statements must be provided to consumers in bankruptcy, the statement should be allowed to contain any information disclosures or messaging required under bankruptcy rules or court orders. Finally, commenters suggested other triggers for when the periodic statement should not be required, including if the consumer has vacated the premise, if mail has been returned due to a bad address, or if the consumer has not sent any payments nor responded to the servicer's attempts to contact them in six months.

The Bureau carefully considered the concerns expressed about the periodic statement overall. Congress clearly mandated that consumers receive on a periodic basis a statement that summarizes certain key loan terms (such as the interest rate) and contact information both for servicers and homeownership counselors and counseling organizations. Congress also authorized the Bureau to require additional information. The Bureau continues to believe, for the reasons listed in the discussion of the proposed rule, as well as for the reasons set forth below, that including the information required beyond that specifically listed in the Dodd-Frank Act will allow the periodic statement to serve a variety of important purposes, including informing consumers of their payment obligations, providing information about the mortgage loan, creating a record of transactions that increase or decrease the outstanding balance, providing information needed to identify and assert errors, and providing information when consumers are delinquent. Indeed, the Bureau believes that consumers likely would be perplexed if they were to receive, on a periodic basis, statements which contained information about their loan terms and outstanding balance but did not include any information about payments. Each item of information required by the periodic statement is discussed below in the section-by-section analysis of the content of the periodic statements.

The Bureau acknowledges that some of the information on the periodic statement may be available through other channels; however, the Bureau notes that Congress clearly determined certain information should be required to be provided to consumers in a single statement on a periodic basis. The Bureau appreciates the concern about potentially confusing the consumer or obscuring important information by

providing too much on the periodic statement. The Bureau believes the periodic statement should be a snapshot of the present account, and not a recital of servicer policies. The Bureau believes that requiring certain information to be on the front page will ensure important information is highlighted. Further, the Bureau has mandated the grouping requirements discussed in § 1026.41(d) below. The Bureau believes the final periodic statement balances the need to present a significant amount of important information and documentation on the loan, with the need to present information in a format the consumer will be able to understand and process.

The Bureau also carefully considered the concerns expressed about circumstances in which periodic statements should not be required. While the Bureau acknowledges that circumstances such as acceleration could make providing a periodic statement more complicated, the Bureau notes that such circumstances are often precisely when a consumer most needs the periodic statement. The Bureau believes an important role of the periodic statement is to document fees and charges to the consumer; as long as such charges may be assessed, the consumer is entitled to receive a periodic statement. The Bureau understands the concerns about the periodic statement being provided when a consumer is in bankruptcy, and addresses these concerns in the section-by-section analysis of § 1026.41(d)(2) (Explanation of Amount Due) below.

Scope

Under TILA section 128(f), the periodic statement requirement applies to residential mortgage loans. The term ''residential mortgage loan'' is defined in TILA section 103(cc)(5) to generally mean any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a consumer credit transaction under an open-end credit plan. Consistent with this definition, proposed § 1026.41(a) would apply the periodic statement requirement to ''any closed-end consumer credit transaction secured by a dwelling.'' This language implements the substantive scope of the statute; no substantive change is intended.

One industry trade association commenter suggested periodic statements should be limited to first lien loans secured by the consumer's *principal* dwelling, because consumers obtaining subordinate lien loans and loans secured by non-principal residences (such as vacation homes) are typically experienced successful homeowners, as evidenced by the fact that such consumers qualified for these loans. One commenter asked for clarification as to whether HELOCs should receive periodic statements, and one commenter sought clarity on simple interest closed-end home equity loans.

The Bureau believes that Congress clearly specified the scope of the periodic statement requirement by using the defined term ''residential mortgage loans.'' This scope is not limited to first lien loans secured by the consumer's principal dwelling, but covers all closed-end consumer transactions secured by a dwelling. However, open-end transactions are not included in the scope of this rule. The scope of the rule is finalized as proposed.

Transmit to the Consumer

Proposed § 1026.41(a) would have required the servicer to transmit the periodic statement to the consumer. The term ''transmit'' is used in the statute. Use of this term would indicate that the servicer must do more than simply make the statement available; the statement must be sent to the consumer. Paper statements mailed to the consumer would meet this requirement. As discussed below with respect to proposed § 1026.41(c), if the servicer is using an electronic method of distribution, a servicer may send the consumer an email indicating that the statement is available, rather than attaching the statement itself, to account for information security concerns. Proposed comment 41(a)–1 clarified that joint obligors need not receive separate statements; a single statement addressed to both of them would satisfy the periodic statement requirement.

All comments on this topic were in relation to electronic statements, which are discussed in § 1026.41(c) below. The final rule uses the term ''provide'' in place of ''transmit.'' The Bureau believes the terms have the same meaning in this context, but ''provide'' conforms with existing language in Regulation Z. This provision is otherwise adopted as proposed.

Billing Cycles

Proposed § 1026.41(a) would have required a periodic statement to be sent each ''billing cycle.'' The billing cycle corresponds to the frequency of payments, as established by the legal obligation of the consumer under the mortgage note and any subsequent modifications. Thus, if a loan requires the consumer to make monthly payments, that consumer will have a monthly billing cycle. Likewise, if a consumer makes quarterly payments, that consumer will have a quarterly billing cycle.

Based on industry outreach, the Bureau has learned of other alternatives to monthly billing cycles. Some loans may be timed to accommodate consumers employed in seasonal industries (for example, a loan may have 10 payments over the course of a year). For such loans the billing cycle may not align with the calendar months. Another non-monthly payment arrangement may occur when payments are made every other week, or other similar less-than-monthly periods. For example, servicers and consumers may arrange a bi-weekly payment program to align mortgage payments with the consumer's paychecks. Such billing cycles may be arrangements with the servicer that do not modify the legal obligation of the consumer. In such cases, a periodic statement may, but is not required to, reflect this modified payment cycle.

The Bureau realized that a requirement to provide statements every other week may be costly for servicers and unhelpful to consumers. In addition, such a short cycle may cause problems with information on the statement being outdated. Thus, proposed § 1026.41(a) provided that, if a loan has a billing cycle shorter than a period of 31 days (for example, a bi-weekly billing cycle), a single periodic statement may be used to cover the entire month. Proposed comment 41(a)–2 clarified how such a single statement would aggregate information from multiple billing cycles. All comments on this topic were in relation to timing of the periodic statement, discussed in the section-by-section analysis of § 1026.41(b) below. The rule is otherwise adopted as proposed.

Legal Authority

Section 1026.41(a) implements TILA section 128(f)(1) requiring that a creditor, assignee, or servicer, with respect to any closed-end consumer credit transaction secured by a dwelling, must transmit a periodic statement to the consumer. In addition, the Bureau is using its authority under TILA section 105(a) and (f) and Dodd-Frank Act section 1405(b) to exempt creditors, assignees, and servicers of residential mortgage loans from the requirement in TILA section 128(f)(1)(G) to transmit a periodic statement each billing cycle when the billing cycle is less than a month, and to instead permit servicers to provide an aggregated periodic statement covering an entire month. For the reasons discussed above, the Bureau believes that the exception is necessary

and proper under TILA section 105(a) both to effectuate the purposes of TILA—to promote the informed use of credit and protect consumers against inaccurate and unfair credit billing practices—and to facilitate compliance. Moreover, the Bureau believes, in light of the factors in TILA section 105(f), that sending periodic statements more than once a month would not provide a meaningful benefit to consumers. Specifically, the Bureau considers that the exemption is proper irrespective of the amount of the loan, the status of the consumer (including related financial arrangements, financial sophistication, and the importance to the consumer of the loan), or whether the loan is secured by the principal residence of the consumer. Further, in the estimation of the Bureau, consistent with Dodd-Frank Act section 1405(b), the exemption will prevent consumer confusion that might result from receiving multiple periodic statements in close sequence, thus furthering the consumer protection purposes of the statute.

41(b) Timing of the Periodic Statement

Proposed § 1026.41(b) provided that the periodic statement must be sent within a reasonably prompt time after the close of the grace period of the previous billing cycle. Proposed comment 41(b)–1 provided that four days after the close of any grace period would be considered reasonably prompt.

Initial Statement

The proposal would have required that the initial periodic statement be sent no later than 10 days before this first payment is due. This adjustment was proposed because there is no previous billing cycle from which to time the sending of the first statement.

Commenters expressed concern both about the usefulness and the feasibility of the provision, highlighting that information on the first payment is often included in the closing documents, and that it may not be possible to obtain the documents and transmit the information into the servicer's system in the proposed timeline.

The Bureau determined that the initial periodic statement would provide minimal benefit to consumers, as the initial payment information is provided at closing, and information on the application of that payment, as well as any transaction activity, would be included in the next periodic statement. Additionally, the Bureau acknowledged the extra costs of implementation and the difficulties of providing an initial statement on the proposed timeline. Due to these factors, the Bureau has decided not to finalize the proposed requirement that an initial periodic statement be provided 10 days before the first payment is due.

Ongoing Statements

The periodic statement serves the dual purposes of giving an accounting of payments received since the previous periodic statement, and reminding the consumer about the upcoming payment. To achieve these dual purposes, the periodic statement must arrive after the last payment was received and before the next payment is due, which can be a relatively narrow window.

Commenters emphasized that because of the tight timeframe between the close of the grace period and the due date of the next payment, sending the statements within four days was not consistent with current practices and may not be operationally feasible. Commenters suggested seven or ten days may be a more reasonable timeframe, or that statements should be allowed to be sent earlier in the month.

Multiple industry commenters also cited their current practice of ''staggering'' statements throughout the month–although their loans have a due date of the first of the month, batches of statements are sent out at various times during the month. Some servicers explained that it is helpful for a servicer to spread the related workload across the month, while others explained that staggered statements allowed consumers the convenience and flexibility of choosing which day of the month their payments will be due.

Many credit union commenters noted that the timing requirements would prevent servicers from providing combined statements–a common practice among credit unions of combining mortgage statements with other account statements. These commenters requested that the proposed rule be modified to allow combined statements. In contrast, a consumer advocate commenter expressly requested the Bureau prohibit the practice of combining statements on the ground that this creates confusion for consumers.

Regarding situations in which a consumer makes more than one payment during the month, commenters asked if they would be allowed to send more than one statement per month (following the ''Bill and Receipt'' system). Commenters also asked for clarification on billing cycles of less than one month and sought clarification about the four day period after the close of the grace period.

The Bureau acknowledges that use of the term ''grace period'' in the proposal may have caused unnecessary confusion. The term ''grace period'' is defined in relation to open-ended credit, in § 1026.5(b)(2)(ii)(B)(3), as a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate. The Bureau believes a periodic statement should be sent no later than four days after the close of the period of time when no late fee is imposed, a time more appropriately described as a ''courtesy period'' in comment 7(b)(11)–1. In light of this, the final rule replaces the term ''grace period'' with ''courtesy period'', and adds comment 41(b)–2 to provide further guidance in this regard. Further, if a mortgage loan has no courtesy period, the periodic statement must be sent no later than four days after the payment is due.

The Bureau acknowledges it may be difficult to process a large number of statements in the short period of time between the close of the courtesy period and four days later, and understands the difficult balance between providing accurate and up-to-date information (which may require not sending a periodic statement until after the 15th of a month), and the importance of notifying the consumer in a timely manner of the amount of their upcoming payment. The Bureau notes that while the rule requires a periodic statement to be sent *no later* than four days after the close of any courtesy period, there is no restriction on sending the periodic statement earlier in the month. That is, there is no requirement in the rule that the servicer must wait until the close of the courtesy period to send the periodic statement. This gives servicers the flexibility to send statements earlier in the month. The Bureau notes this would be particularly appropriate in certain scenarios–for example, if a consumer makes a payment on the first of the month (rather than waiting until the end of the courtesy period), or a consumer has an ''auto-debit'' arrangement to make payments earlier in the month. The Bureau believes this flexibility will address concerns about timing difficulties for combined statements. Other concerns about combining statements are discussed below in the section-by-section analysis of paragraph 41(d) concerning layout.

To clarify the rule on timing, the Bureau notes that, if a consumer makes more than one payment during the month, servicers who have not yet sent the periodic statement for that time period may include all payments as separate transaction items in the transaction activity section. Alternatively, if a servicer has already sent the periodic statement, the

subsequent payments could be reflected in the next periodic statement. Finally, if a servicer wishes to send an extra periodic statement reflecting additional payments, nothing in the regulation would prevent this practice.

If a servicer and a consumer have agreed to an alternative billing cycle from that reflected in the underlying security (for example, if a servicer arranges a bi-weekly payment plan to correspond to a consumer's paychecks), the servicer has the option of sending either periodic statements that reflect the underlying obligation (the payment plan in the original note), or periodic statements that reflect the modified payment arrangement (the agreed-on payment plan). If this, or any payment plan, requires payments that are more frequent than on a monthly basis, the servicer has the option of combining statements and sending one aggregated statement that covers the entire month in place of multiple statements during that month. The periodic statement must be delivered or placed in the mail no later than a reasonably prompt time after the payment due date or the end of any courtesy period provided for the previous billing cycle.

Legal Authority

The Bureau interprets the requirement in TILA section 128(f) that a periodic statement be transmitted for ''each billing cycle'' to authorize the timing requirements in § 1026.41(b). In addition, the timing requirements are authorized under TILA section 105(a) and Dodd-Frank Act sections 1032(a) and 1405(b). For the reasons noted above, the Bureau concludes, pursuant to TILA section 105(a), that the requirements are necessary and proper to effectuate the purposes of TILA. Specifically, § 1026.41(b) promotes the meaningful disclosure of credit terms and protects consumers against inaccurate and unfair credit billing practices by ensuring that consumers receive the periodic statement at a time that is useful to them. In addition, consistent with Dodd-Frank Act section 1032(a), the Bureau believes that the timing requirements help ensure that the features of consumers' residential mortgage loans, both initially and over the term of the loan, are effectively disclosed to consumers in a manner that permits them to understand the costs, benefits, and risks associated with the loan. Moreover, consistent with Dodd-Frank Act section 1405(b), the Bureau believes that the timing requirements improve consumer awareness and understanding of their residential mortgage loans by ensuring that consumers receive the periodic statements at a meaningful time, before their next payment is due, and that the timing requirements are thus in the interest of consumers.

41(c) Form of the Periodic Statement

Proposed § 1026.41(c) provided that the periodic statement disclosures required by § 1026.41 must be made clearly and conspicuously in writing, or electronically, if the consumer agrees, and in a form the consumer may keep. Paper statements sent by mail or provided in person would satisfy this requirement. If electronic statements are used, they must be in a form which the consumer can print or download.

Additional Information Allowed

Proposed comment 41(c)–1 clarified the clear and conspicuous standard, stating that it generally requires that disclosures be in a reasonably understandable form, and explained that other information may be included on the statement, so long as that other information does not overwhelm or obscure the required disclosures. Thus, information that servicers customarily provide in their periodic statements, but is not required by the regulation, such as the servicer's logo, information on payment methods, or additional information on escrow accounts, may continue to be included on periodic statements. Proposed comment 41(c)–2 stated that nothing in subpart C prohibits a servicer from including additional information or combining disclosures required by other laws with the disclosures required by § 1026.41, unless such prohibition is expressly set forth in § 1026.41 or other applicable law.

One commenter requested further clarification on the comment that additional information may be included so long as it does not overwhelm or obscure the required disclosures. This commenter cited concerns that this clarification would be used by consumer lawyers in frivolous litigation, and urged that the commentary include several examples. Another commenter noted that allowing other information without requiring prescriptive content minimizes unnecessary regulatory burdens and accommodates different systems that servicers use. The Bureau believes the guidance given in the proposed commentary is sufficient, and that the clear and conspicuous standard allows an appropriate amount of flexibility. Thus, comments 41(c)–1 and 41(c)–2 are adopted as proposed.

Electronic Distribution: E-Statements, Notifications and Opt-Outs

TILA section 128(f)(2) provides that periodic statements ''may be transmitted in writing or electronically.'' Consistent with this provision, proposed § 1026.41(c), as clarified by proposed comment 41(c)–3, would have allowed statements to be provided electronically, if the consumer agrees. Commenters were generally in favor of allowing electronic statements (e-statements) in place of paper statements, but expressed a few concerns about consent of the consumer and the notification process.

E-statements. Comments were generally in favor of allowing e-statements in place of paper statements, but only if the consumer has given consent. The final rule requires servicers to send a periodic statement each month to consumers. Under certain circumstances, a servicer may send e-statements in place of paper statements. No servicer is *required* to send e-statements. If a servicer prefers to send e-statements (rather than paper statements), they may do so, provided that the consumer consents. The issue of consent is discussed below. Once a consumer consents to receiving e-statements, the servicer may send statements electronically in place of paper statements. A servicer must continue to send paper statements to a consumer unless the consumer has consented to receiving e-statements.

E-Sign Act. The proposed rule would have provided that if a servicer prefers to provide statements electronically, they may do so if the consumer consents. The proposal would have required only affirmative consent by the consumer to receive statements electronically, not full compliance with E-Sign Act verification procedures. Comments indicated some confusion about this provision. Some commenters argued that meeting the E-Sign Act requirements should be considered consent, and some commenters stated that the proposal's provision *not* requiring E-Sign verification procedures appeared to be in conflict with E-Sign Act requirements. Other commenters praised this aspect of the proposal, stating that the E-Sign verification procedures are too cumbersome and a lesser standard would be more appropriate. One commenter suggested this should be addressed by amending the E-Sign Act.

As the proposal explained, the Bureau believes the E-Sign Act's higher level of confirming consent is not mandated by the statute nor required in this situation. The E-sign Act generally provides that if information must be provided or

made available in writing, such info must be provided electronically if certain verification procedures are met. The Bureau notes that TILA section 128(f) does not require a ''writing''; thus, the Bureau does not believe this provision triggers the E-Sign Act.[118] The Bureau believes that only consumer consent, not the full E-Sign verification procedures are required before a servicer may provide a statement electronically in place of paper. If a servicer would like to follow the E-Sign Act procedures to obtain consumer consent, that would be allowed, but servicers may also obtain consent through a simpler process. The Bureau is adopting the comment as proposed.

Consent. Commenters also discussed what should be presumed to be ''consent.'' Some industry commenters suggested that if a consumer has auto-debit set up to pay their mortgage automatically, they should be presumed to have consented to e-statements. Others suggested that consumers who are currently receiving e-statements, or who have consented to electronic disclosures in the past should be deemed as having consented to receiving e-statements.

The Bureau suggested, and commenters agreed, that anyone who is currently receiving certain information electronically from their servicer shall be deemed to have consented to receiving e-statements in place of paper statements. Such consumers have demonstrated their ability and willingness to receive information electronically. This is clarified in comment 41(c)–4. The Bureau does not believe that consumers who pay their mortgage through auto-debit, but who have not consented and are not currently receiving information electronically, shall be deemed to have consented to e-statements. Such consumers must receive paper statements until the servicer obtains some form of consent from the consumer that they are willing to receive information electronically. The Bureau is adopting the rule as proposed, with the addition of comment 41(c)–4 clarifying presumed consent.

Notification. In light of information security concerns, the proposal stated the requirement to transmit a periodic statement to the consumer may be met by sending the consumer an email notification that the statement is available electronically, rather than emailing the statement itself. Two commenters expressed concern about information security.

The Bureau recognizes that, due to concerns about information security, servicers may not want to send periodic statements electronically. Thus, instead of emailing a statement, servicers may make the statement available on a Web site and send an email notifying the consumer that the statement is available. The Bureau notes that it is a common practice for a financial institution to contact a customer to let them know a message is available on a secure Web site. The Bureau also notes that notifying a consumer of a message on a secure Web site presents less of a risk than emailing the message, with potentially sensitive personal information, directly to the consumer. Finally, the Bureau notes that if a servicer does not have the system to securely notify their consumers of the availability of a periodic statement on a secure Web site, such institution may continue to provide paper statements.

Opting-out. Commenters expressed concerns about the notification requirement. Specifically two commenters suggested the Bureau allow alternative forms of notification, such as quarterly statements or text messages. Additionally, a number of commenters suggested that consumers be allowed to opt-out of receiving these notifications, or be allowed to opt-out of periodic statements altogether. Finally, a few commenters further suggested that consumers should be required to opt-in to receiving periodic statements.

The Bureau carefully considered the comments suggesting a consumer either be able to opt-out of the periodic statement, or be required to opt-in to receiving a periodic statement. The Bureau has concerns that consumers may not be fully informed about their rights to periodic statements if they are either required to opt-in, or allowed to opt-out of statements altogether. However, the Bureau also understands that many consumers conduct their finances online and may prefer not to receive monthly reminders about their payments (either in paper or electronically). These consumers may become accustomed to disregarding information from their servicer, thus both decreasing the value of the periodic statement, and presenting the risk that these consumers may accidentally ignore other important information. The Bureau is striking a balance in the final rule, as clarified by comment 41(a)-4. A consumer may not opt-out of receiving periodic statements altogether. However, a consumer who has demonstrated the ability to access statements online may opt out of receiving notification that their statement is available. If a consumer accidentally or inadvertently opts-out of receiving such notifications, they would still be able to access their periodic statements online. These consumers would be able to review past periodic statements to check for errors or proper payment application. However, this would allow consumers who do not feel they need a monthly reminder—for example, consumers enrolled in an auto-debit arrangement—to avoid receiving unwanted emails each month.

Sample Forms

Proposed § 1026.41(c) also stated that sample forms are provided in appendix H–28,[119] and that appropriate use of these forms will be deemed to comply with the section. The sample forms are intended to give guidance regarding compliance with proposed § 1026.41; however, they are not required forms, and any arrangements of the information that meet the requirements of proposed § 1026.41 would be considered in compliance with the section.

While commenters were generally in favor of the sample forms, one industry commenter expressed concerns about the sample forms—mainly that certain elements such as printing on the back, legal-sized paper, or tear-off coupons on the bottom may be difficult for servicers to replicate. Additionally, the Bureau received stylistic comments on the sample forms, suggesting the payment due date and fee information should be more prominent. Some commenters requested greater flexibility in the forms, suggesting that not all the information would fit on the front page, and that the tabular format requirements should be eliminated. Other commenters addressed the importance of a standardized form: one consumer commenter noted that his current lender provides a statement, but because it is so disorganized they are unable to understand the statement.

The Bureau considered the concerns about the sample forms, but notes that none of the details objected to are required by the regulation. For example, elements of the sample forms not specified in the regulation, such as the tear-off coupon and legal sized paper, are not required elements of the periodic statement. These elements are included in the sample forms to provide context, and while they show one way of demonstrating compliance, they are not required. These regulations were crafted to give servicers flexibility in

[118] Additionally, the Bureau notes that TILA section 128(f)(2) requires the Bureau to take into account that statements may be transmitted electronically. This further suggests the periodic statement disclosure is not a ''writing'' which would trigger the E-Sign Act requirements.

[119] The final forms are in appendix H–30.

designing their periodic statements. Thus the Bureau is adopting the rule as proposed.

Legal Authority

The Bureau is implementing § 1026.41(a) and the related comments, in part through the form requirements set forth in § 1026.41(c) and the related sample forms provided in appendix H–30. The form requirements are authorized under TILA section 122, which requires the disclosures under TILA be clear and conspicuous, TILA section 105(a) and Dodd-Frank Act sections 1032(a) and 1405(b). As discussed below, the Bureau concludes, pursuant to TILA section 105(a), that the form requirements are necessary and proper to effectuate the purposes of TILA. Specifically, § 1026.41(c) promotes the meaningful disclosure of credit terms and protects the consumer against inaccurate and unfair credit billing practices by ensuring that the periodic statement sent to consumers is in a form that they can understand. In addition, consistent with Dodd-Frank Act section 1032(a), the Bureau believes that the form requirements help ensure that the features of consumers' residential mortgage loans, both initially and over the term of the loan, are effectively disclosed to consumers in a manner that permits them to understand the costs, benefits, and risks associated with the loan. Moreover, consistent with Dodd-Frank Act section 1405(b), the Bureau believes that the form requirements will improve consumer awareness and understanding of their residential mortgage loans by ensuring that the periodic statements sent to consumers are in a useable form that is easy to understand and that the form requirements are thus in the interest of consumers and the public interest.

41(d) Content and Layout of the Periodic Statement

The proposed rule required certain items to be grouped together. The specific items of content are discussed below. The goal of the grouping and form requirements is to highlight key information such as the amount due, to organize information so the statement will not be overwhelming to the consumer, and to ensure the consumer will be presented with information in an easy to read format. The commentary to § 1026.41(d), discussed below, reflects these goals.

Proposed § 1026.41(d) required specific disclosures be grouped together and presented in close proximity. Information is grouped together to aid the consumer in understanding relatively complex information about their mortgage. Proposed comment 41(d)–1 clarified that close proximity requires items to be grouped together and set off from the other groupings of items. This can be accomplished, for example, by including lines or boxes on the statement, or by including white space between the groupings. Items required to be in close proximity should not have any intervening text between them. The close proximity standard is found in other parts of Regulation Z, including §§ 1026.24(b) and 1026.48. In both provisions, the commentary interprets close proximity to require certain information to be located immediately next to or directly above or below certain other information, without any intervening text or graphical displays.[120]

Proposed comment 41(d)–2 provided that information that is not applicable to the loan may be omitted from the periodic statement. For example, if a loan does not have a prepayment penalty, the periodic statement may omit the prepayment penalty disclosure.

Proposed comment 41(d)–3 provided that the periodic statement may use terminology other than that found on the sample forms so long as the new terminology is commonly understood. This gives servicers the flexibility to use regional terminology or commonly used terms with which consumers are familiar. For example, during consumer testing in California, participants were confused by the use of the term ''escrow.'' One participant explained that in California, the term ''escrow'' refers to an account set up to hold funds until a homebuyer closes on the house. This participant said he was more familiar with the term ''impound account'' to refer to the account holding funds for taxes and insurance.[121] In this example, use of the term ''impound account'' to refer to the escrow account for taxes and insurance would be permitted for periodic statements provided to consumers in California.

In addition to addressing the specific items of information required by the periodic statement (discussed below), commenters discussed the overall layout of the periodic statement. Some industry commenters expressed concern that there was not sufficient flexibility in the requirements on the periodic statement, and that servicers should be allowed to continue using their existing statements. In contrast, some commenters praised the organization of the periodic statement. Finally, some industry commenters expressed concern that requiring all the information to be on the front page of the periodic statement would prevent combined statements.

In response to the concern about requiring too much information on the front page, the Bureau notes that not all the required content must be on the front page of the periodic statement. The amount due, explanation of amount due, past payment breakdown, and contact information must be on the front of the periodic statement. The messages and delinquency information will only be required at certain times, and may be provided as a separate disclosure at the servicer's option. An example of how all this information could fit on the front of the page is provided in the sample forms. As discussed above, the Bureau believes the periodic statement balances the need for information to be presented in a structured format against the flexibility required for servicers to continue the practices that suit their needs. For these reasons, the Bureau is adopting the proposed rule.

Legal Authority

Section 1026.41(d) contains content and layout requirements that implement, in part, TILA section 128(f), and is additionally authorized under TILA section 105(a) and Dodd-Frank Act sections 1032(a) and 1405(b).

More specifically, the content required by § 1026.41(d) is authorized as follows:

- *Statutorily-required content:* TILA section 128(f)(1)(a) through (g) requires the inclusion of certain items of information in the periodic statement. The final regulation generally implements these provisions by requiring the content set forth in § 1026.41(d)(1)(ii), (6) and (7), and the description of late fees in § 1026.41(d)(4).
- *Additional content:* TILA section 128(f)(1)(H) requires inclusion in periodic statements of such other information as the Bureau may prescribe by regulation. The remainder of the content of the periodic statement is promulgated under this authority.

The grouping and other form requirements of the layout in § 1026.41(d) implement, in part, the requirement under TILA section 128(f)(1) that the content of the periodic statement be presented in a conspicuous and prominent manner, and the requirement under TILA section 128(f)(2) for the Bureau to develop and prescribe a standard form for the periodic statement disclosure. The Bureau interprets the term ''standard form'' (a term not used elsewhere in TILA, nor in Regulation Z) to include sample forms, which are commonly

[120] *See* comments 24(b)–2 and 48–3, respectively.

[121] Macro Report, at 12.

used in Regulation Z. In addition, as discussed above with respect to the form requirements under § 1026.41(c) and for the reasons explained below, the grouping and form requirements under § 1026.41(d) are authorized under TILA section 105(a) and Dodd-Frank Act sections 1032(a) and 1405(b).

41(d)(1) Amount Due

Proposed § 1026.41(d)(1) would have required the periodic statement to provide information on the amount due, the payment due date, and the amount of any fee that would be assessed for a late payment, as well as the date on which that fee would be imposed if payment is not received. This information would have had to be grouped together and located at the top of the first page of the statement. The amount due would have had to be more prominent than any information on the page.

A primary purpose of the periodic statement is to alert the consumer to upcoming payment obligations. The Bureau interprets TILA section 129(f)(1)(E), which requires the periodic statement to include a description of any late payment fees, to require disclosure of the amount of any fees that would be assessed for late payments, the date the fees would be imposed if the payment has not been received, and other information regarding late fees discussed below. Although information concerning the amount due and the payment due date is not enumerated in the statute, the Bureau believes that this is the information the consumer is most likely to need and expect. Because of the importance of this information, the proposed ruled would have required it to be placed in the prominent position at the top of the first page, with the total amount as the most prominent item on the page. In consumer testing, all participants were able to identify the amount due on the sample periodic statement presented to them.[122] If the consumer has a payment-option loan, the proposal would have required that each of the payment options must be displayed with the amount due information. An example of such a statement is included in appendix H–30(C).

Commenters were supportive of including the amount due information (amount due, due date, and late fee information) on the periodic statement, even though this amount was not specifically required by the Dodd-Frank Act. Thus, the Bureau is adopting the proposed provisions on amount due.

[122] *See* Macro Report, at 6.

41(d)(2) Explanation of Amount Due

Proposed § 1026.41(d)(2) would have required periodic statements to include an explanation of the amount due, which would disclose the monthly payment amount, including the allocation of that payment to principal, interest and escrow (if applicable). Additionally, the statement would have had to provide the total fees or charges incurred since the last statement, and any amount past-due (which would include both overdue payments and overdue fees). This information would have had to be grouped together in close proximity and located on the first page of the statement.

The explanation of amount due is intended to give consumers a snapshot of why they are being asked to pay the amount due. At a glance, consumers would be able to see their payment amount; how much is allocated to principal, interest and escrow (if applicable); the total fees or other charges incurred since the last statement; and any post-due amounts. In this section, the fees incurred since the last statement would be shown in aggregate. A breakdown of the individual fees would be provided in the transaction activity section required by § 1026.41(d)(4), discussed below.

If the consumer has a payment-option loan, a breakdown of each of the payment options would have been required in the explanation of amount due. Additionally, the explanation of amount due would have required inclusion of information about how each of the payment options will affect the outstanding loan balance. A form with such a box was used during consumer testing. All but one of the participants were able to understand the effects the different payment options would have on their loan balance–that the loan balance would decrease, stay the same (for interest-only payments), or increase.[123] A sample form was provided in proposed appendix H–28(C).[124]

One credit union commenter stated that the breakdown of amount due is not necessary because consumers are only interested in knowing the full amount due, not the details. Some commenters expressed concern about difficulties in providing this payment breakdown, specifically in the context of daily simple interest loans, precomputed loans, and loans when the consumer is in bankruptcy. The Bureau also received comments asking that periodic statements continue to be sent during bankruptcy due to the importance of providing information to consumers in bankruptcy and creating a record of payment and applications. Finally, while commenters were generally supportive of the breakdown for payment option loans, two commenters suggested more information should be required.

[123] Macro Report, at 15.

[124] The final forms are in appendix H–30(C).

The Bureau believes information regarding the components of the amount due is important. Including a breakdown of the amount due allows a consumer to question an improper charge before making a payment. Additionally, a consumer can compare this amount to the past payment breakdown on the next statement to ensure the payment was properly applied.

The Bureau understands the concerns about determining the breakdown for daily simple interest loans, as the breakdown would change depending on which day the consumer makes the payment. In determining the breakdown of amount due, the servicer may assume the consumer will make the payment on the due date. Servicers may include a note explaining this if they believe it is necessary. The Bureau considered the risk that this may cause confusion for consumers, but believes the consumer protection benefits of enabling the consumer to understand what they are being billed for, and thus to question improper charges, outweighs the risk of possible confusion. Further, the Bureau believes that if a consumer with a daily simple interest loan pays his or her loan late, the difference in the amount of the payment that goes to the principal under the amount due (shown on the earlier statement), and the amount of payment that goes to the principal under the application of payment (shown on the next statement) may highlight the additional cost of paying such loans late.

Additionally, the Bureau considered the concerns regarding the breakdown of precomputed loans. The Bureau understands that precomputed loans do not apply payments to principal or interest, but rather to the entire amount due, which consists of both principal and interest for the length of the loan. The Bureau notes there are multiple accounting systems used to determine the outstanding amount when a precomputed loan is prepaid. The Bureau is not requiring a specific system for determining the allocation to principal and interest, but rather notes that any reasonable system for determining the breakdown of principal and interest from the total amount due would be acceptable for the breakdown

of amount due, as well as the breakdown of past payment application.

Similarly, the Bureau understands the concerns about the complications involved in addressing consumers in bankruptcy, (including complicated accounting and rules on communication), but believes that the complexities of this scenario necessitate the information in the periodic statement being provided to the consumer. The Bureau understands that certain laws, such as the FDCPA or the Bankruptcy Code, may prevent attempts to collect a debt from a consumer in bankruptcy, but does not believe these laws prevent a servicer from sending a consumer a statement on the status of their loan. The final rule would allow servicers to make changes to the statement as they believe are necessary when a consumer is in bankruptcy; such servicers may include a message about the bankruptcy [125] and alternatively present the amount due to reflect the payment obligations determined by the individual bankruptcy proceeding.

Finally, the Bureau carefully considered the comments requesting additional language on the effects of non-fully-amortizing payments. While the Bureau believes information explaining the different payment options may assist a consumer making a payment decision, the Bureau also notes that there is limited space on the periodic statement and that there is a risk of providing too much information that may overwhelm the consumer. The Bureau believes the proposed rule appropriately balances these concerns. For these reasons, the Bureau is adopting the proposed rule on explanation of amount due.

41(d)(3) Past Payment Breakdown

Proposed paragraph (d)(3) would have required periodic statements to include a snapshot of how past payments have been applied. Proposed § 1026.41(d)(3)(i) would have required the periodic statement to include both the total of all payments received since the last statement and a breakdown of how those payments were applied to principal, interest, escrow, fees, and charges, and any partial payment or suspense account (if applicable). Proposed § 1026.41(d)(3)(ii) would have required the total of all payments received since the beginning of the calendar year and a breakdown of how those payments were applied to principal, interest, escrow, fees, and charges, as well as the amount currently held in any partial payment or suspense account (if applicable). This information would have had to be grouped together in close proximity, and located on the first page of the statement.

Commenters expressed concern there may be operational difficulties in including the past payment breakdown on the periodic statement because not all servicer systems are set up to provide a breakdown of past payments, either for the past month or the year-to-date. This could be particularly difficult for daily simple interest loans, and precomputed loans. One commenter expressed concern that the year-to-date calculation could be difficult if a loan was transferred to that servicer during the course of that year.

Commenters questioned the value of the past payment breakdown, stating that consumers are not concerned with the breakdown of their past payments, and that this information could be found in the loan documents. Further, some commenters who saw value in the breakdown of payments from the past month questioned the value of the additional breakdown of all payments from the year-to-date. They stated that this information is duplicative as well as available on request, that it may be difficult to fit such information on the periodic statement, that the benefits of providing such information do not outweigh the costs, and that this information could be particularly difficult to compute if the loan is delinquent. Finally, one commenter expressed concern that the year-to-date breakdown would cause confusion if payments have been placed in a suspense account, and asked the Bureau to provide clarity that it is permissible to provide an actual suspense account balance rather than the one calculated year-to-date.

While the Bureau understands there may be some challenges in importing information on the past payment breakdown to the periodic statement, the Bureau notes that because the past payment has been applied, the servicer must have this information. The Bureau also considered the concerns expressed about daily simple interest loans or precomputed loans; however for the reasons discussed above in the section-by-section analysis of explanation of amount due, the Bureau believes the breakdown of these loans can be disclosed on the periodic statement. The Bureau considered the concerns about calculating the year-to-date breakdown of loans which have been transferred from a previous servicer; however, the Bureau believes that all servicers should be able to accurately compute the year-to-date breakdown, and this information should transfer with the loan. Thus the Bureau does not believe that transfer of servicing will present a problem in providing the year-to-date breakdown.

Further, the Bureau believes the past payment breakdown is an important disclosure on the periodic statement. This disclosure serves several purposes, including creating a record of payment application, providing the consumer information needed to assert any errors, and providing information about the mortgage expenses. The breakdown in § 1026.41(d)(3)(i), showing all payments made since the last statement, would allow consumers to confirm that their payments were properly applied. If the payments were not properly applied, the breakdown would provide consumers the information needed to assert an error.

Both the breakdown since the last billing cycle and the breakdown of the year-to-date play an important role in educating the consumer. The payments since the last statement inform consumers of how much their outstanding principal has decreased, while the year-to-date information educates consumers on the costs of their mortgage loan. Consumer testing revealed that testing participants were surprised by how much of their payment is going to interest or fees as opposed to principal. Aggregation over the year-to-date can bring this expense to a consumer's attention, and motivate them to possibly change behaviors that are generating significant expenses. For example, consumers who habitually submit their payment a few days late may correct this behavior if they realize it is costing them hundreds of dollars a year. The breakdown of all payments made in the current calendar year-to-date is of particular importance in educating consumers about their loans, as there is no other mandated year-end summary of all payments received and their application. The past payment breakdown, of both the payments since the last statement and payments for the year-to-date, provides the consumer with important information that is not currently required to be disclosed.

Finally, the Bureau considered the concerns about disclosing suspense account information. Proposed comment 41(d)(3)–1 would have provided guidance on how partial payments that have been sent to a suspense account should be reflected in the past payments breakdown section of the periodic statement. The proposed

[125] For example, servicers may include a statement such as: ''To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this statement is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation. However, Creditor retains rights under its security instrument, including the right to foreclose its lien.''

comment provides illustrative examples of how partial payments sent to a suspense account should be listed as unapplied funds since the last statement and year to date. This comment shows the breakdown should disclose both the amount of funds that were sent to a suspense account during the time reflected by the periodic statement, as well as the total amount *currently* held in the suspense account. The Bureau believes this addresses the concerns about displaying suspense account information. Consumer testing revealed that testing participants had very little understanding about how partial payments are handled.[126] As discussed above, the periodic statement is designed to help consumers understand how partial payments are processed. The past payment breakdown is useful in communicating information about partial payments and suspense accounts to consumers. For these reasons, the Bureau is finalizing the proposed provisions on the past payment breakdown.

41(d)(4) Transaction Activity

Proposed § 1026.41(d)(4) would have required the periodic statement to include a transaction activity section that lists any activity since the last statement that credits or debits the outstanding account balance. For each transaction, the statement would include the date of the transaction, a description of the transaction, and the amount of the transaction. This information must be grouped together, but may be provided anywhere on the statement.

Proposed comment 41(d)(4)–1 clarified that transaction activity includes any activity that credits or debits the outstanding loan balance. For example, proposed comment 41(d)(4)–1 stated that transaction activity would include, without limitation, payments received and applied, payments received and sent to a suspense account, and the imposition of any fee or charge. Thus, the transaction activity section would have provided a list of all charges and payments, covering the time from the last statement until the current statement is printed. This disclosure would allow the consumer to understand what charges are being imposed and provide further detail regarding the aggregated numbers found in the ''explanation of amount due'' section. The transaction activity section would provide a record of the account since the last statement, allowing the consumer to review for errors, ensure payments were received, and understand any and all costs. If a servicer receives a partial payment and decides to return the payment to the consumer, such a payment would not need to be included as a line item in the transaction activity section, because this activity would neither credit nor debit the outstanding account balance. For additional clarity, the Bureau has amended the language in the final rule to state that transaction activity includes any transaction that credits or debits the *amount currently due,* and has amended comment 41(d)(4)–1 to clarify this is the amount referred to by § 1026.41(d)(1)(iii).

Proposed comment 41(d)(4)–2 clarified that the description of any late fee charge in the transaction activity section includes the date of the late fee, the amount of the late fee, and the fact that a late fee was imposed. Proposed comment 41(d)(4)–3 clarified that if a partial payment is sent to a suspense account, the fact of the transfer should be reflected in the transaction description (for example, a partial payment entry in the transaction activity might read: ''Partial payment sent to suspense account''), the funds sent to the suspense account should be reflected in the unapplied funds section of the past payment breakdown, and an explanation of what must be done to release the funds must be provided in the messages section. The messages section, discussed below, would have included an explanation of what the consumer must do to release the funds from the suspense account.

Comments on transaction activity focused on what must be disclosed, and the logistics of fitting this information on the periodic statement. Commenters had questions about what items should be included on this list, asking if a charge is entered and reversed in the same month, may it be excluded; and, if funds sent to a suspense account must be listed on the transaction activity list (and noting a potential inconsistency with the National Mortgage Settlement on this point). One commenter also stated that servicers may not know third-party fees at the time they produce the periodic statement. Commenters also addressed the listing of fees: One commenter stated it might be difficult to list all the fees that are imposed, while a consumer advocate emphasized the importance of listing all the fees that were imposed. One commenter requested that sufficient information be given in the transaction item line such that the consumer could validate the charge. Another commenter expressed concern about being able to fit the entire list of transactions on the first page of the periodic statement. Finally, a commenter sought clarification on how corrections to errors on prior statements can be displayed.

In response to the questions received, the Bureau notes that if a charge is entered and reversed in the same month, it would not affect the amount of the consumer's outstanding balance and both line items may be left off the transaction activity. Funds sent to a suspense account must be included in the transaction activity; it is essential for the consumer to know these funds were received by the servicer. If a servicer does not know the amount of a third-party fee, it cannot bill the consumer for that fee. When the servicer bills the consumer (and thus knows the exact amount of the fee), that fee should be included in the transaction activity. While the Bureau notes it may be difficult to list all the fees that are imposed, the Bureau believes it is essential for the consumer to have an accounting of any fee that is imposed. Further, the transaction description should include sufficient information such that the consumer can determine why the charge is imposed. Servicers may use any reasonable method for correcting errors; for example, they could use a new line item which explains the correction. Finally, the Bureau notes the transaction activity is not required to be on the first page, and servicers may use additional pages if necessary. For these reasons, the Bureau is finalizing the proposed provisions on the transaction activity.

41(d)(5) Partial Payment Information

Proposed § 1026.41(d)(5) would have required a message on the front of the statement if a partial payment of funds is being held in a suspense account regarding what must be done for the funds to be applied. The Bureau sought comment on what, if any, additional messages should be required.

Partial Payment Disclosure

Some commenters appreciated the clarification of suspense account information for consumers, while other commenters felt this was unnecessary and difficult to achieve. Two commenters suggested that there was not sufficient space on the periodic statement to explain the suspense account and requested the information be included in a separate letter. One commenter suggested the consumer should receive disclosures during the life of the loan, specifically annual notices during the first three years of the loan.

While the Bureau does not believe it is appropriate to require servicers to send an annual disclosure on the

[126] Macro Report, at 11.

suspense account procedures for the first three years, the Bureau acknowledges that information on the suspense account may be better disclosed in a separate letter. Thus, the Bureau is modifying the rule to provide that if funds are being held in a suspense account, the amount held in any suspense account must be disclosed in the past payment breakdown on the periodic statement, but the servicer may move the message about what must be done for the funds to be applied to a separate page of the statement, or may send this disclosure as a separate letter. The servicer still has the option of including this disclosure on the periodic statement itself. The final rule reflects this additional flexibility. If the servicer has the benefit of the small servicer exemption in § 1026.41(e)(4), the servicer need not send this separate letter.

Additional Messages

Some commenters expressed concerns about the logistics of including a messages box on the periodic statement. These commenters explained that dynamic information created operational difficulties for the creation of the periodic statement. Commenters had mixed responses to any additional dynamic messages that should be required. Some commenters specifically said there should be no additional messages because this might distract the consumer from other important information. Several commenters suggested the periodic statement should be required to include additional information on escrow accounts, but one commenter argued that a complete escrow breakdown is already provided annually under RESPA, and questioned if this additional information would help consumers. Commenters also suggested additional information about force-placed insurance should be included on the periodic statement. One commenter urged the Bureau to require servicers to include force-placed insurance charges in regular invoice statements that are sent to a consumer so that a consumer is constantly reminded of how much of their payments are going toward paying for such insurance. Another consumer group submitted similar comments recommending that the Bureau require servicers to identify force-placed insurance charges specifically in proposed periodic statements so that consumers could easily recognize when force-placed insurance has been obtained. Finally, one commenter recommended a message about consumers' obligations to pay community assessments.

The Bureau carefully considered requiring additional messages, but decided that none should be required, particularly in light of the additional burden this dynamic feature would add to the periodic statement. The Bureau believes that the additional escrow information is provided through the annual escrow disclosure, and that monthly escrow information would be confusing because, although escrow accrues monthly, payments are often made at discrete times throughout the year to pay taxes and insurance premiums. Additionally, the amount paid into escrow will be shown each month. The Bureau believes that sufficient information on force-placed insurance is provided through the final rule. Charges for force-placed insurance, like any other charge, must be listed in the transaction activity section of the periodic statement. Further, detailed notification about force-placed insurance is included in the disclosures required by the force-placed insurance provisions of the 2013 RESPA Servicing Final Rule. Finally the Bureau believes the suggested message on community assessment obligations would be inappropriate due to the relatively low benefit this message would provide to consumers, and the relatively high costs to servicers of determining and tracking which consumers are members of community associations.

41(d)(6) Contact Information

Proposed § 1026.41(d)(6) would have required that the periodic statement contain contact information specifying where a consumer may obtain information regarding the mortgage. Proposed comment 41(d)(6)–2 clarified that this contact information must be the same as the contact information for asserting errors or requesting information. Proposed § 1026.41(d)(6) provided that the contact information provided must include a toll-free telephone number. Proposed comment 41(d)(6)–1 clarified that the servicer may provide additional information, such as a Web address, at its option. Proposed § 1026.41(d)(6) did not require that that the contact information be set off in a separate section, but simply that it be included on the front page of the statement. This proposed requirement would have allowed servicers to include this information with their company name and logo at the top of the page or elsewhere on the statement.

Comments on the contact information focused on concerns about disclosing the number associated with the oral error resolution procedures in the 2012 RESPA Servicing Proposal. Additionally, one commenter requested that in place of a toll-free number, servicers be allowed to provide a number where the consumer can contact the servicer at no cost.

Because the proposed oral error resolution procedures are not being finalized, proposed comment 41(d)(6)–2 has been removed from the provision requiring the contact information. The Bureau believes it is important for consumers to be able to request information or report errors without incurring a fee, and that it is consistent with standard industry practice to provide a toll-free phone number. The Bureau determined that proposed comment 41(d)(6)–1 provided minimal guidance; thus, this comment is not being finalized. The proposed rule is being adopted, subject to these modifications.

41(d)(7) Account Information

Proposed § 1026.41(d)(7) would have required that the following information about the mortgage, as required by TILA section 128(f)(1), be included on the statement: The amount of the principal obligation, the current interest rate in effect for the loan, the date on which the interest rate may next reset or adjust, the amount of any prepayment penalty, and information on homeownership counselors and counseling organizations.[127] This information may be included anywhere on the statement. This information may, but need not be, grouped together. While the sample forms display this information on the first page, the servicer is not required to include this information on the first page.

Overall, commenters focused on the disclosure of prepayment penalty information and homeownership counselor information, as discussed below. Additionally, some commenters stated that the disclosure of basic account information was unnecessary. Certain commenters objected to the inclusion of information that would also be provided in other disclosures. In particular, they stated the date on which the interest rate will next reset is already on the § 1026.20(c) and 20(d) notices (discussed above in the section-by-section analysis of § 1026.20(c)), as is the prepayment penalty disclosure, and that the outstanding balance, interest rate, and late fees are included in the loan documents.[128] Commenters

[127] TILA section 128(f)(1)(E) also requires a ''description of any late payment fees.'' As noted above, the Bureau is requiring this information to be disclosed in the ''amount due'' section of the periodic statement. *See* § 1026.41(d)(1).

[128] One commenter objected to the disclosure of the maturity date, saying that consumers are generally not interested and that few consumers

pointed out that including the account information may require programing changes, and distract from other more important information on the statement.

The Bureau acknowledges that while some of this information may be available in other documents, some of these documents may not be easily accessible to the consumer. The Bureau believes that one of the purposes of the periodic statement is to serve as a dashboard for the consumer, bringing together important information into a single location. Reminding the consumer of this information on a recurring basis, including particularly the date of an interest rate reset, can help consumers plan their affairs before receiving the notice of a reset. The Bureau believes the consumer protection benefits of these disclosures outweigh the costs of potential duplication, and thus the Bureau is finalizing the proposed provisions requiring disclosure of: The date the interest rate will next reset, the outstanding balance, the current interest rate, and the prepayment penalty (modified to require the existence rather than the amount of such penalty). For these reasons, the Bureau is adopting the proposed rule on account information as final with the minor change that § 1026.41(d)(7)(iii) now requires the date *after* which the interest rate may next change,[129] and subject to the modifications to the prepayment penalty and homeownership counselor disclosures discussed below.

Prepayment penalty. Proposed § 1026.41(d)(7)(iv) would have required the periodic statement to disclose the amount of any prepayment penalty, and defined a prepayment penalty as ''a charge imposed for paying all or part of a transaction's principal before the date on which the principal is due.'' This definition was further clarified in the proposed commentary, and substantially incorporated the definitions of and guidance on prepayment penalties from other rulemakings addressing mortgages and, as necessary, reconciled their differences. The Bureau coordinated the definition of the term prepayment penalty in proposed § 1026.41(d)(7)(iv) with the definitions in other pending rulemakings relating to mortgages.

Commenters had two major concerns with the prepayment penalty provision—disclosing the amount of the penalty, and the definition of a penalty. First, a number of commenters expressed concern over difficulties in calculating and providing the amount of the prepayment penalty. These commenters explained that the amount is determined by a number of dynamic factors, and is often computed by hand. Further, this information may be stored in a separate system. These commenters suggested the periodic statement disclose the *existence* of a prepayment penalty, with a note to call for the amount, rather than the *amount* of the prepayment penalty. Next, several commenters raised concerns about including in the definition of prepayment penalty FHA interest accrual amortization payments (the FHA requirement that interest be paid for a full month if the loan is paid off on the first day of the month) and closing costs reimbursed to the lender for early payoff. Finally, commenters stated that this information should not be included in the periodic statement because it would be inaccurate, it is only relevant to certain consumers, and consumers have not requested it.

The Bureau carefully considered the concerns about providing the amount of the prepayment penalty. The exact amount of the prepayment penalty provides value only to consumers considering refinancing or otherwise paying off their loan. Only a fraction of the consumers who receive the periodic statement will be considering this and will need the exact amount. Such consumers could contact their servicer and, using the information request procedures in the 2013 RESPA Servicing Final Rule, request the exact amount of the prepayment penalty. Requiring the servicer to disclose the existence of the prepayment penalty, rather than the amount, would be far less burdensome to servicers; additionally this modification would result in only a minimal decrease in consumer protection. Thus, the Bureau is making this modification to the final rule.

Additionally, the Bureau considered the definition of the prepayment penalty. The other proposals related to the Title XIV Rulemakings proposed the same definition of prepayment penalty and received comments raising the same concerns about the definition of prepayment penalty as the comments in response to the 2012 TILA Servicing Proposal. The definition of a prepayment penalty has been coordinated across the Title XIV Rulemakings and was in the 2013 ATR Final Rule. In the interest of consistency across the Title XIV Rulemakings, the 2013 TILA Servicing Final Rule cites to the definition of prepayment penalty found in the 2013 ATR Final Rule, rather than re-define prepayment penalty or offer an alternative definition of prepayment penalty. The final rule includes this modification; accordingly, as the comments to the prepayment definition are found in the commentary to the 2013 ATR Final Rule, the duplicative commentary to § 1026.41(d)(7)(iv) has not been finalized.

Legal authority. TILA section 128(f)(1)(D) requires the periodic statement to include the amount of any prepayment penalty that may be charged. For the reasons discussed above, the Bureau is using its authority under TILA section 105(a) and (f) to exempt servicers from having to include this information in periodic statements and to instead require the periodic statement to include the existence of any prepayment penalty. This adjustment is additionally authorized under Dodd-Frank Act section 1405(b).

Homeownership Counselors and Counseling Organizations

TILA section 128(f)(1)(G) requires the periodic statement to include the name, addresses, telephone numbers, and Internet addresses of counseling agencies or programs reasonably available to the consumer that have been certified or approved and made publically available by the Secretary of HUD or a State housing finance authority.

On July 9, 2012, the Bureau released the 2012 HOEPA Proposal to implement other Dodd-Frank Act provisions, including the requirement to provide a list of homeownership counselors and counseling organizations during the application process for mortgage loan. To facilitate compliance, the Bureau proposed to require creditors to provide a list of five homeownership counselors or counseling organizations to applicants for various categories of mortgage loans.[130] The Bureau also stated that it is expecting to develop a Web site portal that would allow lenders to type in the loan applicant's zip code to generate the requisite list, which could then be printed for distribution to the loan applicant. This will allow creditors to access lists of the homeownership counselors and counseling organizations with a minimum amount of effort.[131]

keep their loans up to the full maturity date. The Bureau notes that neither the proposed rule nor the final rule requires disclosure of the maturity date of the loan on the periodic statement.

[129] This change is made to conform with the § 1026.20(c) and (d) ARM disclosures.

[130] *See* 2012 HOEPA Proposal, 77 FR 49090, 49097–99 (Aug. 15, 2012).

[131] The list provided by the lender pursuant to the 2013 HOEPA Final Rule would include only homeownership counselors or counseling organizations from either the most current list of homeownership counselors or counseling

Continued

In connection with the periodic statement requirement, however, the Bureau proposed to use its exception authority to require servicers simply to list where consumers can find a list of counselors, rather than to reproduce a list of counselors in each billing cycle. Proposed § 1026.41(d)(7)(v) would have required the periodic statement to include contact information for any State housing finance authority for the State in which the property is located, and information enabling the consumer to access either the Bureau or the HUD list of homeownership counselors and counseling organizations. The Bureau suggested that this approach may appropriately balance consumer and servicer interests based on several considerations.

First, the Bureau was concerned about information overload for consumers. The periodic statement contains a significant amount of information already. While consumers who are deciding whether to take out a mortgage loan in the first instance may greatly benefit from consultation with a homeownership counselor, that likelihood is greatly reduced with regard to consumers receiving regular periodic statements on existing loans.

Second, the burden on servicers to import the list of counselors into a periodic statement document or to attach a list each billing cycle would have been significantly higher than with the one-time requirement in the HOEPA rulemaking. Space on the periodic statements is limited, and importing updated information from the Bureau Web site each cycle would involve more programming burden than simply listing Web site information in the first instance.

To address these concerns, the proposal would have required that the periodic statements include the contact information to access the State housing finance authority for the State in which the property is located, and the Web site and telephone number to access either the Bureau list or the HUD list of homeownership counselors and counseling organizations.[132] Directing consumers to this information would allow them to choose a program or agency conveniently located for them, and would allow consumers to locate other programs or agencies if those contacted initially could not help them at that time.

The Bureau coordinated the homeownership counselor information requirement in § 1026.41(d)(7)(v) with the other pending rulemakings concerning mortgage loans that address homeownership counselors. The Bureau believes that, to the extent doing so is consistent with consumer protection objectives, adopting a consistent approach to providing homeownership counselor information across its various pending rulemakings will facilitate compliance.

Overall, commenters praised the Bureau's proposal on providing Web site information, rather than individual homeownership counselors and counseling organizations. However, commenters had remaining concerns about providing information for the relevant State housing finance authority in addition to information on how to access the HUD list or the Bureau list. Finally, the Bureau received comments from the National Council of State Housing Agencies, expressing concern about including contact information for State housing finance authorities on the periodic statements. The Council stated that, while the State housing agencies will always be willing to assist struggling homeowners, including their contact information on the periodic statement may increase consumer confusion by misdirecting consumers away from entities more likely to be able to assist them. The Council stated that not all State housing agencies offer counseling programs and, because of limited resources, State housing agencies may not be well-equipped to handle the increased number of inquiries they would receive.

Additional comments focused on the difficulty of providing information for the individual State authority, and reconciling which state's authority should be provided. Several commenters stated that it would be difficult to have information for different State authorities appear on different statements, and asked if they could provide contact information to a location where a consumer could find a list of all the State housing finance authorities. Additionally, some commenters expressed concern about the inconsistency between the periodic statement disclosure and the § 1026.20(d) ARM initial interest rate reset disclosure. While the periodic statement would have required disclosure of the State housing finance authority for the State *in which the property is located,* the § 1026.20(d) ARM disclosure would have required the State authority for the State *in which the consumer has primary residence.* Commenters expressed concern this would create difficulties and asked that these discrepancies be reconciled or, as above, that they be allowed to provide a link to a full list of the State housing finance authorities.

The Bureau carefully considered the comments expressing concern about providing the contact information of the correct State housing finance authority, particularly the comment from the State housing finance authority association expressing this concern. These comments were also raised in connection with the § 1026.20(d) ARM initial interest rate adjustment disclosure. As discussed above in the section-by-section analysis of § 1026.20(d), requiring the contact information for the individual State housing finance authority provides minimal benefit to the consumer (because not all State housing finance authorities provide counseling, and this information is available elsewhere), and imposes a large burden on the servicer (*i.e.,* determining which State housing finance authority's information should be included, and including dynamic information on the statement). For these reasons, the Bureau is removing the requirement to disclose contact information for the State housing finance authority for the State in which the property is located.

Legal authority. The Bureau uses its authority under TILA section 105(a) and (f) and Dodd-Frank Act section 1405(b) to exempt creditors, assignees, and servicers of residential mortgage loans from the requirement in TILA section 128(f)(1)(G) to include in periodic statements contact information for government-certified counseling agencies or programs reasonably available to the consumer (i.e., State Housing Finance Authorities), and to instead require that periodic statements disclose information enabling the consumer to access either the Bureau list or HUD list of homeownership counselors and organizations. For the reasons discussed above, the Bureau believes that this exception and addition are necessary and proper under TILA section 105(a) both to effectuate the purposes of TILA—to promote the informed use of credit and protect consumers against inaccurate and unfair credit billing practices—and to facilitate compliance. Moreover, the Bureau believes, in light of the factors in TILA section 105(f), that disclosure of the information specified in TILA section 128(f)(1)(G) would not provide a meaningful benefit to consumers. Specifically, the Bureau considers that the exemption is proper irrespective of

organizations made available by the Bureau for use by lenders, or the most current list maintained by HUD of homeownership counselors or counseling organizations certified by HUD, or otherwise approved by HUD. *See* 77 FR 49090, 49098.

[132] At the time of publication, the Bureau list was not yet available and the HUD list is available at *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm.*

the amount of the loan, the status of the consumer (including related financial arrangements, financial sophistication, and the importance to the consumer of the loan), or whether the loan is secured by the principal residence of the consumer. Further, the Bureau believes that the exemption will simplify the periodic statement, and improve the homeownership counselor information provided to the consumer, thus furthering the consumer protection purposes of the statute. In addition, consistent with Dodd-Frank Act section 1405(b), the Bureau believes that the modification of the requirements in TILA section 128(f)(1)(G) will improve consumer awareness and understanding and is in the interest of consumers and in the public interest.

41(d)(8) Delinquency Information

Proposed § 1026.41(d)(8) would have required that if the consumer is more than 45 days delinquent, the servicer must include on the periodic statement certain delinquency information grouped together. The accounting of mortgage payments is confusing at best, and becomes significantly more complicated when the loan is delinquent. The combination of fees, partial payments being sent to suspense accounts, and application of payments to the outstanding amounts due can quickly lead to confusion. The early intervention provisions of the 2013 RESPA Servicing Final Rule require servicers to disclose information about loss mitigation or loan modification, but this information is not customized to individual consumers. The proposed delinquency notice on the periodic statement, discussed below, would have provided information that is tailored to the specific consumer. This information would have benefited the consumer in several ways.

First, this notice would have ensured that the consumer is aware of the delinquency as well as potential consequences. Second, this information would have ensured that the consumer has the information specific to his or her loan. For example, certain loan modification programs are tied to specific timelines in delinquency. This delinquency information would ensure that consumers understand the timelines so they can benefit from the programs. Finally, the delinquency information would have created a record of how payments were applied, which would both help consumers understand the amount due and give consumers the information needed to become aware of any errors so they could use the appropriate error resolution procedures. The proposed rule would have required the following information:

- *Delinquency date and risks.* Proposed § 1026.41(d)(8)(i) would have required the periodic statement to include the date on which the consumer became delinquent. Many timelines relevant to the loss mitigation and foreclosure processes are based on the number of days of delinquency. For example, under certain programs consumers may not be eligible for a loan modification unless they are at least 60 days delinquent. However, a consumer may not know the date on which he or she was first considered delinquent. This can be especially confusing in a scenario where the consumer is making partial payments. Proposed § 1026.41(d)(8)(ii) would have required the periodic statement to include a statement reminding the consumer of potential risks of delinquency, for example, that late fees may be assessed or, after a number of months, the consumer can be subject to foreclosure.
- *A recent account history.* Proposed § 1026.41(d)(8)(iii) would have required the periodic statement to include a recent account history as part of the delinquency information. The accounting associated with mortgage loan payments is complicated, and can be even more so in delinquency situations. The accrual of fees and the application of payments to past months can make it very difficult for a consumer to understand the exact amount he or she owes on the loan, and how that total was calculated. Additionally, this complex accounting makes it very difficult for a consumer to identify errors in payment allocations. Although some of this information would be available from previous periodic statements, the Bureau believed that providing a separate recent account history is warranted under the circumstances.

The Bureau further believed that the recent account history would enable the consumer to understand how past payments were applied, provide the information needed to identify any errors, and provide the information necessary to make financial decisions. Proposed § 1026.41(d)(8)(iii) would have required the account history to show the amount due for each billing cycle, or the date on which a payment for a billing cycle was considered fully paid. The date on which the payment was considered fully paid was included to help a consumer understand that a past payment that was previously delinquent has been considered paid. For example, suppose a delinquent consumer does not make a payment in January, but makes a regular payment in February. Without the account history, the consumer would not be able to verify that payments were properly applied. The account history is limited to the lesser of the past six months or the last time the account was current to avoid creating a long list that could overwhelm the rest of the periodic statement.

- *Notice of any loan modification programs.* Proposed § 1026.41(d)(8)(iv) would have required the periodic statement to include as part of the delinquency information notice of any acceptance into a modification program, either trial or permanent, to create a record of acceptance into the modification program. For consistency with the loss mitigation provisions of the 2013 RESPA Servicing Final Rule, the final rule amends this to require notice of a loss mitigation program to which a consumer has agreed.
- *Notice if the loan has been referred to foreclosure.* Proposed § 1026.41(d)(8)(v) would have required the periodic statement to include, as part of the delinquency information notice, that the loan has been referred to foreclosure, if applicable, to ensure that the consumer is aware of any pending foreclosure. For consistency with the loss mitigation provisions of the 2013 RESPA Servicing Final Rule, the final rule amends this to require notice of the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process.
- *Total amount to bring the loan current.* Proposed § 1026.41(d)(8)(vi) would have required that the total amount needed to bring the loan current be included in the delinquency information to ensure that consumers know how much money they must pay to bring the loan back to current status.
- *Homeownership counselor information reference.* Proposed § 1026.41(d)(8)(vii) would have required that the delinquency notice also contain a statement directing the consumer to the homeownership counselor information located on the statement, as proposed by § 1026.41(d)(7)(v). For example, if the homeownership counselor information is on the back of the statement, the delinquency information on the front of the statement would direct consumers to the back of the statement.

The delinquency information was intended to assist consumers who have fallen behind on their mortgage payments. The proposal would not have required provision of this information until the consumer is 45 days delinquent. The Bureau recognized that not all delinquencies indicate troubled consumers; a single missed payment

may be the result of other factors such as misdirected mail or inadvertence. Such consumers would likely be notified of a single missed payment by their servicer, and the missed payment would be reflected on the next periodic statement. These consumers would receive minimal additional benefit from the delinquency information and, if this is a frequent occurrence, such consumers might become accustomed to ignoring the delinquency information. By contrast, two missed payments likely indicate a potentially more serious issue. Thus, the delinquency information would have been required at 45 days to ensure receipt of this information by a consumer who missed two consecutive payments.

Commenters expressed concern that a number of factors would make the proposed delinquency information difficult to implement, including the volume of loan-specific information that would have to be coded, the dynamic nature of the information, the fact that such information is often stored on multiple systems, the lack of space on the periodic statement, the difficulties in determining when a consumer was accepted into a loan modification program, and, as one commenter stated, the fact that the delinquency date calculation is a ''nightmare.''

Commenters also stated that the information in the delinquency notice would be unnecessary, as this information is already provided in investor-required notices, required by the Early Intervention provisions proposed in § 1024.39 and other provisions of the 2012 RESPA Servicing Proposal, the delinquency date is obvious, and the information is required in state-law notices in the foreclosure process. Some commenters went further to say this information should not be provided to the consumer, as the total outstanding balance may cause confusion or depress consumers, any mention of the risk of foreclosure may be considered notice of collection or default in violation of the FDCPA or other laws, and that 45 days is too short a timeline, such that habitually late payers will often receive these messages. One commenter suggested 60 days would be a more appropriate timeline. Another commenter asked if the delinquency information must be provided once, or on each statement.

Other commenters were supportive of the delinquency notice, and even suggested that more information be included. Such commenters said the account history should extend back 12 months, rather than 6 months, there should be information on loss mitigation, there should be more information on the delinquent payment and the effect of delinquencies, and that payment history should be provided in excel format, mirroring current bankruptcy law.

Finally, some commenters provided specific recommendations. Two commenters suggested the periodic statement note the fact that the loan is more than 45 days delinquent and request the consumer contact the servicer. Additionally, two commenters suggested this information might be better contained in a letter—one commenter suggested this should be in the breech letter or a right-to-cure, and the other suggested a payment history and explanation letter. Finally, one commenter suggested the delinquency notice be limited to past due amounts and the dates the payments were owed, and should only be provided up to the point of referral to foreclosure.

The Bureau carefully considered the difficulties of implementing the delinquency information. The Bureau recognizes the difficulties of adding dynamic boxes to the periodic statement, and so—as in the case of the partial payment disclosure discussed above—is affording servicers the flexibility to provide the delinquency information on the periodic statement, on a separate page included with the periodic statement, or in a separate letter.

The Bureau recognizes there is a large amount of loan specific data that may be included on separate systems; however, the Bureau notes the importance of bringing all this information together into one place for the consumer. The Bureau does not believe that any item of information required is unobtainable. In response to the comment that calculating the delinquency date can be a nightmare, the Bureau notes the confusion around this calculation is the very reason such a date should be included in the delinquency information. Finally, in response to concerns about determining the status of a loan modification program, the Bureau notes the 2013 RESPA Servicing Final Rule establishes procedures relating to loss mitigation, including identifying when a borrower has agreed to a loss mitigation program.

The Bureau considered the comment that the delinquency information is unnecessary, but respectfully disagrees, in particular for the reasons expressed in the proposed rule and the supportive comments above. While the Bureau agrees that some of this information is available through other disclosures and in other locations, the Bureau believes it is important to bring this information together in a single place. In particular, while the Bureau acknowledges that delinquency information is provided in the early intervention notice required by the 2013 RESPA Servicing Final Rule, the Bureau notes that this information is generic, while the information in the periodic statement is specific to the individual loan. These two notices are designed to complement each other—for example, the early intervention notice information may discuss an option that is only available to consumers who are 60 days delinquent, and the periodic statement information would inform an individual consumer of the exact date they were considered delinquent. The Bureau considered the comment that the total amount outstanding may depress or confuse consumers, but the Bureau believes the value of transparent disclosure of information outweighs such concerns. The Bureau considered the concerns that mentioning the risks of foreclosure may violate the FDCPA, but the Bureau notes that specific language is not required by the regulation—if a servicer feels that mention of foreclosure is inappropriate when a consumer is 45 days delinquent, at that time they could warn the consumer instead of the imposition of late fees.[133] Finally, in response to the comments that 45 days is too early to require this disclosure, the Bureau notes that a 45 day delinquency corresponds to two missed payments. Delaying the delinquency notice to 60 days or more would mean a consumer would not receive this information until they had missed three payments. The Bureau notes the delinquency notice information complements the early intervention information, and that these notices should be provided on a similar timeframe. The Bureau notes the delinquency information must be provided on, or accompanying, *each* periodic statement sent when a consumer is at least 45 days delinquent. The Bureau notes that much of the information on the delinquency notice will change as time passes, and thus a single statement will quickly become outdated.

The Bureau carefully considered the above recommendations to streamline the notice to delinquent consumers. The Bureau believes merely noting the delinquency and instructing the consumer to contact the servicer is insufficient; further this information (and more) is provided by the early intervention information required by the 2013 RESPA Servicing Final Rule. The

[133] A servicer may believe foreclosure language is more appropriate later in the process when the servicer is preparing to file the first filing required for the foreclosure process.

goal of the enhanced and customized disclosures in the periodic statement is, in part, to provide delinquent consumers with additional information that might encourage them to contact their servicer. As discussed above, the Bureau believes the 45-day timeline is proper for the delinquency notice. The Bureau has adopted the proposed rule as final, with the additional flexibility of allowing such information to be contained on a separate page of the periodic statement, or in a separate letter.

41(e) Exemptions

41(e)(1) Reverse Mortgages

Proposed § 1026.41(e)(1) would have exempted reverse mortgages, as defined by § 1026.33(a), from the periodic statement requirement. The Bureau proposed this exemption for reverse mortgages because the periodic statement requirement was designed for a traditional mortgage product. Information that would be relevant and useful on a reverse mortgage statement differs substantially from the information required on the periodic statement. Incorporating the unique aspects of a reverse mortgage into the periodic statement regulations would require significant alterations to the form and regulation. The Bureau believed that it is more appropriate to address consumer protections relating to reverse mortgages in a separate comprehensive rulemaking.

The Bureau received few comments on reverse mortgages—two commenters suggested that reverse mortgages should not be exempted, a third commenter suggested that reverse mortgage with escrow accounts should be brought in, and one commenter specifically praised the reverse mortgage exemption. For the reasons expressed in the proposal, the Bureau believes the consumer protections relating to reverse mortgages would be more appropriately addressed in a separate comprehensive rulemaking. Thus, the Bureau is adopting the proposed rule exempting reverse mortgages.

Legal Authority

The Bureau uses its authority under TILA sections 105(a) and (f) and Dodd-Frank Act section 1405(b) to exempt reverse mortgages from the requirement in TILA section 128(f) to provide periodic statements. For the reasons discussed above, the Bureau believes the exemption is necessary and proper under TILA section 105(a) both to effectuate the purposes of TILA, and to facilitate compliance.

Moreover, the Bureau believes, in light of the factors in TILA section 105(f), that disclosure of the information specified in TILA section 128(f)(1) would not provide a meaningful benefit to consumers of reverse mortgages. Specifically, the Bureau considers that the exemption is proper irrespective of the amount of the loan, the status of the consumer (including related financial arrangements, financial sophistication, and the importance to the consumer of the loan), or whether the loan is secured by the principal residence of the consumer. Additionally, in the estimation of the Bureau, the exemption would further the consumer protection purposes of the statute by avoiding the consumer confusion that would result by applying the same disclosure requirements to reverse mortgages as other mortgages and leaving reverse mortgages to be addressed in a comprehensive reverse mortgage rulemaking. Further, consistent with Dodd-Frank Act section 1405(b), the Bureau believes that the modification of the requirements in TILA section 128(f) to exempt reverse mortgages would improve consumer awareness and understanding and is in the interest of consumers and in the public interest.

41(e)(2) Timeshare Plans

Proposed § 1026.41(e)(2) would have clarified that timeshare plans as defined by 11 U.S.C. 101 (53D) are exempt from the periodic statement requirement. TILA section 128(f) provides that the periodic statement requirement applies to residential mortgage loans. The definition of residential mortgage loans set forth in TILA section 103(cc)(5) specifies that timeshare plans do not fall under this definition. Because no comments were received on the proposed timeshare plan exemption, this provision is being finalized without any changes.

41(e)(3) Coupon Book

Proposed § 1026.41(e)(3) would have implemented the statutory exemption in TILA section 128(f)(3) for fixed-rate loans for which the servicer provides a coupon book containing substantially similar information as found in the periodic statement. The Bureau recognizes the value of the coupon book as striking a balance between ensuring consumers receive important information, and providing a low burden method for servicers to comply with the periodic statement requirements. As such, the Bureau sought to effectuate the coupon book exemption. The nature of a coupon book (both its smaller size and static nature) creates difficulties in including substantially similar information as would be on a periodic statement. The main problem is the static nature of a coupon book. Because a coupon book may cover an entire year or more, it cannot include information that changes on a monthly basis. By contrast, a periodic statement can provide dynamic information that changes on a monthly basis. To address this problem, the Bureau proposed an exemption requiring certain information in the coupon book, certain information to be made available upon request, and certain information to be provided at delinquency.

Proposed comment 41(e)(3)–1 defined ''fixed-rate'' by reference to § 1026.18(s)(7)(iii), which defines ''fixed-rate mortgage'' as a transaction secured by a dwelling that is not an adjustable-rate or a step-rate mortgage. Proposed comment 41(e)(3)–2 explained what a coupon book is.

Information in the Coupon Book

Proposed § 1026.41(e)(3)(i) would have required the following information to be included on each coupon within the book: The payment due date, the amount due, and the amount and date that any late fee will be incurred. In specifying the amount due on each coupon, servicers would assume that all prior payments have been paid in full.

Proposed § 1026.41(e)(3)(ii) would have required the following information to be included in the coupon book itself, though it need not be on each coupon: The amount of the principal loan balance, the interest rate in effect for the loan, the date on which the interest rate may next change; the amount of any prepayment penalty that may be charged, the contact information for the servicer, and homeownership counselor information. Each of these items is discussed above in the section-by-section analysis of proposed § 1026.41(d). The coupon book would also have been required to disclose information on how the consumer may obtain the dynamic information discussed below. The information described above may be, but is not required to be, included on each coupon. Instead, it may be included anywhere in the coupon book, including on the covers, or on filler pages, as explained by proposed comment 41(e)(3)–3. Because the outstanding principal balance will typically change during the time period covered by the coupon book, proposed comment 41(e)(3)–4 clarified that a coupon book need only include the outstanding principal balance at the beginning of that time period.

Information Made Available

Due to the static nature of the coupon book, certain dynamic information that would have been required to be included on periodic statements could not have been included in coupon books. Thus, proposed § 1026.41(e)(3)(iii) would have required that certain dynamic information be made available upon the consumer's request. The servicer could provide the information orally, in writing, in person, or electronically, if the consumer consents. Proposed § 1026.41(e)(3)(iii) would have required the following dynamic information be made available to the consumer upon request: The monthly payment amount, including a breakdown showing how much, if any, will be allocated to principal, interest, and any escrow account; the total of fees or charges imposed since the last payment period; any payment amount past due; the total of all payments received since the beginning of the payment period, including a breakdown of how much, if any, of those payments was applied to principal, interest, escrow, fees and charges, and any partial payment suspense accounts; the total of all payments received since the beginning of the calendar year, including a breakdown of how much, if any, of those payments was applied to principal, interest, escrow, fees and charges, and how much is currently in any partial payment or suspense account; and a list of all the transaction activity (as defined in proposed comment 41(d)(4)–1) that occurred since the payment period.

Many commenters praised the coupon book exemption and suggested it be finalized as proposed. Other commenters expressed concerns about requirements of the coupon book exemption, saying these requirements were too expansive. Finally commenters requested clarification as to what would trigger the requirement for servicers using coupon books to provide the information that is made available.

The Bureau carefully considered the comments received on the coupon book exemption. As an initial matter, the Bureau clarifies the information made available under § 1026.41(e)(3)(iii). Such information would have to be provided to the consumer at the consumer's request. The Bureau does not believe an excessive amount of information is required on the periodic statement, and for the reasons discussed above in the section-by-section analysis of 41(d), believes the required items of information should be disclosed to the consumer. However, in light of the difficulties of having dynamic information on a coupon book, the Bureau believes this information should be provided at the consumer's request.

Delinquency Information

Proposed § 1026.41(e)(3)(iv) would have required that to qualify for the coupon book exception, the delinquency information required by proposed § 1026.41(d)(8), discussed above, must be sent to the consumer in writing for each billing cycle for which the consumer is more than 45 days delinquent at the beginning of the billing cycle. Due to the static nature of the coupon book, such information would likely have to be provided in a separate letter. Commenters expressed concern about the requirement to provide the delinquency information, saying this information would be difficult to provide, and unnecessary.

The Bureau believes the delinquency information is even more important to a consumer who is not receiving periodic statements due to the coupon book exemption. Coupon books are generally only updated on an annual basis–a consumer who becomes delinquent during the year will not have any other guaranteed source of up-to-date information on the status of their loan of the type that those receiving periodic statements will receive under the rule. For these reasons, the Bureau is adopting the rule as proposed (subject to the modifications that have been made to the portions of § 1026.41(d) that are referenced in the coupon book exemption).[134]

Legal Authority

The Bureau uses its authority under TILA section 105(a) to give effect to the coupon book exemption in TILA section 128(f)(3). TILA section 128(f)(3) provides an exemption to the periodic statement for fixed-rate loans when a coupon book that contains substantially similar information to the periodic statement is provided. Using its authority under TILA section 128(f)(1)(H), the Bureau has added certain dynamic items to the periodic statement that would be infeasible to include in a coupon book. The Bureau uses its TILA section 105(a) authority to permit use of a coupon book even where certain dynamic information is not included in the book so long as such information is made available at the consumer's request. Additionally, the delinquency information must be provided in a separate letter when appropriate, as required by § 1026.41(e)(3)(iv). The Bureau believes this exemption is necessary and proper to facilitate compliance.

41(e)(4) Small Servicers

Proposed paragraph (e)(4) would have exempted certain small servicers from the duty to provide periodic statements. The proposal defined ''small servicer'' as a servicer (i) who services 1,000 or fewer mortgage loans; and (ii) only services mortgage loans for which the servicer or an affiliate is the owner or assignee, or for which the servicer or an affiliate is the entity to whom the mortgage loan obligation was initially payable.

The Bureau proposed this exemption after careful consideration of the benefits and burdens of the periodic statement requirement. The Bureau explained that it believed that the proposed periodic statement would have been helpful to consumers because it would have provided a well-integrated communication that not only contains information about upcoming payments due, but also information about loan status, fees charged, past payment crediting, and potential resources and other useful information for consumers who have fallen behind in their payments. The Bureau believed that providing a single-integrated document, in place of a number of other communications that contain fragments of this information can be more efficient for consumers and servicers alike. And in light of the historic problems that have been reported in parts of the servicing industry, the periodic statement could be a useful tool for consumers to monitor their servicers' performance and identify any issues or errors as soon as they occur.

At the same time, the Bureau recognized that the servicing industry is not monolithic. Producing a periodic statement with the elements proposed in § 1026.41 requires sophisticated programming to place individualized information on each consumer's statement for each billing cycle. The Bureau recognized that certain small servicers would likely have to rely on outside vendors to develop or modify existing systems to produce statements in compliance with the rule. As discussed further below, the Bureau received detailed information from the Small Business Review Panel process confirming the technological and operational challenges faced by small servicers, as well as postage and other

[134] For example, paragraph 41(e)(3)(ii)(A) references the information required by paragraph 41(d)(7), which includes prepayment penalty information. Whereas the proposed rule required disclosure of the amount of any prepayment penalty, the final rule requires disclosure only of the existence of such a penalty. Accordingly, under final paragraph 41(e)(3)(ii)(A), a coupon book must likewise include only information regarding the existence of a prepayment penalty.

expenses that would be associated with providing periodic statements on an ongoing basis. Because small servicers maintain small portfolios, the Small Entity Representatives emphasized that they cannot spread fixed costs across a large number of loans the way that larger servicers can.

Where small servicers *already* have incentives to provide high levels of customer contact and information, the Bureau explained that it believed that the circumstances may warrant exempting those servicers from complying with the periodic statement requirement. In particular, small servicers that make loans in their local communities and then either hold their loans in portfolio or retain the servicing rights have incentives to maintain ''high-touch,'' customer-centric customer service models. Affirmative communications with consumers help such servicers (and their affiliates) to ensure loan performance, protect their reputations in their communities, and market other consumer financial products and services to the customers for whom they service mortgages.[135] Because those servicers generally have a long-term relationship with the consumers, their incentives with regard to charging fees and other servicing practices may be more aligned with consumer interests. These motivations help to ensure a good relationship and incentivize good customer service—including making available information about upcoming payments, fees charged and payment history, as well as other information needed by distressed consumers. At the same time, consumers generally have easy access to these small, community-based servicers, to obtain any information they desire.

In proposing the small servicer exemption, the Bureau believed that *both* of these conditions were necessary to warrant a possible exemption from the periodic statement rule—that is, that an exemption may be appropriate only for servicers that service a relatively small number of loans *and* originate the loans and retain either ownership or servicing rights. Larger servicers are likely to be much more reliant on, and sophisticated users of, computer technology to manage their operations efficiently. In such situations, implementation of the periodic statement requirement is likely to be somewhat easier to accomplish and perhaps even provide technological benefits for the servicers. Larger servicers also generally operate in a larger number of communities under circumstances in which the ''high touch'' model of customer service is not practicable. In light of this fact and the consumer benefits from integrated communications, the Bureau did not believe it would be appropriate to exempt all servicers who originate loans that they then hold in portfolio or with respect to which they retain ownership or servicing rights, without regard to size.

The proposed exemption is consistent with feedback that the Bureau received from Small Entity Representatives during the Small Business Review Panel process regarding the potentially significant burdens that would be imposed by a periodic statement requirement. Participants explained that they already provide much of the information in the proposed periodic statement through alternative means, including correspondence, more limited periodic statements, coupon books, passbooks, and telephone conversations.[136] According to the Small Entity Representatives, even where small servicers do not affirmatively provide particular items of information to consumers, they generally provide it on request. However, the participants emphasized repeatedly that consolidating all of the information into a single monthly dynamic statement would be difficult for small servicers.[137]

The Small Entity Representatives explained that, due to their small size, they generally do not maintain in-house technological expertise and would generally use third-party vendors to develop periodic statements. Due to their small size, they believed they would have no control over these vendor costs.[138] Additionally, the small servicers have smaller portfolios over which to spread the fixed costs of producing periodic statements. Such servicers stated they are unable to gain cost efficiencies and cannot effectively spread the implementation costs of periodic statements across their loan portfolios. Finally, several Small Entity Representatives stated that mailing periodic statements could cost thousands of dollars per month beyond some of their current alternative communication channels, such as coupon books or passbooks.

Small Servicer Defined

At the time of the proposal, the Bureau had only roughly estimated the amount of burden that would be imposed by the periodic statement requirement on servicers of different sizes. However, the Bureau believed that a threshold of 1,000 loans serviced may be an appropriate approximation to limit the proposed exemption to smaller servicers in the market.

In addition to the 1,000 loan threshold, the exemption from the periodic statement would have been limited to entities that exclusively service loans that they or an affiliate own or originated. The proposed exemption was limited to these servicers because of the incentives discussed above. The proposed commentary clarified the application of the small servicer definition. Proposed comment 41(e)(4)–1 stated that loans obtained by a servicer or an affiliate in connection with a merger or acquisition are considered loans for which the servicer or an affiliate is the creditor to whom the mortgage loan is initially payable.

The proposed rule also stated that in determining whether a small servicer services 1,000 mortgage loans or less, a servicer would be evaluated based on its size as of January 1 for the remainder of the calendar year. A servicer that, together with its affiliates, crosses the threshold during a calendar year would have six months or until the beginning of the next calendar year, whichever is later, to begin providing periodic statements. Proposed comment 41(e)(4)–2 gave examples for calculating when a servicer that crosses the 1,000 loan threshold would need to begin sending periodic statements. The purpose of this provision was to permit a servicer that crossed the 1,000 loan threshold a period of time (the greater of either six months, or until the beginning of the next calendar year) to bring the servicer's operations into compliance with the periodic statement requirements for which the servicer was previously exempt.

Proposed comments 41(e)(4)–3 clarified the circumstances in which subservicers or servicers who do not own the loans they are servicing, do not qualify for the small servicer exemption, even if such servicers are below the 1,000 loan threshold. Proposed comment 41(e)(4)–4 clarified that, if a servicer subservices mortgage loans for a master servicer that does not meet the small servicer exemption, the subservicer cannot claim the benefit of the exemption, even if it services 1,000 or fewer loans. The Bureau stated that permitting an exemption in such circumstances could potentially exempt a larger master servicer from the obligation to provide periodic

[135] *See* Lori J. Pinto et al., Prime Alliance Loan Servicing, *Re-Thinking Loan Serving,* at 8 (Apr. 2010) (''Pinto Paper''), *available at http://cuinsight.com/media/doc/WhitePaper_CaseStudy/wpcs_ReThinking_LoanServicing_May2010.pdf.*

[136] Small Business Review Panel Report, at 16–19.

[137] Small Business Review Panel Report, at 16–19.

[138] Small Business Review Panel Report, at 17.

statements, even if it has master servicing responsibility for several thousand loans.

Scope of the Small Servicer Exemption

The Bureau received comments both supporting and disagreeing with the small servicer exemption. Commenters who supported the small servicer exemption agreed that, for the reasons expressed in the proposed rule, the large burden on small servicers and small decrease in consumer benefits justified the small servicer exemption to the periodic statement requirement. Many of these commenters felt the scope of the exemption should be expanded, and small servicers should be exempt from other provisions of the servicing rules. A few commenters disagreed with any small servicer exemption, because they felt all consumers should benefit from the protection of the rules, regardless of their servicer's size. One commenter suggested that if small servicers are exempt, they should have strict liability for any errors.

The Bureau considered the comments objecting to a small servicer exemption to the periodic statement, but believes that, for the reasons discussed above, such an exemption is appropriate in the periodic statement context. The Bureau also considered if a small servicer exemption would be appropriate for other provisions of the mortgage servicing rules. A discussion of small servicers is included in the discussion above of each section of the rule. In general, the Bureau has decided not to exempt small servicers from obligations to which they are already subject (such as the requirement to provide an ARM adjustment notice or payoff statement or to promptly credit payments). The Bureau also has decided not to exempt small servicers from providing the new, initial ARM adjustment notice, as that notice is required only once in the life of any ARM and should not require large incremental expense to deliver for servicers who already are providing the annual adjustment notices. Finally, the small servicer exemption overall is discussed in more detail in the Dodd-Frank Act section 1022 analysis and Final Regulatory Flexibility Analysis below.

Size of the small servicer exemption. As discussed below in the Dodd-Frank Act section 1022 analysis, commenters almost unanimously stated that the size of the small servicer exemption was too small—most of the commenters suggested somewhere between 5,000 and 10,000 loans would be more appropriate. Some commenters also proposed alternative definitions of a small servicer. Some commenters suggested that only the nation's largest servicers should be required to provide the periodic statement. One commenter suggested that all portfolio loans should receive the benefit of the small servicer exemption. One commenter suggested this should be determined by the charged-off/delinquency ratio. One commenter suggested that entities exempt from the Home Mortgage Disclosure Act (HMDA) reporting requirements should be considered small servicers. Two commenters suggested that only institutions under direct Bureau supervision should be required to provide periodic statements. One commenter suggested that small servicer status should be determined solely by loan count, and the second prong of the test (requiring that the servicer owns or originated the loan) should be removed. Some commenters suggested that the small servicer definition should consider the type of entity–two suggested that State housing finance authorities should be exempt, and another commenter suggested all bona fide non-profits should be exempt. Several comments suggested that all credit unions should be exempt.

The Bureau carefully considered the comments discussing the size of the small servicer exemption. The Bureau believes that, in general, loan count is the appropriate measure for a small servicer. The Bureau prefers loan count to asset threshold because the Bureau believes scale is better defined by the number of loans rather than the size of those loans. Further, these numbers will not need to be adjusted due to inflation. While the Bureau is hesitant to exempt entire classes of entities because of concerns about keeping a level playing field, the Bureau notes that certain classes of entities face special challenges when it comes to providing periodic statements, and have presented persuasive reasons why they should be exempt. In particular, the Bureau has decided to include Housing Finance Agencies in the small servicer exemption.

In light of comments received and additional analysis of the data, the Bureau has expanded the loan threshold to 5,000 loans in the final rule. See the Dodd-Frank Act section 1022 analysis below for a full discussion of the loan threshold.

The Bureau received several requests for clarification in counting the number of loans. One commenter asked if this meant 1,000 or fewer of the type of loans covered by this requirement, or 1,000 or fewer of all types of mortgages serviced. Another commenter asked if HELOCs serviced should be included in the count. One commenter asked about interim servicing loans—loans only held for a very short period of time. The Bureau also received requests for clarifications about servicers who sell loans they originated as servicing released, and about creditors who qualify for the exemption and if they may continue to send their current periodic statements which do not meet all the requirements of the periodic statement provisions.

The loan threshold is determined by counting loans that would be subject to the periodic statement requirement, thus any HELOCs would not be included in the count (because HELOCs are not subject to the periodic statement requirement). The Bureau notes that if a servicer sells a loan servicing released, it would no longer be a servicer for that loan, and thus that loan would have no effect on the determination of small servicer status. Finally, the Bureau notes that a small servicer not subject to the periodic statement requirements of § 1026.41 would be free to continue sending periodic statements at its discretion, regardless of if those periodic statements conform to the periodic statement requirements. For these reasons, the Bureau is adopting the proposed exemption for periodic statements, but modifying the definition of small servicer in the manner discussed above.

Housing Finance Agencies

Certain commenters, including the National Council of State Housing Agencies, requested that the Bureau exempt loans financed by State housing finance agencies. These commenters observed that State housing finance agencies operate as public entities in every State and that, as instrumentalities of government, they have a unique mission to provide safe and affordable financing. In addition, the commenters stated, loans financed by such agencies tend to perform better than other loans.

The Bureau agrees with the commenters that the risk of exempting loans from high-cost mortgage coverage where a State housing finance authority is the creditor should be low, given the agencies' mission to provide safe and affordable financing to consumers and the protections provided by the agencies' lending practices. The burdens placed on such agencies would take away from their mission and might render the agencies unable to originate the loans. In turn, consumers likely would turn to more expensive forms of credit, such as credit cards or unsecured debt. The Bureau notes that it recognized the special status of State housing finance agencies in the 2013

HOEPA Final Rule which exempts such agencies from the provision in § 1026.32(a)(5) prohibiting a creditor from being affiliated with a homeownership counseling entity.

Upon further consideration, the Bureau is adopting in the final rule an exemption for mortgage transactions originated by a Housing Finance Agency, as that term is defined in 24 CFR 266.5. The Bureau uses this definition to coordinate with the similar exemption in the 2013 HOEPA Final Rule. The Bureau is adopting this exemption pursuant to its authority under TILA section 105(a) to exempt all or any class of transactions where necessary or proper to effectuate the purposes of TILA, to prevent evasion, or to facilitate compliance. The Bureau believes that this exemption is necessary and proper to effectuate the purposes of TILA.

Legal authority. The Bureau exercises its authority under TILA section 105(a) and (f), and Dodd-Frank Act section 1405(b) to exempt small servicers from the periodic statement requirement under TILA section 128(f). For the reasons discussed above, the Bureau believes the exemption is necessary and proper under TILA section 105(a) to facilitate compliance. As discussed above, it would be very expensive for small servicers to incur the initial costs of setting up a system to send periodic statements, as a result, such servicers may choose to exit the market. In addition, consistent with TILA section 105(f) and in light of the factors in that provision, the Bureau believes that requiring small servicers to comply with the periodic statement requirement specified in TILA section 128(f) would not provide a meaningful benefit to consumers in the form of useful information or protection. The Bureau believes that the business model of small servicers ensures their consumers already receive the necessary information, and that requiring them to provide periodic statements would impose significant costs and burden. Specifically, the Bureau believes that the exemption is proper without regard to the amount of the loan, the status of the consumer (including related financial arrangements, financial sophistication, and the importance to the consumer of the loan), or whether the loan is secured by the principal residence of the consumer. In addition, consistent with Dodd-Frank Act section 1405(b), for the reasons discussed above, the Bureau believes that the modification of the requirements in TILA section 128(f) to exempt small servicers would further the consumer protection purposes of TILA.

Appendix H to Part 1026

The Bureau is exercising its authority under TILA section 105(c) to issue model and sample forms for § 1026.20(c) and (d).

Appendix H–4(D) to Part 1026

The Bureau is exercising its authority under TILA section 105(c) to issue model and sample forms for § 1026.20(c) and (d).

Appendices G and H—Open-End and Closed-End Model Forms and Clauses

Proposed revisions to appendices G and H–1 would have added the appendix sections that illustrate examples of the model forms and sample forms for the ARM disclosures proposed by § 1026.20(c) and (d) to the list of appendix sections illustrating examples of other model disclosures required by Regulation Z which format may not be changed by creditors. It also would have clarified that reference to creditors in the commentary would have been applicable to creditors, assignees, and servicers with regard to § 1026.20(c) and (d). The final rule is issued without this proposed revision and, thus, the comment is unchanged. Because both § 1026.20(c) and (d) explicitly state that their requirements, as well as those of other regulations in subpart C that govern § 1026.20(c) and (d), apply to creditors, assignees, and servicers, including the reference in this commentary would be redundant and unnecessary. For a discussion of the decision to remove § 1026.20(c) and (d) from the list of model and sample forms that do not permit formatting changes, see the section-by-section analysis of § 1026.20(c)(3)(i) and (d)(3)(i).

Appendix H—Closed-End Model Forms and Clauses–7

The Bureau is issuing appendix H–7 with technical changes to conform to the final rule.

Appendix H—Closed-End Model Forms and Clauses–7(i)

Proposed revisions to appendix H–7(i) would have included § 1026.20(d), as well as § 1026.20(c), as the types of models illustrated in this appendix. The proposed revision also would have added text so that the provision stated that appendix H–4(D) included examples of the two types of model forms for adjustable-rate mortgages: § 1026.20(d) initial adjustment notices and § 1026.20(c) payment change notices for adjustments resulting in corresponding payment changes. Having received no comments on this topic, the Bureau is adopting the commentary as proposed.

VI. Effective Date

This final rule is effective on January 10, 2014. The Bureau believes that this approach is consistent with the timeframes established in section 1400(c) of the Dodd-Frank Act and, on balance, will facilitate the implementation of the Title XIV Rulemakings' overlapping provisions, while also affording covered persons sufficient time to implement the more complex or resource-intensive new requirements. Certain of the regulations set forth in the Final Servicing Rules are required under title XIV. Specifically, section 1420 of the Dodd-Frank Act, which requires the periodic statement, states that the Bureau ''shall develop and prescribe a standard form for the disclosure required under this subsection, taking into account that the statements required may be transmitted in writing or electronically.'' 15 U.S.C. 1638(f)(2). Other regulations set forth in the Final Servicing Rules, while implementing amendments under title XIV of the Dodd-Frank Act, are *not* regulations required under title XIV. Pursuant to section 1400(c)(2) of the Dodd-Frank Act, the effective dates of these regulations need not be within one year of issuance.

The Bureau received approximately 60 comments from industry participants with respect to the appropriate effective date. As stated above, comments from consumer advocacy groups generally urged earlier effective dates. A number of industry trade associations, as well as a large bank and a small credit union indicated that the Bureau should provide a sufficient amount of time, but did not express an opinion regarding an appropriate timeframe. The majority of servicers, including large and small banks, non-bank servicers, and numerous credit unions, as well as their trade associations, indicated that the Bureau should establish an effective date of between 12 and 18 months after issuance.[139] Some large banks, a bank servicer, numerous trade associations, the SBA, and the GSEs stated that the Bureau should consider an implementation period of approximately 18–24 months for certain of the requirements. Further, three banks and numerous trade associations for banks and manufactured housing servicers stated that the Bureau should consider an effective date between 24 and 36 months after issuance. Each of the industry commenters generally stated that the requested time was

[139] In addition, a force-placed insurer stated that it would be require between 6–12 months to implement regulations relating to force-placed insurance requirements.

necessary to effectively implement the regulations because of the complexity of the proposed rules, the impact on systems changes and staff training, and the cumulative impact of the proposed mortgage servicing rules when combined with other requirements imposed by the Dodd-Frank Act or proposed by the Bureau. These letters provide some basis to believe that implementing the regulations within 12 months is challenging for many firms. They do not establish, however, that implementation in 12 months is impracticable.

For the reasons already discussed above, the Bureau believes that an effective date of January 10, 2014 for this final rule and most provisions of the other title XIV final rules will ensure that consumers receive the protections in these rules as soon as reasonably practicable, taking into account the timeframes established by the Dodd-Frank Act, the need for a coordinated approach to facilitate implementation of the rules' overlapping provisions, and the need to afford covered persons sufficient time to implement the more complex or resource-intensive new requirements.

VII. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[140] The Proposal set forth a preliminary analysis of these effects, and the Bureau requested and received comments on the topic. In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, HUD, the FHFA, the Federal Trade Commission, and the Federal Emergency Management Agency, with respect to consistency with any prudential, market, or systemic objectives administered by such agencies. The Bureau also held discussions with or solicited feedback from the U.S. Department of Agriculture Rural Housing Service, the Farm Credit Administration, the FHA, and the VA regarding the potential impacts of the final rule on those entities' loan programs.

In this rulemaking, the Bureau amends Regulation Z, which implements TILA, and the official interpretation to the regulation, as part of its implementation of the Dodd-Frank Act amendments to TILA's mortgage servicing rules. The amendments to Regulation Z implement Dodd-Frank Act sections 1418 (initial interest rate adjustment notice for ARMs), 1420 (periodic statements), and 1464 (prompt crediting of mortgage payments and response to requests for payoff amounts). The final rule also revises certain existing regulatory requirements for disclosing rate and payment changes to adjustable-rate mortgages in current § 1026.20(c).

Elsewhere in today's **Federal Register**, the Bureau is also publishing the 2013 RESPA Servicing Final Rule that implements Dodd-Frank Act section 1463. The RESPA rule implements requirements regarding procedures for obtaining force-placed insurance; procedures for investigating and resolving alleged errors and responding to requests for information; reasonable information management policies and procedures; early intervention for delinquent borrowers; continuity of contact for delinquent borrowers; and loss-mitigation procedures.

As an initial matter, in response to a comment, the Bureau considers whether the statute explicitly or implicitly addresses a market failure. Part II.A of the final rule (''Overview of the Mortgage Servicing Market and Market Failures'') discusses the servicing market and servicer incentives. As noted in the proposed rule, a fundamental feature of the market for servicing is that borrowers generally do not choose their own servicers.[141] It is therefore difficult for borrowers to protect themselves from shoddy service or harmful practices. A borrower may select a servicer at origination by choosing a lender that pledges to service the loans that it originates. However, relatively few lenders commit to servicing the loans that they originate, most borrowers do not choose a servicer at origination, and some borrowers who do choose a servicer at origination may find that the servicer retains a subservicer that interacts with the borrower. A borrower may refinance a mortgage loan to receive a new servicer. However, refinancing is an expensive and generally impractical way for a homeowner to obtain a new servicer, and, similar to origination, the borrower does not generally select the new servicer.

The Bureau recognizes that certain servicers have incentives to service well. Servicers that rely on a local reputation—their ability to attract new consumers depends on how well they treat current consumers—have incentives to provide high quality servicing. This describes many of the small servicers that the Bureau consulted as part of a process required under SBREFA. They described their businesses as requiring a ''high touch'' model of customer service, both to ensure loan performance and to maintain a strong reputation in their local communities. The vast majority of smaller servicers are community banks and credit unions, which tend to operate in narrowly defined geographic areas, depend deeply on the economies of these communities for their profitability, offer a range of products and services in both deposits and loans, are known for a ''relationship'' model that depends on repeat business to obtain more deposits and extend more loans, and could suffer significant harm to their business from any major failure to treat customers properly because they are particularly vulnerable to ''word of mouth.'' These small servicers also generally service only loans they either originated or hold on portfolio.

The Bureau believes that servicers that service relatively few loans, all of which they either originated or hold on portfolio, generally have incentives to service well: foregoing the returns to scale of a large servicing portfolio indicates that the servicer chooses not to profit from volume, and owning or having originated all of the loans serviced indicates a stake in either the performance of the loan or in an ongoing relationship with the borrower.

In general, however, mortgage servicing is influenced by the absence of avenues through which consumers can effectively reward or penalize servicers for the quality of servicing. A consumer cannot readily leave a servicer if the quality of servicing proves to be unsatisfactory, and the consumer cannot generally control the selection of the new servicer. Consumers also generally do not have other ways of imposing financial consequences on servicers for poor servicing. Markets are incomplete between consumers and servicers, and such incomplete markets are a form of market failure. This market failure leaves many servicers with only limited incentives to engage in certain activities of value to consumers.[142]

[140] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a 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.

[141] *See* 77 FR 57318, 57321 (Sept. 17, 2012).

[142] *See* Joseph E. Stiglitz. *Economics of the Public Sector,* at 85 ch.4 (3d ed., 2000). An alternative way to view the market failure is that servicers are both the agents of investors and, as a practical matter, monopoly providers of information to consumers about details of the loan and consumer payments. Market failures need not be mutually exclusive.

Of particular relevance to this rulemaking is the fact that servicers receive very little benefit from developing disclosures that are valuable to consumers. That is to say, the market provides servicers with limited incentives to conduct (or pay others to conduct) the research necessary to discover information that consumers find useful at different decision points and the ways to present this information to consumers. Servicers do have an incentive to provide borrowers with information and services that keep collection costs low. Thus, they have an incentive to make sure consumers know the payment due in each period, the date the payment is due, and where to send it. Servicers also have some incentive to limit customer inquiries, and so servicers may provide additional information that consumers want. The Bureau knows that certain servicers have experimented with improving their disclosures (and these instances are discussed below). However, this work does not appear to be widespread and the Bureau received only a small number of comments about efforts to improve disclosures. These facts are consistent with the fact that servicers receive minimal consequential feedback from consumers about the quality of servicing in general and the quality of servicing disclosures in particular. The market failure in mortgage servicing provides an economic rationale for establishing national servicing standards, including standards for disclosures, with a limited number of exceptions.

Congress included in the Dodd-Frank Act the mortgage servicing provisions described above in response to pervasive and profound consumer protection problems in mortgage servicing. The new protections in the rules promulgated under TILA and RESPA will significantly improve the transparency of mortgage loans after origination, provide substantive protections to consumers, enhance consumers' ability to obtain information from and dispute errors with servicers, and provide consumers, particularly distressed and delinquent consumers, with better customer service.

B. Provisions To Be Analyzed

The analysis below considers the benefits, costs, and impacts of the following major provisions:

1. Changes in the format, content, and timing of the existing interest rate adjustment disclosures for most closed-end adjustable-rate mortgages as required by revised § 1026.20(c).

2. New initial interest rate adjustment disclosures for most closed-end adjustable-rate mortgages as required by new § 1026.20(d).

3. Prompt crediting of payments for consumer credit transactions (both open- and closed-end) secured by the consumer's principal dwelling and response to requests for payoff amounts from consumers with consumer credit transactions (both open- and closed-end) secured by a dwelling as required by revised § 1026.36(c).

4. New periodic statement disclosure requirements for most consumer credit transactions secured by a dwelling as required by new § 1026.41.

With respect to each major provision, the analysis considers the benefits and costs to consumers and covered persons, and in certain instances considers other impacts. The analysis also addresses comments the Bureau received on the proposed Dodd-Frank Act section 1022 analysis as well as certain other comments on the benefits or costs of provisions of the proposed rule when doing so is helpful to understanding the Dodd-Frank Act section 1022 analysis. Comments that mention the benefits or costs of a provision of the proposed rule in the context of commenting on the merits of that provision are addressed in the section-by-section analysis of that provision. The analysis also addresses certain alternative provisions that were considered by the Bureau in the development of the proposed rule, the final rule, or in response to comments.

C. Data and Quantification of Benefits, Costs and Impacts

Section 1022 of the Dodd-Frank Act requires that the Bureau, in adopting the rule, consider potential benefits and costs to consumers and covered persons resulting from the rule, including the potential reduction of access by consumers to consumer financial products or services resulting from the rule, as noted above; it also requires the Bureau to consider the impact of proposed rules on covered persons and the impact on consumers in rural areas. These potential benefits and costs, and these impacts, however, are not generally susceptible to particularized or definitive calculation in connection with this rule. The incidence and scope of such potential benefits and costs, and such impacts, will be influenced very substantially by economic cycles, market developments, and business and consumer choices that are substantially independent from adoption of the rule. No commenter has advanced data or methodology that it claims would enable precise calculation of these benefits, costs, or impacts. Moreover, the potential benefits of the rule on consumers and covered persons in creating market changes anticipated to address market failures are especially hard to quantify.

In considering the relevant potential benefits, costs, and impacts, the Bureau has utilized the available data discussed in this preamble, where the Bureau has found it informative, and applied its knowledge and expertise concerning consumer financial markets, potential business and consumer choices, and economic analyses that it regards as most reliable and helpful, to consider the relevant potential benefits and costs, and relevant impacts. The data relied upon by the Bureau also include the public comment record established by the proposed rule. The Bureau recognizes that some parties may have different perspectives or consider potential benefits and costs differently.

However, the Bureau notes that for some aspects of this analysis, there are limited data available with which to quantify the potential costs, benefits, and impacts of the final rule. Regarding costs to covered persons, the Bureau would need data on the one-time and ongoing costs of modifying existing disclosures and creating new disclosures. Further, as discussed below, these costs depend on the size of the servicer, whether it prepares disclosures in-house or uses a vendor, and (if it uses a vendor) the terms of the contract with the vendor. Some of this data is proprietary and not generally available. Quantifying consumer benefits would require data on the impact of the new disclosures on housing finance decisions like refinancing and the cost savings and other benefits of these decisions.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the final rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts. Where possible, the Bureau has made quantitative estimates based on these principles and the data that are available. For the reasons stated in this preamble, the Bureau considers that the rule as adopted faithfully implements the purposes and objectives of Congress in the statute. Based on each and all of these considerations, the Bureau has concluded that the rule is appropriate as an implementation of the Dodd-Frank Act.[143]

[143] The Bureau noted in the proposals associated with the Title XIV Rulemakings that it sought to obtain additional data to supplement its consideration of the rulemakings, including additional data from the National Mortgage License System (NMLS) and the NMLS Mortgage Call

Continued

D. Baseline for Analysis

The above-discussed amendments to TILA in the Dodd-Frank Act are self-effectuating, and the Dodd-Frank Act generally does not require the Bureau to adopt regulations to implement these amendments. For example, certain provisions of the final rule regarding the new initial interest rate adjustment notice and the new periodic statement disclosure implement self-effectuating amendments to TILA. Thus, many costs and benefits of these provisions arise largely or entirely from those amendments, not from the final rule. These provisions of the final rule provide substantial benefits to servicers, compared to allowing the TILA amendments to take effect without implementing regulations, by clarifying parts of those amendments that are ambiguous. Greater clarity on these amendments, as provided by the final rule, should reduce the compliance burdens on covered persons by, for example, reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation.[144]

Dodd-Frank Act section 1022 permits the Bureau to consider the benefits, costs, and impacts of the final rule solely compared to the state of the world in which the statute takes effect without implementing regulations. To provide the public better information about the benefits and costs of the statute, however, the Bureau has chosen to consider the benefits, costs, and impacts of the new initial interest rate adjustment notice and the periodic statement disclosure against a pre-statutory baseline (*i.e.,* to consider the benefits, costs, and impacts of the relevant provisions of the Dodd-Frank Act and the regulation combined). The Bureau has discretion in future rulemakings to choose the most appropriate baseline for that particular rulemaking.

The provisions of the final rule regarding prompt crediting of payments and response to requests for payoff amounts also implement self-effectuating amendments to TILA and the benefits, costs, and impacts of these provisions are also considered against a pre-statutory baseline. However, these amendments to TILA largely codify existing Regulation Z provisions in § 1026.36(c). Thus, the pre-statute and post-statute baselines are substantially the same. The final rule largely clarifies servicer[145] duties that are ambiguous under the statute and existing regulations.

Finally, the provisions regarding the § 1026.20(c) disclosure for adjustable-rate mortgages impose obligations on servicers[146] that are authorized, but not required, under TILA sections 105(a) and 128(f) and Dodd-Frank Act section 1405(b). Accordingly, with respect to § 1026.20(c), the Bureau considers the benefits, costs, and impacts of the provisions against the baseline provided by the current provisions of § 1026.20(c).

E. Coverage of the Final Rule

Each provision covers certain consumer credit transactions secured by a dwelling, as described further in each section below.

Size of the Small Servicer Exemption

As discussed above, the Bureau believes that servicers that service relatively few loans, all of which they either originated or hold on portfolio, generally have incentives to service well: Foregoing the returns to scale of a large servicing portfolio indicates that the servicer chooses not to profit from volume, and owning or having originated all of the loans serviced indicates a stake in either the performance of the loan or in an ongoing relationship with the borrower. The vast majority of smaller servicers are community banks and credit unions, which tend to operate in narrowly defined geographic areas, depend deeply on the economies of these communities for their profitability, offer a range of products and services in both deposits and loans, are known for a ''relationship'' model that depends on repeat business to obtain more deposits and extend more loans, and could suffer significant harm to the business from any major failure to treat customers properly because they are particularly vulnerable to ''word of mouth.'' These small servicers generally maintain ''high-touch,'' customer-centric customer service models. They also generally service only loans they either originated or hold on portfolio.

Where small servicers already have incentives to provide high levels of customer contact and information, the Bureau believes that the circumstances warrant exempting those servicers from complying with certain provisions. For community banks and credit unions in particular, affirmative communications with consumers help them (and their affiliates) to ensure loan performance, market other consumer financial products and services to the customers for whom they service mortgages and have a relationship, and protect their reputations in their local communities.[147] Because these servicers generally have a long-term relationship with their customers, their incentives with regard to charging fees and other servicing practices tend to be more aligned with consumer interests. At the same time, consumers generally have easy access to these small community-based servicers to obtain any information they desire.

The Bureau believes that these two conditions are necessary to warrant a possible exemption from a provision of the rule—that is, that an exemption may be appropriate only for servicers that service a relatively small number of loans and either own or originated the loans they service. Larger servicers are likely to be much more reliant on, and sophisticated users of, computer technology in order to manage their operations efficiently. In such situations, compliance is likely to be somewhat easier to accomplish. Further, larger servicers also generally operate in a larger number of communities under circumstances in which the ''high touch'' model of customer service is not practical or service many loans in which they do not have as much a stake in the long-term performance.

In order to implement the small servicer exemption, the Bureau defines a small servicer to be any servicer that, together with any affiliates, services 5,000 or fewer mortgages loans, all of which the servicer or affiliates

Report, loan file extracts from various lenders, and data from the pilot phases of the National Mortgage Database. Each of these data sources was not necessarily relevant to each of the rulemakings. The Bureau used the additional data from NMLS and NMLS Mortgage Call Report data to better corroborate its estimate of the contours of the non-depository segment of the mortgage market. The Bureau has received loan file extracts from three lenders, but at this point, the data from one lender is not usable and the data from the other two is not sufficiently standardized nor representative to inform consideration of the final rules. Additionally, the Bureau has thus far not yet received data from the National Mortgage Database pilot phases. The Bureau also requested that commenters submit relevant data. All probative data submitted by commenters were discussed in this document.

[144] In response to a comment, the Bureau notes that it is focused here on the fact that regulatory provisions that clarify ambiguous statutory provisions mitigate certain compliance costs associated with uncertainty over what the statutory provisions require. While it is possible that some clarifications would put greater burdens on servicers as compared to what the statute would ultimately be found to mandate, the Bureau believes that the rule's clarifying provisions generally mitigate burden.

[145] Reference in parts VII, VIII, and IX to ''servicers'' with regard to the final rule for requests for payoff amounts means creditors, assignees, and servicers.

[146] Reference in parts VII, VIII, and IX to ''servicers'' with regard to the final rules for adjustable-rate mortgages means creditors, assignees, and servicers.

[147] *See* Pinto Paper, at 8.

originated or own.[148] The definition incorporates the requirement that the servicer or affiliates originated or own the loans because, as explained above, the Bureau believes that this is a key indicator of servicers that generally have incentives to provide high levels of customer contact and information. To develop the loan count threshold, the Bureau computed loan counts for insured depository institutions using data on aggregate unpaid principal balance and a measure the Bureau derived for the average loan unpaid principal balance at insured depositories.[149] The Bureau's methodology takes into account the fact that servicers that service smaller numbers of loans also tend to service loans with smaller unpaid principal balances. For example, the Bureau finds that the average unpaid principal balance on mortgage loans at insured depositories and credit unions is about $160,000, but it is only about $80,000 at insured depositories and credit unions with under $1 billion in assets.

The Bureau believes that the 5,000 mortgage loan threshold further identifies the group of servicers that make loans only or largely in their local communities or more generally have incentives to provide high levels of customer contact and information. The Bureau also believes, in light of the available data, that no other threshold is superior in balancing potential over-inclusion and under-inclusion. With the threshold set at 5,000 loans, the Bureau estimates that over 98% of insured depositories and credit unions with under $2 billion in assets fall beneath the threshold. In contrast, only 29% of such institutions with over $2 billion in assets fall beneath the threshold and only 11% of such institutions with over $10 billion in assets do so. Further, over 99.5% of insured depositories and credit unions that meet the traditional threshold for a community bank—$1 billion in assets—fall beneath the threshold.[150] The Bureau estimates there are about 60 million closed-end mortgage loans overall, with about 5.7 million serviced by insured depositories and credit unions that qualify for the exemption.[151]

The Bureau believes that the insured depositories and credit unions that fall below the 5,000 loan threshold consist overwhelmingly of entities that make loans in their local communities and have incentives to provide high levels of customer contact and information. Further, while some such entities may service more than 5,000 loans, the Bureau believes that relatively few do, so expanding the loan count above 5,000 is more likely to include entities that use a different servicing model. If the loan count threshold were set at 10,000 mortgage loans, for example, over 99.5% of insured depositories and credit unions with under $2 billion in assets would fall beneath the threshold. However, 50% of insured depositories with over $2 billion in assets and 20% of those with over $10 billion in assets would fall beneath the threshold. The Bureau recognizes that some of these servicers may not qualify as small servicers because some may not own or have originated all of the loans they service. However, the Bureau believes that these figures give a fair representation of the types of servicers that would qualify as small servicers given the respective thresholds.[152]

The Bureau concludes that the 5,000 mortgage loan threshold, coupled with the requirement to service only loans owned or originated, provides a reasonable balance between the goal of including a substantial number of servicers that make loans only or largely in their local communities or more generally have incentives to provide high levels of customer contact and information and excluding servicers that use a different, less personal business model. The Bureau further believes that it is appropriate for a definition of small servicers, for purposes of an exemption to servicing rules, to include conditions specifically associated with the incentives and business model of servicers, such as owning or originating all loans. There is no perfect way, however, to identify servicers that have chosen a business model in which an essential component is providing high levels of customer contact and information.[153]

Finally, the Bureau estimates that there are about 13.9 million closed-end mortgage loans serviced by non-depositories. The data is not available with which to accurately estimate the number of exempt non-depository servicers or the number of loans they service. However, the Bureau believes that the number of loans serviced is a small percentage of this total given the financial advantages of servicing large numbers of loans. The Bureau has therefore decided not to distinguish, in the definition of a small servicer, whether a mortgage servicer is an insured depository or credit union or has some other business form.

Size of the Small Servicer Exemption in the Proposed Rule

The Bureau proposed 1,000 mortgage loans for the threshold in the definition of a small servicer. At the time of the proposal, the Bureau understood that a significant number of servicers that maintained ''high touch'' customer service models would have qualified for

[148] The 5,000-loan threshold reflects the purposes of the exemption that the rule establishes for these servicers and the structure of the mortgage servicing industry. The Bureau's choice of 5,000 in loans serviced for purposes of Regulation Z does not imply that a threshold of that type or of that magnitude would be an appropriate way to distinguish small firms for other purposes or in other industries.

[149] Credit Unions report the number and aggregate balance of mortgages held in portfolio on their Call Report. Using these reports the Bureau calculated the average unpaid principal balance of portfolio mortgages by State for credit unions with less than $1 billion in assets and applied the State specific figures to banks and thrifts under $10 billion in assets. For banks and thrifts with over $10 billion in assets, the Bureau relied on the OCC Mortgage Metrics Report, which showed an average unpaid principal balance estimate of $175,000. For securitized loans, the Bureau relied on the FHFA's Home Loan Performance database, which provides data by size of securitized loan book; this yielded average unpaid principal balances ranging from $141,000 to $189,000.

[150] The Bureau notes, however, that the FDIC recently released a new set of empirical criteria for identifying community banks in which some banks with under $1 billion in assets are excluded and some banks with over $1 billion in assets are included. *See* Fed. Deposit Ins. Corp., *FDIC Community Banking Study,* at 1–5 (Dec. 2012), *available at http://www.fdic.gov/regulations/resources/cbi/study.html.* The study is somewhat critical of using a $1 billion threshold to define community banks, as has been traditional. The Bureau's rule equates roughly to a $2 billion threshold to the extent that the rule covers 98% of insured depositories and credit unions with fewer assets.

[151] To obtain estimates of loan counts, the Bureau aggregated mortgage loan counts obtained or derived from the FHFA ''Home Loan Performance'' data described above, the Board's Flow of Funds Accounts of the United States (statistical release z.1), the data from the credit union Call Report and the bank and thrift Call Report, the CoreLogic mortgage loan servicing data set, and the BBx data set from BlackBox Logic.

[152] The Bureau believes that almost all insured depositories and credit unions that service 5,000 or fewer loans own or originated those loans. Entities servicing loans they did not originate and do not own most likely view servicing as a stand-alone line of business, and they would choose to service substantially more than 5,000 loans in order to obtain a profitable return on their investment in servicing. To the extent the assumption does not hold, it is more likely not to hold for insured depositories and credit unions servicing more than 5,000 loans.

[153] The Bureau received comments from two credit unions recommending a 5,000 mortgage loan threshold. Two bank trade associations recommended a 10,000 loan threshold, one bank recommended 15,000, and the Small Business Administration recommended 5,000 to 10,000. One bank trade association recommended that a small servicer should be either any servicer that services only loans that it owns or originated, without limit, or any servicer that services 10,000 loans or fewer. For the reasons described above, the Bureau believes that the 5,000 loan count threshold coupled with the requirement that the servicer owns or originated the loans provide an appropriate definition of small servicer for purposes of the exemption.

the proposed exemption. This understanding was based in part on estimates of the number of loans serviced by banks, thrifts and credit unions derived from data on the aggregate unpaid principal balance in Call Reports and an assumed average unpaid principal balance on mortgage loans of $175,000.[154]

A number of industry commenters provided information about the unpaid principal balance on mortgage loans at their institutions and indicated that the average unpaid principal balance was much smaller. One commenter stated that the principal balance on its loans at origination was less than half the Bureau's figure; for 2011 originations the principal balance was $81,600. Another commenter stated that its average loan amount was about $56,000 and that the average mortgage in the State of Oklahoma mid-2012 was about $106,000. Yet another commenter stated that the median size of the loans on its portfolio was about $70,000. One commenter stated that the Bureau's approach penalized servicers that specialize in moderately priced homes. The Bureau seriously considered these comments. In response, the Bureau developed the methodology described above to estimate the number of loans serviced by insured depositories and credit unions.

F. Potential Benefits and Costs to Consumers and Covered Persons

1. Changes in the Format, Content, and Timing of the Regulation Z § 1026.20(c) Disclosure for Adjustable-Rate Mortgages

Under current § 1026.20(c), a notice of interest rate adjustment for variable-rate transactions subject to § 1026.19(b) must be mailed or delivered to consumers whose payments will change as a result of an interest rate adjustment at least 25, but no more than 120, calendar days before a payment at a new level is due. Creditors must also provide an annual disclosure to consumers whose interest rate, but not mortgage payment, changes during the year covered by the disclosure. The final rule eliminates the annual disclosure. Thus, the discussion below relates exclusively to the payment change disclosure required under § 1026.20(c).[155] The final rule also changes the minimum time for providing advance notice to consumers from 25 days to 60 days before the first payment at a new level is due, with an accommodation for ARMs with look-back periods of less than 45 days originated before January 10, 2015. The maximum time for advance notice remains the same: 120 days prior to the due date of the first payment at a new level. The revised § 1026.20(c) disclosure also contains additional content, as described in part V. The format and content of the revised § 1026.20(c) disclosure closely tracks the format and content of the initial interest rate adjustment disclosure under § 1026.20(d), discussed below.

Potential benefits to consumers. Regarding the change in timing, the Bureau does not believe that the current minimum of 25 days provides sufficient time for consumers to pursue meaningful alternatives such as refinancing, home sale, loan modification, forbearance, or deed-in-lieu of foreclosure. Nor does this minimum provide sufficient time for consumers to adjust household finances to cover new payments. The Board's 2009 Closed-End Proposal stated that HMDA data for the years 2004 through 2007 suggested that a requirement to provide ARM adjustment disclosures 60, rather than 25, days before the first payment at a new level is due would more closely reflects the time needed for consumers to refinance a loan.[156]

The benefits to consumers from the content of the revised § 1026.20(c) disclosure are measured against a baseline provided by the current § 1026.20(c) disclosure. Thus, the benefits of the rule flow entirely from changes to the disclosure; for the sake of clarity, however, the discussion mentions certain key features of the disclosure that are unchanged. For qualitative analysis, the revisions to the § 1026.20(c) disclosure may be broadly categorized as facilitating (a) the choice of an alternative to making the new payment, including refinancing; (b) the budgeting of household resources; and (c) the accumulation of equity by certain consumers (*i.e.,* those with interest-only or negatively-amortizing payments). Individual items in the disclosure may provide more than one of these benefits. The benefits of these disclosures are discussed further in part V.

The current and revised § 1026.20(c) disclosures both provide the current and upcoming interest rate and payment (not an estimate) and the date the first payment at the new rate is due. This may alert the consumer to a problem with affordability and the need to assess alternatives. However, only the revised disclosure provides notice of a prepayment penalty and explains the circumstances under which any prepayment penalty may be imposed. This notice may be useful to some consumers facing a problem with affordability and needing to assess alternatives. For example, the notice may prompt a consumer who is unclear about whether a penalty is still in effect to contact her servicer; a consumer must know if a penalty exists and (if so) the amount to properly assess alternatives that require paying off the existing loan.

In addition, the disclosure of the persistent features of the loan facilitates consumer evaluation of the longer-term benefits of the loan compared to alternatives. For instance, the revised disclosure includes an explanation of how the new interest rate and payment are determined, including the index or formula used and any adjustment to the index such as any margin added. The revised disclosure also states any limits on the interest rate or payment increase at each adjustment and over the life of the loan and the earliest date at which any foregone interest increase could be applied. In contrast, the current § 1026.20(c) disclosure provides only the index value without any explanation and does not provide information about limits on interest rate or payment increases. The additional information facilitates comparisons with alternative loans and any reevaluation of the consumer's housing finance decisions and comparisons with alternative financing options. All of this information is also useful to consumers for the budgeting of household resources.

The revised § 1026.20(c) disclosure provides additional information to consumers with interest-only or negatively-amortizing loans that addresses the accumulation of equity. For these loans, the revised disclosure states the amount of the current and new payment allocated to pay principal, interest, and taxes and insurance in escrow, as applicable, and information on how these payments will affect the balance of the loan. If negative amortization will occur due to the interest rate adjustment, the disclosure states the payment required to fully amortize the loan at the new interest

[154] This is the average unpaid principal balance for first-lien residential mortgages at the largest national banks, which at the time of the report accounted for 63 percent of all outstanding mortgages; *See* Office of the Comptroller of the Currency, *OCC Mortgage Metrics Report, Second Quarter 2011* (Sept. 2011) ("OCC Mortgage Metrics Report"), *available at http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics-2011/mortgage-metrics-q2-2011.pdf.*

[155] As discussed in part V, the Bureau believes that the annual notice is duplicative given that the periodic statement required by § 1026.41 provides much of the same information. Thus, eliminating the annual notice reduces costs for servicers with little or no loss in benefits to consumers.

[156] A comment on timing is discussed below under costs to consumers.

rate. The disclosure alerts consumers with these types of loans to features that bear on equity accumulation, and it provides this information at a time when these consumers may be evaluating their mortgage terms and considering refinancing. In contrast, the current § 1026.20(c) disclosures provide only the loan balance and information about the payment required to fully amortize the loan at the new interest rate if the interest rate adjustment caused the negative amortization.

As discussed in part V, the Bureau recognizes that the benefit to consumers of information in a particular disclosure may be attenuated to the extent that the same information is available in other disclosures that are provided at the same (or nearly the same) time.[157] In particular, the periodic statement will provide consumers with some of the same information as that in the revised § 1026.20(c) disclosure. However, the differences in the timing of the two disclosures makes the periodic statement less useful than the revised § 1026.20(c) disclosure for facilitating comparisons between the current and new payment before the new payment is due. Similarly, while the periodic statement presents the new payment due and the amount paid the previous month, it does not compare the two as explicitly as the revised § 1026.20(c) disclosure does. Finally, since the revised § 1026.20(c) disclosure is provided only if the payment changes, the benefit to consumers from receiving important information on both disclosures is likely greater than the benefit of receiving this information only on the periodic statement disclosure.[158]

The Bureau is also prescribing formatting requirements for the § 1026.20(c) disclosure. As discussed above, these requirements benefit consumers by facilitating consumer understanding of the information in the disclosures. The final rule provides that the disclosures must be provided in the form of a table and in the same order as, and with headings and format substantially similar to, certain model forms provided with the final rule. The Bureau's testing of certain information in the § 1026.20(d) notice (that is the same as certain information in the § 1026.20(c) notice) showed that the participants readily understood the information in the notice when the terms and calculations were presented in the logical order contained in the model forms. While there is no formula for producing the ideal disclosure, the Bureau believes that disclosures that satisfy the prescribed formatting requirements likely provide greater benefits to consumers than disclosures that do not satisfy these requirements. The Bureau also believes that there is some consumer benefit in harmonizing the § 1026.20(c) and (d) notices, so they present similar information in a similar format.[159]

Although the Bureau does not have the data necessary to quantify the consumer benefits of the revisions to the § 1026.20(c) disclosure required by the rule, the following hypothetical illustrates how consumers are likely to benefit from the disclosures.[160] The Bureau estimates that approximately 650,000 adjustable-rate mortgages may have an interest rate adjustment in each of the next three years. Suppose that just 5 percent of the consumers with these mortgages are sent the disclosure (this occurs only if the payment adjusts) and, because of the change in the timing from 25 days to 60 days before the first payment at a new level is due, refinance one month sooner. If these consumers reduce their monthly payment by $50, then the annual savings to consumers would be over $1.6 million or about $2.50 per disclosure.[161]

The Bureau received comments that questioned the benefits to consumers of the proposed changes to the § 1026.20(c) notice both broadly and in respect to particular changes. The Bureau disagrees with these assessments of the value of the modifications to the § 1026.20(c) notice. The belief that the current notice is adequate may be based on the fact (explained above) that consumers cannot provide the standard market signal that a servicer is inadequate, *i.e.,* finding another service provider. Since servicers receive minimal consequential feedback from consumers about the quality of servicing disclosures, they have little incentive to incur the costs of researching and discovering the information consumers want in the payment adjustment notice and the ways to present this information that consumers find most useful. The Bureau disagrees with the assertion that the Bureau failed to cite any research supporting the proposed revisions of the § 1026.20(c) notice. On the contrary, the proposal noted that the Bureau worked closely with ICF Macro (Macro) to develop the closely related § 1026.20(d) model disclosure, conducted three rounds of consumer testing, and revised the disclosure on the basis of the test results. Based on this anecdotal evidence and the Bureau's own judgment and expertise about the marketplace and consumer needs and behavior, the Bureau believes that the benefits to the vast majority of consumers from national servicing standards for disclosures provided by the rule are substantial.

The Bureau did receive five comments from industry referring to efforts by servicers to improve consumer disclosures. One commenter discussed its general commitment to provide customers with clear, simple information about their loans. Another discussed a successful effort to improve its interest rate adjustment disclosure in an effort to increase consumer awareness, improve loss mitigation, and facilitate early interventions where delinquency could be caused by a payment increase. This commenter said it provided simple, low-tech forms but with a longer notice period and achieved significant results and response rates. One commenter from a credit union described an effort to provide earlier rate adjustment disclosures to members so they would have more time to make decisions about obtaining a new loan or continuing with their current one. The initial attempt at this enhancement was difficult and the commenter had to add a staff member to manage the project, but after some adjustments to the timing of the disclosures the enhancement seems to have been successful. A fourth industry

[157] The Bureau received comments from industry that also made this point.

[158] Of course, a consumer who receives the prescribed § 1026.20(c) disclosure may derive little additional benefit from shortly thereafter receiving some of the same information on the periodic statement disclosure. There would, however, likely be little cost saving for servicers in not having to provide the information on the periodic statement disclosure that also appears on the § 1026.20(c) disclosure for just one or two months.

[159] For a general discussion of disclosure formatting, disclosure testing and consumer benefits, *see* Jeanne Hogarth & Ellen Merry, *Designing Disclosures to Inform Consumer Financial Decisionmaking: Lessons Learned From Consumer Testing,* Fed. Reserve Bull., Aug. 2011, at 1 (''Hogarth & Merry'').

[160] One commenter suggested that the Bureau conduct a ''breakeven'' analysis, referring to OMB's Circular A–4 guidance that it issued in connection with Executive Order 12866. Section 1022(b)(2)(A) requires the Bureau to consider the potential benefits and costs to consumers and covered persons. By its terms, section 1022(b)(2)(A) does not require the Bureau to quantify the benefits and costs of the rule; limit its consideration to quantifiable benefits and costs; or determine whether the benefits outweigh the costs. Rather, the Bureau is required to ''consider'' the benefits and costs of the rule. The Bureau believes that there are multiple reasonable approaches for conducting the consideration called for by Dodd-Frank Act section 1022(b)(2)(A) and that the approach it has taken in this analysis is reasonable and that, particularly in light of the difficulties of reliably estimating certain benefits and costs and the Bureau's resource constraints, it has discretion to decline to undertake additional or different forms of analysis.

[161] Although the reduction in monthly payment would last for more than one month, the benefit attributable to the change in timing of the disclosure would be the one month of savings.

commenter requested permission to continue to use its ''consumer-tested and appreciated'' periodic billing statement. A fifth industry commenter argued against including delinquency information in the periodic statement since, in the commenter's experience, this information was more effective in collection letters.

The Bureau recognizes that certain servicers have experimented with improving their disclosures. However, this work does not appear to be widespread; as noted, the Bureau received only a small number of comments about efforts to improve disclosures. The Bureau recognizes that servicers have an incentive to keep collection costs low and therefor to make sure consumers know the payment due in each period, the date the payment is due, and where to send it. Servicers also have some incentive to limit customer inquiries, and they may therefore provide some additional information that consumers want. Some consumers receive disclosures, however, given the market failure described above, the Bureau does not believe that the aforementioned incentives are sufficient to generate better disclosures that would benefit consumers.

Potential costs to consumers. As explained further in the discussion of costs to covered persons, the cost to covered persons is expected to be about 83 cents per disclosure. This estimate takes into account both one-time additional costs (amortized over five years) and additional annual production and distribution costs.[162]

Given the small additional cost per disclosure, the Bureau believes that this cost will not be passed on to consumers in the form of increased fees or charges. Servicers may in general attempt to shift a cost increase onto others, such as creditors, who may in turn attempt to pass on such costs to consumers, so consumers may ultimately bear part of a cost increase that falls nominally on servicers. For the prescribed § 1026.20(c) disclosure, however, the costs to be shifted are very small. Thus, the disclosure is not likely to cause any material cost increase on consumers.

An industry association commented that the change in the timing of the ARM disclosure would increase the pricing of ARMs. As one industry commenter explained, committing earlier to an interest rate to provide consumers with earlier notice of the new rate and payment would increase interest rate risk. While the Bureau agrees with this point in general, the Bureau disagrees with the relevance of the point in this instance. First, as discussed in part V, the Bureau believes that the majority of ARMs already commit to an interest rate early enough to provide consumers with the earlier notice.[163] Thus, the requirement for earlier notice would not, in fact, require an earlier commitment to the interest rate for the majority of ARMs. Second, as also discussed in part V, the Bureau believes it is unlikely that, for the minority of ARM products with a look-back period of less than 45 days, the adjustment to a slightly longer look-back period will meaningfully impact the manner in which the product is priced. The slight increase in the period is not a sufficiently long enough time for a material change in interest rates except in the most unusual circumstances.

As noted above, the final rule adds commentary to explain that servicers have the flexibility to modify the disclosures to accommodate certain situations and consumer credit transactions not addressed by the model forms. Still, servicers must present the required information in a format substantially similar to the format of the prescribed model forms. The Bureau recognizes the possibility that constraints on the way servicers present information to consumers may prohibit the use of more effective forms that servicers are using or may develop. The constraints would then impose a cost on consumers.

The Bureau does not believe these costs are substantial. As discussed above, very few commenters described efforts to test and develop superior disclosures. Nor does the Bureau believe that servicers' current disclosures generally are superior to the prescribed disclosure, and the Bureau is unaware of general efforts by servicers to develop interest rate adjustment notices that provide the benefits to consumers of the prescribed model forms. The Bureau worked closely with Macro to develop the closely related § 1026.20(d) model disclosure, conducted three rounds of consumer testing, and revised the disclosure on the basis of the test results. Based on this anecdotal information, the comment letters, and the Bureau's own expertise in disclosure and consumer behavior, the Bureau believes that the risk of precluding servicers from using disclosures that might provide greater benefits to their customers is relatively small.

As discussed above, some consumers have adjustable-rate mortgages with look-back periods shorter than 45 days. For example, FHA and VA ARMs often have look-back periods of 15 or 30 days. Servicers that handle such ARMs contractually will not be able to comply with the requirement to provide the § 1026.20(c) disclosure between 60 and 120 days before the first payment at a new level is due. Accordingly, the Bureau is grandfathering these existing ARMs, if originated before January 10, 2015. Going forward, however, ARMs must be structured to permit compliance with the prescribed 60- to 120-day timeframe.

It is possible that ARMs with look-back periods shorter than 45 days may have certain cost advantages to servicers or investors in certain interest rate environments (*e.g.,* when rates are rising quickly). In such environments, competition among servicers for servicing rights may translate the cost advantage into a benefit to originators and consumers; and, in that event, the required 60- to 120-day timeframe may impose a cost on consumers by making mortgages with such shorter look-back periods unavailable. The Bureau believes that because very few consumers have such ARMs, very few consumers would experience such costs.

Potential benefits to covered persons. The Bureau has carefully considered whether there are any significant benefits to covered persons from this provision. The Bureau has determined that there are not.

Potential costs to covered persons. The modifications to the § 1026.20(c) disclosure will result in certain compliance costs to covered persons. Based on discussions with servicers and software vendors, the Bureau believes that, in general, servicers of all sizes will incur minimal one-time costs to learn about the final rule. They will generally use vendors for one-time software and IT upgrades and for producing the disclosure. The revised disclosure provides to consumers information that is not currently disclosed to them, including information that is specific to each loan. Servicers (or their vendors) may not have ready access to all of this additional loan-level information; for example, if some of this additional

[162] In this and subsequent numerical discussions, ''amortizing'' an amount $x over a certain number of years means making equal payments in each year that sum up to $x. The Bureau is using five years because Section 1022(d) of the Dodd-Frank Act provides that the Bureau shall assess significant rules adopted by the Bureau within five years of the effective date of the rule.

[163] Any ARM with a 45 day (or longer) look-back period could comply with the requirement to provide earlier notice. In 2011, approximately 10% of new home-purchase loans were ARMs and most had loan contracts with 45-day look-back periods. Approximately 88% of the ARMs guaranteed by Fannie Mae and Freddie Mac have 45-day look-back periods.

information is stored in a database that is not regularly accessed by systems that produce the current disclosures.

The Bureau believes that under existing vendor contracts, large- and medium-sized servicers may not be charged for the upgrades but will be charged for producing and then distributing (*i.e.,* mailing or electronically providing) the disclosure. Vendors will likely pass along all of these costs to small servicers.[164] However, when most servicers simultaneously need an upgrade, the one-time cost is mitigated by the fact that the costs of a single vendor may be spread among a large number of servicers.[165]

Extrapolating from FHFA data, the Bureau estimates that approximately 639,000 adjustable-rate mortgages will have an interest rate adjustment in each of the next three years.[166] Consumers with these mortgages will receive the revised § 1026.20(c) disclosure, however, only if the interest rate *and* payment adjusts; thus, this figure is most likely an overestimate of the number of consumers that would receive the revised § 1026.20(c). The Bureau believes there are essentially no distribution costs attributable to the rule. In the absence of the rule, servicers would nonetheless be required to provide the current § 1026.20(c) payment change disclosure, and the current and revised payment change disclosures have essentially the same number of recipients.[167] The remaining annual costs attributable to the rule are production costs associated with the additional content and formatting. Based on discussions with industry, the Bureau believes the annual production costs passed along to servicers would be about $128,000 (20 cents production cost per disclosure). Finally, based on discussions with industry and extrapolating from FHFA data, the Bureau estimates the one-time cost of modifying the existing § 1026.20(c) disclosure for all 12,600 servicers to be about $2 million.[168] Amortizing the one-time cost over five years and combining it with the annual cost gives an aggregate annual cost of about $528,000.[169] Thus, the cost of the modifications is $42 annually per servicer or 83 cents per disclosure.

Of the $2 million just described, about $1.65 million is the one-time costs for small servicers of revising the existing disclosure. Amortizing this cost over five years requires a payment of $41 by each small servicer in each of five years. The Bureau is not aware of any representative and reasonably obtainable data on the prevalence of ARMs in the loan portfolios of small servicers, so it is not possible to estimate the number of disclosures that small servicers would produce each year. Thus, it is not possible to quantify the total annual cost of the modifications specifically for small servicers.

The Bureau has taken a number of additional steps to mitigate the costs to covered persons, including: Exempting certain types of loans where appropriate, such as ARMs with terms of one year or less; eliminating the requirement that an annual notice be sent when there is no change in rate and payment; and grandfathering loans with a look-back period of less than 45 days originated prior to January 10, 2015; and requiring disclosure of the existence of a prepayment penalty rather than the amount of any prepayment penalty. See the section-by-section analysis for § 1026.20(c).

One industry association commenter quoted a similar but less detailed analysis in the proposed rule and stated that the Bureau did not adequately identify the types of costs or the amount of those costs that servicers will incur. In response, the Bureau has provided the additional detail above.

This commenter also provided a description of the types of costs that bank servicers would incur, ''as part of engaging vendors for * * * technology-related projects.''[170] According to the commenter, a servicer undertaking this activity would incur costs for project identification and planning, vendor selection and due diligence, customized programming, adjustments prior to launch, and costs for new hardware and software. The commenter provided the example of a community bank that was changing its vendor-provided loan processing software.

While the Bureau appreciates the commenter's detailed analysis of the one-time costs associated with engaging vendors for technology-related projects, the Bureau does not believe that the revisions to the § 1026.20(c) payment change disclosure qualify as a technology-related project on the scale described by the commenter. For servicers that use vendors, changes to an existing disclosure will require software updates from the existing vendor and some monitoring by the servicer. In contrast, the commenter appears to describe the selection of a vendor to produce an *entirely new* loan processing system. While the loan processing system must communicate accurately with the servicing system, the discussion and example have no direct connection to the costs that would be incurred by a servicer from implementing the revised § 1026.20(c) disclosures. The commenter informed the Bureau that the vendor that produces the disclosures for the community bank in the example (*i.e.,* the core provider) is different from the one providing the loan processing system which further indicates that these two activities are quite distinct.

Only two comments provided specific estimates for costs associated with revising the § 1026.20(c) disclosure. One credit union commented that it expects this disclosure to cause an additional annual expense of over $75,000. One industry association referenced a $1 million upfront cost estimate included in a comment by two unidentified large servicers on an earlier proposal by the Board. However, neither commenter provided additional information necessary for interpreting these figures, determining whether they are consistent with the Bureau's cost analysis, or using them in that analysis. Such additional information would include the number of ARMs serviced, how frequently the payments are likely to adjust, and

[164] In discussions such as this of costs to covered persons, ''small servicers'' are servicers that meet the size standard for that business established by the Small Business Administration. Banks, thrifts, and credit unions that service mortgage loans must have $175 million or less in assets and other servicers must have $7 million or less in average annual receipts.

[165] This analysis considers the benefits, costs, and impacts of disclosures assuming that all servicers use vendors for this purpose. The Bureau believes that virtually all servicers, regardless of size, use vendors for disclosures.

[166] For these estimates, the Bureau used the Home Loan Performance data from the FHFA. Home Loan Performance is a supervisory loan-level database of all guaranteed Fannie Mae and Freddie Mac mortgages. It includes characteristics of the loans at origination and then a quarterly time-series of performance throughout the life of the loan.

[167] Furthermore, by eliminating the annual § 1026.20(c) disclosure, the rule reduces certain production and distribution costs relative to the baseline.

[168] The Bureau makes the following assumptions, based on discussions with industry. All 12,600 servicers familiarize themselves with the rule for a total one-time cost of $750,000. Approximately 8,000 small servicers (*i.e.,* servicers that meet the Small Business Administration size standard) use 100 vendors, each of which spends 80 hours to revise the existing disclosure and another 80 hours validating it, all at $72 per hour. This gives an additional one-time cost of $1 million. Thirty-one very large servicers perform these tasks in-house, for an additional one-time cost of $250,000. This gives total one-time costs of $2 million. The remaining servicers have contracts with vendors under which the vendor absorbs all one-time costs of a disclosure mandated by regulation.

[169] $528,000 = ($2,000,000/5) + $128,000.

[170] U.S. Consumer Fin. Prot. Bureau, Doc ID No. 0151, *Public Comment Submission on CFPB–2012–0033,* at 9 (Oct. 9, 2012) (comment from Robert Davis, Exec. VP, American Bankers Association).

whether the servicer uses vendors or does all work in-house.

The Bureau recognizes that certain financial benefits to consumers from the revised § 1026.20(c) disclosure may have an associated financial cost to covered persons. Servicer compensation is not directly tied to the interest rate on a consumer's mortgage, but rather to the unpaid principal balance. Thus, when a consumer refinances a mortgage at a lower interest rate, one servicer incurs a cost but another receives a benefit. On the other hand, if a consumer refinances from an adjustable-rate mortgage to a 15-year fixed-rate mortgage, then the consumer would pay off the unpaid principal balance more quickly and servicer income would fall. Servicers may also receive reduced fee income from delinquent consumers (or investors) if the notice helps consumers avoid delinquency.

Finally, some of the information provided in the revised § 1026.20(c) disclosure is also provided in the initial interest rate adjustment disclosure discussed below. The Bureau believes that harmonizing the two disclosures mitigates these compliance burdens for servicers and reduces the aggregate production costs to servicers.

2. New Initial Interest Rate Adjustment Notice for Adjustable-Rate Mortgages

Dodd-Frank Act section 1418 requires servicers and creditors to provide a new, one-time disclosure to consumers who have hybrid ARMs. The disclosure concerns the initial interest rate adjustment and, unlike the disclosure in § 1026.20(c), is not provided for interest rate adjustments after the first adjustment. The Dodd-Frank Act section 1418 disclosure must be given either (a) between six and seven months prior to such initial interest rate adjustment or (b) at consummation of the mortgage if the initial interest rate adjustment occurs during the first six months after consummation. The savings clause in TILA section 128A(c) confers authority on the Bureau to extend the notice requirement to non-hybrid ARMs in addition to hybrid ARMs.

The final rule implements this provision by requiring that the disclosure be provided at least 210, but not more than 240, days before the first payment at the adjusted level is due. The Bureau, relying upon the savings clause, is broadening the scope of the final rule, as proposed, to include ARMs that are not hybrid. The disclosure includes the content required by the statute, with modification to the housing counselor and state housing finance authority information. The disclosure includes certain additional information not required by the statute, including notice of the existence of any prepayment penalty (but not the amount). Finally, as explained above, the Bureau conducted three rounds of consumer testing on these disclosures. The disclosure forms were revised after each round of testing to improve their effectiveness with consumers.

Potential benefits to consumers. Decades of research shows that consumers make important decisions about housing finance at the initial interest rate adjustment. Consumers often choose to prepay at or before the initial interest rate adjustment and the greater the payment shock, the greater the likelihood of prepayment. These results hold for conventional ARMs originated in the 1990s as well as for subprime hybrid ARMs (2/28 and 3/27) originated in the 2000s.[171]

More controversial is the question of whether payment shock at the initial interest rate adjustment causes default. One published analysis of data from the 2000s does not find a causal relationship between payment shock at the initial interest rate adjustment and default.[172] However, for consumers with certain hybrid ARMs originated in the 2000s, a substantial number experienced an increase in monthly payment of at least 5 percent at the initial interest rate adjustment, and some research finds that the default rate for these loans was three times higher than it would have been if the payment had not changed.[173]

The information in the interest rate adjustment notice would provide a number of benefits to consumers with closed-end adjustable-rate mortgages. These benefits may be broadly categorized as facilitating (a) the choice of an alternative to making the new payment, including refinancing; (b) the budgeting of household resources; and (c) the accumulation of equity by certain consumers (*i.e.,* those with interest-only or negatively-amortizing payments). Individual items in the disclosure may provide more than one of these benefits.

The final rule requires disclosure of the new interest rate and payment—the exact amount, where available, or an estimate, where exact amounts are unavailable. Disclosing an estimate of the interest rate and any new payment at least 210, but not more than 240, days before the first payment at the adjusted level is due gives consumers a significant amount of time in which to pursue alternatives to making payments at the adjusted level. When interest rates are stable, the estimate is informative about the future mortgage payment, and consumers benefit from being able to plan future budgets or to address a problem with affordability, perhaps by refinancing. The estimate is less informative about the future mortgage payment when interest rates are volatile, but under any circumstances, an estimated payment that is well above the highest amount that the consumer can afford alerts the consumer to a potential problem and the need to gather additional information.

While some consumers with ARMs may benefit from disclosure of any potential new interest rate and payment (or estimates of these amounts) well before the first payment at the adjusted level is due, the benefits from this information are likely greatest when provided prior to the initial interest rate adjustment. Subsequent interest rate adjustments reflect the difference between two fully-indexed interest rates (*i.e.,* interest rates that are the sum of a benchmark rate and a margin). In contrast, the initial interest rate adjustment may reflect the difference between an interest rate that is below the fully-indexed rate at the time of origination (a so-called ''teaser'' or ''introductory'' rate) and a rate that is fully-indexed at the time of adjustment. For example, in 2005, the teaser rate on subprime ARMs with an initial fixed-rate period of two or three years was 3.5 percentage points below the fully-indexed rate.[174] As a result, mortgages originated in that year faced a potentially large change in the interest rate and payment, or ''payment shock,'' at the first adjustment. Furthermore, consumers facing the initial interest rate adjustment may fail to anticipate even the possibility of a change in payment, since this is necessarily the first time since origination that the payment could change. Consumers facing payment shock or an unanticipated change in payment also benefit from having additional time to plan future budgets or

[171] Brent W. Ambrose & Michael LaCour-Little, *Prepayment Risk in Adjustable Rate Mortgages Subject to Initial Year Discounts: Some New Evidence,* 29 Real Est. Econs. 305 (2001) (showing that the expiration of teaser rates causes more ARM prepayments, using data from the 1990s). The same result, using data from the 2000s and focusing on subprime mortgages, is reported in Shane Sherland, *The Past, Present and Future of Subprime Mortgages* (Fed. Reserve Bd., Staff Working Paper 2006–63, 2008); the result that larger payment increases generally cause more ARM prepayments, using data from the 1980s, appears in James Vanderhoff, *Adjustable and Fixed Rate Mortgage Termination, Option Values and Local Market Conditions,* 24 Real Est. Econs. 379 (1996).

[172] Christopher Mayer et al., *The Rise in Mortgage Defaults,* 23 J. Econ. Persps. 27, 37 (2009) (''Mayer et al.'').

[173] Anthony Pennington-Cross & Giang Ho, *The Termination of Subprime Hybrid and Fixed-Rate Mortgages,* 38 Real Est. Econs. 399, 420 (2010).

[174] *See* Mayer et al., at 37.

to address a problem with affordability. Thus, consumers facing the initial interest rate adjustment may benefit from the notice through both the information it provides regarding the potentially new interest rate and payment and the additional time it provides consumers to adapt.

A number of items on the disclosure may help the consumer who anticipates having problems making the new payment. In addition to information on the amount of the new payment, the disclosure lists alternatives to making the new payment and gives a brief explanation of each alternative. It discloses if a prepayment penalty applies, and if so provides information about when that prepayment penalty may be imposed. It provides information on rate limits that may affect future payment changes. It provides the telephone number of the creditor, assignee, or servicer to call if the consumer anticipates having problems making the new payment. Finally, it gives contact information for where a consumer can access certain lists of homeownership counselors and SHFAs. All of this information benefits a consumer who anticipates having problems with making the new payment.

Finally, certain items on the disclosure may facilitate the accumulation of equity by consumers with interest-only or negatively-amortizing payments. For these consumers, the disclosure states the amount of both the current and the expected new payment allocated to principal, interest, and escrow, as applicable.[175] The disclosure provides information about how these payments will affect the loan balance. If negative amortization occurs as a result of the adjustment, the disclosure must state the payment required to fully amortize the loan at the new interest rate. The disclosure alerts consumers with these types of loans to features that bear on equity accumulation, and it provides this information at a time when these consumers may be evaluating their mortgage terms and considering refinancing.

As discussed above, § 1026.20(d) includes formatting requirements for the initial interest rate adjustment notice. These requirements benefit consumers by facilitating consumer understanding of the information in the disclosures. Except for the date of the notice, the final rule requires that the disclosures must be provided in the form of a table and in the same order as, and with headings and format substantially similar to, certain forms provided with the final rule. The Bureau's testing showed that the consumers who participated readily understood the information in the notice when the terms and calculations were presented in the groupings and logical order contained in the model forms. While there is no formula for producing the ideal disclosure, the formatting requirements are generally informed by decades of consumer testing. Based on this anecdotal evidence and the Bureau's own judgment and expertise about the marketplace and consumer needs and behavior, the Bureau believes that disclosures that satisfy the formatting requirements likely provide greater benefits to consumers than disclosures that do not satisfy these requirements.[176]

The Bureau does not have the data necessary to quantify the benefits of the initial interest rate adjustment notice to consumers. Certain consumers with ARMs will be aware of the upcoming initial interest rate adjustment and the possibility of refinancing or (if there is a payment adjustment) considering alternatives to making a new payment, of needing to reallocate household resources in light of a new payment, and of reviewing the household balance sheet in light of an interest-only or negatively-amortizing loan. The Bureau is not aware of data with which it could fully quantify the value of the information in the disclosure to these consumers or determine the savings to them in time and other resources from not having to obtain this information from other sources. Furthermore, there are other consumers with adjustable-rate mortgages who may be uninformed or misinformed (or perhaps forgetful) about the upcoming initial interest rate adjustment or the financial implications of interest-only and negatively-amortizing loans on equity accumulation. The Bureau is not aware of data with which it could quantify the benefits to these consumers of becoming better informed about these features of their mortgages.

Although the Bureau does not have the data necessary to quantify the consumer benefits of the initial interest rate adjustment notice, the following hypothetical illustrates how consumers are likely to benefit from the disclosures. The Bureau estimates that approximately 280,000 adjustable-rate mortgages will have an initial interest rate adjustment in each of the next three years. If the new initial interest rate adjustment notice prompts just 1 percent of the consumers who receive the new notice to refinance six months earlier than they otherwise would, and they reduce their monthly mortgage payment by $50, then the annual savings to consumers would be over $1.6 million per year, or about $6 per disclosure.[177] More generally, consumers may benefit whether interest rates are rising or falling if the consumer would qualify for a mortgage with better terms and the notice prompts the consumer to shop for one somewhat sooner; however, the benefits are more likely to occur when interest rates are rising since acting sooner would benefit the most consumers.

In response to the proposed rule, the Bureau received general comments asserting that existing interest rate adjustment disclosures are adequate, the new disclosures would provide no consumer benefits, or the new disclosures would produce fewer benefits than costs. One industry association commented that the existing system of interest rate adjustment disclosures provided ''substantial notice'' to consumers and no research referenced by the Bureau produced evidence that the present system needed improvement. Another industry association commenter similarly stated it was not aware of any deficiencies in the current ARM adjustment notices, and that the Bureau had not provided sufficient explanation that dictates specific information and formatting requirements. Others argued that, even if consumers with hybrid ARMs might benefit from the initial interest rate adjustment notice, consumers with non-hybrid ARMs would receive at most small benefits that did not justify the costs.

The Bureau notes that the statute specifically requires an early notice of the initial interest rate adjustment. As discussed above, the earlier notice may benefit consumers over and above the benefit of the 60 day notice because many consumers may be particularly unlikely to anticipate the very first payment adjustment. Two advance notices may catch the attention of more consumers than one.

[175] The current payment allocation would also appear on the periodic statement disclosure. However, listing the current and expected new payment allocation in one disclosure benefits consumers by making clear any differences between the two allocations. The Bureau recognizes that the benefit of information in a particular disclosure may be mitigated to the extent that the same information is available in other disclosures that are provided at the same (or nearly the same) time.

[176] For a general discussion of disclosure formatting, disclosure testing, and consumer benefits, *see* Hogarth & Merry.

[177] Although the reduction in monthly payment would likely last for more than six months, the benefit unambiguously attributable to the disclosure would be the savings in each of six months.

The Bureau did receive five comments from industry referring to efforts by servicers to improve consumer disclosures. These comments, which are relevant to both proposed § 1026.20(c) and (d), and the Bureau's response, are discussed above in the section-by-section analysis of § 1026.20(c).

Potential costs to consumers. As explained further in the discussion of costs to covered persons, the cost to covered persons is expected to be about $2.67 cents per disclosure. This estimate takes into account both one-time additional costs (amortized over five years) and additional annual production and distribution costs.

Given the moderate cost per disclosure and the fact it is given just once over the life of the loan, the Bureau believes that consumers would see at most a minimal increase in fees or charges. Servicers may in general attempt to shift a cost increase onto others and consumers may ultimately bear part of an increase that falls nominally on servicers. For the initial interest rate adjustment notice, however, the costs to be shifted are small. Furthermore, even if servicers did attempt to shift the costs, it is not clear that consumers would bear them. Consider, for example, servicers who bid for servicing rights on mortgages originated by others. The additional costs associated with providing the initial rate adjustment notice may cause servicers to bid less aggressively for certain servicing rights. In that event, lenders or investors may bear some of the cost. Servicers may also attempt to obtain higher compensation for servicing from creditors. Creditors may respond by attempting to increase fees or charges at origination or by increasing the cost of credit. In this case, consumers may bear some, but not necessarily all of the costs. The relative sensitivity of supply and demand in these interrelated markets would determine the proportion of the cost increase borne by different parties, including consumers.

The final rule limits how servicers may present the required information in the initial interest rate adjustment notice. Servicers must present the required information in a format substantially similar to the format of the prescribed model forms. The Bureau recognizes the possibility that constraints on the way servicers present information to consumers may prohibit the use of more effective forms that servicers are using or may develop. The constraints would then impose a cost on consumers.

The Bureau does not believe these costs are substantial. As discussed above, very few commenters described efforts to test and develop superior disclosures, and the Bureau is unaware of efforts by servicers to develop an initial interest rate adjustment notice that meets the requirements of the Dodd-Frank Act and provides the benefits to consumers of the prescribed model forms. In contrast, the Bureau worked closely with Macro to develop the model disclosures, conducted three rounds of consumer testing, and revised the disclosure after each round.

The Bureau received numerous comments that disclosing an estimate of the new monthly payment would confuse consumers or lead them to make poor decisions. The Bureau received similar comments from the Small Entity Representatives during the Small Business Review Panel process. The Bureau believes that clearly stating on the form that the new monthly payment is an *estimate* and that consumers will receive a notice with the exact amounts two to four months prior to the date the first payment at the adjusted level is due (in cases where the interest rate adjustment results in a corresponding payment change) will mitigate consumer confusion on this point. The Bureau notes that Dodd-Frank Act section 1418 requires disclosure of a good faith estimate of the new monthly payment. In addition, servicers must provide the actual amount of the new monthly payment in the notice if it is available; and if it is not available, then consumers will be notified of the actual amount of the new monthly payment between 60 and 120 days before the first payment is due, if the interest rate adjustment causes a corresponding change in payment, pursuant to the prescribed § 1026.20(c) disclosure.

Potential benefits to covered persons. The Bureau has carefully considered whether there are any significant benefits to covered persons from this provision. The Bureau has determined that there are not.

Potential costs to covered persons. The initial interest rate adjustment notice will result in certain compliance costs to covered persons. Based on discussions with servicers and software vendors, the Bureau believes that, in general, servicers of all sizes will incur minimal one-time costs to learn about the final rule. They will generally use vendors for one-time software and IT upgrades and for producing the disclosure. The new disclosure provides consumers information that is not currently disclosed to them, including information that is specific to each loan. Servicers (or their vendors) may not have ready access to all of this additional loan-level information; for example, if some of this additional information is stored in a database that is not regularly accessed by systems that produce the current disclosures.

The Bureau believes that under existing vendor contracts, large- and medium-sized servicers may not be charged for the upgrades but will be charged for producing and then distributing *(i.e.,* mailing or electronically providing) the disclosure. Vendors will likely pass along all of these costs to small servicers.[178] However, when most servicers simultaneously need an upgrade, the one-time cost is mitigated by the fact that the costs of a single vendor may be spread among a large number of servicers.

Extrapolating from FHFA data, the Bureau estimates that about 280,000 ARMs will adjust for the first time in each of the next three years. Based on discussions with industry, the Bureau believes the annual production and distribution costs for the disclosure is $140,000 (50 cents per disclosure). The small ongoing costs reflect the fact that there will be relatively few initial interest rate adjustments on adjustable-rate mortgages over the next few years. Using both these data sources, the Bureau estimates the one-time cost of the disclosure for the 12,600 servicers is about $3 million.[179] Amortizing the one-time cost over five years and combining it with the annual cost gives an aggregate annual cost of about $740,000.[180] Thus, the cost of new disclosure is $58 annually per servicer or $2.67 per disclosure.

Using a similar methodology, the Bureau estimates the one-time cost for small servicers of the new disclosure is

[178] In discussions such as this of costs to covered persons, ''small servicers'' are servicers that meet the size standard for that business established by the Small Business Administration. Banks, thrifts, and credit unions that service mortgage loans must have $175 million or less in assets and other servicers must have $7 million or less in average annual receipts.

[179] The Bureau makes the following assumptions, based on discussions with industry. 12,600 servicers familiarize themselves with the rule for a total one-time cost of $523,000. The 8,000 small servicers *(i.e.,* servicers that meet the Small Business Administration size standard) use 100 vendors, each of which spends 160 hours developing the new disclosure (double the amount of revising an existing disclosure) and another 160 hours validating it (double the amount of validating an existing disclosure), all at $72 per hour. This gives an additional one-time cost of $2.3 million. Thirty-one very large servicers perform these tasks in-house, for an additional one-time cost of $178,000. This gives total one-time costs of about $3 million. The remaining servicers have contracts with vendors under which the vendor absorbs all one-time costs of a disclosure mandated by regulation.

[180] $740,000 = ($3,000,000/5) + $138,500.

about $2.7 million. Amortizing this cost over five years requires a payment of $58 by each small servicer in each of five years. The Bureau is not aware of any representative and reasonably obtainable data on the loan portfolios of small servicers, so it is not possible to estimate the number of disclosures that small servicers would produce each year. Thus, it is not possible to quantify the total annual cost of the modifications specifically for small servicers.

The Bureau attempted to reduce the burden to servicers where it could be done with minimal impact on the consumer protection purposes of the rule. The Bureau mitigates the burden of the disclosure, among other ways, by requiring the contact information for the list of home ownership counselors or counseling organization in place of a list of individual counseling agencies or programs required by the statute, and by requiring disclosure of the existence of a prepayment penalty in place of the maximum amount of the prepayment penalty. Additionally, the Bureau attempted to harmonize the § 1026.20(c) and (d) disclosures both to reduce the burden on servicers, and to facilitate comprehension by consumers. In addition, relative to the statute, the Bureau has included an exemption for ARMs with a term of one year or less. Further, relative to the statute, the Bureau has drafted the rule such that rate changes occasioned by a consumer's acceptance into a loss mitigation arrangement will not trigger the requirement for the rate change notification. Finally, the Bureau has interpreted the statutory requirement that the notice be ''separate and distinct from all other correspondence'' [181] to mean that, while the notice must be provided as a separate document, that document may be placed in the same envelope as other communications (as opposed to requiring a separate envelope).

One industry association cited a cost analysis similar to, but less detailed than, the cost analysis presented in the proposed rule and stated that the Bureau did not adequately identify the types of costs or the amount of those costs that banks will incur. This commenter provided a description of the types of costs that bank servicers would incur, ''as part of engaging vendors for * * * technology-related projects.'' In response, the Bureau has provided the additional detail above and a discussion of the comment in the consideration of the costs to covered persons of the revised § 1026.20(c) disclosure, above. Although the disclosure is new, the Bureau believes that neither this fact nor the content of the disclosure would necessitate a technology-related project on the scale described by the commenter.

Another industry commenter referenced the $58 cost figure for small servicers, which consists of one-time costs paid in each of five years. The commenter claimed that this figure was too low and listed a number of one-time and ongoing activities her bank would need to undertake to comply. However, the commenter did not provide an alternative cost figure or explain how the activities she listed would constitute the alternative figure. The commenter did say her bank would have to produce over 100 notices per year. The Bureau notes that $58 was an average figure for one-time costs and that with 100 notices, a better estimate of her institution's costs (consistent with the Bureau's calculations) would be $2.67 per disclosure so $267 per year.

The Bureau recognizes that certain financial benefits to consumers from the initial interest rate adjustment notice may have an associated financial cost to covered persons. Servicer compensation is not directly tied to the interest rate on a consumer's mortgage, but rather to the unpaid principal balance. Thus, when a consumer refinances a mortgage at a lower interest rate, one servicer incurs a cost but another receives a benefit. On the other hand, if a consumer refinances from an adjustable-rate mortgage to a fifteen year fixed-rate mortgage, then the consumer would pay off the unpaid principal balance more quickly and servicer income would fall. Similarly, if the notice helps consumers avoid delinquency, servicers may receive reduced fee income from delinquent consumers (or investors).

Finally, as discussed in part V, the Bureau considered but decided not to exempt small servicers from the initial interest rate adjustment notice. The Bureau is not including an exemption for small servicers because an exemption would deprive certain consumers of the seven to eight months advance notice before the first payment at a new level is due that is provided by the disclosure, as well as the information about alternatives and how to contact various sources of assistance. Additionally, the Bureau notes that small servicers are exempt from the periodic statement requirement of final § 1026.41—one other source of information on when an interest rate might adjust that is provided to consumers. Conversely, the Bureau believes that the benefit to small entities from an exemption would be small. Vendors will spread the one-time software and IT costs of the notice over many small servicers and the annual costs will be small since the notice is given just once to each consumer with an adjustable-rate mortgage.

3. Prompt Crediting of Payments and Response to Requests for Payoff Amounts

TILA section 129F (as added by Dodd-Frank Act section 1464(a)) generally codifies existing Regulation Z § 1026.36(c)(1)(i) on prompt crediting of payments. The final rule requires periodic payments (defined as an amount sufficient to cover principal, interest and escrow (if applicable)) to be promptly credited, and provides clarification on the handling of partial payments (*i.e.,* payments less than a periodic payment).

The final rule clarifies that servicers have the option of holding partial payments in a suspense account. If servicers hold partial payments in a suspense account, the servicer must disclose the amount on the periodic statement if a periodic statement is required. If sufficient funds accrue in any suspense or unapplied funds account to cover a periodic payment, such funds must be credited as if a periodic payment were received.

TILA section 129G (as added by Dodd-Frank Act section 1464(b)) requires that a creditor or servicer of a home loan send an accurate payoff balance within a reasonable time, but in no case more than seven business days, after the receipt of a written request for such balance from or on behalf of the consumer. This generally codifies existing Regulation Z § 1026.36(c)(1)(iii) on payoff statements.

The Bureau did not receive comments on the proposed Dodd-Frank Act section 1022(b)(2) analysis or issues closely related to that analysis in connection with the proposed provisions in § 1026.36(c). Comments on the provisions of the proposed rule are addressed in the section-by-section analysis.

Potential benefits and costs to consumers. The statute largely codifies an existing regulation. While the existing regulation does not specifically address the handling of partial payments, the final rule requires practices regarding the handling of partial payments already followed by many servicers. Thus, the benefits and costs to consumers from a pre-statute baseline are likely small.

Qualitatively, the provisions on prompt crediting, coupled with the disclosure on the periodic statement of the amount of funds being held in any

[181] TILA section 128A(b).

suspense account, should help consumers manage and reduce defaults. Consumers will better understand when their payments are being held in a suspense account rather than being applied and also when partial payments will be applied. Not including late fees in the definition of periodic payment requires servicers to credit a payment that covers principal, interest and escrow even if late fees are outstanding. Consumers who make such a payment benefit from having that payment credited. Overall, these provisions of the final rule ensure that consumers benefit from every effort that they make to pay their mortgage debt.

Potential benefits and costs to covered persons. As the statute largely codifies an existing regulation, the benefits and costs to covered persons from a pre-statute baseline are likely small. However, neither current Regulation Z nor Dodd-Frank Act section 1464(a) define what constitutes a ''payment'' for purposes of the crediting requirement. Thus, the final rule benefits servicers by clarifying the meaning of this term. The Bureau believes that many servicers already credit payments as required by the final rule, and for those that do, this clarification is a benefit and is the only impact of the rule.

The Bureau engaged in outreach and believes that many servicers already comply with the final rule. However, for servicers with different crediting practices, the final rule may delay the receipt of fee income or reduce some float income. The Bureau has no data with which to determine whether this is the case but believes these losses would generally be small. The Bureau has mitigated the burden of the payoff statement provision relative to the statute by including a clause allowing additional time when providing a payoff statement within seven days would not be feasible due to certain circumstances.

4. New Periodic Statement Disclosure for Certain Mortgages

Section 1420 of the Dodd-Frank Act requires the creditor, assignee, or servicer of any residential mortgage loan to transmit to the consumer, for each billing cycle, a periodic statement that sets forth certain specified information in a clear and conspicuous manner. The statute also gives the Bureau the authority to require servicers [182] to require additional content to be included in the periodic statement. The statute provides an exception to the periodic statement requirement for fixed-rate loans if the consumer is given a coupon book containing substantially the same information as the statement.

The final rule requires the periodic statement to include the content listed in the statute, as applicable, as well as billing information, payment application information, and information that may be helpful to distressed or delinquent consumers. In accordance with the statute, the final rule provides a coupon book exemption for fixed-rate loans when the consumer is given a coupon book with certain information required by the periodic statement. The final rule also provides exemptions for small servicers, reverse mortgages, and timeshares. The periodic statement disclosure would be provided to all consumers with a closed-end residential mortgage, unless one of the exemptions applies.

Potential benefits to consumers. The Bureau does not have representative information on the extent to which servicers currently provide consumers with coupon books, billing statements, or periodic statements that comply with the final rule.[183] The Bureau assumes that servicers currently provide consumers with basic billing information since servicers have an incentive to keep collection costs low. This information likely includes the amount due, the payment due date, and the amount of any late payment fee; and it may also include information that would tend to prompt the consumer to contact the servicer if it were missing, like the current interest rate and perhaps the amount of the payment going into escrow (if any). Because such information is currently being provided, its presence on the periodic statement required by final § 1026.41 likely provides no benefits or costs relative to the baseline. The benefits to consumers of these disclosures are discussed further in part V.

There is other information that typically appears on billing statements and coupon books but is accurate only if the consumer always makes the scheduled payment on time and no other payment. It includes the outstanding principal balance, total payments made since the beginning of the calendar year, and the breakdown of payments into principal, interest, and escrow. This information is not accurate, however, if the consumer makes an extra payment, provides a partial payment, or misses a payment entirely.

All of the aforementioned information appears on the periodic statement required by final § 1026.41. However, on the periodic statement, the information would be accurate even if the consumer makes an extra payment, provides a partial payment, or misses a payment entirely. Consumers generally benefit from having accurate information about payments in order to monitor the servicer, assert errors if necessary, and track the accumulation of equity. However, delinquent consumers may especially benefit from tracking the effects of delinquency on equity so they can effectively determine how to allocate income and consider options for refinancing. For these consumers, the periodic statement may provide large benefits relative to coupon books or billing statements that do not provide the aforementioned information.

Finally, there is information that simply cannot be provided on a coupon book. This includes fees or charges imposed since the last periodic statement, partial payments, past due payments, and a wide range of delinquency information and information about loan modifications and foreclosure. Consumers who are more than 45 days delinquent will have a delinquency notice included on the periodic statement (or provided separately to them) providing specific information about the delinquency of their loan. This is one way the servicer may catch the attention of the consumer.

Accurate information about past due charges and how fees and charges accumulate over time is especially useful to distressed or delinquent consumers who are managing a variety of debts and who want to know the least costly way of increasing their total debt or the most advantageous way of reducing their total debt. For example, a consumer with past due amounts on a mortgage, a car, and a credit card would need information about the past due amounts and how the fees and charges accumulate in order to determine whether a partial or full mortgage payment is the most advantageous way of reducing total debt. This information may also be inaccurate, and disclosing it on a periodic statement may facilitate the detection and correction of errors.

The final rule includes grouping requirements for the format of the periodic statement. The grouping requirements present the information on the periodic statement in a logical format and may facilitate consumer understanding of the information in the

[182] Reference in parts VII, VIII, and IX to ''servicers'' with regard to the final rule for the periodic statements, means creditors, assignees, and servicers.

[183] The Bureau did receive one comment from an industry association stating that less than 10% of the members in one of its working groups regularly use coupon books as a billing method.

different components of the disclosure. The General Design Principles discussed in the Macro Final Report [184] include grouping together related concepts and figures because consumers are likely to find it easier to absorb and make sense of financial disclosure forms if the information is grouped in a logical way. The Bureau also tested model periodic statement disclosures that satisfy the grouping requirements. As discussed above, while there is no formula for producing the ideal disclosure, the Bureau believes that disclosures that satisfy the grouping requirement are likely to provide greater benefits to consumers than disclosures that do not.

There are two main exemptions to the periodic statement requirement. The first, provided by statute, is an exemption for consumers with fixed-rate mortgages who receive coupon books that contain certain information. As discussed above, the fixed or formulaic information on coupon books will be accurate for consumers who make only scheduled payments. Consumers with fixed-rate mortgages never have to manage a changed payment amount. However, the Bureau does not have ready access to data on whether they are less likely than consumers with ARMs subject to the requirements to make additional payments, partial payments or miss a payment. Therefore, the Bureau cannot estimate the extent to which such consumers may be substantially worse off than consumers with ARMs subject to the requirements.

The Bureau also provides an exemption for small servicers. A small servicer is defined as a servicer who either both (i) services 5,000 or fewer mortgage loans and (ii) only services mortgage loans for which the servicer or an affiliate is the owner or assignee, or for which the servicer or an affiliate is the entity to whom the mortgage loan obligation was initially payable; or who is a Housing Finance Agency, as defined in 24 CFR 266.5. Such small servicers will not have to provide the periodic statement.

As discussed above and in the section-by-section analysis of § 1026.41(e)(4), the Bureau believes that servicers that meet both conditions generally provide consumers with ready access to the information on the periodic statement required by final § 1026.41, but possibly through other channels. Servicers who only service loans for which they or an affiliate is the owner or creditor face either a reduction in the value of an asset on their portfolios or the loss of an investment in the relationship with the consumer which was established by originating the loan if they provide poor servicing. Servicers that also service relatively few loans have an incentive to commit to a ''high-touch'' business model that offers highly responsive customer service. The Bureau believes that servicers that meet both conditions work to effectively provide their customers with ready access to comprehensive information about their payments, amounts due and other account information. Thus, the Bureau believes that the exemption produces at most a minimal reduction in benefits to the customers of small servicers.

Using a range of data sources, the Bureau roughly estimates that approximately 52 million consumers would receive the periodic statement disclosure (taking into account the small servicer exemption).[185] To illustrate the potential benefits of the periodic statements, suppose 10 percent of these consumers save 15 minutes each year because the disclosure provides them with information about their loan or payments that is not provided by their current billing statements or coupon books (*e.g.,* a past payment breakdown). These consumers might, for example, have to spend 15 minutes contacting their servicer by phone or some other means to obtain the same information. This is a savings of 1.3 million hours per year, or about $22 million at the median wage of $17 per hour.

The Bureau recognizes that the benefit to consumers of information in a particular disclosure may be attenuated to the extent that the same information is available in other disclosures that are provided at the same (or nearly the same) time. The Bureau received numerous comments pointing out particular pieces of information on the periodic statement that are available to consumers on other disclosures such as IRS Form 1098; the annual escrow statement (for consumers who use escrow accounts); State mandated notices regarding referral to foreclosure, cures, and loss mitigation; bankruptcy disclosures; and notices associated with the early intervention, continuity of contact and loss mitigation provisions in the Bureau's companion proposed rulemaking on mortgage servicing, the 2013 RESPA Servicing Final Rule. Individual comments regarding disclosures on the periodic statement that are duplicative of disclosures provided in other documents are presented and discussed in part V.

While consumers may not generally benefit from duplicative disclosures, the periodic statement consolidates key information related to their mortgages, including information about their payments and the implications of non-payment that is currently provided in different documents. Regardless of whether consumers should know which of the aforementioned documents provide the information they may need in a particular situation, and regardless of whether consumers should retain these documents and keep them readily available, a consolidated periodic statement benefits consumers who are poorly informed about where to find the information they may need or who did not retain the relevant documents. A consolidated disclosure also provides an overview of mortgage debt and payments that some consumers may find easier to understand and more informative about the financial condition of their households than a variety of separate documents. Overall, the Bureau believes that providing a single integrated document, in addition to a number of other communications that contain fragments of this information, can be more efficient for consumers.

Potential costs to consumers. The Bureau received comments claiming that the periodic statement generally, or particular disclosures in it, could produce negative consequences for consumers. One industry commenter stated that requiring content that may be irrelevant to the consumer could detract from the actual relevant content. An industry association commenter stated that the entire periodic statement may be unwanted and could cause consumers to overlook other important information that is provided to them on a periodic basis, such as annual escrow or private mortgage insurance notices or late notices. Another argued that the periodic statement should present only a snapshot of the consumer's account and that disclosing general policies of the servicer would confuse consumers. An industry commenter argued that requiring information about any loan modification the consumer received would be confusing.

The Bureau recognizes that consumers are heterogeneous, that some will benefit more than others from a new disclosure, and that some may even

[184] *See* Macro Report.

[185] The Bureau estimates there are about 60 million closed-end mortgage loans (first and subordinate liens) and about 8 million will be exempt from the periodic statement requirement. For these estimates, the Bureau aggregated mortgage loan counts obtained or derived from the FHFA ''Home Loan Performance'' data described above, the Board's Flow of Funds Accounts of the United States (statistical release z.1), the data from the credit union Call Report and the bank and thrift Call Report, the CoreLogic mortgage loan servicing data set, and the BBx data set from BlackBox Logic.

experience negative, unintended consequences. However, the Bureau believes that the consolidated periodic disclosure it developed and tested provides consumer benefits. As discussed above, servicers receive minimal consequential feedback from consumers about the quality of servicing disclosures. Thus, they have little incentive to incur the costs of researching and discovering the information consumers want in a periodic disclosure. The Bureau did receive one comment from industry referring to its ''consumer tested and appreciated'' periodic statement and another arguing against including delinquency information in the periodic statement since, in the commenter's experience, this information was more effective in collection letters. The Bureau is aware of other efforts by certain servicers to improve their disclosures. However, this work does not appear to be widespread, and the Bureau received only a small number of comments about efforts to improve disclosures. In contrast, the Bureau worked closely with Macro to develop the model disclosures, conducted three rounds of consumer testing, and revised the disclosure based on the results of this testing. Based on this anecdotal evidence, the comment letters, and the Bureau's expertise in disclosure design and consumer behavior, the Bureau concludes that consumers in general will benefit from the periodic statement disclosure even if certain consumers may find the disclosure confusing.

Some or all of the costs attributable to the periodic statement provisions may be passed through to consumers. As explained below, the Bureau believes that the annual cost per consumer is small. Servicers may in general attempt to shift a cost increase onto others and consumers may ultimately bear part of an increase that falls nominally on servicers. For the new periodic statement disclosure, however, the costs to be shifted are small and so consumers would see at most a small cost increase.

As discussed above, the Bureau is adopting grouping requirements for the periodic statement disclosure. The Bureau recognizes the possibility that constraints on the way servicers present information to consumers may prohibit the use of more effective forms that servicers are using or may develop. The constraints would then impose a cost on consumers.

The Bureau does not believe these costs are substantial. As discussed above, very few commenters described efforts to test and develop superior disclosures, and the Bureau is unaware of general efforts by servicers to develop a periodic statement that meets the requirements of the Dodd-Frank Act and provides the benefits to consumers of the prescribed model forms. In contrast, the Bureau worked closely with Macro to develop the model disclosures, conducted three rounds of consumer testing, and revised the disclosure based on the results of this testing.

Potential benefits to covered persons. Providing the content in the periodic statement on a regular basis to consumers may reduce the frequency with which consumers contact the servicer for information and reduce the time servicers spend answering consumer questions. Servicers benefit to some extent when consumers detect errors quickly, and the information in the periodic statement may facilitate this. Servicers may also have reduced costs when they manage fewer partial payments and delinquencies and can resolve delinquencies sooner.

Potential costs to covered persons. The periodic statement disclosure requirements will result in certain compliance costs to non-exempt servicers. Regarding the scope of coverage, the Bureau believes that about 380 insured depositories and credit unions will not qualify for the small servicer exemption (and about 10,800 will qualify). The insured depositories and credit unions that do not qualify for the small servicer exemption service about 40.4 million loans (those that do qualify service about 5.7 million loans).

Using data sources described in the analysis of the small servicer exemption, the Bureau estimates that there are about 13.9 million closed-end mortgage loans serviced by non-depositories. However, the Bureau does not have the data necessary to accurately estimate the number of exempt non-depository servicers or the number of loans they service. The Bureau believes that the number of loans serviced is a small percentage of this total given the financial advantages of servicing large numbers of loans.

Regarding costs, based on discussions with servicers and software vendors, the Bureau believes that, in general, servicers of all sizes will incur minimal one-time costs to learn about the final rule. They will generally use vendors for one-time software and IT upgrades and for producing the disclosure. The revised disclosure provides to consumers information that is not currently disclosed to them, including information that is specific to each loan. Servicers (or their vendors) may not have ready access to all of this additional loan-level information; for example, if some of this additional information is stored in a database that is not regularly accessed by systems that produce the current disclosures.

The Bureau believes that under existing vendor contracts, large and medium sized servicers may not be charged for the upgrades but will be charged for producing and then distributing *(i.e.,* mailing or electronically communicating) the disclosure. Vendors will likely pass along all of these costs to small servicers.[186] However, when most servicers simultaneously need an upgrade, the one-time cost is mitigated by the fact that the costs of a single vendor may be spread among a large number of servicers.

A particular challenge in estimating the cost of the periodic statement disclosure requirements comes from the lack of information on the extent to which servicers currently provide consumers with coupon books, billing statements, or periodic statements.[187] This makes it impossible to quantify the impact of the rule and its cost. For example, servicers who do not currently provide billing statements to consumers with adjustable rate mortgages will have new production and distribution costs for servicing those loans. In contrast, servicers who already provide billing statements will have new production costs but not new distribution costs for servicing those loans. Servicers who provide coupon books to consumers with fixed rate mortgages may not have any new production or distribution costs for servicing those loans, depending on how frequently they revise their coupon books.[188]

The lack of information on these current servicing practices makes it impossible to determine the impact of the rule on the production and

[186] In discussions of costs to covered persons, ''small servicers'' are servicers that meet the size standard for that business established by the Small Business Administration. Banks, thrifts and credit unions that service mortgage loans must have $175 million or less in assets and other servicers must have $7 million or less in average annual receipts.

[187] A further complication comes from the use of ''combined'' periodic statements. The Bureau received a number of comments on this topic. Combined periodic statements may contain information about mortgage loans and open-end loans along with information about savings and checking accounts. The timing of the periodic statement may limit the ability of servicers to combine all of this information in one disclosure. Servicers who currently send a billing statement in a combined disclosure may therefore incur additional distribution costs along with additional production costs. *See* the section-by-section analysis of § 1026.41(b) for a full discussion of the timing issue and comments.

[188] However, servicers who provide coupon books to consumers with fixed rate mortgages are required to provide a delinquency notice (*see* § 1026.41(e)(3)(iv)). Since servicers already provide some kind of delinquency notice, the costs attributable to the rule are most likely small.

distribution of disclosures. Thus, it is not possible to accurately determine the cost of the rule to covered persons. However, the Bureau received a few comments that presented costs associated with the new periodic statement disclosure: [189]

- An industry association commenter stated that for larger credit unions, the mailing costs alone may exceed $500,000.00 per year. For smaller credit unions these costs would likely be upwards of $75,000 to $100,000 per year. The commenter also reported that one credit union servicing 5,500 mortgages stated it would incur an additional $70,000 in expenses to prepare and mail the periodic statement. Initial programming and development charges could be $65,000 to more than $100,000.
- A credit union servicing 11,000 mortgage loans commented it would have up-front costs of $45,000 to $65,000 and monthly production and mailing costs of $6,800.
- A multi-bank financial holding company commented that its subsidiary banks would have costs of 72 cents per statement each month, so $172,800 annually.
- A non-depository financial services company servicing 4,000 loans commented it would incur an initial cost of over $5,000 and ongoing costs of $40,000.
- An industry association commenter stated that a large credit union in North Carolina reported annual costs of $500,000 if it cannot use a combined statement; smaller credit unions reported $10,000 to $25,000 additional annual costs.

From these five comments, the Bureau can derive the following four estimates of annual costs per loan (assuming 12 disclosures per year) and three estimates of one-time costs per loan:[190]

Annual costs: $7.42, $8.64, $10.00, $12.73.

One-time costs: $1.25, $5.25, $18.18.

Regarding the annual costs, the commenters do not provide enough detail for the Bureau to know if they are accurately computing the cost of the periodic statement requirement relative to the proper baseline. For example, if commenters currently produce and mail a billing statement, then they should deduct the current production and mailing costs from those they expect to incur from the rule. For both one-time and annual costs, the Bureau would need to know whether these servicers are using vendors and (if so) the contract terms with those vendors to know if the commenters are accurately computing the cost of the rule.

Setting aside these issues, however, the Bureau notes that the median of the total annual costs reported by the commenters (assuming a five-year amortization) is $10.25 per loan. Thus, for loans that refinance every five years, the periodic statement requirement would add about $50 to the cost of the loan. The Bureau notes that this amount could be recovered at origination with a minor fee or through a very small increase in the cost of credit to consumers. However, the Bureau believes that this figure sharply overstates the cost of the periodic statement requirement relative to the proper baseline. Many of these consumers already receive billing statements, so there would not be any additional distribution costs from the disclosure, and a cost currently incurred is not properly attributed to the rule.

Finally, the Small Business Review Panel stated that a periodic statement requirement would impose significant burdens on small servicers.[191] The panel explained that while much of the information in the periodic statement was already being provided through alternative means and most of the information is available on request, consolidating this information into a single monthly dynamic statement would be difficult for small servicers. The Small Entity Representatives expressed that due to their small size, they would not be able to have in-house expertise and would generally use third-party vendors to develop periodic statements. Due to their small size, they believed they would have no control over these vendor costs. Additionally, the small servicers have a smaller portfolio over which to spread the fixed costs of producing periodic statements. Such servicers stated they would be unable to gain cost efficiencies and could not effectively spread the implementation costs of periodic statements across their loan portfolios. Finally, even the costs of mailing monthly statements could be significant to the extent that small servicers currently use alternative information methods (such as coupon books for adjustable-rate mortgages, or passbooks).

The Bureau believes that the small servicer exemption in § 1026.41(e)(4) covers essentially all small insured depositories and credit unions. The Bureau has only a rough estimate of the number of small non-depository servicers covered by the exemption, but the estimate supports the view that vast majority would be exempt. Further discussion of the impact of the rule on small business is discussed in part VIII below.

The Bureau is mitigating the burden of the periodic statement requirement relative to the statute by including exemptions and relaxing certain provisions. In addition to the reverse mortgage exemption, the Bureau has expanded the small servicer exemption both by increasing the loan threshold from the proposed 1,000 loans to 5,000 loans, and by including Housing Finance Agencies in the small servicer exemption. Further, the Bureau has made modifications to the statutorily required information that must be disclosed on the periodic statement, including requiring the *existence* of any prepayment penalty (in place of the *amount*), and by requiring Web site information on housing counselors (in place of a list of specific housing counselors).

G. Potential Specific Impacts of the Final Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Dodd-Frank Act § 1026

Overall, the impact of the rule on depository institutions and credit unions depends on a number of factors, including the institutions' current software and compliance systems and the current practices of third-party service providers. Based on discussions with industry, and taking into account the expanded small servicer exemption from the periodic statement requirement, the Bureau believes that larger depositories and credit unions will incur only minimal costs from this rulemaking. The following analysis focuses on depository institutions and credit unions with total assets between $175 million and $10 billion; the impact of the rule on depository institutions and credit unions with less than $175 million in total assets is discussed above and in the Final Regulatory Flexibility Analysis.

The initial interest rate adjustment notice is a new disclosure. The Bureau believes that depository institutions and credit unions with total assets between $175 million and $10 billion use third-party vendors who will, under current contracts, absorb the information collection and data processing costs. The Bureau believes that vendors do not absorb the costs of mailing disclosures,

[189] Other comments on the costs of providing the periodic statement disclosure are discussed in the section-by-section analysis.

[190] When a range of costs is reported, these estimates use the higher figure.

[191] As in the previous discussions of costs in part VII, ''small servicer'' means servicers that meet the Small Business Administration size standard.

and based on discussions with industry the Bureau understands that 70–80 percent of consumers have not elected to receive disclosures electronically. Relatively few adjustable-rate mortgages have been originated in recent years, however, and so the number that will adjust for the first time in the near term will be small.

The costs to depository institutions and credit unions with total assets between $175 million and $10 billion from the revised § 1026.20(c) disclosure will also be minimal. The Bureau expects that the information collection and data processing costs will largely be absorbed by third-party vendors. The mailing costs of the revised § 1026.20(c) will be the same as the mailing costs of the current disclosure.

Based on discussions with industry, the Bureau believes that the vast majority of depositories and credit unions, of any size, are already in compliance with the provisions for prompt crediting of payments and response to requests for payoff amounts.

Thus, most of the impact of the final rule on depository institutions and credit unions with total assets between $175 million and $10 billion comes from the periodic statement disclosure. The Bureau believes that a significant number of these institutions will qualify for the small servicer exception adopted in the final rule. Using FHFA and Call Report data, the Bureau estimates that 92% of institutions in this range and all but one of those with assets of $175 million and below will qualify for the exception.

For those institutions with total assets between $175 million and $10 billion that do not qualify for the exception, the Bureau expects that the information collection and data processing costs will largely be absorbed by third-party vendors. Thus, the main cost factor for these institutions is the mailing (or more generally, the distribution) costs. For the reasons discussed above, the Bureau cannot accurately estimate this cost. It is reasonable to suppose, however, that there would be no new distribution costs associated with fixed rate mortgages that currently receive billing statements. There may also be no new distribution costs associated with fixed rate mortgages that currently receive coupon books; however, servicers who provide these consumers with coupon books that do not comply with the new rule would need to provide them with revised coupon books that do comply with the new rule. Similarly, it is reasonable to suppose that there would be no new distribution costs associated with adjustable rate mortgages that currently receive billing statements. There would, however, be new mailing costs for adjustable-rate mortgages that currently receive coupon books.

2. Impact of the Provisions on Consumer Access to Credit and Consumers in Rural Areas

The consideration of the cost of each provision of the final rule above found that these costs were extremely small for the § 1026.20(c) disclosure, the new initial interest rate adjustment notice, and the prompt crediting requirement. Thus, these provisions will have no significant impact on consumer access to credit. The Bureau cannot accurately estimate the cost of the periodic statement requirement, and there is a substantial difference between the Bureau's rough estimate of this cost and the higher cost figures submitted in comments. However, even the higher cost figures should not materially reduce consumer access to credit given that such costs may be recovered at origination through a relatively minor fee.

Consumers in rural areas may experience impacts from the final rule that are different in certain respects from the benefits experienced by consumers in general. Consumers in rural areas may be more likely to obtain mortgages from local banks and credit unions that service 5,000 loans or fewer and only service loans which they originated or own. For reason discussed above, these servicers likely already provide many of the benefits to consumers that the final rule is designed to provide. These servicers will benefit from the exemption to the periodic statement requirement in the final rule by not incurring the costs associated with modifying an existing disclosure or creating a new disclosure to comply with this requirement. Borrowers in turn may benefit, either as mortgagees or as customers at these insured depositories and credit unions, through continued access to a lending and servicing model they prefer.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (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.[192] The Bureau also is subject to certain additional procedures under the RFA involving the convening of panel to consult with small business representatives prior to proposing a rule for which an IFRA is required.[193]

An entity is considered ''small'' if it has $175 million or less in assets for the banks, and $7 million or less in revenue for non-bank mortgage lenders, mortgage brokers, and mortgage servicers.[194] The Bureau did not certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. Thus, the Bureau convened a Small Business Review Panel to obtain advice and recommendations of representatives of the regulated small entities. The 2012 TILA Servicing Proposal preamble included detailed information on the Small Business Review Panel.[195] The Panel's advice and recommendations are found in the Small Business Review Panel Report;[196] several of these recommendations were incorporated into the proposed rule. The 2012 TILA Servicing Proposal also included a discussion of each of the panel's recommendations in the section-by-section analysis of each section.

The 2012 TILA Servicing Proposal contained an Initial Regulatory Flexibility Analysis (IRFA),[197] pursuant to section 603 of the RFA. In this IRFA the Bureau solicited comment on whether the burden imposed on small entities by the initial interest rate adjustment disclosure outweighed the consumer protection benefits it would afford as well as whether the proposed rule would have any impact on the cost of credit for small entities. Comments addressing the initial rate adjustment disclosure are addressed in the section-by-section analysis above. Comments addressing the impact on the cost of credit are discussed below. Elsewhere in the proposal, the Bureau sought comment on the small servicer exemption, specifically if ''small servicer'' was properly defined, and if the small servicer exemption should be

[192] For purposes of assessing the impacts of the final rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[193] 5 U.S.C. 609.

[194] The current SBA size standards are found on SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards.*

[195] 77 FR 57318, 57376–77 (Sept. 17, 2012).

[196] *See* Small Business Review Panel Report.

[197] 77 FR 57318, 57376–83 (Sept. 17, 2012).

extended to other provisions of the proposed rules. These comments are addressed in the section-by-section analysis of each provision.

Based on the comments received, and for the reasons stated below, the Bureau is not certifying that the final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Bureau has prepared the following final regulatory flexibility analysis pursuant to section 604 of the RFA.

1. A Statement of the Need for, and Objectives of, the Rule

The Bureau is publishing final rules to establish new regulatory protections for consumers relating to mortgage servicing. The final rule amends Regulation Z to implement amendments to TILA that were added by sections 1418, 1420, and 1464 of the Dodd-Frank Act. Congress included sections 1418, 1420, and 1464 in the Dodd-Frank Act to address consumer harms relating to mortgage servicing.

The overall objective of the disclosure requirements and the payoff statement provision is to ensure that consumers can obtain basic, accurate information about their mortgage loan obligations in a timely manner. The amendments to Regulation Z are, among other things, intended to protect consumers by ensuring that a consumer receives disclosures in advance of an interest rate adjustment with sufficient time to explore options available to the consumer, if necessary, to avoid payment shock. The Bureau also proposes to revise the content and timeframe of the Regulation Z § 1026.20(c) disclosure for interest rate adjustments that result in an accompanying payment change, from the current between 25 and 120 days before the first payment at a new level is due, to between 60 and 120 days before the first payment at a new level is due.

Further the amendments are intended to ensure that a consumer receives a monthly mortgage statement that discloses the current status of the consumer's mortgage loan obligation. The required periodic statement is designed to serve a variety of purposes. These purposes include informing consumers of their payment obligation, providing consumers with information about their mortgage in an easily read and understood format, creating a record of transactions to aid in error detection and resolution, and providing information to distressed or delinquent consumers.

Finally, the amendments are intended to protect consumers by imposing requirements clarifying the crediting of consumer mortgage loan payments and by requiring a servicer to provide a consumer with a payoff statement within a reasonable timeframe. The objective of the prompt crediting requirement is to ensure that consumers benefit from every effort that they make to pay their mortgage debt. The final rule clarifies the meaning of ''payment'' for purposes of the crediting requirement but does not require immediate crediting of partial payments.

2. Summary of Significant Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

In accordance with section 3(a) of the RFA, the Bureau prepared an IRFA. In the IFRA, the Bureau estimated the possible compliance costs for small entities from each major component of the rule against a pre-statute baseline.[198] The Bureau requested comments on the IRFA. An industry association submitted a comment letter that referred in passing to the Regulatory Flexibility Analysis. It did, however, raise three significant issues regarding the impact of the proposed rule on small servicers. First, the commenter stated that it would not be effective public policy to require servicers smaller than those in the top-50 to incur the costs of complying with the proposed rule. The commenter observed that the top-50 servicers service 80 percent of outstanding mortgage loans and compliance with the rule would impose significant costs on the well over 12,000 servicers that service the remaining 20 percent. The commenter states that small servicers' costs are disproportionate to their share of the market. Second, the commenter states that neither the proposed Dodd-Frank Act section 1022 analysis nor the IRFA adequately identifies the types of costs or the amount of those costs that bank servicers will incur as a result of the servicing rulemakings. Third, the commenter states that given the servicing performance of community banks and the incentives that drive their high level of customer service, there is no demonstrated need to apply to small servicers those elements of the proposal that are not required by the Dodd-Frank Act.[199]

The Bureau has carefully considered these comments and responds as follows. First, while the Bureau agrees that it should be aware of imposing a disproportionate share of compliance costs on a particular segment of a market, it believes that doing so may be necessary under certain circumstances. The consequences of compliance costs for covered persons depend on the size of these costs relative to other costs and the ability of covered persons to absorb or shift these costs. The consequences for consumers depend on these factors as well as the improvements in products and services from compliance by servicers. These consequences are not summarized by the share of aggregate costs imposed on a particular segment. The Bureau also notes that the fact that a large number of small servicers will require new and revised disclosures means that each vendor will likely spread the one-time costs of developing and validating disclosures over a large number of servicers.[200]

Second, the proposed Dodd-Frank Act section 1022 analysis and IRFA both briefly described the one-time and ongoing costs that bank servicers would incur as part of the servicing rulemaking. Both also provided limited quantification of the costs attributable to the rule, from a pre-statutory baseline, in light of the limited amount of data that was reasonably available. As discussed in the final Dodd-Frank Act section 1022 analysis, the Bureau does not believe that the changes required of servicers in this rulemaking would impose the types of costs that the commenter describes.[201]

Finally, the Bureau notes that it has offered good reasons for requiring all servicers to provide the revised § 1026.20(c) disclosure. The additional content, clear formatting and earlier disclosure will benefit consumers who need to refinance or move. The Bureau also notes that applying the modified § 1026.20(c) disclosure to only certain servicers may create confusion as the servicers not covered by the new rule would still be required to provide the existing notices on the existing timeframe; having servicers send very similar notices on different timeframes may be confusing for the marketplace.

The Bureau received numerous comments describing in general terms the impact of the proposed rule on small servicers and the need for exemptions

[198] *See* part VII.B. for an explanation of pre-statute baseline.

[199] The commenter does not define small servicer, but the commenter does request that the Bureau increase the loan threshold in § 1026.41(e)(4) to 10,000. The Bureau notes that about 200 insured depositories and credit unions service over 10,000 loans and others service some loans for others.

[200] This point was made in the proposed Dodd-Frank Act section 1022 analysis, *see* 77 FR 57318, 57369 (Sept. 17, 2012), and is discussed further in the final Dodd-Frank section 1022 analysis.

[201] *See* part VII.B and the consideration of costs to covered persons from the revised § 1026.20(c) notice in part VII.D.1.

for small servicers from various provisions of the proposed rule. These comments, and the Bureau's responses, are discussed in the section-by-section analysis, element 5 of this FRFA (regarding the small servicer exception to the periodic statement requirement) and element 6–1 of this FRFA.

3. Response to the Small Business Administration Office of Advocacy Comment

The Small Business Administration Office of Advocacy (Advocacy) provided a formal comment letter to the Bureau in response to the proposed rules on mortgage servicing. Among other things, this letter expressed concern about the following issues: Inadequate notice of the proposed rules, small servicer exemptions, and the effective date of the regulation.

First, Advocacy expressed concern that small entities did not have adequate notice of the proposed rules, because although the proposed rules were posted on the Bureau Web site on August 10, 2012 with comments due 60 days later, the rules were not published in the **Federal Register** until September 17, 2012. Advocacy was concerned that small entities that relied on the **Federal Register** for notice of proposed rules would not have sufficient time to prepare comments in response to the proposed rule.

The Bureau believes that small entities were given adequate notice and a full opportunity to comment on the proposed rule. The rules were press released and published on the Bureau's Web site a full 60 days before the close of the comment period.[202] The Bureau engaged in industry outreach, including a publicity campaign around the Regulation Room project encouraging and facilitating public participation in the rulemaking process.[203] Further, the Bureau believes that, in light of the recent attention on the industry, including the National Mortgage Settlement and market changes, small entities would be aware that the Dodd-Frank Act mandated changes to the servicing industry and proposed rules would be forthcoming; particularly given that trade associations have taken an active role in the rulemaking. The Bureau believes such trade associations have helped to inform small entities of the proposed rulemaking.[204] In light of all this, the Bureau believes that small entities were given adequate notice of the proposed rules, as evidenced by the large number of small entities who submitted formal comments.

Second, Advocacy encouraged the Bureau to use its exception authority to exempt small servicers from as much of the proposed rule as possible, including specific requests for exemptions from the ARM disclosure and periodic statement provisions. The Advocacy letter expressed concerns that the new § 1026.20(d) initial interest rate adjustment notice would be confusing to consumers because the rate could change during the six month period between when the estimate was provided and when the rate actually changes, such that this would not provide meaningful notice to the consumer. Additionally, Advocacy encouraged the Bureau to exempt small entities from the rate change notification for non-hybrid ARMs because the changes are not required by the statute. Finally, Advocacy encouraged the Bureau to exempt all small entities from the periodic statement requirements.

The Bureau carefully considered a small servicer exemption in light of each of the proposed rules, and a complete discussion of the consideration of a small servicer exemption is found in the respective section of the section-by-section analysis. The Bureau believes the earlier notification of the initial rate change will help to ensure a consumer who would have difficulty making payments at the adjusted rate has sufficient time to pursue the alternatives suggested in the notification. As discussed above, the Bureau believes benefits of the earlier timeframe outweigh the potential confusion the estimate may cause. Further, the Bureau believes that, because both hybrid and non-hybrid ARMs are subject to the same risk of payment shock, it is appropriate to expand the scope of the rule to include non-hybrid ARMs, as contemplated by the savings clause in TILA section 128A(c). Finally, the Bureau is finalizing the proposed small servicer exemption for the periodic statement requirement, with an expanded threshold (5,000 loans). For the reasons discussed above in the section-by-section analysis, the Bureau believes this is the appropriate scope of the small servicer exemption.

Third, Advocacy encouraged the Bureau to provide Small Entity Representatives with a sufficient amount of time for them to comply with the requirements of the proposal, and expressed this could take 18–24 months. A complete discussion of the effective date is found in part VI above. While the Bureau understands the new rules will take time to implement, the Bureau also believes that consumers should have the benefit of the additional protections as soon as practical. In light of the comments received, the Bureau believes that 12 months is an appropriate implementation period. This time period is consistent with (1) the period requested by the vast majority of comments, (2) outreach conducted by the Bureau with vendors and systems providers regarding timeframes for updating core systems, and (3) the implementation period for other requirements imposed by the Dodd-Frank Act or regulations issued by the Bureau that may also impact creditors, assignees, and servicers. Further, the Bureau believes that an approximately 12-month implementation period appropriately balances the needs of industry to adjust operations to implement the Final Servicing Rules with the goal of providing consumers the benefit of the protections implemented by the Final Servicing Rules.

4. A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply

As discussed in the Small Business Review Panel Report, for purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions.[205] A ''small business'' is determined by application of SBA regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards.[206] Under such standards, insured depositories and credit unions are considered ''small'' if they have $175 million or less in assets, and for other financial businesses, the threshold is average annual receipts (*i.e.,* annual revenues) that do not exceed $7 million.[207]

During the Small Business Review Panel process, the Bureau identified five categories of small entities that may be subject to the proposed rule for purposes of the RFA: Commercial banks/savings institutions [208] (NAICS 522110 and 522120), credit unions (NAICS 522130), firms providing real estate credit (NAICS 522292), firms engaged in other activities related to

[202] *See* CFPB Press Release on Servicing Proposal.

[203] *See e.g.,* Nat'l Ass'n of Fed. Credit Unions, *CFPB Proposes Mortgage Servicing Rule Changes* (Aug. 12, 2012) (''NAFCU Compliance Blog''), *available at http://www.nafcu.org/News/2012_News/August/CFPB_proposes_mortgage_servicing_rule_changes/.*

[204] *See e.g.,* NAFCU Compliance Blog.

[205] 5 U.S.C. 601(6).

[206] *See* SBA Size Standards.

[207] *See* SBA Size Standards.

[208] Savings institutions include thrifts, savings banks, mutual banks, and similar institutions.

credit intermediation (NAICS 522390), and small non-profit organizations. Commercial banks, savings institutions, and credit unions are small businesses if they have $175 million or less in assets. Firms providing real estate credit and firms engaged in other activities related to credit intermediation are small businesses if average annual receipts do not exceed $7 million.

A small non-profit organization is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Small non-profit organizations engaged in mortgage servicing typically perform a number of activities directed at increasing the supply of affordable housing in their communities. Some small non-profit organizations originate and service mortgage loans for low and moderate income individuals while others purchase loans or the mortgage servicing rights on loans originated by local community development lenders. Servicing income is a substantial source of revenue for some small non-profit organizations while others receive most of their income from grants or investments.

The following table provides the Bureau's estimate of the number and types of entities to which the rule will apply:

Table 1: Estimated number of affected entities and small entities by NAICS code and engagement in closed-end mortgage loan servicing

Category	NAICS	Total entites	Small entities	Entities engaged in mortgage loan servicing	Small entities engaged in mortgage loan servicing
Commercial banks & savings institutions	522110, 522120	7,081	3,779	6,975	3,714
Credit unions	522130	7,040	6,079	4,889	3,951
Real estate credit	522292	5,791	5,152	1,388	800
Other activities related to credit intermediation (includes loan servicing)	522390	5,494	5,319		

For commercial banks, savings institutions, and credit unions, the number of entities and asset sizes were obtained from December 2011 Call Report data as compiled by SNL Financial.[209] Banks and savings institutions are counted as engaging in mortgage loan servicing if they hold closed-end loans secured by one to four family residential property or they are servicing mortgage loans for others. Credit unions are counted as engaging in mortgage loan servicing if they have closed-end one to four family mortgages in portfolio, or hold real estate loans that have been sold but remain serviced by the institution.

For firms providing real estate credit and firms engaged in other activities related to credit intermediation, the total number of entities and small entities comes from the 2007 Economic Census. The total number of these entities engaged in mortgage loan servicing is based on a special analysis of data from the Nationwide Mortgage Licensing System and Registry (NMLS) and is current as of Q1 2011. The total equals the number of non-depositories that engage in mortgage loan servicing, including tax-exempt entities, except for those mortgage loan servicers (if any) that do not engage in any mortgage-related activities that require a State license. The estimated number of small entities engaged in mortgage loan servicing is based on predicting the likelihood that an entity's revenue is less than the $7 million threshold based on the relationship between servicer portfolio size and servicer rank in data from Inside Mortgage Finance.

Non-profits and small non-profits engaged in mortgage loan servicing would be included under real estate credit if their primary activity is originating loans and under other activities related to credit intermediation if their primary activity is servicing. The Bureau has not been able to separately estimate the number of non-profits and small non-profits engaged in mortgage loan servicing. These non-profits may list loan servicing income on the IRS Form 990 Statement of Revenue, but it is not possible to search public databases on non-profit entities according to what they list on the Statement of Revenue.

The Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from the new periodic statement disclosure requirements in § 1026.41. The Bureau estimates that all but one insured depository or credit union that meets the SBA asset threshold will qualify for the exemption. The Bureau's methodology for this estimate is straightforward in the case of credit unions. The credit union Call Report presents the number of mortgages held in credit union portfolios and the amount of assets. The Bureau could readily determine which credit union small servicers (as defined by the SBA asset threshold) serviced 5,000 mortgage loans or less. In contrast, the bank and thrift Call Report does not present the number of mortgages, only the aggregate unpaid principal balance, and the amount of assets. The Bureau developed estimates of the average unpaid principal balance at banks and thrifts of different sizes and use this with the information on aggregate unpaid principal balance to derive loan counts at each bank and thrift.[210] The Bureau could then determine which bank and thrift small servicers (as defined by the SBA asset threshold) serviced 5,000 mortgage loans or less.

It is not possible to observe whether the loans that servicers are servicing for others were originated by those servicers. However, the Bureau believes that all insured depositories and credit

[209] The Bureau has updated these figures from the Initial Regulatory Flexibility Analysis, which used December 2010 Call Report data as compiled by SNL Financial.

[210] For banks and thrifts with under $10 billion in assets, the Bureau calculated the average unpaid principal balance of portfolio mortgages by State for credit unions with less than $1 billion in assets and applied the State specific figures to these banks and thrifts. For banks and thrifts with over $10 billion in assets, the Bureau relied on the OCC Mortgage Metrics Report, which showed an average unpaid principal balance estimate of $175,000. For securitized loans, the Bureau relied on the FHFA's Home Loan Performance database, which provides data by size of securitized loan book; this yielded average unpaid principal balances ranging from $141,000 to $189,000.

unions that meet both the SBA asset threshold and the loan count threshold likely qualify for the exception. In principle, these entities may not qualify for the exception because they do not meet the other conditions of the exception, *i.e.,* they service loans that they did not originate and do not own. The Bureau believes that this is extremely unlikely, however. First, most entities servicing loans they did not originate and do not own most likely view servicing as a stand-alone line of business. In this case they would most likely choose to service substantially more than 5,000 loans in order to obtain a profitable return on their investment in servicing. Additionally, the Bureau believes it is highly unlikely that insured depositories and credit unions with $175 million in assets or less choose to make this investment, preferring to use their assets to support other activities. Taking both factors into account, the Bureau believes that essentially all insured depositories and credit unions that meet the SBA threshold and the loan count condition qualify for the exception.

The Bureau does not have the data necessary to accurately estimate the number of small entity non-depositories that would be covered by the exemption.[211] To obtain a rough estimate, the Bureau notes that $7 million in servicing revenue would be generated from an aggregate unpaid principal balance of $2 billion.[212] The Bureau estimates that all but 4 percent of insured depositories and credit unions servicing an aggregate unpaid principal balance of $2 billion or less service 5,000 loans or less. Assuming a similar relationship between servicing revenue and loan counts holds for non-depository servicers, at least for relatively small depository and non-depository servicers, all but 4 percent of non-depository servicers would service 5,000 loans or less. This estimate and the limited data available imply that 768 (all but 4 percent of 800, or 32) non-depository servicers would service 5,000 loans or less. The Bureau considers these figures to be the best available approximations to the number of non-depository servicers that would and would not qualify for the exemption.

5. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final rule does not impose new reporting or recordkeeping requirements. The final rule does, however, impose new compliance requirements on certain small entities. The requirements on small entities from each major component of the rule are presented below. The Bureau discusses impacts against a pre-statute baseline.

Compliance requirements. As discussed in detail in the section-by-section analysis above, the final rule imposes new compliance requirements on servicers. The final rule requires initial interest rate adjustment notifications, revised subsequent interest rate adjustment notifications, new periodic statement disclosures, and certain changes to the prompt crediting and payoff balance provisions of Regulation Z. As discussed in the Dodd-Frank Act section 1022 analysis in part VII above, the Bureau believes that small servicers will incur one-time costs to learn about the final rule and will generally use vendors for one-time software and IT upgrades. Small servicers will also generally use vendors for producing and distributing *(i.e.,* mailing or electronically communicating) the disclosures. The Bureau believes that vendors will likely pass along all of these costs to small servicers. However, the one-time cost to each small servicer will be mitigated by the fact that the costs of a single vendor will be spread among a large number of servicers. The ongoing costs of the ARM disclosures to each small servicer will be mitigated by the relatively small number of ARMs that currently exist. The one-time and ongoing costs of the periodic statement disclosure will be mitigated by the exemption for smaller servicers (as defined in § 1026.41(e)(4)).

Section 1026.20(c) generally amends the timing and content requirement for ARMs to provide a disclosure prior to each interest rate adjustment that effects a change in payment. This change will likely impose a one-time cost on small entities to update their system to comply with this provision. The Bureau reduces the burden on small entities, among other ways, by providing model forms which can be used to ease compliance, by providing exemptions for loans with a term of one year or less, by requiring similar information to that in the § 1026.20(d) notice, and by entirely eliminating the current annual disclosure that is required when over the course of a year, no interest rate adjustment causes a payment change.

Section 1026.20(d) generally requires a new disclosure for the initial interest rate adjustment of an adjustable-rate mortgage. The new disclosure will likely impose one-time and ongoing costs on servicers. Servicers will need to obtain system upgrades from vendors or make programming changes themselves. One Small Entity Representative reported the changes could take two to four days of IT support; these would be one-time costs. The Bureau reduces the burden on small entities, among other ways, by providing model forms which can be used to ease compliance, ensuring similarities between this and the § 1026.20(c) notice, and by providing exemptions for loans with a term of one year or less.

Section 1026.36(c)(1) requires prompt crediting of periodic payments, and allows that partial payments may be held in suspense accounts subject to certain requirements. Compliance with this provision should impose minimal additional costs as prompt crediting of payments is already required by existing Regulation Z. Although many small entities reported they do not use suspense accounts, small servicers who do use suspense accounts may be required to update their systems to comply with this provision.

Section 1026.36(c)(3) requires payoff balances to be provided within seven business days unless exceptional circumstances apply. Compliance with this provision should impose no significant additional cost as this essentially codifies existing Regulation Z § 1026.36(c)(1)(iii) provisions on payoff statements, except that the current provision requires payoff statements to be provided within a reasonable time and creates a safe harbor for responses provided within five business days.

Section 1026.41 generally requires servicers to provide a periodic statement. Servicers may be required to update their systems to comply with this provision. The periodic statement requirement imposes one-time and ongoing costs on small servicers. The

[211] In the proposed rule, the Bureau stated that it was working to gather data from the Nationwide Mortgage Licensing System and Registry (NMLS) that would be additional to the data used in Table 1. The Bureau considered that this additional data might allow the Bureau to refine its estimate of the number of small entity non-depositories that would be covered by the proposed periodic statement exemption in the proposed 2012 TILA Servicing Proposal. The Bureau did obtain additional data from the NMLS. This data, however, does not contain information directly about mortgage servicing revenue and mortgage loans serviced and it has limited information with which to derive these amounts. The Bureau has therefore not used this additional NMLS data to estimate the number of small entity non-depositories that would be covered by the exemption in this final rule. The Bureau also requested that commenters submit relevant data. All probative data submitted by commenters were discussed in this document.

[212] This calculation assumes the servicer receives 35 basis points on each dollar of unpaid principal balance. Typical annual servicing fees are 25 basis points for prime fixed-rate loans, 37.5 basis points for prime ARMs, 44 basis points for FHA loans, and 50 basis points for subprime loans; *See* Larry Cordell *et al., The Incentives of Mortgage Servicers: Myths and Realities,* at 15 (Fed. Reserve Bd., Working Paper No. 2008–46, 2008). The conclusion of the analysis would be the same regardless of which figure is used.

specific types of costs incurred by a servicer depend on whether the servicer produces the periodic statement in-house or uses a third-party vendor. In-house one-time costs include the development of a new form, system reprogramming or acquisition, and perhaps new or updated software. In-house ongoing costs for production include additional system use and staff time. In-house ongoing costs would also include paper, printing, and mailing costs for distributing the periodic statement to consumers who do not give permission to receive the disclosure electronically. Vendors may also charge an initial one-time cost for developing a new form as well as ongoing costs for producing and distributing the statement. The Bureau reduces the burden on small entities, among other ways, by providing sample forms which can be used to ease compliance with the final rule, by providing a coupon book exemption for certain fixed-rate mortgages, and by providing a small servicer exemption for certain small entities.

The Small Entity Representatives who use vendors stated that they did not know what their vendors would charge to enable them to comply with the new periodic statement requirement. The Small Entity Representatives agreed that the one-time charge would be different from what they would be charged if they were the only entity making the change. Vendors can spread the one-time costs of new regulatory requirements over many servicers.

In accordance with Dodd-Frank Act section 1420, the final rule includes a coupon book exemption for fixed-rate loans where the consumer is given a coupon book with certain of the information required by the periodic statement. It is not possible to estimate the share of residential mortgage loans serviced by small servicers that would qualify for this exemption. Many of the Small Entity Representatives reported that they provide consumers with coupon books for ARMs. However, there is no data with which to estimate the percentage of small servicer portfolio loans that are in fixed-rate mortgages. Based on anecdotal reports, the Bureau understands that many small servicer portfolio loans are adjustable-rate mortgages.

Finally, the rule includes a small servicer exemption. In the proposed rule, the Bureau provided an exemption from the periodic statement requirement for servicers that serviced 1,000 or fewer loans, all of which they either owned or had originated. The initial regulatory flexibility analysis provided a preliminary analysis of the exemption and stated that all but 13 small insured depositories and credit unions and 65 percent of small entity non-depositories would be covered by the exemption. As was explained in the section-by-section analysis of proposed paragraph 41(e)(4), this calculation was based on the assumption that the average unpaid principal balance on the 1,000 loans was $175,000.[213] Data from the bank and thrift Call Report on total unpaid principal balance of loans serviced by each bank or thrift then allowed the Bureau to estimate the number of small insured depositories and credit unions that would be covered by the exemption. The Bureau solicited comment on all aspects of the proposed exemption and asked interested parties to provide information relating to the exemption.

Comments received. The Bureau received a number of comments from banks and thrifts regarding the average unpaid principal balance of loans they originate or service. One industry commenter stated that the average size of loans it serviced was about $55,000 and that the average mortgage in the State of Oklahoma was about $106,000. Another stated that the average size of loans in its portfolio was less than half the Bureau's figure and that at origination it would lend only about $120,000 on the median-valued house in the zip code of its main office. Another stated that it serviced 1,800 loans with an average loan size of just under $70,000, and that the proposed threshold penalizes banks that specialize in moderately-priced homes.[214]

In response to these comments, the Bureau performed additional analysis of Call Report data from banks, thrifts and credit unions. In particular, careful examination of loan count information from the credit union Call Report allowed the Bureau to improve its estimate of the likely average unpaid principal balance of loans serviced by banks that meet the SBA threshold for a small servicer. The Bureau has concluded that the likely average unpaid principal balance of loans serviced by insured depositories and credit unions that meet the SBA threshold is closer to $70,000.[215] The Bureau also concludes that about 100 servicers meeting the threshold likely service more than 1,000 loans.

On the basis of this additional analysis, the final rule increases the loan count threshold for the exemption from 1,000 loans to 5,000 loans. The Bureau's estimate of the number of small bank and small non-bank mortgage servicers that will be exempt under the new threshold were presented in element 4 of this FRFA, above.

Estimate of the classes of small entities which will be subject to the requirement. Section 603(b)(4) of the RFA requires an estimate of the classes of small entities which will be subject to the requirement. The classes of small entities which will be subject to the reporting, recordkeeping, and compliance requirements of the proposed rule are the same classes of small entities that are identified above in part VIII.B.4.

Section 603(b)(4) of the RFA also requires an estimate of the type of professional skills necessary for the preparation of the reports or records. The Bureau anticipates that the professional skills required for compliance with the proposed rule are the same or similar to those required in the ordinary course of business of the small entities affected by the proposed rule. Compliance by small entities that will be affected by the rule will require continued performance of the basic functions that they perform today: Generating disclosure forms, crediting partial payments from consumers either immediately or when they constitute a full payment, and responding to requests for payoff statements.

6–1. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

The Bureau understands the new provisions will impose a cost on small entities, and has attempted to mitigate the burden wherever it can be done without unduly diminishing consumer protection. The section-by-section analysis of each provision contains a complete discussion of the following steps taken to minimize the burden.

[213] This is the average unpaid principal balance for first-lien residential mortgages at the largest national banks, which at the time of the report accounted for 63 percent of all outstanding mortgages; *See* OCC Mortgage Metrics Report.

[214] On the other hand, one industry commenter reported holding 2,555 loans totaling $440 million, so approximately $172,000 per loan. The Bureau notes that only one of these four commenters meets the Small Business Association threshold for a small servicer.

[215] Credit Unions report the number and aggregate balance of mortgages held in portfolio on their Call Report. From these reports the Bureau calculated the average unpaid principal balance of portfolio mortgages by State for credit unions with less than $1 billion in assets and applied the State specific figures to banks and thrifts under $10 billion in assets. For securitized loans the Bureau derived the average unpaid principal balance based upon the size of the securitized loan book using the FHFA's Home Loan Performance database, which yielded balances ranging from $141,000 to $189,000.

Regulation Z § 1026.20(c) Disclosure for Adjustable-Rate Mortgages

The Bureau is making changes to the existing § 1026.20(c) disclosure for ARMs. The Bureau has attempted to mitigate the burden of the changes to the § 1026.20(c) notice by modifying the final rule from the proposed requirements on prepayment penalties and housing counselors, and by increasing the flexibility in the model forms, for the same reasons discussed in the discussion of § 1026.20(d) immediately below. Additionally, the Bureau is mitigating the burden by including exemptions in the § 1026.20(c) rule for loans with terms of one year or less. Finally, the Bureau is eliminating the annual § 1026.20(c) notice for interest rate adjustments that do not cause changes in payment. The Bureau considered but decided not to exempt small servicers, as they are currently providing this disclosure.

Regulation Z § 1026.20(d) New Initial Interest Rate Adjustment Notice for Adjustable-Rate Mortgages

Dodd-Frank Act section 1418 requires servicers to provide a new disclosure to consumers who have hybrid ARMs regarding the initial interest rate adjustment. The Bureau requires the initial interest rate adjustment notice for hybrid (1/3, 1/5, etc.) as well as ARMs that are not hybrid (1/1, 3/3, 5/5, etc.). The Bureau has attempted to mitigate the burden of the notice by modifying the final rule from the proposed requirements on prepayment penalties and housing counselors, and by increasing the flexibility in the model forms.

First, due to the nature of prepayment penalties, disclosing the amount of a prepayment penalty is significantly more burdensome than disclosing the existence of a prepayment penalty and the date it expires. Only certain consumers are interested in the amount of the prepayment penalty; such consumers can obtain this information by contacting their servicer. Thus, the final rule requires only the existence of a prepayment penalty (as well as the expiration date, and servicer contact information) in place of the amount. Second, the Bureau is amending the final rule by removing the requirement to include contact information for the State housing authority for the State where the consumer resides (as required by the proposal), or the even more burdensome requirement of providing a list of individual counselors (as required by the statute). Instead the Bureau is requiring disclosure of: (1) The HUD or Bureau Web site on homeownership counselors and counseling agencies, (2) the HUD toll free telephone number for the HUD list of homeownership counselors and counseling agencies, and (3) the Bureau Web site for locating State housing finance authorities. Third, as discussed in the section-by-section analysis of the initial interest rate adjustment disclosure, the Bureau has included commentary highlighting the flexibility of the model forms to allow for other types of products and consumer situations. The Bureau believes these changes reduce the burden on small servicers, without greatly diminishing the consumer protection provided by this rule. Finally, the Bureau has drafted the initial ARM interest rate adjustment notice to parallel the ongoing § 1026.20(c) ARM disclosures to further reduce the implementation and compliance burden.

Additionally, the Bureau considered but decided not to adopt certain alternatives, including the following: Eliminating the notice altogether, eliminating the estimate from the notice, exempting small servicers from the notice, and limiting the notice to only hybrid ARMs (rather than all ARMs). The Bureau reached this decision based on the following considerations. First, the Bureau believes the statutorily-required good-faith estimate provides important information to consumers; the Bureau believes the value of this information outweighs the potential risk of confusion. Second, the Bureau has decided it would not be appropriate to exempt small servicers from the § 1026.20(d) notice. As discussed above in the section-by-section analysis of § 1026.20(d), an exception would deprive certain consumers of advance notice seven to eight months before the first payment at a new level would be due. Without this advance notice, consumers may not have sufficient time to weigh their alternatives and pursue alternative actions. Finally, the Bureau believes it is appropriate to require the § 1026.20(d) notice for all ARMs. Both hybrid ARMs and those that are not hybrid may subject consumers to the same payment shock that the ARM disclosure was designed to address. Accordingly, the Bureau believes that the underlying rationale for the § 1026.20(d) notice is equally applicable to all ARMs, whether hybrid or non-hybrid, and should be extended to all ARMs.

Prompt Crediting and Request for Payoff Amounts

The rules on prompt crediting and payoff statements clarify the definition and crediting of payments, the handling of partial payments, the use of suspense accounts, and the time permitted for providing a payoff statement. Small servicers are generally already in compliance with these rules. For this reason, among others, the Bureau did not adopt a small servicer exemption.

The Bureau has attempted to mitigate the burden of the rules by including flexibility in the rule which allows, but does not mandate, suspense accounts and by including an exemption to the requirement to provide payoff statements within seven business days when circumstances make that timeline infeasible. First, the final rule allows, but does not require suspense accounts. This flexibility allows the variety of current business practices to continue. Servicers who currently use suspense accounts will not have to eliminate this practice. Likewise, servicers who currently credit or return partial payments will not have to incur the burden of establishing suspense accounts. Second, the Bureau included an exemption in the provision addressing payoff statements. This exemption allows payoff statements to be provided in a reasonable time when seven business days is not feasible because a loan is in bankruptcy or foreclosure, because the loan is a reverse mortgage or shared appreciation mortgage, or due to natural disasters or other similar circumstances. This exemption eases the burden of the provision addressing payoff statements. Finally, the Bureau considered but decided not to require prompt crediting of partial payments, and requiring application of an accumulated full payment in a suspense account to the oldest outstanding amount due. Instead, the final rule gives servicers the option of allowing partial payments to be sent to a suspense account. The Bureau believes this flexibility is less burdensome than requiring immediate application of partial payments.

Periodic Statements

Dodd-Frank Act section 1420 requires servicers to provide a new periodic statement to the consumer for each billing cycle. The rule would generally require the content listed in the statute, additional billing information, and payment application information. Thus, the statutory disclosure requirements would impose a smaller economic burden on small servicers than would the Bureau's regulatory disclosure requirements.

As discussed above in element four of this FRFA, the Bureau believes it has largely mitigated the burden of the periodic statement requirement on servicers that meet the size standards

established by the SBA. For servicers who do not receive the benefit of this exemption, the Bureau has mitigated the burden by modifying the requirements on the disclosure of the prepayment penalty and the information on housing counselors, as discussed above. Additionally, the Bureau considered, but decided not to adopt the following alternatives: Limiting the periodic statement disclosure to the DFA requirements, requiring the use of a specific form, limiting the small servicer exemption to servicers servicing 1,000 or fewer loans, and requiring alternative compliance for smaller servicers who have the advantage of the small servicer exemption.

6–2. Description of the Steps the Agency Has Taken To Minimize Any Additional Cost of Credit for Small Entities

Section 603(d) of the RFA requires the Bureau to consult with small entities regarding the potential impact of the proposed rule on the cost of credit for small entities and related matters.[216] To satisfy these statutory requirements, the Bureau provided notification to the Chief Counsel for Advocacy of the Small Business Administration on April 9, 2012 that the Bureau would collect the advice and recommendations of the same Small Entity Representatives identified in consultation with the Chief Counsel through the Small Business Review Panel process concerning any projected impact of the proposed rule on the cost of credit for small entities as well as any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities. The Bureau sought to collect the advice and recommendations of the Small Entity Representatives during the Small Business Review Panel outreach meeting regarding these issues because, as small financial service providers, the Small Entity Representatives could provide valuable input on any such impact related to the proposed rule.

At the time the Bureau circulated the Small Business Review Panel materials to the Small Entity Representatives in advance of the Small Business Review Panel outreach meeting, it had no evidence that the proposals under consideration would result in an increase in the cost of business credit for small entities. Instead, the summary of the proposals stated that the proposals would apply only to mortgage loans obtained by consumers primarily for personal, family, or household purposes and the proposals would not apply to loans obtained primarily for business purposes.

At the Small Business Review Panel outreach meeting, the Bureau asked the Small Entity Representatives a series of questions regarding cost of business credit issues. The questions were focused on two areas. First, the Small Entity Representatives were asked whether, and how often, they extend to their customers closed-end mortgage loans to be used primarily for personal, family, or household purposes but that are used secondarily to finance a small business, and whether the proposals then under consideration would result in an increase in their customers' cost of credit. Second, the Bureau inquired as to whether, and how often, the Small Entity Representatives take out closed-end, home-secured loans to be used primarily for personal, family, or household purposes and use them secondarily to finance their small businesses, and whether the proposals under consideration would increase the Small Entity Representatives' cost of credit.

The Small Entity Representatives had few comments on the impact on the cost of business credit. While they took this time to express concerns that these regulations would increase their costs, they said these regulations would have little to no impact on the cost of business credit. When asked, one Small Entity Representative mentioned that at times people may use a home-secured loan to finance a business, which was corroborated by a different Small Entity Representative based on his personal experience with starting a business.

In the IRFA, the Bureau asked interested parties to provide data and other factual information regarding the use of personal home-secured credit to finance a business. The Bureau received only one comment on this issue. The commenter stated that more than 52 percent of the 27.9 million small businesses in the United States are home-based and close to 80 percent of small businesses file taxes as individuals. The commenter further stated that, according to the SBA, 73.2 percent of small businesses in the United States are sole proprietors. Thus, in some instances, an increase in the cost of consumer credit is also an increase in the cost of business credit.[217]

Regarding the impact of the rule on the cost of consumer credit, the Bureau does not believe that the frequency or content of the new initial rate adjustment notice or the changes in the frequency and content of the § 1026.20(c) disclosure create significant one-time costs or significant additional ongoing costs for servicers. The new initial rate adjustment disclosure is a one-time disclosure. The revised § 1026.20(c) disclosure will be given less frequently than the disclosures required by in current § 1026.20(c), much of the content of the revised disclosure is provided in the current disclosure, and the Bureau has worked to mitigate the cost of the additional content in the revised disclosure. Certain one-time and ongoing costs will likely be absorbed by vendors, as discussed above. The periodic statement disclosure is given much more frequently and the additional costs may be significantly larger than the additional costs for other disclosures. However, the Bureau is mitigating the cost of this disclosure with the exemption for almost all small servicers, as described above.

If vendors passed along all of the minimal costs associated with this rule to servicers, then the cost of servicing would rise by this amount. Servicers may attempt to collect this revenue by increasing penalties for missed payments or other charges outside of origination, in which case individuals who incur these charges may make much larger one-time payments than they do now. Over time, however, it is just as likely that servicers will seek to recover these costs at origination. All of the additional costs of servicing could be met by an origination fee or an increment to the cost of credit equal to the additional cost of servicing multiplied by the expected number of years the loan would be serviced. The Bureau believes that this cost would be minimal as well.

The impact of an increase in the cost of mortgage loan servicing on other forms of consumer credit that may be used to fund a business, and on business credit itself, would be even smaller. If a lender has made optimal (profit maximizing) decisions in one line of business, a change in the costs of another line of business would not disrupt or alter the optimal decisions in the first line of business absent some shared inputs or platforms (''economies of scope'') or other important interdependencies that are not obvious in regards to consumer credit. This is especially clear if there is competition in the other line of business, in this case business credit lending, from firms that do not service mortgage loans and therefore did not experience a cost increase. Absent collusion, firms that

[216] 5 U.S.C. 603(d).

[217] Email from Tom Sullivan, U.S. Chamber of Commerce, to Mitch Hochberg, U.S. Consumer Fin. Protection Bureau (Nov. 13, 2012) (ex-parte communication available at *http://www.regulations.gov/#!documentDetail;D=CFPB–2012–0033–0183*).

did not experience an increase in the costs have the ability and the incentive to underprice any firm that attempts to pass along a cost increase.

In summary, the Bureau believes that the effect of the mortgage servicing rule on the cost of credit for small businesses is at most negligible. Furthermore, this cost is negligible whether the small business consumer is relying on a consumer mortgage loan, some other type of consumer credit, or a small business loan.

IX. Paperwork Reduction Act

The Bureau's information collection requirements contained in this rule, and identified as such, were submitted to OMB for review under section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA). Notwithstanding any other provision of the law, under the Paperwork Reduction Act, the Bureau may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid OMB control number. The OMB control number for this collection is 3170–0028.

This rule amends 12 CFR part 1026 (Regulation Z). Regulation Z currently contains collections of information approved by OMB, and the Bureau's OMB control number for Regulation Z is 3170–00015. The collection title is: Truth in Lending Act (Regulation Z) 12 CFR 1026.

On September 17, 2012, the proposed rule was published in the **Federal Register** (77 FR 57317). The Bureau invited comment on: (1) Whether the proposed collection of information is necessary for the proper performance of the Bureau's functions, including whether the information has practical utility; (2) the accuracy of the Bureau's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The comment period for the burden analysis sections of the proposed rule expired on November 16, 2012. The Bureau did not receive any comments on the burden of the proposed information collection. However, the Bureau did receive comment on the more general consideration of certain costs in the proposed Dodd-Frank Act section 1022 analysis, this comment is addressed in the final Dodd-Frank Act section 1022 analysis above.

The title of this information collection is Mortgage Servicing Amendment (Regulation Z). The frequency of response is *on occasion.* The information collection required provides benefits for consumers and is mandatory. *See* 15 U.S.C. 1601 *et seq.* Because the Bureau does not collect any information, no issue of confidentiality arises. The likely respondents would be federally-insured depository institutions (such as commercial banks, savings banks, and credit unions) and non-depository institutions that service consumer mortgage loans.

Under the rule, the Bureau generally accounts for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: Insured depository institutions with more than $10 billion in total assets, their depository institution affiliates (together, the Bureau depository respondents), and certain non-depository servicers (the Bureau non-depository respondents). The Bureau and the Federal Trade Commission (FTC) generally both have enforcement authority over non-depository institutions under Regulation Z. Accordingly, the Bureau has allocated to itself half of the total estimated burden from non-depository respondents. Other Federal agencies, including the FTC, are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Bureau's burden estimation methodology.

Using the Bureau's burden estimation methodology, the total estimated burden under the changes to Regulation Z for the roughly 12,643 institutions, including Bureau respondents,[218] that are estimated to service consumer mortgages subject to the rule would be approximately 25,000 one-time burden hours and 65,000 ongoing burden hours per year. The aggregate estimates of total burdens presented in this part IX are based on estimates averaged across respondents. The Bureau expects that the amount of time required to implement each of the proposed changes for a given institution may vary based on the size, complexity, and practices of the respondent.

A. Information Collection Requirements

The Bureau is making four changes to the information collection requirements in Regulation Z. First, amended § 1026.20(c) regarding adjustable-rate mortgages changes the format, content, and timing of the existing rate adjustment disclosures. The rule changes the minimum time for providing advance notice to consumers from 25 days to 60 days before the first payment at a new level is due when an interest rate adjustment causes a payment change. Servicers will be required to provide certain information that they may not currently disclose, but would no longer be required to notify consumers of a rate adjustment if the payment is unchanged. Second, as previously discussed, § 1026.20(d) regarding adjustable-rate mortgages requires creditors, assignees, or servicers to send a new initial rate adjustment disclosure at least 210, but not more than 240, days before the date the first payment is due after the initial rate adjustment. The new disclosure includes, among other things, information regarding the calculation of the new interest rate and information to assist consumers in the event the consumer requires alternative financing.

Third, § 1026.36 makes changes to the existing requirements on servicers to promptly credit payments that satisfy payment rules specified by a servicer. Amended § 1026.36 also makes changes to the existing requirements to provide an accurate payoff balance upon request. This modifies the timeline on the existing information collection of the requirement to provide accurate payoff statements.

Fourth, § 1026.41 requires a new periodic statement disclosure. The required content would include billing information, such as the amount due, payment due date, and information on any late fees; information on recent transaction activity and how payments were applied; general loan information, such as the interest rate and when it may next adjust, outstanding principal balance, etc.; and other information that may be helpful to troubled consumers. Certain small servicers (those servicing 5,000 mortgages or less and who own or originated all the loans they are servicing) are exempt from this requirement. Fixed-rate mortgages are exempt if the servicer provides the consumer with a coupon book that contains certain information, and makes

[218] For purposes of this PRA analysis, the Bureau's depository respondents under the proposed rule are 130 depository institutions and depository institution affiliates that service closed-end consumer mortgages. The Bureau's non-depository respondents are an estimated 1,388 non-depository servicers. Unless otherwise specified, all references to burden hours and costs for the Bureau respondents for the collection requirements under the proposed rule are based on a calculation of the burden from all of the Bureau's depository respondents and half of the burden from the Bureau's non-depository respondents.

other information available to the consumer.

B. Burden Analysis Under the Four Information Collection Requirements [219]

1. Changes in the Regulation Z § 1026.20(c) Disclosure for Adjustable-Rate Mortgages

All Bureau respondents will have a one-time burden under this requirement associated with reviewing the regulation. Certain Bureau respondents will have one-time burden from creating software and IT capability to provide the additional content in the disclosure. The Bureau estimates this one-time burden to be 165 hours for Bureau depository respondents and 1,050 hours and $58,000 for Bureau non-depository respondents.[220]

Regarding ongoing burden, the Bureau is requiring the disclosure only when the interest rate adjustment results in a corresponding change in the required payment. The Bureau believes it would be usual and customary to provide consumers with a disclosure under these circumstances. Thus, the Bureau believes there is no burden from distribution costs for purposes of PRA from the § 1026.20(c) disclosure. The Bureau recognizes that there is content in the disclosure beyond what may be usual and customary to provide. Bureau respondents that do not use vendors and certain small respondents that use vendors will incur production costs associated with this extra content, and this is considered a burden for purposes of PRA. The Bureau estimates the ongoing burden to be 1,250 hours for Bureau depository respondents and 180 hours and $22,000 for Bureau non-depository respondents.

2. New Initial Interest Rate Adjustment Notice for Adjustable-Rate Mortgages

All Bureau respondents will have a one-time burden under this requirement associated with reviewing the regulation. Certain Bureau respondents will have a one-time burden from creating software and IT capability to produce the new disclosure. The Bureau estimates this one-time burden to be 140 hours for Bureau depository respondents and 1,500 hours and $115,000 for Bureau non-depository respondents.

Certain Bureau respondents will have ongoing burden associated with the IT used in producing the disclosure. All Bureau respondents will have ongoing costs associated with distributing (*e.g.,* mailing) the disclosure. The Bureau estimates this ongoing burden to be 530 hours and $57,000 for Bureau depository respondents and 80 hours and $5,600 for Bureau non-depository respondents.

3. Prompt Crediting of Payments and Response to Requests for Payoff Amounts

All Bureau respondents will have a one-time burden under this requirement associated with reviewing the regulation. The Bureau estimates this one-time burden to be 110 hours for Bureau depository respondents and 1,375 hours for Bureau non-depository respondents.

Regarding ongoing burden, the Bureau understands that the payoff statement requirement amends the timeline of a pre-existing disclosure that respondents are currently providing in the normal course of business. The Bureau does not believe that proposed changes to the content and timing of the existing disclosure will significantly change the ongoing production or distribution costs of the notice currently provided in the normal course of business. The Bureau estimates the ongoing burden to be 1,650 hours and $178,000 for Bureau depository respondents and 250 hours and $17,000 for Bureau non-depository respondents.

4. New Periodic Statements

All Bureau respondents that are not exempt will have a one-time burden under this requirement associated with reviewing the regulation. Certain Bureau respondents will have a one-time burden from creating software and IT capability to modify existing periodic disclosures or produce a new disclosure. The disclosure incorporates the usual and customarily provided information in billing statements that many respondents already provide. However, the additional data fields and formatting requirements may not be usual and customary. The Bureau estimates this one-time burden to be 170 hours for Bureau depository respondents and 800 hours for Bureau non-depository respondents.

Regarding ongoing burden, consumers who currently receive a periodic statement or billing statement are receiving these disclosures in the normal course of business. The Bureau believes that most other consumers with mortgages receive a coupon book or other type of payment medium, such as a passbook. The statute provides that servicers do not have to provide the periodic statement disclosure to consumers who have both a fixed-rate mortgage and a coupon book. Thus, the only consumers who are not already receiving a billing statement or periodic disclosure to whom servicers will have to begin providing the periodic statement disclosure under the proposed rule are those with both an adjustable-rate mortgage and a coupon book. The burden of distributing the periodic statement disclosure to these consumers is, for purposes of PRA, the ongoing burden from distribution costs from the proposed periodic statement disclosure. The Bureau recognizes that there is content in the periodic statement disclosure beyond what may be usual and customary to provide in existing billing statements. The Bureau estimates the ongoing burden to be 47,000 hours and $5,065,000 for Bureau depository respondents and 4,600 hours and $330,000 for Bureau non-depository respondents.

C. Summary of Burden Hours for Bureau Respondents

[219] Based on discussions with industry participants, the Bureau assumes that all depository respondents except for one large entity and 95% of non-depository respondents (100% of small non-depository respondents) use third-party vendors for one-time software and IT capability and for ongoing production and distribution activities associated with disclosures. The Bureau believes at this time that under existing mortgage servicing contracts, vendors would absorb the one-time software and IT costs and ongoing production costs of disclosures for large- and medium-sized respondents but pass along these costs to small respondents. The Bureau will further consider the extent to which respondents use third-party vendors and the extent to which third-party vendors charge various costs to different types of respondents, and the Bureau seeks data and other factual information from interested parties on these issues.

[220] Dollar figures include estimated costs to vendors.

	Respondents	Disclosures Per Respondent	Hours burden per disclosure	Total burden hours	Total vendor costs
Ongoing:					
ARM 20(c) Notice	824	600	0.00290	1,000	22,000
ARM 20(d) Notice	824	300	0.00290	1,000	64,000
Periodic Statements	424	42,400	0.00286	52,000	5,397,000
Prompt Crediting & Payoff Statements	824	800	0.00290	2,000	195,000
One-Time:					
ARM 20(c) Notice	824	1	1.47524	1,000	58,000
ARM 20(d) Notice	824	1	2.00340	2,000	115,000
Periodic Statements	424	1	2.30357	1,000	0
Prompt Crediting & Payoff Statements	824	1	1.80340	1,000	115,000

Totals may not be exact due to rounding.

Between the proposed and final rule the Bureau improved its methodology for estimating the average unpaid principal balance of outstanding mortgages. In addition, the Bureau updated the institution counts from 2010 year-end to 2011 year-end figures.

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 amends Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601; 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart C—Closed-End Credit

■ 2. Section 1026.17 is amended by revising paragraphs (a)(1) and (b) to read as follows:

§ 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, § 1026.20(c) and (d), or § 1026.47. The disclosures required by § 1026.20(d) shall be provided as a separate document from all other written materials. 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.

* * * * *

(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) and (d). 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.

* * * * *

■ 3. Section 1026.20 is amended by revising the heading and paragraphs (c) and (d) to read as follows:

§ 1026.20 Disclosure requirements regarding post-consummation events.

* * * * *

(c) *Rate adjustments with a corresponding change in payment.* The creditor, assignee, or servicer of an adjustable-rate mortgage shall provide consumers with disclosures, as described in this paragraph (c), in connection with the adjustment of interest rates pursuant to the loan contract that results in a corresponding adjustment to the payment. To the extent that other provisions of this subpart C govern the disclosures required by this paragraph (c), those provisions apply to assignees and servicers as well as to creditors. The disclosures required by this paragraph (c) also shall be provided for an interest rate adjustment resulting from the conversion of an adjustable-rate mortgage to a fixed-rate transaction, if that interest rate adjustment results in a corresponding payment change.

(1) *Coverage.* (i) *In general.* For purposes of this paragraph (c), an adjustable-rate mortgage or ''ARM'' is a closed-end consumer credit transaction secured by the consumer's principal dwelling in which the annual percentage rate may increase after consummation.

(ii) *Exemptions.* The requirements of this paragraph (c) do not apply to:

(A) ARMs with terms of one year or less; or

(B) The first interest rate adjustment to an ARM if the first payment at the adjusted level is due within 210 days after consummation and the new interest rate disclosed at consummation pursuant to § 1026.20(d) was not an estimate.

(2) *Timing and content.* Except as otherwise provided in paragraph (c)(2) of this section, the disclosures required by this paragraph (c) shall be provided to consumers at least 60, but no more than 120, days before the first payment at the adjusted level is due. The disclosures shall be provided to consumers at least 25, but no more than 120, days before the first payment at the adjusted level is due for ARMs with uniformly scheduled interest rate adjustments occurring every 60 days or more frequently and for ARMs originated prior to January 10, 2015 in which the loan contract requires the adjusted interest rate and payment to be calculated based on the index figure available as of a date that is less than 45 days prior to the adjustment date. The disclosures shall be provided to consumers as soon as practicable, but not less than 25 days before the first payment at the adjusted level is due, for the first adjustment to an ARM if it occurs within 60 days of consummation and the new interest rate disclosed at consummation pursuant to § 1026.20(d) was an estimate. The disclosures required by this paragraph (c) shall include:

(i) A statement providing:

(A) An explanation that under the terms of the consumer's adjustable-rate mortgage, the specific time period in which the current interest rate has been in effect is ending and the interest rate and mortgage payment will change;

(B) The effective date of the interest rate adjustment and when additional future interest rate adjustments are scheduled to occur; and

(C) Any other changes to loan terms, features, or options taking effect on the same date as the interest rate adjustment, such as the expiration of interest-only or payment-option features.

(ii) A table containing the following information:

(A) The current and new interest rates;

(B) The current and new payments and the date the first new payment is due; and

(C) For interest-only or negatively-amortizing payments, the amount of the current and new payment allocated to principal, interest, and taxes and insurance in escrow, as applicable. The current payment allocation disclosed shall be the payment allocation for the last payment prior to the date of the disclosure. The new payment allocation disclosed shall be the expected payment allocation for the first payment for which the new interest rate will apply.

(iii) An explanation of how the interest rate is determined, including:

(A) The specific index or formula used in making interest rate adjustments and a source of information about the index or formula; and

(B) The type and amount of any adjustment to the index, including any margin and an explanation that the margin is the addition of a certain number of percentage points to the index, and any application of previously foregone interest rate increases from past interest rate adjustments.

(iv) Any limits on the interest rate or payment increases at each interest rate adjustment and over the life of the loan, as applicable, including the extent to which such limits result in the creditor, assignee, or servicer foregoing any increase in the interest rate and the earliest date that such foregone interest rate increases may apply to future interest rate adjustments, subject to those limits.

(v) An explanation of how the new payment is determined, including:

(A) The index or formula used;

(B) Any adjustment to the index or formula, such as the addition of a margin or the application of any previously foregone interest rate increases from past interest rate adjustments;

(C) The loan balance expected on the date of the interest rate adjustment; and

(D) The length of the remaining loan term expected on the date of the interest rate adjustment and any change in the term of the loan caused by the adjustment.

(vi) If applicable, a statement that the new payment will not be allocated to pay loan principal and will not reduce the loan balance. If the new payment will result in negative amortization, a statement that the new payment will not be allocated to pay loan principal and will pay only part of the loan interest, thereby adding to the balance of the loan. If the new payment will result in negative amortization as a result of the interest rate adjustment, the statement shall set forth the payment required to amortize fully the remaining balance at the new interest rate over the remainder of the loan term.

(vii) The circumstances under which any prepayment penalty, as defined in § 1026.32(b)(6)(i), may be imposed, such as when paying the loan in full or selling or refinancing the principal dwelling; the time period during which such a penalty may be imposed; and a statement that the consumer may contact the servicer for additional information, including the maximum amount of the penalty.

(3) *Format.* (i) The disclosures required by this paragraph (c) shall be provided in the form of a table and in the same order as, and with headings and format substantially similar to, forms H–4(D)(1) and (2) in appendix H to this part; and

(ii) The disclosures required by paragraph (c)(2)(ii) of this section shall be in the form of a table located within the table described in paragraph (c)(3)(i) of this section. These disclosures shall appear in the same order as, and with headings and format substantially similar to, the table inside the larger table in forms H–4(D)(1) and (2) in appendix H to this part.

(d) *Initial rate adjustment.* The creditor, assignee, or servicer of an adjustable-rate mortgage shall provide consumers with disclosures, as described in this paragraph (d), in connection with the initial interest rate adjustment pursuant to the loan contract. To the extent that other provisions of this subpart C govern the disclosures required by this paragraph (d), those provisions apply to assignees and servicers as well as to creditors. The disclosures required by this paragraph (d) shall be provided as a separate document from other documents provided by the creditor, assignee, or servicer. The disclosures shall be provided to consumers at least 210, but no more than 240, days before the first payment at the adjusted level is due. If the first payment at the adjusted level is due within the first 210 days after consummation, the disclosures shall be provided at consummation.

(1) *Coverage.* (i) *In general.* For purposes of this paragraph (d), an adjustable-rate mortgage or ''ARM'' is a closed-end consumer credit transaction secured by the consumer's principal dwelling in which the annual percentage rate may increase after consummation.

(ii) *Exemptions.* The requirements of this paragraph (d) do not apply to ARMs with terms of one year or less.

(2) *Content.* If the new interest rate (or the new payment calculated from the new interest rate) is not known as of the date of the disclosure, an estimate shall be disclosed and labeled as such. This estimate shall be based on the calculation of the index reported in the source of information described in paragraph (d)(2)(iv)(A) of this section within fifteen business days prior to the date of the disclosure. The disclosures required by this paragraph (d) shall include:

(i) The date of the disclosure.

(ii) A statement providing:

(A) An explanation that under the terms of the consumer's adjustable-rate mortgage, the specific time period in which the current interest rate has been in effect is ending and that any change in the interest rate may result in a change in the mortgage payment;

(B) The effective date of the interest rate adjustment and when additional future interest rate adjustments are scheduled to occur; and

(C) Any other changes to loan terms, features, or options taking effect on the same date as the interest rate adjustment, such as the expiration of interest-only or payment-option features.

(iii) A table containing the following information:

(A) The current and new interest rates;

(B) The current and new payments and the date the first new payment is due; and

(C) For interest-only or negatively-amortizing payments, the amount of the current and new payment allocated to principal, interest, and taxes and insurance in escrow, as applicable. The current payment allocation disclosed shall be the payment allocation for the last payment prior to the date of the disclosure. The new payment allocation disclosed shall be the expected payment allocation for the first payment for which the new interest rate will apply.

(iv) An explanation of how the interest rate is determined, including:

(A) The specific index or formula used in making interest rate adjustments and a source of information about the index or formula; and

(B) The type and amount of any adjustment to the index, including any margin and an explanation that the margin is the addition of a certain number of percentage points to the index.

(v) Any limits on the interest rate or payment increases at each interest rate adjustment and over the life of the loan, as applicable, including the extent to which such limits result in the creditor, assignee, or servicer foregoing any increase in the interest rate and the earliest date that such foregone interest rate increases may apply to future interest rate adjustments, subject to those limits.

(vi) An explanation of how the new payment is determined, including:

(A) The index or formula used;

(B) Any adjustment to the index or formula, such as the addition of a margin;

(C) The loan balance expected on the date of the interest rate adjustment;

(D) The length of the remaining loan term expected on the date of the interest rate adjustment and any change in the term of the loan caused by the adjustment; and

(E) If the new interest rate or new payment provided is an estimate, a statement that another disclosure containing the actual new interest rate and new payment will be provided to the consumer between two and four months before the first payment at the adjusted level is due for interest rate adjustments that result in a corresponding payment change.

(vii) If applicable, a statement that the new payment will not be allocated to pay loan principal and will not reduce the loan balance. If the new payment will result in negative amortization, a statement that the new payment will not be allocated to pay loan principal and will pay only part of the loan interest, thereby adding to the balance of the loan. If the new payment will result in negative amortization as a result of the interest rate adjustment, the statement shall set forth the payment required to amortize fully the remaining balance at the new interest rate over the remainder of the loan term.

(viii) The circumstances under which any prepayment penalty, as defined in § 1026.32(b)(6)(i), may be imposed, such as when paying the loan in full or selling or refinancing the principal dwelling; the time period during which such a penalty may be imposed; and a statement that the consumer may contact the servicer for additional information, including the maximum amount of the penalty.

(ix) The telephone number of the creditor, assignee, or servicer for consumers to call if they anticipate not being able to make their new payments.

(x) The following alternatives to paying at the new rate that consumers may be able to pursue and a brief explanation of each alternative, expressed in simple and clear terms:

(A) Refinancing the loan with the current or another creditor or assignee;

(B) Selling the property and using the proceeds to pay the loan in full;

(C) Modifying the terms of the loan with the creditor, assignee, or servicer; and

(D) Arranging payment forbearance with the creditor, assignee, or servicer.

(xi) The Web site to access either the Bureau list or the HUD list of homeownership counselors and counseling organizations, the HUD toll-free telephone number to access the HUD list of homeownership counselors and counseling organizations, and the Bureau Web site to access contact information for State housing finance authorities (as defined in § 1301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

(3) *Format.* (i) Except for the disclosures required by paragraph (d)(2)(i) of this section, the disclosures required by this paragraph (d) shall be provided in the form of a table and in the same order as, and with headings and format substantially similar to, forms H–4(D)(3) and (4) in appendix H to this part;

(ii) The disclosures required by paragraph (d)(2)(i) of this section shall appear outside of and above the table required in paragraph (d)(3)(i) of this section; and

(iii) The disclosures required by paragraph (d)(2)(iii) of this section shall be in the form of a table located within the table described in paragraph (d)(3)(i) of this section. These disclosures shall appear in the same order as, and with headings and format substantially similar to, the table inside the larger table in forms H–4(D)(3) and (4) in appendix H to this part.

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 4. Section 1026.36 is amended by revising paragraph (c) to read as follows:

§ 1026.36 Prohibited acts or practices in connection with credit secured by a dwelling.

* * * * *

(c) *Servicing practices.* For purposes of this paragraph (c), the terms ''servicer'' and ''servicing'' have the same meanings as provided in 12 CFR 1024.2(b).

(1) *Payment processing.* In connection with a consumer credit transaction secured by a consumer's principal dwelling:

(i) *Periodic payments.* No servicer shall fail to credit a periodic 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)(1)(iii) of this section. A periodic payment, as used in this paragraph (c), is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle. A payment qualifies as a periodic payment even if it does not include amounts required to cover late fees, other fees, or non-escrow payments a servicer has advanced on a consumer's behalf.

(ii) *Partial payments.* Any servicer that retains a partial payment, meaning any payment less than a periodic

payment, in a suspense or unapplied funds account shall:

(A) Disclose to the consumer the total amount of funds held in such suspense or unapplied funds account on the periodic statement as required by § 1026.41(d)(3), if a periodic statement is required; and

(B) On accumulation of sufficient funds to cover a periodic payment in any suspense or unapplied funds account, treat such funds as a periodic payment received in accordance with paragraph (c)(1)(i) of this section.

(iii) *Non-conforming payments.* 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 five days after receipt.

(2) *No pyramiding of late fees.* In connection with a consumer credit transaction secured by a consumer's principal dwelling, a servicer shall not impose any late fee or delinquency charge for a payment if:

(i) Such a fee or charge is attributable solely to failure of the consumer to pay a late fee or delinquency charge on an earlier payment; and

(ii) The payment is otherwise a periodic payment received on the due date, or within any applicable courtesy period.

(3) *Payoff statements.* In connection with a consumer credit transaction secured by a consumer's dwelling, a creditor, assignee or servicer, as applicable, must provide an accurate statement of the total outstanding balance that would be required to pay the consumer's obligation in full as of a specified date. The statement shall be sent within a reasonable time, but in no case more than seven business days, after receiving a written request from the consumer or any person acting on behalf of the consumer. When a creditor, assignee, or servicer, as applicable, is not able to provide the statement within seven business days of such a request because a loan is in bankruptcy or foreclosure, because the loan is a reverse mortgage or shared appreciation mortgage, or because of natural disasters or other similar circumstances, the payoff statement must be provided within a reasonable time. A creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the requirement in this paragraph (c)(3) to provide a payoff statement.

* * * * *

■ 5. Section 1026.41 is added to read as follows:

§ 1026.41 Periodic statements for residential mortgage loans.

(a) *In general.* (1) *Scope.* This section applies to a closed-end consumer credit transaction secured by a dwelling, unless an exemption in paragraph (e) of this section applies. Such transactions are referred to as *mortgage loans* for the purposes of this section.

(2) *Periodic statements.* A servicer of a transaction subject to this section shall provide the consumer, for each billing cycle, a periodic statement meeting the requirements of paragraphs (b), (c), and (d) of this section. If a mortgage loan has a billing cycle shorter than a period of 31 days (for example, a bi-weekly billing cycle), a periodic statement covering an entire month may be used. For the purposes of this section, *servicer* includes the creditor, assignee, or servicer, as applicable. A creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the requirement in this section to provide a periodic statement.

(b) *Timing of the periodic statement.* The periodic statement must be delivered or placed in the mail within a reasonably prompt time after the payment due date or the end of any courtesy period provided for the previous billing cycle.

(c) *Form of the periodic statement.* The servicer must make the disclosures required by this section clearly and conspicuously in writing, or electronically if the consumer agrees, and in a form that the consumer may keep. Sample forms for periodic statements are provided in appendix H–30. Proper use of these forms complies with the requirements of this paragraph (c) and the layout requirements in paragraph (d) of this section.

(d) *Content and layout of the periodic statement.* The periodic statement required by this section shall include:

(1) *Amount due.* Grouped together in close proximity to each other and located at the top of the first page of the statement:

(i) The payment due date;

(ii) The amount of any late payment fee, and the date on which that fee will be imposed if payment has not been received; and

(iii) The amount due, shown more prominently than other disclosures on the page and, if the transaction has multiple payment options, the amount due under each of the payment options.

(2) *Explanation of amount due.* The following items, grouped together in close proximity to each other and located on the first page of the statement:

(i) The monthly payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow and, if a mortgage loan has multiple payment options, a breakdown of each of the payment options along with information on whether the principal balance will increase, decrease, or stay the same for each option listed;

(ii) The total sum of any fees or charges imposed since the last statement; and

(iii) Any payment amount past due.

(3) *Past Payment Breakdown.* The following items, grouped together in close proximity to each other and located on the first page of the statement:

(i) The total of all payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, sent to any suspense or unapplied funds account; and

(ii) The total of all payments received since the beginning of the current calendar year, including a breakdown of that total showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, currently held in any suspense or unapplied funds account.

(4) *Transaction activity.* A list of all the transaction activity that occurred since the last statement. For purposes of this paragraph (d)(4), *transaction activity* means any activity that causes a credit or debit to the amount currently due. This list must include the date of the transaction, a brief description of the transaction, and the amount of the transaction for each activity on the list.

(5) *Partial payment information.* If a statement reflects a partial payment that was placed in a suspense or unapplied funds account, information explaining what must be done for the funds to be applied. The information must be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

(6) *Contact information.* A toll-free telephone number and, if applicable, an electronic mailing address that may be used by the consumer to obtain information about the consumer's account, located on the front page of the statement.

(7) *Account information.* The following information:

(i) The amount of the outstanding principal balance;

(ii) The current interest rate in effect for the mortgage loan;

(iii) The date after which the interest rate may next change;

(iv) The existence of any prepayment penalty, as defined in § 1026.32(b)(6)(i), that may be charged;

(v) The Web site to access either the Bureau list or the HUD list of homeownership counselors and counseling organizations and the HUD toll-free telephone number to access contact information for homeownership counselors or counseling organizations; and

(8) *Delinquency information.* If the consumer is more than 45 days delinquent, the following items, grouped together in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter:

(i) The date on which the consumer became delinquent;

(ii) A notification of possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured;

(iii) An account history showing, for the previous six months or the period since the last time the account was current, whichever is shorter, the amount remaining past due from each billing cycle or, if any such payment was fully paid, the date on which it was credited as fully paid;

(iv) A notice indicating any loss mitigation program to which the consumer has agreed, if applicable;

(v) A notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable;

(vi) The total payment amount needed to bring the account current; and

(vii) A reference to the homeownership counselor information disclosed pursuant to paragraph (d)(7)(v) of this section.

(e) *Exemptions.* (1) *Reverse mortgages.* Reverse mortgage transactions, as defined by § 1026.33(a), are exempt from the requirements of this section.

(2) *Timeshare plans.* Transactions secured by consumers' interests in timeshare plans, as defined by 11 U.S.C. 101(53D), are exempt from the requirements of this section.

(3) *Coupon books.* The requirements of paragraph (a) of this section do not apply to fixed-rate loans if the servicer:

(i) Provides the consumer with a coupon book that includes on each coupon the information listed in paragraph (d)(1) of this section;

(ii) Provides the consumer with a coupon book that includes anywhere in the coupon book:

(A) The account information listed in paragraph (d)(7) of this section;

(B) The contact information for the servicer, listed in paragraph (d)(6) of this section; and

(C) Information on how the consumer can obtain the information listed in paragraph (e)(3)(iii) of this section;

(iii) Makes available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (d)(2) through (5) of this section; and

(iv) Provides the consumer the information listed in paragraph (d)(8) of this section in writing, for any billing cycle during which the consumer is more than 45 days delinquent.

(4) *Small servicers.* (i) *Exemption.* A creditor, assignee, or servicer is exempt from the requirements of this section for mortgage loans serviced by a small servicer.

(ii) *Small servicer defined.* A small servicer is a servicer that either:

(A) Services 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; or

(B) Is a Housing Finance Agency, as defined in 24 CFR 266.5.

(iii) *Small servicer determination.* In determining whether a small servicer services 5,000 or fewer mortgage loans, a servicer is evaluated based on the number of mortgage loans serviced by the servicer and any affiliates as of January 1 for the remainder of the calendar year. A servicer that crosses the threshold will have six months after crossing the threshold or until the next January 1, whichever is later, to comply with any requirements for which a servicer is no longer exempt as a small servicer.

■ 6. Appendix H to Part 1026 is amended by:

■ A. Removing the entry for H–4(D) and adding entries in alphanumerical order for H–4(D)(1) through H–4(D)(4), and H–30(A), through H–30(D), in the table of contents at the beginning of the appendix;

■ B. Republishing the note to H–4(C);

■ C. Removing H–4(D);

■ D. Adding model and sample forms H–4(D)(1) through H–4(D)(4), and H–30(A) through H–30(C), and sample clause H–30(D), in alphanumerical order; and

■ E. Republishing H–4(E) and H–4(F).

The additions and republications read as follows:

Appendix H to Part 1026—Closed-End Model Forms and Clauses

* * * * *

H–4(D)(1) Adjustable-Rate Mortgage Model Form (§ 1026.20(c))

H–4(D)(2) Adjustable-Rate Mortgage Sample Form (§ 1026.20(c))

H–4(D)(3) Adjustable-Rate Mortgage Model Form (§ 1026.20(d))

H–4(D)(4) Adjustable-Rate Mortgage Sample Form (§ 1026.20(d))

* * * * *

H–30(A) Sample Form of Periodic Statement (§ 1026.41)

H–30(B) Sample Form of Periodic Statement with Delinquency Box (§ 1026.41)

H–30(C) Sample Form of Periodic Statement for a Payment-Options Loan (§ 1026.41)

H–30(D) Sample Clause for Homeownership Counselor Contact Information (§ 1026.41)

* * * * *

BILLING CODE 4810–AM–P

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)(1) Model Form for § 1026.20(c)

Changes to Your Mortgage Interest Rate and Payments on *(date)*

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a *(duration)* period during which your interest rate stayed the same. That period ends on *(date)*, so on that date your interest rate and mortgage payment change. After that, your interest rate may change *(frequency)* for the rest of your loan term. [Also, as of *(date)* *(changes to loan terms, features or options)*.]

	Current Rate and *(frequency)* Payment	**New** Rate and *(frequency)* Payment
Interest Rate	___%	___%
[Principal]	[$_____]	[$_____]
[Interest]	[$_____]	[$_____]
[Escrow (Taxes and Insurance)]	[$_____]	[$_____]
Total *(frequency)* Payment	**$_____**	**$_____ (due *(date)*)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is *(index)* and your margin is ___%. The *(index)* is published *(frequency)* in *(source of information)*. [*Description and amount of other adjustment(s) to the index*].

[**Rate Limit[s]:** [Your rate cannot go higher than ___% over the life of the loan.] [Your rate can change each year by no more than ___%.] [We did not include an additional ___% interest rate increase to your new rate because a rate limit applied. This additional increase may be applied to your interest rate when it adjusts again on *(date)*.]]

New Interest Rate and Monthly Payment: The table above shows your new interest rate and new monthly payment. Your new payment is based on the *(index)*, your margin, [*description of other adjustment(s) to the index,*] your loan balance of $_____, and your remaining loan term of ___ months.

[**Interest-Only Payments:** Your new payment will not cover any principal. Therefore, making this payment will not reduce your loan balance.]

[**Warning about Increase in Your Loan Balance:** Your new payment covers only part of the interest and no principal. Therefore, the unpaid interest will add to the balance of the loan. [In order to fully pay off your loan by the end of the loan term at the new interest rate, you would have to pay $_____ per month.]]

[**Prepayment Penalty:** [None] [Keep in mind that if you pay off your loan, refinance or sell your home before *(date)*, you could be charged a penalty. Contact *(mortgage company)* at *(telephone number)* [or *(email address)*] for more information, such as the maximum amount of the penalty you could be charged.]]

H-4(D)(2) Sample Form for § 1026.20(c)

July 20, 2012

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on September 1, 2012

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on September 1, 2012, so on that date your interest rate and mortgage payment change. After that, your interest rate may change annually for the rest of your loan term.

	Current Rate and Monthly Payment	**New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Total Monthly Payment	**$983.88**	**$1,211.81 (due October 1, 2012)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 1-year LIBOR and your margin is 2.25%. The LIBOR index is published daily in the Wall Street Journal.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change each year by no more than 2.00%.

New Interest Rate and Monthly Payment: The table above shows your new interest rate and new monthly payment. Your new payment is based on the LIBOR index, your margin, your loan balance of $189,440, and your remaining loan term of 324 months.

Prepayment Penalty: Keep in mind that if you pay off your loan, refinance or sell your home before September 1, 2012, you could be charged a penalty. Contact Springside Mortgage at (800) 765-4321 for more information, such as the maximum amount of the penalty you could be charged.

H-4(D)(3) Model Form for § 1026.20(d)

(Date)

Changes to Your Mortgage Interest Rate and Payments on *(date)*

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a *(duration)* period during which your interest rate stayed the same. That period ends on *(date)*, so on that date your interest rate may change. After that, your interest rate may change *(frequency)* for the rest of your loan term. Any change in your interest rate may also change your mortgage payment. [Also, as of *(date)* *(change(s) to loan terms, features or options)*.]

	Current Rate and *(frequency)* Payment	[**Estimated**] **New** Rate and *(frequency)* Payment
Interest Rate	___%	___%
[Principal]	[$_____]	[$_____]
[Interest]	[$_____]	[$_____]
[Escrow (Taxes and Insurance)]	[$_____]	[$_____]
Total *(frequency)* Payment	**$_____**	**$_____ (due *(date)*)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is *(index)* and your margin is ___%. The *(index)* is published *(frequency)* in *(source of information)*. [*Description and amount of other adjustment(s) to the index.*]

[**Rate Limit[s]:** [Your rate cannot go higher than ___% over the life of the loan.] [Your rate can change each year by no more than ___%.] [We did not include an additional ___% interest rate increase to your new rate because a rate limit applied. This additional increase may be applied to your interest rate when it adjusts again on *(date)*.]]

New Interest Rate and Monthly Payment: The table above shows [our estimate of] your new interest rate and new monthly payment. These amounts are based on the *(index)* as of now, your margin, [*description of other adjustment(s) to the index,*] your loan balance of $_____, and your remaining loan term of ___ months. [**However, if the *(index)* has changed when we calculate the exact amount of your new interest rate and payment, your new interest rate and payment may be different from the estimate above. We will send you another notice with the exact amount of your new interest rate and payment 2 to 4 months before the first new payment is due, if your new payment will be different from your current payment.**]

[**Interest-Only Payments:** Your new payment will not cover any principal. Therefore, making this payment will not reduce your loan balance.]

[**Warning about Increase in Your Loan Balance:** Your new payment covers only part of the interest and no principal. Therefore, the unpaid interest will add to the balance of the loan. In order to fully pay off your loan by the end of the loan term at the new interest rate, you would have to pay $_____ per month.]]

[**Prepayment Penalty:** [None] [Keep in mind that if you pay off your loan, refinance or sell your home before *(date)*, you could be charged a penalty. Contact *(mortgage company)* at the telephone number [*or (email address)*] below for more information, such as the maximum amount of the penalty you could be charged.]]

If You Anticipate Problems Making Your Payments:

- Contact *(mortgage company)* at *(telephone number)* [or *(email address)*] as soon as possible.
- If you seek an alternative to the upcoming changes to your interest rate and payment, the following options **may** be possible (most are subject to lender approval):
  - Refinance your loan with us or another lender;
  - Sell your home and use the proceeds to pay off your current loan;
  - Modify your loan terms with us;
  - Payment forbearance temporarily gives you more time to pay your monthly payment.
- If you would like contact information for counseling agencies or programs in your area, call the U.S. Department of Housing and Urban Development (HUD) at (*telephone number*) or visit [*(internet address of the U.S. Department of Housing and Urban Development counseling agency list)* [or] [the U.S. Consumer Financial Protection Bureau (CFPB) at (*internet address of the U.S. Consumer Financial Protection Bureau homeownership counselors and counseling organization list)*]. If you would like contact information for a state housing finance agency, contact the U.S. Consumer Financial Protection Bureau (CFPB) at *(internet address of U.S. Consumer Financial Protection Bureau state housing finance agency access list)*.

H-4(D)(4) Sample Form for § 1026.20(d)

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on September 1, 2012

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on September 1, 2012, so on that date your interest rate may change. After that, your interest rate may change annually for the rest of your loan term. Any change in your interest rate may also change your mortgage payment. Also, as of September 1, 2012 your mortgage payment will include principal as well as interest.

	Current Rate and Monthly Payment	**Estimated New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Principal	**- none -**	$237.70
Interest	$708.33	$1,041.66
Escrow (Taxes and Insurance)	$450.00	$450.00
Total Monthly Payment	**$1,158.33**	**$1,729.36 (due October 1, 2012)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 1-year LIBOR and your margin is 2.25%. The LIBOR index is published daily in the Wall Street Journal.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change each year by no more than 2.00%. We did not include an additional 1.00% interest rate increase to your new rate because a rate limit applied. This additional increase may be applied to your interest rate when it adjusts again on September 1, 2013.

New Interest Rate and Monthly Payment: The table above shows our estimate of your new interest rate and new monthly payment. These amounts are based on the LIBOR index as of now, your margin, your loan balance of $200,000, and your remaining loan term of 324 months. **However, if the LIBOR index has changed when we calculate the exact amount of your new interest rate and payment, your new interest rate and payment may be different from the estimate above. We will send you another notice with the exact amount of your new interest rate and payment 2 to 4 months before the first new payment is due, if your new payment will be different from your current payment.**

Prepayment Penalty: None

If You Anticipate Problems Making Your Payments:

- Contact Springside Mortgage at 1-800-555-4567 as soon as possible.
- If you seek an alternative to the upcoming changes to your interest rate and payment, the following options **may** be possible (most are subject to lender approval):
  - Refinance your loan with us or another lender;
  - Sell your home and use the proceeds to pay off your current loan;
  - Modify your loan terms with us;
  - Payment forbearance temporarily gives you more time to pay your monthly payment.
- If you would like contact information for counseling agencies or programs in your area, call the U.S. Department of Housing and Urban Development (HUD) at 800-569-4287 or visit www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm. If you would like contact information for a State housing finance agency, visit the U.S. Consumer Financial Protection Bureau (CFPB) at http://www.consumerfinance.gov.

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-30(A) Sample Form of Periodic Statement

Springside Mortgage
Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement
Statement Date: 3/20/2012

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number	**1234567**
Payment Due Date	**4/1/2012**
Amount Due	**$2,079.71**

If payment is received after 4/15/12, $160 late fee will be charged.

Account Information	
Outstanding Principal	$264,776.43
Interest Rate (Until October 2012)	4.75%
Prepayment Penalty	Yes

Explanation of Amount Due	
Principal	$386.46
Interest	$1,048.07
Escrow (for Taxes and Insurance)	$235.18
Regular Monthly Payment	**$1,669.71**
Total Fees Charged	$410.00
Total Amount Due	**$2,079.71**

Transaction Activity (2/20 to 3/19)

Date	Description	Charges	Payments
3/16/12	Late Fee (charged because full payment not received by 3/15/2012)	$160.00	
3/17/12	Payment Received – Thank you		$1,669.71
3/19/12	Property Inspection Fee	$250.00	

Past Payments Breakdown

	Paid Last Month	Paid Year to Date
Principal	$384.93	$1,150.25
Interest	$1,049.60	$3,153.34
Escrow (Taxes and Insurance)	$235.18	$705.54
Fees	$0.00	$0.00
Total	**$1,669.71**	**$5,009.13**

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Memphis, TN 38101

Amount Due	
Due By 4/1/2012:	**$2,079.71**
$160 late fee will be charged after 4/15/12	
Additional Principal	$.
Additional Escrow	$.
Total Amount Enclosed	**$.**

Make check payable to Springside Mortgage.

1234567 34571892 342359127

H-30(B) Sample Form of Periodic Statement with Delinquency Box

Springside Mortgage
Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement
Statement Date: 3/20/2012

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number	**1234567**
Payment Due Date	**4/1/2012**
Amount Due	**$4,339.13**

If payment is received after 4/15/12, $160 late fee will be charged.

Account Information	
Outstanding Principal	$264,776.43
Interest Rate (Until October 2012)	4.75%
Prepayment Penalty	Yes

Explanation of Amount Due	
Principal	$386.46
Interest	$1,048.07
Escrow (Taxes and Insurance)	$235.18
Regular Monthly Payment	**$1,669.71**
Total Fees and Charges	$410.00
Overdue Payment	$2,259.42
Total Amount Due	**$4,339.13**

Transaction Activity (2/20 to 3/19)

Date	Description	Charges	Payments
3/13/12	Partial Payment Received*		$1,000.00
3/16/12	Late Fee (charged because full payment not received by 3/15/2012)	$160.00	
3/19/12	Property Inspection Fee	$250.00	

Past Payments Breakdown

	Paid Last Month	Paid Year to Date
Principal	$0.00	$383.31
Interest	$0.00	$1,051.22
Escrow (Taxes and Insurance)	$0.00	$235.18
Fees	$0.00	$410.00
Partial Payment (Unapplied)*	$1,000.00	$1,490.00
Total	**$1,000.00**	**$3,569.71**

Important Messages

***Partial Payments:** Any partial payments that you make are not applied to your mortgage, but instead are held in a separate suspense account. If you pay the balance of a partial payment, the funds will then be applied to your mortgage.

****Delinquency Notice****

You are late on your mortgage payments. Failure to bring your loan current may result in fees and foreclosure—the loss of your home. As of March 20, you are 49 days delinquent on your mortgage loan.

Recent Account History

- Payment due 12/1/11: Fully paid on time
- Payment due 1/1/12: Fully paid on 2/3/12
- Payment due 2/1/12: Unpaid balance of $589.71
- Payment due 3/1/12: Unpaid balance of $2,079.71
- Current payment due 4/1/12: $1,669.71
- **Total: $4,339.13 due. You must pay this amount to bring your loan current.**

If You Are Experiencing Financial Difficulty: See back for information about mortgage counseling or assistance.

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

Amount Due		
Due By 4/1/2012:		**$4,339.13**
$160 late fee will be charged after 4/15/12		
Additional Principal	$	.
Additional Escrow	$	.
Total Amount Enclosed	**$**	.

Make check payable to Springside Mortgage.

1234567 34571892 342359127 DN

H-30(C) Sample Form of Periodic Statement for a Payment-Options Loan

Springside Mortgage
Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement
Statement Date: 3/20/2012

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number		**1234567**
Payment Due Date		**4/1/2012**
Amount Due	**Option 1 (Full):**	**$1,829.71**
	Option 2 (Interest-Only):	**$1,443.25**
	Option 3 (Minimum):	**$1,156.43**

If payment is received after 4/15/12, $160 late fee will be charged.

Account Information	
Outstanding Principal	$260,000.00
Interest Rate (Until October 2012)	4.75%
Prepayment Penalty	Yes

Explanation of Amount Due			
	Option 1 (Full)	Option 2 (Interest-Only)	Option 3 (Minimum)
Principal	$386.46	$0	$0
Interest	$1,048.07	$1,048.07	$761.25
Escrow (Taxes and Insurance)	$235.18	$235.18	$235.18
Regular Monthly Payment	**$1,669.71**	**$1,283.25**	**$996.43**
Total Fees and Charges	$160.00	$160.00	$160.00
Total Amount Due	**$1,829.71**	**$1,443.25**	**$1,156.43**
If you make this payment...	... your principal balance will decrease, and you will be closer to paying off your loan.	... your principal balance will stay the same, and you will not be closer to paying off your loan.	... **your principal balance will increase**. You will be borrowing more money and losing equity in your home.

Transaction Activity (2/20 to 3/19)

Date	Description	Charges	Payments
3/16/12	Late Fee (charged because payment was received after 3/15/2012)	$160.00	
3/19/12	Payment Received – Thank you		$1,669.71

Past Payments Breakdown		
	Paid Last Month	**Paid Year to Date**
Principal	$384.93	$1,150.25
Interest	$1,049.60	$3,153.34
Escrow (Taxes and Insurance)	$235.18	$705.54
Fees	$0.00	$0.00
Total	**$1,669.71**	**$5,009.13**

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

Amount Due		
Due By 4/1/2012:	❑ **Option 1 (Full):**	**$1,829.71**
	❑ **Option 2 (Interest-Only):**	**$1,443.25**
	❑ **Option 3 (Minimum):**	**$1,156.43**
	$160 late fee will be charged after 4/15/12	
Additional Principal	$	.
Additional Escrow	$	.
Total Amount Enclosed	**$**	.

Make check payable to Springside Mortgage.

1234567 34571892 342359127 P

BILLING CODE 4810–AM–C

H–30(D) Sample Clause for Homeownership Counselor Contact Information

Housing Counselor Information: If you would like counseling or assistance, you can contact the following:

• U.S. Department of Housing and Urban Development (HUD): For a list of homeownership counselors or counseling organizations in your area, go to *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm* or call 800–569–4287.

* * * * *

■ 7. In Supplement I to Part 1026—Official Interpretations:

■ A. Under *Section 1026.17—General Disclosure Requirements:*

■ i. Under *Paragraph 17(a)(1),* paragraph 2.ii is revised.

■ ii. Under *Paragraph 17(c)(1),* paragraph 1 is revised.

■ B. Under *Section 1026.19—Certain Mortgage and Variable-Rate Transactions:*
■ i. Under *19(b) Certain variable-rate transactions,* paragraphs 4 and 5.i.C are revised.
■ ii. Under *Paragraph 19(b)(2)(xi),* paragraph 1 is revised.
■ C. The heading for *Section 1026.20* is revised.
■ D. Under newly designated *Section 1026.20:*
■ i. *Paragraph 20(c) Variable-rate adjustments* is revised.
■ ii. *Paragraph 20(d) Initial rate adjustment* is added.
■ E. Under *Section 1026.36—Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling,* under *36(c) Servicing practices:*
■ i. *Paragraph 36(c)(1)(i),* paragraph 2, and *Paragraph 36(c)(1)(ii), Paragraph 36(c)(1)(iii),* and *Paragraph 36(c)(2)* are revised.
■ ii. *Paragraph 36(c)(3)* is added.
■ F. *Section 1026.41—Periodic Statements for Residential Mortgage Loans* is added.
■ G. Under *Appendix H—Closed-End Model Forms and Clauses,* paragraphs 7 introductory text and 7.i are revised.

The revisions and additions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart C—Closed-End Credit

* * * * *

Section 1026.17–General Disclosures Requirements

17(a) Form of disclosures.

Paragraph 17(a)(1).

* * * * *

2. * * *

ii. The general segregation requirement described in this subparagraph does not apply to the disclosures required under § 1026.19(b) although the disclosures must be clear and conspicuous.

* * * * *

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) and (d), 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.

* * * * *

Section 1026.19—Certain Mortgage and Variable-Rate Transactions

* * * * *

19(b) Certain variable-rate transactions.

* * * * *

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). 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 * * *

i. * * *

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: § 1026.19(b)(2)(i), (iii), (iv), (v), (vi), (vii), (viii), and (ix). (See comments 20(c)(1)(ii)–3.ii, 20(d)(1)(ii)–2.ii, and 30–1 regarding the inapplicability of variable-rate adjustment notices and interest rate limitations to price-level-adjusted or similar mortgages.)

* * * * *

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) and (d) regarding notices of adjustments.) For example, the disclosure provided pursuant to § 1026.20(d) might state, ''You will be notified at least 210, but no more than 240, days before the first payment at the adjusted level is due after the initial interest rate adjustment of the loan. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.'' The disclosure provided pursuant to § 1026.20(c) might state, ''You will be notified at least 60, but no more than 120, days before the first payment at the adjusted level is due after any interest rate adjustment resulting in a corresponding payment change. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.''

* * * * *

Section 1026.20—Disclosure Requirements Regarding Post-Consummation Events

* * * * *

20(c) Rate adjustments with a corresponding change in payment.

1. *Creditors, assignees, and servicers.* Creditors, assignees, and servicers that own either the applicable adjustable-rate mortgage or the applicable mortgage servicing rights or both are subject to the requirements of § 1026.20(c). Creditors, assignees, and servicers are also subject to the requirements of any provision of subpart C that governs § 1026.20(c). For example, the form requirements of § 1026.17(a) apply to § 1026.20(c) disclosures and thus, assignees and servicers, as well as creditors, are subject to those requirements. While creditors, assignees, and servicers are all subject to the requirements of § 1026.20(c), they may decide among themselves which of them will provide the required disclosures.

2. *Loan modifications.* Under § 1026.20(c), the interest rate adjustment disclosures are required only for interest rate adjustments occurring pursuant to the loan contract. Accordingly, creditors, assignees, and servicers need not provide the disclosures for interest rate adjustments occurring in loan modifications made for loss mitigation purposes. Subsequent interest rate adjustments resulting in a corresponding payment change occurring pursuant to the modified loan contract, however, are subject to the requirements of § 1026.20(c).

3. *Conversions.* In addition to the disclosures required for interest rate adjustments under an adjustable-rate mortgage, § 1026.20(c) also requires the disclosures for an ARM converting to a fixed-rate transaction when the conversion changes the interest rate and results in a corresponding payment change. When an open-end account converts to a closed-end adjustable-rate mortgage, the § 1026.20(c) disclosure is not required until the implementation of an interest rate adjustment post-conversion that results in a corresponding payment change. For example, for an open-end account that converts to a closed-end 3/1 hybrid ARM, *i.e.,* an ARM with a fixed rate of interest for the first three years after which the interest rate adjusts annually, the first § 1026.20(c) disclosure would not be required until three years after the conversion, and only if that first adjustment resulted in a payment change.

Paragraph 20(c)(1)(i).

1. *In general.* An adjustable-rate mortgage, as defined in § 1026.20(c)(1)(i), is a variable-rate transaction as that term is used in subpart C, except as distinguished by comment § 1026.20(c)(1)(ii)–3. The requirements of this section are not limited to transactions financing the initial acquisition of the consumer's principal dwelling.

Paragraph 20(c)(1)(ii).

1. *Short-term ARMs.* Under § 1026.20(c)(1)(ii), construction, home improvement, bridge, and other loans with terms of one year or less are not subject to the requirements in § 1026.20(c). In determining the term of a construction loan that may be permanently financed by the same creditor or assignee, the creditor or assignee may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or as a single combined transaction.

2. *First new payment due within 210 days after consummation.* Section 1026.20(c) disclosures are not required if the first payment at the adjusted level is due within 210 days after consummation, when the new interest rate disclosed at consummation pursuant to § 1026.20(d) is not an estimate. For example, the creditor, assignee, or servicer would not be required to provide the disclosures required by § 1026.20(c) for the first time an ARM interest rate adjusts if the first payment at the adjusted level was due 120 days after consummation and the adjusted interest rate disclosed at consummation pursuant to § 1026.20(d) was not an estimate.

3. *Non-adjustable-rate mortgages.* The following transactions, if structured as fixed-rate and not as adjustable-rate mortgages based on an index or formula, are not subject to § 1026.20(c):

i. Shared-equity or shared-appreciation mortgages;

ii. Price-level adjusted 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. Graduated-payment mortgages or step-rate transactions;

iv. Renewable balloon-payment instruments; and

v. Preferred-rate loans.

Paragraph 20(c)(2).

1. *Timing.* The requirement that § 1026.20(c) disclosures be provided to consumers within a certain timeframe means that the creditor, assignee, or servicer must deliver the notice or place it in the mail within that timeframe, excluding any grace or courtesy periods. The requirement that the § 1026.20(c) disclosures must be provided between 25 and 120 days before the first payment at the adjusted level is due for frequently-adjusting ARMs, applies to ARMs that adjust regularly at a maximum of every 60 days.

Paragraph 20(c)(2)(ii)(A).

1. C*urrent and new interest rates.* The current interest rate is the interest rate that applies on the date the disclosure is provided to the consumer. The new interest rate is the actual interest rate that will apply on the date of the adjustment. The new interest rate is used to determine the new payment. The ''new interest rate'' has the same meaning as the ''adjusted interest rate.'' The requirements of § 1026.20(c)(2)(ii)(A) do not preclude creditors, assignees, and servicers from rounding the interest rate, pursuant to the requirements of the ARM contract.

Paragraph 20(c)(2)(iv).

1. *Rate limits and foregone interest rate increases.* Interest rate carryover, or foregone interest rate increases, is the amount of interest rate increase foregone at any ARM interest rate adjustment that, subject to rate caps, can be added to future interest rate adjustments to increase, or to offset decreases in, the rate determined by using the index or formula. The disclosures required by § 1026.20(c)(2)(iv) regarding foregone interest rate increases apply only to transactions permitting interest rate carryover.

Paragraph 20(c)(2)(v)(B).

1. *Application of previously foregone interest rate increases.* The disclosures regarding the application of previously foregone interest rate increases apply only to transactions permitting interest rate carryover.

Paragraph 20(c)(2)(vi).

1. *Amortization statement.* For ARMs requiring the payment of interest only, such as interest-only loans, § 1026.20(c)(2)(vi) requires a statement that the new payment covers all of the interest but none of the principal, and therefore will not reduce the loan balance. For negatively-amortizing ARMs, § 1026.20(c)(2)(vi) requires a statement that the new payment covers only part of the interest and none of the principal, and therefore the unpaid interest will be added to the principal balance.

2. *Amortization payment.* Disclosure of the payment needed to amortize fully the outstanding balance at the new interest rate over the remainder of the loan term is required only when negative amortization occurs as a result of the interest rate adjustment. The disclosure is not required simply because a loan has interest-only or partially-amortizing payments. For example, an ARM with a five-year term and payments based on a longer amortization schedule, in which the final payment will equal the periodic payment plus the remaining unpaid balance, does not require disclosure of the payment necessary to amortize fully the loan in the remainder of the five-year term. A disclosure is also not required when the new payment is sufficient to prevent negative amortization but the final loan payment will be a different amount due to rounding.

Paragraph 20(c)(2)(vii).

1. *Prepayment penalty.* The creditor, assignee, or servicer of an ARM with no prepayment penalty, as that term is used in § 1026.20(c)(2)(vii), may decide to exclude the prepayment section from the § 1026.20(c) disclosure, retain the prepayment section and insert after the heading ''None'' or other indication that there is no prepayment penalty, or indicate there is no prepayment penalty in some other manner. *See also* comment 1.vi to Appendices G and H—Open-End and Closed-End Model Forms and Clauses.

Paragraph 20(c)(3)(i).

1. *Format of disclosures.* The requirements of § 1026.20(c)(3)(i) and (ii) to provide the § 1026.20(c) disclosures in the same order as, and with headings and format substantially similar to, the model and sample forms do not preclude creditors, assignees, and servicers from modifying the disclosures to accommodate particular consumer circumstances or transactions not addressed by the forms. For example, in the case of a consumer bankruptcy or under certain State laws, the creditor, assignee, or servicer may modify the forms to remove language regarding personal liability. Creditors, assignees, and servicers providing the required notice to a consumer whose ARM is converting to a fixed-rate mortgage, may modify the model language to explain that the interest rate will no longer adjust. Creditors, assignees, and servicers electing to provide consumers with interest rate notices in cases where the interest rate adjusts without a corresponding change in payment may modify the forms to fit that circumstance. A payment-option ARM, which is an ARM permitting consumers to choose among several different payment options for each billing period, is an example of a loan that may require modification of the § 1026.20(c) model and sample forms. See appendix H–30(C) for an example of an allocation table for a payment-option loan.

20(d) Initial rate adjustment.

1. *Creditors, assignees, and servicers.* Creditors, assignees, and servicers that own either the applicable adjustable-rate mortgage or the applicable mortgage servicing rights or both are subject to the requirements of § 1026.20(d). Creditors, assignees, and servicers are also subject to the requirements of any provision of subpart C that governs § 1026.20(d). For example, the form requirements of § 1026.17(a) apply to § 1026.20(d) disclosures and thus, assignees and servicers, as well as creditors, are subject to those requirements. While creditors, assignees, and servicers are all subject to the requirements of § 1026.20(d), they may decide among themselves which of them will provide the required disclosures.

2. *Loan modifications.* Under § 1026.20(d), the interest rate adjustment disclosures are required only for the initial interest rate adjustment occurring pursuant to the loan contract. Accordingly, creditors, assignees, and servicers need not provide the disclosures for interest rate adjustments occurring in loan modifications made for loss mitigation purposes. The initial interest rate adjustment occurring pursuant to the modified loan contract, however, is subject to the requirements of § 1026.20(d).

3. *Timing and form of initial rate adjustment.* The requirement that § 1026.20(d) disclosures be provided in writing, separate and distinct from all other correspondence, means that the initial ARM interest rate adjustment notice must be provided to consumers as a separate document but may, in the case of mailing the disclosure, be in the same envelope with other material and, in the case of emailing the disclosure, be a separate attachment from other attachments in the same email. The requirement that the disclosures be provided to consumers between 210 and 240 days ''before the first payment at the adjusted level is due'' means the creditor, assignee, or servicer must deliver the notice or place it in the mail between 210 and 240 days prior to the due date, excluding any grace or courtesy periods, of the first payment calculated using the adjusted interest rate.

4. *Conversions.* When an open-end account converts to a closed-end adjustable-rate mortgage, the § 1026.20(d) disclosure is not required until the implementation of the initial interest rate adjustment post-conversion. For example, for an open-end account that converts to a closed-end 3/1 hybrid ARM, *i.e.,* an ARM with a fixed rate of interest for the first three years after which the interest rate adjusts annually, the § 1026.20(d) disclosure would not be required until three years after the conversion when the interest rate adjusts for the first time.

Paragraph 20(d)(1)(i).

1. *In general.* An adjustable-rate mortgage, as defined in § 1026.20(d)(1)(i), is a variable-rate transaction as that term is used in subpart C, except as distinguished by comment § 1026.20(d)(1)(ii)–2. The requirements of this section are not limited to transactions financing the initial acquisition of the consumer's principal dwelling.

Paragraph 20(d)(1)(ii).

1. *Short-term ARMs.* Under § 1026.20(d)(1)(ii), construction, home improvement, bridge, and other loans with terms of one year or less are not subject to the requirements in § 1026.20(d). In determining the term of a construction loan that may be permanently financed by the same creditor or assignee, the creditor or assignee may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or as a single combined transaction.

2. *Non-adjustable-rate mortgages.* The following transactions, if structured as fixed-rate and not as adjustable-rate mortgages based on an index or formula, are not subject to § 1026.20(d):

i. Shared-equity or shared-appreciation mortgages;

ii. Price-level adjusted 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. Graduated-payment mortgages or step-rate transactions;

iv. Renewable balloon-payment instruments; and

v. Preferred-rate loans.

Paragraph 20(d)(2)(i).

1. *Date of the disclosure.* The date that must appear on the disclosure is the date the creditor, assignee, or servicer generates the notice to be provided to the consumer.

Paragraph 20(d)(2)(iii)(A).

1. *Current and new interest rates.* The current interest rate is the interest rate that applies on the date of the disclosure. The new interest rate is the interest rate used to calculate the new payment and may be an estimate pursuant to § 1026.20(d)(2). The new payment, if calculated from an estimated new interest rate, will also be an estimate. The ''new interest rate'' has the same meaning as the ''adjusted interest rate.'' The requirements of § 1026.20(d)(2)(iii)(A) do not preclude creditors, assignees, and servicers from rounding the interest rate, pursuant to the requirements of the ARM contract.

Paragraph 20(d)(2)(v).

1. *Rate limits and foregone interest rate increases.* Interest rate carryover, or foregone interest rate increases, is the amount of interest rate increase foregone at the first ARM interest rate adjustment that, subject to rate caps, can be added to future interest rate adjustments to increase, or to offset decreases in, the rate determined by using the index or formula. The disclosures required by § 1026.20(d)(2)(v) regarding foregone interest rate increases apply only to transactions permitting interest rate carryover.

Paragraph 20(d)(2)(vii).

1. *Amortization statement.* For ARMs requiring the payment of interest only, such as interest-only loans, § 1026.20(d)(2)(vii) requires a statement that the new payment covers all of the interest but none of the principal, and therefore will not reduce the loan balance. For negatively-amortizing ARMs, § 1026.20(d)(2)(vii) requires a statement that the new payment covers only part of the interest and none of the principal, and therefore the unpaid interest will be added to the principal balance.

2. *Amortization payment.* Disclosure of the payment needed to amortize fully the outstanding balance at the new interest rate over the remainder of the loan term is required only when negative amortization occurs as a result of the interest rate adjustment. The disclosure is not required simply because a loan has interest-only or partially-amortizing payments. For example, an ARM with a five-year term and payments based on a longer amortization schedule, in which the final payment will equal the periodic payment plus the remaining unpaid balance, does not require disclosure of the payment necessary to amortize fully the loan in the remainder of the five-year term. A disclosure is also not required when the new payment is sufficient to prevent negative amortization but the final loan payment will be a different amount due to rounding.

Paragraph 20(d)(2)(viii).

1. *Prepayment penalty.* The creditor, assignee, or servicer of an ARM with no prepayment penalty, as that term is used in § 1026.20(d)(2)(viii), may decide to exclude the prepayment section from the § 1026.20(d) disclosure, retain the prepayment section and insert after the heading ''None'' or other indication that there is no prepayment penalty, or indicate there is no prepayment penalty in some other manner. *See also* comment to Appendices G and H—Open-End and Closed-End Model Forms and Clauses—1.vi.

Paragraph 20(d)(3)(i).

1. *Format of disclosures.* The requirements of § 1026.20(d)(3)(i) and (iii) to provide the § 1026.20(d) disclosures in the same order as, and with headings and format substantially similar to, the model and sample forms do not preclude creditors, assignees, and servicers from modifying the disclosures to accommodate particular consumer circumstances or transactions not addressed by the forms. For example, in the case of a consumer bankruptcy or under certain State laws, the creditor, assignee, or servicer may modify the forms to remove language regarding personal liability. A payment-option ARM, which is an ARM permitting consumers to choose among several different payment options for each billing period, is an example of a loan that may require modification of the § 1026.20(d) model and sample forms. See appendix H–30(C) for an example of an allocation table for a payment-option loan.

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

Section 1026.36—Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

* * * * *

Paragraph 36(c)(1)(i).

* * * * *

2. *Method of crediting periodic payments.* The method by which periodic payments shall be credited is based on the legal obligation between the creditor and consumer, subject to applicable law.

* * * * *

Paragraph 36(c)(1)(ii).

1. *Handling of partial payments.* If a servicer receives a partial payment from a consumer, to the extent not prohibited by applicable law or the legal obligation between the parties, the servicer may take any of the following actions:

i. Credit the partial payment upon receipt.

ii. Return the partial payment to the consumer.

iii. Hold the payment in a suspense or unapplied funds account. If the payment is held in a suspense or unapplied funds account, this fact must be reflected on future periodic statements, in accordance with § 1026.41(d)(3). When sufficient funds accumulate to cover a periodic payment, as defined in § 1026.36(c)(1)(i), they must be treated as a periodic payment received in accordance with § 1026.36(c)(1)(i).

Paragraph 36(c)(1)(iii).

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.

Paragraph 36(c)(2).

1. *Pyramiding of late fees.* The prohibition on pyramiding of late fees in § 1026.36(c)(2) should be construed consistently with the ''credit practices rule'' of the Federal Trade Commission, 16 CFR 444.4.

Paragraph 36(c)(3).

1. *Person acting on behalf of the consumer.* For purposes of § 1026.36(c)(3), 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 creditor, assignee or 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.

2. *Payment requirements.* The creditor, assignee or servicer may specify reasonable requirements for making payoff requests, such as requiring requests to be directed to a mailing address, email address, or fax number specified by the creditor, assignee or servicer or any other reasonable requirement or method. If the consumer does not follow these requirements, a longer timeframe for responding to the request would be reasonable.

3. *Accuracy of payoff statements.* Payoff statements must be accurate when issued.

* * * * *

Section 1026.41—Periodic Statements for Residential Mortgage Loans

41(a) In general.

1. *Recipient of periodic statement.* When two consumers are joint obligors with primary liability on a closed-end consumer credit transaction secured by a dwelling, subject to § 1026.41, the periodic statement may be sent to either one of them. For example, if a husband and wife jointly own a home, the servicer need not send statements to both the husband and the wife; a single statement may be sent.

2. *Billing cycles shorter than a 31-day period.* If a loan has a billing cycle shorter than a period of 31 days (for example, a bi-weekly billing cycle), a periodic statement covering an entire month may be used. Such statement would separately list the upcoming payment due dates and amounts due, as required by § 1026.20(d)(1), and list all transaction activity that occurred during the related time period, as required by paragraph (d)(4). Such statement may aggregate the information for the explanation of amount due, as required by paragraph (d)(2), and past payment breakdown, as required by paragraph (d)(3).

3. *One statement per billing cycle.* The periodic statement requirement in § 1026.41 applies to the ''creditor, assignee, or servicer as applicable.'' The creditor, assignee, and servicer are all subject to this requirement (*but see* comment 41(a)–4), but only one statement must be sent to the consumer each billing cycle. When two or more parties are subject to this requirement, they may decide among themselves which of them will send the statement.

4. *Opting out.* A consumer may not opt out of receiving periodic statements altogether. However, consumers who have demonstrated the ability to access statements online may opt out of receiving notifications that statements are available. Such an ability may be demonstrated, for example, by the consumer receiving notification that the statements is available, going to the Web site where the information is available, viewing the information about their account and selecting a link or option there to indicate they no longer would like to receive notifications when new statements are available.

41(b) Timing of the periodic statement.

1. *Reasonably prompt time.* Section 1026.41(b) requires that the periodic statement be delivered or placed in the mail no later than a reasonably prompt time after the payment due date or the end of any courtesy period. Delivering, emailing or placing the periodic statement in the mail within four days of close of the courtesy period of the previous billing cycle generally would be considered reasonably prompt.

2. *Courtesy period.* The meaning of ''courtesy period'' is explained in comment 7(b)(11)–1.

41(c) Form of the periodic statement.

1. *Clear and conspicuous standard.* The ''clear and conspicuous'' standard generally requires that disclosures be in a reasonably understandable form. Except where otherwise provided, the standard does not prohibit adding to the required disclosures, as long as the additional information does not overwhelm or obscure the required disclosures. For example, while certain information about the escrow account (such as the account balance) is not required on the periodic statement, this information may be included.

2. *Additional information; disclosures required by other laws.* Nothing in § 1026.41 prohibits a servicer from including additional information or combining disclosures required by other laws with the disclosures required by this subpart, unless such prohibition is expressly set forth in this subpart, or other applicable law.

3. *Electronic distribution.* The periodic statement may be provided electronically if the consumer agrees. The consumer must give affirmative consent to receive statements electronically. If statements are provided electronically, the creditor, assignee, or servicer may send a notification that a consumer's statement is available, with a link to where the statement can be accessed, in place of the statement itself.

4. *Presumed consent.* Any consumer who is currently receiving disclosures for any account (for example, a mortgage or checking account) electronically from their servicer shall be deemed to have consented to receiving e-statements in place of paper statements.

41(d) Content and layout of the periodic statement.

1. *Close proximity.* Paragraph (d) requires several disclosures to be provided in close proximity to one another. To meet this requirement, the items to be provided in close proximity must be grouped together, and set off from the other groupings of items. This could be accomplished in a variety of ways, for example, by presenting the information in boxes, or by arranging the items on the document and including spacing between the groupings. Items in close proximity may not have any intervening text between them.

2. *Not applicable.* If an item required by paragraph (d) or (e) of this section is not applicable to the loan, it may be omitted from the periodic statement or coupon book. For example, if there is no prepayment penalty associated with a loan, the prepayment penalty disclosures need not be provided on the periodic statement.

3. *Terminology.* A servicer may use terminology other than that found on the sample periodic statement in appendix H–30, so long as the new terminology is commonly understood. For example, servicers may take into consideration regional differences in terminology and refer to the account for the collection of taxes and insurance, referred to in § 1026.41(d) as the ''escrow account,'' as an ''impound account.''

41(d)(3) Past payment breakdown.

1. *Partial payments.* The disclosure of any partial payments received since the previous statement that were sent to a suspense or unapplied funds account as required by § 1026.41(d)(3)(i) should reflect any funds that were received in the time period covered by the current statement and that were placed in such account. The disclosure of any portion of payments since the beginning of the calendar year that was sent to a partial payment or suspense account as required by § 1026.41(d)(3)(ii) should reflect all funds that are currently held in a suspense or unapplied funds account. For example:

i. Suppose a payment of $1,000 is due, but the consumer sends in only $600 on January 1, which is held in a suspense account. Further assume there are no fees charged on this account. Assuming there are no other funds in the suspense account, the January statement should reflect: Unapplied funds since last statement—$600. Unapplied funds YTD—$600.

ii. Assume the same facts as in the preceding paragraph, except that during February the consumer sends in $300 and this too is held in the suspense account. The statement should reflect: Unapplied funds since last statement—$300. Unapplied funds YTD—$900.

iii. Assume the same facts as in the preceding paragraph, except that during March the consumer sends in $400. Of this payment, $100 completes a full periodic payment when added to the $900 in funds already held in the suspense account. This $1,000 is applied to the January payment, and the remaining $300 remains in the suspense account. The statement should reflect: Unapplied funds since last statement—$300. Unapplied Funds YTD—$300.

41(d)(4) Transaction Activity.

1. *Meaning.* Transaction activity includes any transaction that credits or debits the amount currently due. This is the same amount that is required to be disclosure under § 1026.41(d)(1)(iii). Examples of such transactions include, without limitation:

i. Payments received and applied;

ii. Payments received and held in a suspense account;

iii. The imposition of any fees (for example late fees); and

iv. The imposition of any charges (for example, private mortgage insurance).

2. *Description of late fees.* The description of any late fee charges includes the date of the late fee, the amount of the late fee, and the fact that a late fee was imposed.

3. *Partial payments.* If a partial payment is sent to a suspense or unapplied funds account, this fact must be in the transaction description along with the date and amount of the payment.

41(e)(3) Coupon book exemption.

1. *Fixed rate.* For guidance on the meaning of 'fixed rate' for purpose of § 1026.41(e)(3), see § 1026.18(s)(7)(iii) and its commentary.

2. *Coupon book.* A coupon book is a booklet provided to the consumer with a page for each billing cycle during a set period of time (often covering one year). These pages are designed to be torn off and returned to the servicer with a payment for each billing cycle. Additional information about the loan is often included on or inside the front or back cover, or on filler pages in the coupon book.

3. *Information location.* The information required by paragraph (e)(3)(ii) need not be provided on each coupon, but should be provided somewhere in the coupon book. Such information could be located, *e.g.,* on or inside the front or back cover, or on filler pages in the coupon book.

4. *Outstanding principal balance.* Paragraph (e)(3)(ii)(A) requires the information listed in paragraph (d)(7) to be included in the coupon book. Paragraph (d)(7)(i) requires the disclosure of the outstanding principal balance. If the servicer makes use of a coupon book and the exemption in § 1026.41(e)(3), the servicer need only disclose the principal balance at the beginning of the time period covered by the coupon book.

41(e)(4) Small servicers.

41(e)(4)(ii) Small servicer defined.

1. *Small servicers that do not qualify for the exemption.* A servicer that services any mortgage loans for which a servicer or an affiliate is not the creditor or assignee is not a small servicer. For example, a servicer that owns mortgage servicing rights for mortgage loans that are not owned by the servicer or an affiliate, or for which the servicer or an affiliate was not the entity to whom the obligation was initially payable, is not a small servicer.

2. *Master servicing and subservicing.* Both a master servicer and a subservicer, as those terms are defined in 12 CFR 1024.31, must meet the requirements of a small servicer. For example, if a master servicer meets the definition of a small servicer, but retains a subservicer that does not meet the definition of a small servicer, the subservicer is not a small servicer for the purposes of determining any exemption, and must comply with the requirements of a servicer.

41(e)(4)(iii) Small servicer determination.

1. *Loans obtained by merger or acquisition.* Any mortgage loans obtained by a servicer or an affiliate as part of a merger or acquisition, or as part of the acquisition of all of the assets or liabilities of a branch office of a lender, should be considered mortgage loans for which the servicer or an affiliate is the creditor to which the mortgage loan is initially payable. A branch office means either an office of a depository institution that is approved as a branch by a Federal or State supervisory agency or an office of a for-profit mortgage lending institution (other than a depository institution) that takes applications from the public for mortgage loans.

2. Application of evaluation threshold. The following examples demonstrate when a servicer either is considered or is no longer considered a small servicer:

i. A servicer that begins servicing more than 5,000 mortgage loans on October 1, and services more than 5,000 mortgage loans as of January 1 of the following year, would no longer be considered a small servicer on April 1 of that following year.

ii. A servicer that begins servicing more than 5,000 mortgage loans on February 1, and services more than 5,000 mortgage loans as of January 1 of the following year, would no longer be considered a small servicer on January 1 of that following year.

iii. A servicer that begins servicing more than 5,000 mortgage loans on February 1, but services less than 5,000 mortgage loans as of January 1 of the following year, is considered a small servicer for that following year.

* * * * *

Appendix H—Closed-End Model Forms and Clauses

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7. *Models H–4(D) through H–4(J).* These model clauses and sample and model forms illustrate certain notices, statements, and other disclosures required as follows:

i. Model H–4(D)(1) illustrates the interest rate adjustment notice required under § 1026.20(c) and Model H–4(D)(2) provides an example of a notice of interest rate adjustment with corresponding payment change. Model H–4(D)(3) illustrates the interest rate adjustment notice required under § 1026.20(d) and Model H–4(D)(4) provides an example of a notice of initial interest rate adjustment.

* * * * *

Dated: January 17, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2013–01241 Filed 2–1–13; 4:15 pm]

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Part IV

Department of Commerce

United States Patent and Trademark Office

37 CFR Part 1

Changes To Implement and Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act; Final Rules

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2012–0015]

RIN 0651–AC77

Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The Leahy-Smith America Invents Act (AIA) amends the patent laws pertaining to the conditions of patentability to convert the U.S. patent system from a ''first to invent'' system to a ''first inventor to file'' system; treats U.S. patents and U.S. patent application publications as prior art as of their earliest effective U.S., foreign, or international filing date; eliminates the requirement that a prior public use or sale be ''in this country'' to be a prior art activity; and treats commonly owned or joint research agreement patents and patent application publications as being by the same inventive entity for purposes of novelty, as well as nonobviousness. The AIA also repeals the provisions pertaining to statutory invention registrations. The United States Patent and Trademark Office (Office or USPTO) is revising the rules of practice in patent cases for consistency with, and to address the examination issues raised by, the changes in section 3 of the AIA.

DATES: *Effective date:* The changes in this final rule are effective on March 16, 2013.

Applicability date: The changes to 37 CFR 1.55 and 1.78 apply to any application filed under 35 U.S.C. 111 or 363 on or after March 16, 2013. The provisions of 1.17 and 37 CFR 1.293 through 1.297 as in effect on March 15, 2013, apply to any request for a statutory invention registration filed prior to March 16, 2013. New 37 CFR 1.109 applies to any application for patent, and to any patent issuing thereon, that contains, or contained at any time, a claim to a claimed invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is on or after March 16, 2013, and to any application for patent, and to any patent issuing thereon, that contains, or contained at any time, a specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains, or contained at any time, a claim to a claimed invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is on or after March 16, 2013.

FOR FURTHER INFORMATION CONTACT: Susy Tsang-Foster, Legal Advisor (telephone (571) 272–7711; electronic mail message (*susy.tsang-foster@uspto.gov*)) or Linda S. Therkorn, Patent Examination Policy Advisor (telephone (571) 272–7837; electronic mail message (*linda.therkorn@uspto.gov*)), of the Office of the Deputy Commissioner for Patent Examination Policy.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose: Section 3 of the AIA, *inter alia,* amends the patent laws to: (1) Convert the U.S. patent system from a ''first to invent'' system to a ''first inventor to file'' system; (2) treat U.S. patents and U.S. patent application publications as prior art as of their earliest effective filing date, regardless of whether the earliest effective filing date is based upon an application filed in the United States or in another country; (3) eliminate the requirement that a prior public use or sale be ''in this country'' to be a prior art activity; and (4) treat commonly owned or joint research agreement patents and patent application publications as being by the same inventive entity for purposes of 35 U.S.C. 102, as well as 35 U.S.C. 103. These changes in section 3 of the AIA are effective on March 16, 2013, but apply only to certain applications filed on or after March 16, 2013. This final rule revises the rules of practice in title 37 of the Code of Federal Regulations (CFR) for consistency with, and to address the examination issues raised by, the changes in section 3 of the AIA.

The Office sets out the conditions of patentability in 35 U.S.C. 102 and 103 as interpreted by the case law in the *Manual of Patent Examining Procedure* (MPEP). *See* MPEP sections 2121 through 2146 (8th ed. 2001) (Rev. 9, Aug. 2012) (MPEP). The Office is also issuing guidelines and will be training the Patent Examining Corps on how the changes to 35 U.S.C. 102 and 103 in section 3 of the AIA impact examination procedure and the provisions of the MPEP pertaining to 35 U.S.C. 102 and 103.

Summary of Major Provisions: The Office is specifically adopting the following changes:

The Office is adding definitions provided in the AIA to the rules of practice.

The Office is providing for the submission of affidavits or declarations showing that: (1) A disclosure upon which a claim rejection is based was by the inventor or a joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or (2) there was a prior public disclosure by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. In response to public comment, the Office has provided a more flexible approach for submission of an affidavit or declaration with evidence of a prior public disclosure. In response to similar comments regarding the prior public disclosure exception provisions, the Office wants to highlight that there is no requirement that the mode of disclosure by an inventor or joint inventor be the same as the mode of disclosure of an intervening disclosure (e.g., inventor discloses his invention at a trade show and the intervening disclosure is in a peer-reviewed journal), as explained in more detail in the examination guidelines. Additionally, there is no requirement that the disclosure by the inventor or a joint inventor be a verbatim or *ipsissimis verbis* disclosure of an intervening disclosure in order for the exception based on a prior public disclosure of subject matter by the inventor or a joint inventor to apply. The guidelines also clarify that the exception applies to subject matter of the intervening disclosure that is simply a more general description of the subject matter previously publicly disclosed by the inventor or a joint inventor.

The Office is providing for the situation in which a U.S. patent or U.S. patent application publication has a prior art effect as of the filing date of a foreign priority application by requiring that the certified copy of the foreign application or an interim copy of the foreign application be filed within the later of four months from the actual filing date of the application filed under 35 U.S.C. 111(a) or sixteen months from the filing date of the prior foreign application. This requirement does not apply if: (1) The foreign application was filed in a foreign intellectual property office participating with the Office in a bilateral or multilateral priority document exchange agreement (participating foreign intellectual property office); or (2) a copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office that permits the Office to obtain such a copy, and the applicant timely requests in a separate document that the Office retrieve such copy from

the participating intellectual property office. The priority document exchange program provides for the electronic transmission of priority documents to and from participating foreign Intellectual Property Offices (if applicant files a request and an authorization) without payment of a fee. The current participating offices are the European Patent Office (EPO), the Japan Patent Office (JPO), the Korean Intellectual Property Office (KIPO), and the World Intellectual Property Organization (WIPO).

The Office is eliminating the provisions directed to statutory invention registrations.

Finally, the Office is adopting additional requirements for nonprovisional applications filed on or after March 16, 2013, that claim priority to or the benefit of the filing date of an earlier application (i.e., foreign, provisional, or nonprovisional application, or international application designating the United States of America) that was filed prior to March 16, 2013. If such a nonprovisional application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the later-filed application, four months from the date of entry into the national stage in an international application, sixteen months from the filing date of the prior-filed application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the application. This procedure will permit the Office to readily determine whether the nonprovisional application is subject to the changes to 35 U.S.C. 102 and 103 in the AIA.

Costs and Benefits: This rulemaking is not economically significant as that term is defined in Executive Order 12866 (Sept. 30, 1993).

Specific Changes to Title 35, United States Code

The AIA was enacted into law on September 16, 2011. *See* Public Law 112–29, 125 Stat. 284 (2011). Section 3 of the AIA specifically amends 35 U.S.C. 102 to provide that a person shall be entitled to a patent unless: (1) The claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention (35 U.S.C. 102(a)(1)); or (2) the claimed invention was described in a patent issued under 35 U.S.C. 151, or in an application for patent published or deemed published under 35 U.S.C. 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention (35 U.S.C. 102(a)(2)). *See* 125 Stat. at 285–86. The publication of an international application designating the United States of America by the World Intellectual Property Organization (WIPO) is deemed a publication under 35 U.S.C. 122(b) (except as provided in 35 U.S.C. 154(d)). *See* 35 U.S.C. 374.

35 U.S.C. 102(b) as amended by section 3 of the AIA provides for exceptions to the provisions of 35 U.S.C. 102(a). The exceptions in 35 U.S.C. 102(b)(1) provide that a disclosure made one year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under 35 U.S.C. 102(a)(1) if: (A) The disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor (35 U.S.C. 102(b)(1)(A)); or (B) the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor (35 U.S.C. 102(b)(1)(B)). *See* 125 Stat. at 286. The exceptions in 35 U.S.C. 102(b)(2) provide that a disclosure shall not be prior art to a claimed invention under 35 U.S.C. 102(a)(2) if: (A) The subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor (35 U.S.C. 102(b)(2)(A)); (B) the subject matter disclosed had, before such subject matter was effectively filed under 35 U.S.C. 102(a)(2), been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor (35 U.S.C. 102(b)(2)(B)); or (C) the subject matter disclosed and the claimed invention, not later than the effective filing date of the claimed invention, were owned by the same person or subject to an obligation of assignment to the same person (35 U.S.C. 102(b)(2)(C)). *See id.*

35 U.S.C. 102(c) as amended by section 3 of the AIA provides for common ownership under joint research agreements. 35 U.S.C. 102(c) specifically provides that subject matter disclosed and a claimed invention shall be deemed to have been owned by the same person or subject to an obligation of assignment to the same person in applying the provisions of 35 U.S.C. 102(b)(2)(C) if: (1) The subject matter disclosed was developed and the claimed invention was made by, or on behalf of, one or more parties to a joint research agreement that was in effect on or before the effective filing date of the claimed invention; (2) the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and (3) the application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement. *See id.* The AIA also provides that the enactment of 35 U.S.C. 102(c) is done with the same intent to promote joint research activities that was expressed, including in the legislative history, through the enactment of the Cooperative Research and Technology Enhancement Act of 2004 (the ''CREATE Act''; Pub. L. 108–453, 118 Stat. 3596 (2004)), and that the Office shall administer 35 U.S.C. 102(c) in a manner consistent with the legislative history of the CREATE Act that was relevant to its administration. *See* 125 Stat. at 287.

35 U.S.C. 102(d) as amended by section 3 of the AIA provides a definition for ''effectively filed'' for purposes of determining whether a patent or application for patent is prior art to a claimed invention under 35 U.S.C. 102(a)(2). 35 U.S.C. 102(d) provides that for purposes of determining whether a patent or application for patent is prior art to a claimed invention under 35 U.S.C. 102(a)(2), such patent or application shall be considered to have been effectively filed, with respect to any subject matter described in the patent or application, on the earliest of: (1) The actual filing date of the patent or the application for patent; or (2) if the patent or application for patent is entitled to claim a right of priority or the benefit of an earlier filing date under 35 U.S.C. 119, 120, 121, or 365 based upon one or more prior filed applications for patent, the filing date of the earliest such application that describes the subject matter. *See* 125 Stat. at 286–87.

The AIA provides a number of definitions for terms used in title 35 of the United States Code. *See* 125 Stat. at 285. The term ''inventor'' means the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention, and the terms ''joint inventor'' and ''coinventor'' mean any one of the individuals who invented or discovered the subject matter of a joint invention. 35 U.S.C. 100(f) and (g). The term ''joint research agreement'' means a written contract, grant, or cooperative

agreement entered into by two or more persons or entities for the performance of experimental, developmental, or research work in the field of the claimed invention. 35 U.S.C. 100(h). The term ''effective filing date'' for a claimed invention in a patent or application for patent (other than a reissue application or a reissued patent) means the earliest of: (1) The actual filing date of the patent or the application for the patent containing a claim to the invention; or (2) the filing date of the earliest application for which the patent or application is entitled, as to such invention, to a right of priority or the benefit of an earlier filing date under 35 U.S.C. 119, 120, 121, or 365. 35 U.S.C. 100(i)(1). The ''effective filing date'' for a claimed invention in a reissued patent or an application for reissue shall be determined by deeming the claim to the invention to have been contained in the patent for which reissue was sought. 35 U.S.C. 100(i)(2). The term ''claimed invention'' means the subject matter defined by a claim in a patent or an application for a patent. 35 U.S.C. 100(j).

AIA 35 U.S.C. 103 provides that a patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in 35 U.S.C. 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. *See* 125 Stat. at 287. AIA 35 U.S.C. 103 also provides that patentability shall not be negated by the manner in which the invention was made. *See id.*

The AIA eliminates the provisions in 35 U.S.C. 135 for patent interference proceedings and replaces them with patent derivation proceedings. *See* 125 Stat. at 289–90. The Office has implemented the patent derivation proceedings provided for in the AIA in a separate rulemaking. *See Changes To Implement Derivation Proceedings,* 77 FR 56068 (Sept. 11, 2012). The AIA also replaces the interference provisions of 35 U.S.C. 291 with derivation provisions. *See* 125 Stat. at 288–89.

The AIA repeals the provisions of 35 U.S.C. 104 (special provisions for inventions made abroad) and 157 (statutory invention registrations). *See* 125 Stat. at 287. The AIA also makes conforming changes to 35 U.S.C. 111, 119, 120, 134, 145, 146, 154, 172, 202(c), 287, 305, 363, 374, and 375(a). *See* 125 Stat. at 287–88, and 290–91.

The AIA provides that the changes in section 3 that are being implemented in this rulemaking take effect on March 16, 2013. *See* 125 Stat. at 293. The AIA also provides that the changes (other than the repeal of 35 U.S.C. 157) in section 3 apply to any application for patent, and to any patent issuing thereon, that contains, or contained at any time: (1) A claim to a claimed invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is on or after March 16, 2013; or (2) a specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains, or contained at any time, such a claim. *See id.*

The AIA also provides that the provisions of 35 U.S.C. 102(g), 135, and 291 as in effect on March 15, 2013, shall apply to each claim of an application for patent, and any patent issued thereon, for which the amendments made by this section also apply, if such application or patent contains, or contained at any time: (1) A claim to an invention having an effective filing date as defined in 35 U.S.C. 100(i) that occurs before March 16, 2013; or (2) a specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains, or contained at any time, such a claim. *See id.*

General Discussion of the Changes From Proposed Rules

The Office published a notice of proposed rulemaking and a notice of proposed examination guidelines on July 26, 2012, to implement the first inventor to file provisions of section 3 of the AIA. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR 43742 (July 26, 2012) (notice of proposed rulemaking), and *Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR 43759 (July 26, 2012) (notice of proposed examination guidelines). The Office also conducted a roundtable discussion with the public on September 6, 2012, to obtain public input from organizations and individuals on issues relating to the Office's proposed implementation of the first inventor to file provisions of the AIA. *See Notice of Roundtable on the Implementation of the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR 49427 (Aug. 16, 2012). The Office also conducted a number of roadshow presentations in September of 2012 that included a discussion of the first inventor to file provisions of the AIA. In view of the input from the public, the Office is making the following changes to the proposed rules of practice pertaining to the first inventor to file provisions in section 3 of the AIA in this final rule:

Changes to the Time Period for Submitting a Certified Copy of the Foreign Priority Application: The Office proposed to require that the certified copy of the foreign application be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43743, 43745, and 43754. The Office received a number of comments indicating that the Office should consider alternative means of ensuring that a copy of any priority application is available. The Office is requiring in this final rule that a certified copy of the foreign application be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, but is also providing that this requirement does not apply if: (1) The priority application was filed in a participating foreign intellectual property office, or if a copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office that permits the Office to obtain such a copy, and the Office either receives a copy of the foreign application from the participating foreign intellectual property office or a certified copy of the foreign application within the pendency of the application and before the patent is granted; or (2) the applicant provides an interim copy of the original foreign application within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, and files a certified copy of the foreign application within the pendency of the application and before the patent is granted. The Office is additionally providing a ''good cause'' exception in the rule for a belated certified copy of the foreign application.

Changes To the Statements Required For Nonprovisional Applications Claiming Priority to or the Benefit of an Application filed Prior to March 16, 2013: The Office proposed two requirements for nonprovisional applications filed on or after March 16, 2013, that claim priority to or the benefit of the filing date of an earlier application (i.e., foreign, provisional, nonprovisional application, or international application designating the United States of America) that was filed prior to March 16, 2013 (transition

application). First, the Office proposed to require that if a transition application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the later-filed application, four months from the date of entry into the national stage in an international application, sixteen months from the filing date of the prior-filed application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the application. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43743, 43745, 43747–48, and 43755–57. Second, the Office proposed that if a transition application does not contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013, but discloses subject matter not also disclosed in the prior-filed foreign, provisional, nonprovisional application, or international application designating the United States of America, the applicant must provide a statement that the later filed application includes subject matter not disclosed in the prior-filed foreign, provisional, nonprovisional application, or international application designating the United States of America within the later of four months from the actual filing date of the later-filed application, four months from the date of entry into the national stage in an international application, or sixteen months from the filing date of the prior-filed application. *See id.* The Office received a number of comments expressing various concerns with a requirement that an applicant determine the effective filing date of the claims in his or her application, and questioning the need for any such statement in an application that never contained a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

The Office is providing in this final rule that a statement is required only if a transition application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013. Thus, no statement is required if a transition application discloses subject matter not also disclosed in the prior-filed foreign, provisional, nonprovisional application, or international application designating the United States of America but does not ever contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013. The Office is also providing that an applicant is not required to provide such a statement if the applicant reasonably believes on the basis of information already known to the individuals designated as having a duty of disclosure with respect to the application that the transition application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013. Thus, an applicant in this situation is not required to conduct any additional investigation or analysis to determine the effective filing date of the claims in their applications.

Changes To Affidavits or Declarations Showing a Prior Disclosure by an Inventor or Another Who Obtained the Subject Matter From an Inventor: The Office proposed setting out the standard for a successful affidavit or declaration where the disclosure is the inventor's own work (i.e., a satisfactory showing that the inventor or a joint inventor is in fact the inventor of the subject matter of the disclosure) and where the disclosure was by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor (i.e., showing that the inventor or a joint inventor is the inventor of the subject matter disclosed and directly or indirectly communicated the subject matter disclosed to another) in the rules of practice. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43743, 43749–51, and 43758–59. The Office also proposed to require the applicant to file a petition for a derivation proceeding if a rejection is based upon a U.S. patent or U.S. patent application publication of a patented or pending application naming another inventor and the patent or pending application claims an invention that is the same or substantially the same as the applicant's claimed invention. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43751 and 43759. The Office received a number of comments suggesting that a procedural provision should not set out the standard for a successful affidavit or declaration and suggesting that the Office should not require an applicant to file a petition for a derivation proceeding. The Office is revising the provision in this final rule to simply specify: (1) When an affidavit or declaration of attribution or prior public disclosure may be used to disqualify a disclosure as prior art; and (2) the procedural requirements for such an affidavit or declaration. The Office is also replacing the provision that the Office may require the applicant to file a petition for a derivation proceeding with a provision indicating that such an affidavit or declaration may not be available to overcome a rejection when the affidavit or declaration contends that an inventor named in the U.S. patent or U.S. patent application publication derived the claimed invention from the inventor or a joint inventor named in the application or patent, and that in such a case, an applicant or a patent owner may file a petition for a derivation proceeding.

The Office has sought to address the concerns of its stakeholders as expressed in the public comment, and plans to seek additional public comment on the rules of practice pertaining to the first inventor to file provisions of section 3 of the AIA after the Office and the public have gained experience with the rules of practice pertaining to the first inventor to file provisions in operation.

Discussion of Specific Rules

The following is a discussion of the amendments to Title 37 of the Code of Federal Regulations, part 1, in this final rule.

Section 1.9: Section 1.9 is amended to add the definition of the terms used throughout the rules.

Section 1.9(d)(1) provides that the term ''inventor'' or ''inventorship'' as used in this chapter means the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention. *See* 35 U.S.C. 100(f). While the term ''inventorship'' is not used in 35 U.S.C. 100(f), the term ''inventorship'' is currently used throughout the rules of practice to mean the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention. Section 1.9(d)(2) provides that the term ''joint inventor'' or ''coinventor'' as used in this chapter means any one of the individuals who invented or discovered the subject matter of a joint invention. *See* 35 U.S.C. 100(g).

Section 1.9(e) provides that the term ''joint research agreement'' as used in this chapter means a written contract, grant, or cooperative agreement entered into by two or more persons or entities for the performance of experimental, developmental, or research work in the field of the claimed invention. *See* 35 U.S.C. 100(h).

Section 1.9(f) provides that the term ''claimed invention'' as used in this chapter means the subject matter

defined by a claim in a patent or an application for a patent. *See* 35 U.S.C. 100(j).

Section 1.14: Section 1.14(f) is amended to correct the spelling of the word ''proprietary.''

Section 1.17: Section 1.17 is amended to eliminate the provisions pertaining to statutory invention registrations in § 1.17(g), (n), and (o). See discussion of the provisions of §§ 1.293 through 1.297.

Sections 1.17(g) and (i) are also amended for consistency with the changes to § 1.55. See discussion of § 1.55.

Section 1.53: Section 1.53(b) is amended for consistency with the reorganization of § 1.78. See discussion of § 1.78.

Section 1.53(c) is amended to eliminate the provisions pertaining to statutory invention registrations. See discussion of the provisions of §§ 1.293 through 1.297.

Section 1.53(j) is removed as the provisions of § 1.53 pertain to applications filed under 35 U.S.C. 111 and the discussion of former § 1.53(j) pertained to applications filed under the Patent Cooperation Treaty (PCT).

Section 1.55: Section 1.55 is reorganized into paragraphs (a) through (l) for clarity.

Section 1.55(a) provides generally that an applicant in a nonprovisional application may claim priority to one or more prior foreign applications under the conditions specified in 35 U.S.C. 119(a) through (d) and (f), 172, and 365(a) and (b) and § 1.55.

Section 1.55(b) provides that the nonprovisional application must be filed not later than twelve months (six months in the case of a design application) after the date on which the foreign application was filed, or that the nonprovisional application is entitled to claim the benefit under 35 U.S.C. 120, 121, or 365(c) of an application that was filed not later than twelve months (six months in the case of a design application) after the date on which the foreign application was filed. *See* MPEP § 201.13. While section 3(g)(1) of the AIA amended 35 U.S.C. 172 to eliminate the reference to ''the time specified in section 102(d)'' in view of the elimination of the premature foreign patenting provisions of pre-AIA 35 U.S.C. 102(d), the AIA did not otherwise change the provision in 35 U.S.C. 172 that the right of priority provided for by 35 U.S.C. 119(a) through (d) shall be six months in the case of designs. *See* MPEP § 1504.10. Section 1.55(b) also provides that this twelve-month period is subject to 35 U.S.C. 21(b) (and § 1.7(a)) and PCT Rule 80.5, and the six-month period is subject to 35 U.S.C. 21(b) and § 1.7(a). 35 U.S.C. 21(b) and § 1.7(a) provide that when the day, or the last day, for taking an action (e.g., filing a nonprovisional application within twelve months of the date on which the foreign application was filed) or paying a fee in the Office falls on Saturday, Sunday, or a Federal holiday within the District of Columbia, the action may be taken, or fee paid, on the next succeeding secular or business day. PCT Rule 80.5 has similar provisions relating to the expiration of any period during which any document or fee in an international application must reach a national Office or intergovernmental organization.

Section 1.55(c) pertains to the time for filing a priority claim and certified copy of a foreign application in an international application entering the national stage under 35 U.S.C., which corresponds to former § 1.55(a)(1)(ii). Section 1.55(c) provides that in an international application entering the national stage under 35 U.S.C., the claim for priority must be made and a certified copy of the foreign application must be filed within the time limit set forth in the PCT and the Regulations under the PCT. Note that it is permissible, but not required under § 1.55(c), to present the claim for priority in an application data sheet in an international application entering the national stage under 35 U.S.C.

Section 1.55(d) pertains to the time for filing a priority claim in an application filed under 35 U.S.C. 111(a).

Section 1.55(d) also requires the claim for priority to be presented in an application data sheet. *See Changes To Implement the Inventor's Oath or Declaration Provisions of the Leahy-Smith America Invents Act,* 77 FR 48776, 48818 (Aug. 14, 2012). Section 1.55(d) does not include the requirement of former § 1.55(a)(1)(i) for an identification of any foreign application for the same subject matter having a filing date before that of the application for which priority is claimed, but otherwise contains the provisions of former § 1.55(a)(1)(i).

Section 1.55(d) does not provide for an application under 35 U.S.C. 111(b) because an application under 35 U.S.C. 111(b) may not claim priority to or the benefit of an earlier filed application. *See* 35 U.S.C. 111(b)(7).

Section 1.55(e) pertains to a waiver of claims for priority and acceptance of unintentionally delayed claims for priority under 35 U.S.C. 119(a) through (d) or (f), or 365(a) in an application filed under 35 U.S.C. 111(a). Section 1.55(e) also requires that a petition to accept a delayed claim for priority be accompanied by a certified copy of the foreign application if required by § 1.55(f), unless previously submitted. Section 1.55(h)(4) permits applicants to request in a separate document that the Office obtain a copy of the foreign application that was filed in a nonparticipating intellectual property office from a participating intellectual property office that permits the Office to obtain such a copy to be filed with a petition under § 1.55(e), and § 1.55(i)(1) permits an interim copy to be filed with a petition under § 1.55(e). Section 1.55(e) otherwise contains the provisions of former § 1.55(c).

Section 1.55(f) pertains to the time for filing a certified copy of the foreign application in an application filed under 35 U.S.C. 111(a). Section 1.55(f) provides that in an original application filed under 35 U.S.C. 111(a), a certified copy of the foreign application must be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, except as provided in § 1.55(h) or (i). Section 1.55(f) also provides that the time period in § 1.55(f) does not apply in a design application. Since U.S. patent application publications (as well as U.S. patents) will have a prior art effect as of the earliest priority date (for subject matter disclosed in the priority application) with respect to applications subject to AIA 35 U.S.C. 102, the Office needs to ensure that it has a copy of the priority application by the time of publication. The time period of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application is consistent with the international norm for when the certified copy of the foreign application needs to be filed in an application. *See* PCT Rule 17.1(a).

Section 1.55(f) further provides that if a certified copy of the foreign application is not filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, and the exceptions in § 1.55(h) and (i) are not applicable, the certified copy of the foreign application must be accompanied by a petition including a showing of good and sufficient cause for the delay and the petition fee set forth in § 1.17(g). The Office is including a provision in § 1.55(f) to provide for the belated filing of a certified copy of the foreign application to provide a lower standard (good and sufficient cause versus an extraordinary situation) and lower fee ($200 petition fee set forth in § 1.17(g) versus the $400 petition fee set forth in

§ 1.17(f)) than would otherwise be applicable for a petition under § 1.183 to waive or suspend a requirement of the regulations in such a situation.

Section 1.55(g) provides requirements for filing a priority claim, certified copy of foreign application, and translation that are applicable in all applications.

Section 1.55(g)(1) corresponds to the provisions of former § 1.55(a)(2). Section 1.55(g)(1) provides that the claim for priority and the certified copy of the foreign application specified in 35 U.S.C. 119(b) or PCT Rule 17 must, in any event, be filed in or received by the Office within the pendency of the application and before the patent is granted. Section 1.55(g) does not in any way supersede the timing requirements of § 1.55(c) through (f) for a claim for priority and the certified copy of the foreign application. Section 1.55(g)(1) simply indicates that the claim for priority and the certified copy of the foreign application must be filed in or received by the Office within the pendency of the application and before the patent is granted in all situations. For example, if a petition to accept a delayed claim for priority is filed under § 1.55(e), the claim for priority and the certified copy of the foreign application must still be filed within the pendency of the application and before the patent is granted. Section 1.55(g)(1) also provides that if the claim for priority or the certified copy of the foreign application is filed after the date the issue fee is paid, it must also be accompanied by the processing fee set forth in § 1.17(i), but the patent will not include the priority claim unless corrected by a certificate of correction under 35 U.S.C. 255 and § 1.323.

Section 1.55(g)(2) corresponds to the provisions of former § 1.55(a)(3). Section 1.55(g)(2) provides that the Office may require that the claim for priority and the certified copy of the foreign application be filed earlier than otherwise provided in § 1.55: (1) When the application is involved in an interference (see § 41.202 of this title) or derivation (see part 42 of this title) proceeding; (2) when necessary to overcome the date of a reference relied upon by the examiner; or (3) when deemed necessary by the examiner. Notwithstanding the time period requirement of 1.55(f), this provision is still needed to provide for situations where the Office is examining an application within four months from the filing date of the application such as an application examined under the Office's Track I prioritized examination program. *See Changes To Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures Under the Leahy-Smith America Invents Act,* 76 FR 59050 (Sept. 23, 2011), and *Changes To Implement the Prioritized Examination for Requests for Continued Examination,* 76 FR 78566 (Dec. 19, 2011).

Section 1.55(g)(3) corresponds to the provisions of former § 1.55(a)(4)(i). Section 1.55(g)(3) provides that an English language translation of a non-English language foreign application is not required except: (1) When the application is involved in an interference (see § 41.202 of this title) or derivation (see part 42 of this title) proceeding; (2) when necessary to overcome the date of a reference relied upon by the examiner; or (3) when specifically required by the examiner.

Section 1.55(g)(4) corresponds to the provisions of former § 1.55(a)(4)(ii). Section 1.55(g)(4) provides that if an English language translation of a non-English language foreign application is required, it must be filed together with a statement that the translation of the certified copy is accurate.

Section 1.55(h) provides that the requirement in § 1.55(c), (f), and (g) for a certified copy of the foreign application to be filed within the time limit set forth in § 1.55(c), (f), and (g) will be considered satisfied if the Office receives a copy of the priority document through the priority document exchange program within the period specified in § 1.55(g)(1). *See Changes To Implement Priority Document Exchange Between Intellectual Property Offices,* 72 FR 1664 (Jan. 16, 2007). Section 1.55(h) specifically provides that this requirement for a timely filed certified copy of the foreign application will be considered satisfied if: (1) The foreign application was filed in a foreign intellectual property office participating with the Office in a bilateral or multilateral priority document exchange agreement (participating foreign intellectual property office); (2) the claim for priority is presented in an application data sheet (§ 1.76(b)(6)), identifying the foreign application for which priority is claimed, by specifying the application number, country (or intellectual property authority), day, month, and year of its filing, and including the information necessary for the participating foreign intellectual property office to provide the Office with access to the foreign application; and (3) the copy of the foreign application is received by the Office from the participating foreign intellectual property office, or a certified copy of the foreign application is filed, within the pendency of the application and before the patent is granted (as set forth in § 1.55(g)(1)).

Section 1.55 no longer requires that a request that the Office obtain a copy of the foreign application be made within the later of four months from the filing date of the application or sixteen months from the filing date of the foreign application if the foreign application was filed in a participating foreign intellectual property office. This is because the Office treats a priority claim (presented in an application data sheet) to an application filed in a participating foreign intellectual property office as such a request, and any priority claim must be filed within the later of four months from the filing date of the application filed under 35 U.S.C. 111(a) or sixteen months from the filing date of the foreign application (except as provided in § 1.55(e)).

Section 1.55(h) also provides that if the foreign application was not filed in a participating foreign intellectual property office, but a copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office that permits the Office to obtain such a copy, the applicant must also file a request in a separate document that the Office obtain a copy of the foreign application from the participating intellectual property office. This request must identify the participating intellectual property office and the application number and filing date of the subsequent application in which a copy of the foreign application was filed, and be filed within the later of sixteen months from the filing date of the prior foreign application or four months from the actual filing date of an application under 35 U.S.C. 111(a), within four months from the later of the date of commencement (§ 1.491(a)) or the date of the initial submission under 35 U.S.C. 371 in an application entering the national stage under 35 U.S.C. 371, or with a petition under § 1.55(e). Applicants can use Form PTO/SB/38 (Request to Retrieve Electronic Priority Application(s)) to file such a request.

The Office has provided information concerning the priority document exchange program on its Internet Web site (*www.uspto.gov*). This information includes the intellectual property offices that participate in the priority document exchange program, as well as the information necessary for each participating foreign intellectual property office to provide the Office with access to the foreign application.

The Office appreciates that an applicant may discover that the Office will not receive a copy of a foreign application through the priority

document exchange program until after the expiration of the time frame specified in § 1.55(f). In this situation, an applicant who otherwise meets the conditions of § 1.55(h) may satisfy the requirement of § 1.55(h)(3) by filing a certified copy of the foreign application in the Office within the pendency of the application and before the patent is granted.

Note that the Office cannot obtain a copy of a design application to which priority is claimed, or a foreign application to which priority is claimed in a design application, through the priority document exchange program. In addition, note that the Office can obtain a PCT application to which priority is claimed through the priority document exchange program for PCT applications filed in a limited number of PCT Receiving Offices (currently, RO/DK (Denmark), RO/FI (Finland), RO/IB (International Bureau), and RO/SE (Sweden)).

Applicants continue to bear the ultimate responsibility for ensuring that the priority document is filed by the time required under § 1.55(g)(1). Accordingly, applicants are encouraged to check as necessary to confirm receipt by the Office of appropriate documents. Priority documents retrieved from a participating foreign intellectual property office will bear the document description: ''Priority documents electronically retrieved by USPTO from a participating IP Office.''

Section 1.55(i) permits an applicant to provide an ''interim copy'' of the original foreign application from the applicant's own records to provide for the situation in which the applicant cannot obtain a certified copy of the foreign application within the time limit set forth in § 1.55(f), although there is no requirement that an applicant be unable to obtain a certified copy of the foreign application within the time limit set forth in § 1.55(f) to use § 1.55(i). Section 1.55(i) provides that the requirement in § 1.55(f) for a certified copy of the foreign application to be filed within the time limit set forth in § 1.55(f) will be considered satisfied if the applicant files a copy of the original foreign application clearly labeled as ''Interim Copy,'' including the specification, and any drawings or claims upon which it is based. Section 1.55(i) also provides that the interim copy of the foreign application must be filed together with a separate cover sheet identifying the foreign application by specifying the application number, country (or intellectual property authority), day, month, and year of its filing, and stating that the copy filed in the Office is a true copy of the original application as filed in the foreign country (or intellectual property authority). Section 1.55(i) also provides that the interim copy of the foreign application and cover sheet must be filed within the later of sixteen months from the filing date of the prior foreign application or four months from the actual filing date of an application under 35 U.S.C. 111(a), or with a petition under § 1.55(e). Section 1.55(i) finally provides that a certified copy of the foreign application ultimately must be filed within the period specified in § 1.55(g)(1). Thus, providing an interim copy of a foreign application under § 1.55(i) satisfies the requirement for a certified copy of the foreign application to be filed within the time limit set forth in § 1.55(f), but a certified copy of the foreign application must still be filed before a patent is granted.

Section 1.55(j) pertains to applications filed on or after March 16, 2013, that claim priority to a foreign application filed prior to March 16, 2013. Section 1.55(j) provides that if a nonprovisional application filed on or after March 16, 2013, claims priority to a foreign application filed prior to March 16, 2013, and also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the nonprovisional application, four months from the date of entry into the national stage as set forth in § 1.491 in an international application, sixteen months from the filing date of the prior-filed foreign application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the nonprovisional application. Section 1.55(j) further provides that an applicant is not required to provide such a statement if the applicant reasonably believes on the basis of information already known to the individuals designated in § 1.56(c) that the nonprovisional application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

This information is needed to assist the Office in determining whether the nonprovisional application is subject to AIA 35 U.S.C. 102 and 103 or pre-AIA 35 U.S.C. 102 and 103. If the Office must determine on its own the effective filing date of every claim ever presented in a nonprovisional application filed on or after March 16, 2013, that claims priority to or the benefit of a foreign application filed prior to March 16, 2013, the time required to examine an application will significantly increase. This in turn would result in an inefficient examination process that leads to increased examination costs, higher patent pendency, and/or reduced patent quality. The applicant, on the other hand, should be far more familiar with the contents of both the transition application and its priority or benefit application(s) than the examiner. Therefore, the Office is requiring the applicant, who is in the best position to know the effective filing date of each claimed invention, to indicate whether application contains, or contained at any time, a claimed invention that has an effective filing date on or after March 16, 2013.

This provision is tailored to the transition to 35 U.S.C. 102 and 103 under the AIA. For a nonprovisional application filed on or after March 16, 2013, that claims priority to a foreign application, the applicant would not be required to provide any statement if: (1) The nonprovisional application claims only subject matter disclosed in a foreign application filed prior to March 16, 2013; or (2) the nonprovisional application claims only priority to a foreign application filed on or after March 16, 2013. Section 1.55(j) also does not require that the applicant identify how many or which claims in the nonprovisional application have an effective filing date on or after March 16, 2013, or that the applicant identify the subject matter in the nonprovisional application not also disclosed in the foreign application. Section 1.55(j) requires only that the applicant state that there is a claim in the nonprovisional application that has an effective filing date on or after March 16, 2013.

The Office may issue a requirement for information under § 1.105 if an applicant takes conflicting positions on whether an application contains, or contained at any time, a claim to a claimed invention having an effective filing date on or after March 16, 2013. For example, the Office may require the applicant to identify where there is written description support under 35 U.S.C. 112(a) in the pre-AIA application for each claim if an applicant provides the statement under § 1.55(j) but later argues that the application should have been examined as a pre-AIA application because the application does not actually contain a claim to a claimed invention having an effective filing date on or after March 16, 2013. The Office would not issue a requirement for information under § 1.105 simply because of a disagreement with the applicant's statement under § 1.55(j) or the lack of such a statement.

Section 1.55(k) contains the provisions of former § 1.55(b).

Section 1.55(l) provides that the time periods set forth in § 1.55 are not extendable. This is not a change from former practice, under which the time periods set forth in § 1.55 are not extendable. This provision simply avoids the need to separately state that a time period is not extendable with respect to each time period set forth in § 1.55.

As it is now more than a decade since the implementation of eighteen-month publication in November of 2000, and as the changes in this final rule to § 1.55 do not apply to applications filed before March 16, 2013, the language in former § 1.55 itself that certain time periods therein do not apply to an application filed under 35 U.S.C. 111(a) before November 29, 2000, or to an international application filed under 35 U.S.C. 363 before November 29, 2000, has been deleted.

Section 1.71: Section 1.71(g)(1) is amended to remove reference to pre-AIA 35 U.S.C. 103(c)(2)(C) which provided for the names of the parties to a joint research agreement in the application for patent and is replaced by a reference to the definition of a joint research agreement (JRA) as set forth in § 1.9(e) in order to provide for both pre-AIA and AIA applications and patents.

Section 1.76: Sections 1.76(b)(5) and (b)(6) are amended for consistency with the changes to and reorganization of §§ 1.55 and 1.78. See discussion of §§ 1.55 and 1.78.

Section 1.77: Section 1.77(b) is amended to provide for any statement regarding prior disclosures by the inventor or a joint inventor. Section 1.77(a) sets out a preferred arrangement for a patent application, and § 1.77(b) sets out a preferred arrangement of the specification of a patent application. An applicant is not required to use the format specified in § 1.77 or identify in the specification any prior disclosures by the inventor or a joint inventor, but identifying any prior disclosures by the inventor or a joint inventor may save applicants (and the Office) the costs related to an Office action and reply, and expedite examination of the application.

Section 1.77(b)(2) is amended to delete the parenthetical ''(unless included in the application data sheet)'' for consistency with § 1.78(c)(5).

Section 1.78: Section 1.78 is reorganized as follows: (1) § 1.78(a) contains provisions relating to claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application; (2) § 1.78(b) contains provisions relating to delayed claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application; (3) § 1.78(c) contains provisions relating to claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional or international application; (4) § 1.78(d) contains provisions relating to delayed claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional or international application; (5) § 1.78(e) contains provisions relating to applications containing patentably indistinct claims; (6) § 1.78(f) contains provisions relating to applications or patents under reexamination naming different inventors and containing patentably indistinct claims; and (7) § 1.78(g) provides that the time periods set forth in § 1.78 are not extendable. In addition, as it is now more than a decade since the implementation of eighteen-month publication in November of 2000, and as the changes in this final rule to § 1.78 do not apply to applications filed before March 16, 2013, the language in former § 1.78 that certain time periods therein do not apply to an application filed under 35 U.S.C. 111(a) before November 29, 2000, or to an international application filed under 35 U.S.C. 363 before November 29, 2000, has been deleted.

Section 1.78(a) addresses claims under 35 U.S.C. 119(e) for the benefit of one or more prior-filed provisional applications. Section 1.78(a) contains the provisions of former § 1.78(a)(4) and (a)(5) except as otherwise discussed in this final rule.

Under 35 U.S.C. 119(e)(1), a provisional application must disclose the invention claimed in at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112(a) (except for the requirement to disclose the best mode) for the later-filed application to receive the benefit of the filing date of the provisional application as to such invention. *See New Railhead Mfg., L.L.C.* v. *Vermeer Mfg. Co.,* 298 F.3d 1290, 1294 (Fed. Cir. 2002) (for a nonprovisional application to actually receive the benefit of the filing date of the provisional application, ''the specification of the provisional [application] must 'contain a written description of the invention and the manner and process of making and using it, in such full, clear, concise, and exact terms,' 35 U.S.C. 112 ¶ 1, to enable an ordinarily skilled artisan to practice the invention claimed in the nonprovisional application''). Section 1.78(a), however, does not require (as did former § 1.78(a)(4)) that the provisional application must disclose the invention claimed in at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112(a) (except for the requirement to disclose the best mode) because § 1.78 pertains to claims to the benefit of a prior-filed application. The AIA draws a distinction between being entitled to the benefit of a prior-filed application and being entitled to claim the benefit of a prior-filed application. *See* 157 Cong. Rec. S1370 (2011) (explaining the distinction between being entitled to actual priority or benefit for purposes of 35 U.S.C. 100(i) and being entitled only to claim priority or benefit for purposes of AIA 35 U.S.C. 102(d)). Nevertheless, the prior-filed application must disclose an invention in the manner provided by 35 U.S.C. 112(a) (except for the requirement to disclose the best mode) for the later-filed application to receive the benefit of the filing date of the prior-filed application under 35 U.S.C. 119(e) (or 35 U.S.C. 120) as to such invention. In contrast, the prior-filed application must describe the subject matter for the later-filed application to be considered effectively filed under AIA 35 U.S.C. 102(d) on the filing date of the prior-filed application with respect to that subject matter.

Section 1.78(a)(1) provides that a nonprovisional application (other than a design application) or international application designating the United States of America must be filed not later than twelve months after the date on which the provisional application was filed, or that the nonprovisional application or international application designating the United States of America be entitled to claim the benefit under 35 U.S.C. 120, 121, or 365(c) of an application that was filed not later than twelve months after the date on which the provisional application was filed. Section 1.78(a)(1) also provides that this twelve-month period is subject to 35 U.S.C. 21(b) (and § 1.7(a)). As discussed previously, 35 U.S.C. 21(b) (and § 1.7(a)) provide that when the day, or the last day, for taking any action (e.g., filing a nonprovisional application within twelve months of the date on which the provisional application was filed) or paying any fee in the Office falls on Saturday, Sunday, or a Federal holiday within the District of Columbia, the action may be taken, or fee paid, on the next succeeding secular or business day.

Section 1.78(a)(2) provides that each prior-filed provisional application must name the inventor or a joint inventor named in the later—filed application as the inventor or a joint inventor.

Section 1.78(a)(2) and (c)(2) require the reference to each prior-filed application to be included in an

application data sheet. *See Changes To Implement the Inventor's Oath or Declaration Provisions of the Leahy-Smith America Invents Act,* 77 FR at 48820.

Section 1.78(a)(6) requires that if a nonprovisional application filed on or after March 16, 2013, claims the benefit of the filing date of a provisional application filed prior to March 16, 2013, and also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the nonprovisional application, four months from the date of entry into the national stage as set forth in § 1.491 in an international application, sixteen months from the filing date of the prior-filed provisional application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the nonprovisional application. Section 1.78(a)(6) further provides that an applicant is not required to provide such a statement if the applicant reasonably believes on the basis of information already known to the individuals designated in § 1.56(c) that the nonprovisional application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

This information is needed to assist the Office in determining whether the nonprovisional application is subject to AIA 35 U.S.C. 102 and 103 or pre-AIA 35 U.S.C. 102 and 103. As discussed previously, if the Office must determine on its own the effective filing date of every claim ever presented in a nonprovisional application filed on or after March 16, 2013, that claims priority to or the benefit of a provisional application filed prior to March 16, 2013, the time required to examine an application will significantly increase. This in turn would result in an inefficient examination process that leads to increased examination costs, higher patent pendency, and/or reduced patent quality. The applicant, on the other hand, should be far more familiar with the contents of both the transition application and its priority or benefit application(s) than the examiner. Therefore, the Office is requiring the applicant, who is in the best position to know the effective filing date of each claimed invention, to indicate whether application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

This provision is tailored to the transition to 35 U.S.C. 102 and 103 under the AIA. Thus, for a nonprovisional application filed on or after March 16, 2013, that claims the benefit of the filing date of a provisional application, the applicant would not be required to provide any statement if: (1) The nonprovisional application discloses only subject matter also disclosed in a provisional application filed prior to March 16, 2013; or (2) the nonprovisional application claims only the benefit of the filing date of a provisional application filed on or after March 16, 2013. Section 1.78(a)(6) also does not require that the applicant identify how many or which claims in the nonprovisional application have an effective filing date on or after March 16, 2013, or that the applicant identify the subject matter in the nonprovisional application not also disclosed in the provisional application. Section 1.78(a)(6) requires only that the applicant state that there is a claim in the nonprovisional application that has an effective filing date on or after March 16, 2013.

The Office may issue a requirement for information under § 1.105 if an applicant takes conflicting positions on whether an application contains, or contained at any time, a claim to a claimed invention having an effective filing date on or after March 16, 2013. For example, the Office may require the applicant to identify where there is written description support under 35 U.S.C. 112(a) in the pre-AIA application for each claim to a claimed invention if an applicant provides the statement under § 1.78(a)(6), but later argues that the application should have been examined as a pre-AIA application because the application does not actually contain a claim to a claimed invention having an effective filing date on or after March 16, 2013.

Section 1.78(b) contains provisions relating to delayed claims under 35 U.S.C. 119(e) for the benefit of prior-filed provisional applications. Section 1.78(b) contains the provisions of former § 1.78(a)(6).

Section 1.78(c) contains provisions relating to claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional or international application designating the United States of America. Section 1.78(c)(1) provides that each prior-filed application must name the inventor or a joint inventor named in the later-filed application as the inventor or a joint inventor. In addition, each prior-filed application must either be: (1) An international application entitled to a filing date in accordance with PCT Article 11 and designating the United States of America; or (2) a nonprovisional application under 35 U.S.C. 111(a) that is entitled to a filing date as set forth in § 1.53(b) or § 1.53(d) for which the basic filing fee set forth in § 1.16 has been paid within the pendency of the application (provisions from former § 1.78(a)(1)).

Section 1.78(c) does not contain a provision (as did former § 1.78(a)(1)) that the prior-filed application disclose the invention claimed in at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112(a). For a later-filed application to receive the benefit of the filing date of a prior-filed application, 35 U.S.C. 120 requires that the prior-filed application disclose the invention claimed in at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112(a) (except for the requirement to disclose the best mode). As discussed previously, § 1.78 pertains to claims to the benefit of a prior-filed application, and the AIA draws a distinction between being entitled to the benefit of a prior-filed application and being entitled to claim the benefit of a prior-filed application.

Section 1.78(c)(2) is amended to clarify that identifying the relationship of the applications means identifying whether the later-filed application is a continuation, divisional, or continuation-in-part of the prior-filed nonprovisional application or international application. *See* MPEP section 201.11.

Section 1.78(c)(3) through (5) contain the provisions of former § 1.78(a)(2). Section 1.78(c)(5) also provides that cross-references to applications for which a benefit is not claimed must not be included in an application data sheet (§ 1.76(b)(5)). Including cross-references to applications for which a benefit is not claimed in the application data sheet may lead the Office to inadvertently schedule the application for publication under 35 U.S.C. 122(b) and § 1.211 *et seq.* on the basis of the cross-referenced applications having the earliest filing date.

Section 1.78(c)(6) requires that if a nonprovisional application filed on or after March 16, 2013, claims the benefit of the filing date of a nonprovisional application or an international application designating the United States of America filed prior to March 16, 2013, and also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the

later-filed application, four months from the date of entry into the national stage as set forth in § 1.491 in an international application, sixteen months from the filing date of the prior-filed application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the later-filed application. Section 1.78(c)(6) further provides that an applicant is not required to provide such a statement if the application claims the benefit of a nonprovisional application in which a statement under § 1.55(j), § 1.78(a)(6), or § 1.78(c)(6) that the application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, has been filed (as an application that contains, or contained at any time, a specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or an application that is subject to AIA 35 U.S.C. 102 and 103 is itself subject to AIA 35 U.S.C. 102 and 103). Section 1.78(c)(6) also further provides that an applicant is not required to provide such a statement if the applicant reasonably believes on the basis of information already known to the individuals designated in § 1.56(c) that the later filed application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

This information is needed to assist the Office in determining whether the nonprovisional application is subject to AIA 35 U.S.C. 102 and 103 or pre-AIA 35 U.S.C. 102 and 103. As discussed previously, if the Office must determine on its own the effective filing date of every claim ever presented in a nonprovisional application filed on or after March 16, 2013, that claims priority to or the benefit of a nonprovisional application or an international application designating the United States of America filed prior to March 16, 2013, the time required to examine an application will significantly increase. This in turn would result in an inefficient examination process that leads to increased examination costs, higher patent pendency, and/or reduced patent quality. The applicant, on the other hand, should be far more familiar with the contents of both the transition application and its priority or benefit application(s) than the examiner. Therefore, the Office is requiring the applicant, who is in the best position to know the effective filing date of each claimed invention, to indicate whether application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

This provision is tailored to the transition to 35 U.S.C. 102 and 103 under the AIA. Thus, for a nonprovisional application filed on or after March 16, 2013, that claims the benefit of the filing date of a nonprovisional application or an international application designating the United States of America, the applicant would not be required to provide any statement if: (1) The nonprovisional application discloses only subject matter also disclosed in a prior-filed nonprovisional application or international application designating the United States of America filed prior to March 16, 2013; or (2) the nonprovisional application claims only the benefit of the filing date of a nonprovisional application or an international application designating the United States of America filed on or after March 16, 2013. Section 1.78(c)(6) also does not require that the applicant identify how many or which claims in the later-filed nonprovisional application have an effective filing date on or after March 16, 2013, or that the applicant identify the subject matter in the later-filed nonprovisional application not also disclosed in the prior-filed nonprovisional application or international application designating the United States of America. Section 1.78(c)(6) requires only that the applicant state that there is a claim in the later-filed nonprovisional application that has an effective filing date on or after March 16, 2013.

The Office may issue a requirement for information under § 1.105 if an applicant takes conflicting positions on whether a nonprovisional application contains, or contained at any time, a claim to a claimed invention having an effective filing date on or after March 16, 2013. For example, the Office may require the applicant to identify where there is written description support under 35 U.S.C. 112(a) in the pre-AIA application for each claim to a claimed invention if an applicant provides the statement under § 1.78(c)(6) but later argues that the application should have been examined as a pre-AIA application because the application does not actually contain a claim to a claimed invention having an effective filing date on or after March 16, 2013. The Office would not issue a requirement for information under § 1.105 simply because of a disagreement with the applicant's statement under § 1.78(c)(6) or the lack of such a statement.

Section 1.78(d) contains provisions relating to delayed claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of prior-filed nonprovisional or international applications. Section 1.78(d) contains the provisions of former § 1.78(a)(3).

Section 1.78(e) contains the provisions of former § 1.78(b) pertaining to applications containing ''conflicting'' claims. Section 1.78(e), however, uses the term ''patentably indistinct'' rather than ''conflicting'' for clarity as the term ''conflicting'' is not otherwise employed in the rules of practice. *See Changes To Implement Derivation Proceedings,* 77 FR at 56070, 56071–72, and 56090 (adding new § 42.401, which includes defining same or substantially the same as meaning patentably indistinct).

Section 1.78(f) addresses applications or patents under reexamination that name different inventors and contain patentably indistinct claims. The provisions are similar to the provisions of former § 1.78(c), but the language has been amended to refer to ''on its effective filing date (as defined in § 1.109) or on its date of invention, as applicable'' in place of ''at the time the later invention was made'' to provide for both AIA applications (under the ''first inventor to file'' system) and pre-AIA applications. Section 1.78(f) likewise uses the term ''patentably indistinct'' rather than ''conflicting'' for clarity.

Section 1.78(g) provides that the time periods set forth in § 1.78 are not extendable.

Section 1.84: Section 1.84(a) is amended to eliminate the provisions pertaining to statutory invention registrations. See discussion of the provisions of §§ 1.293 through 1.297.

Section 1.103: Section 1.103(g) is removed to eliminate the provisions pertaining to statutory invention registrations. See discussion of the provisions of §§ 1.293 through 1.297.

Section 1.104: Section 1.104(c)(4) is amended to include the provisions that pertain to commonly owned or joint research agreement subject matter for applications and patents subject to AIA 35 U.S.C. 102 and 103. Specifically, § 1.104(c)(4) implements the provisions of 35 U.S.C. 102(b)(2)(C) and 35 U.S.C. 102(c) in the AIA. Thus, § 1.104(c)(4) is applicable to applications and patents that are subject to AIA 35 U.S.C. 102 and 103.

Section 1.104(c)(4)(i) provides that subject matter which would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(2) and a claimed invention will be treated as commonly owned for purposes of AIA 35 U.S.C. 102(b)(2)(C) if the applicant or patent owner provides a statement to the effect that the subject matter and the claimed invention, not later than the effective

filing date of the claimed invention, were owned by the same person or subject to an obligation of assignment to the same person.

Section 1.104(c)(4)(ii) addresses joint research agreements and provides that subject matter which would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(2) and a claimed invention will be treated as commonly owned for purposes of AIA 35 U.S.C. 102(b)(2)(C) on the basis of a joint research agreement under AIA 35 U.S.C. 102(c) if: (1) The applicant or patent owner provides a statement to the effect that the subject matter was developed and the claimed invention was made by or on behalf of one or more parties to a joint research agreement, within the meaning of 35 U.S.C. 100(h) and § 1.9(e), that was in effect on or before the effective filing date of the claimed invention, and the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and (2) the application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement.

Section 1.104(c)(5) is amended to include the provisions that pertain to commonly owned or joint research agreement subject matter for applications and patents subject to 35 U.S.C. 102 and 103 in effect prior to the effective date of section 3 of the AIA. Thus, § 1.104(c)(5) is applicable to applications and patents that are subject to 35 U.S.C. 102 and 103 in effect prior to March 16, 2013.

Section 1.104(c)(5)(i) provides that subject matter which qualifies as prior art under 35 U.S.C. 102(e), (f), or (g) in effect prior to March 16, 2013, and a claimed invention in an application filed on or after November 29, 1999, or any patent issuing thereon, in an application filed before November 29, 1999, but pending on December 10, 2004, or any patent issuing thereon, or in any patent granted on or after December 10, 2004, will be treated as commonly owned for purposes of 35 U.S.C. 103(c) in effect prior to March 16, 2013, if the applicant or patent owner provides a statement to the effect that the subject matter and the claimed invention, at the time the claimed invention was made, were owned by the same person or subject to an obligation of assignment to the same person.

Section 1.104(c)(5)(ii) addresses joint research agreements and provides that subject matter which qualifies as prior art under 35 U.S.C. 102(e), (f), or (g) in effect prior to March 16, 2013, and a claimed invention in an application pending on or after December 10, 2004, or in any patent granted on or after December 10, 2004, will be treated as commonly owned for purposes of 35 U.S.C. 103(c) in effect prior to March 16, 2013, on the basis of a joint research agreement under 35 U.S.C. 103(c)(2) in effect prior to March 16, 2013, if: (1) The applicant or patent owner provides a statement to the effect that the subject matter and the claimed invention were made by or on behalf of the parties to a joint research agreement, within the meaning of 35 U.S.C. 100(h) and § 1.9(e), which was in effect on or before the date the claimed invention was made, and that the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and (2) the application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement. Sections 1.104(c)(4)(ii) and 1.104(c)(5)(ii) make reference to the definition of joint research agreement contained in 35 U.S.C. 100(h) and § 1.9(e). The AIA did not change the definition of a joint research agreement, but merely moved the definition from 35 U.S.C. 103(c)(3) to 35 U.S.C. 100(h). Thus, the Office is referencing the definition of joint research agreement in 35 U.S.C. 100(h) in § 1.104(c)(4)(ii) and (c)(5)(ii) for simplicity.

Section 1.104(c)(6) is added to clarify that patents issued prior to December 10, 2004, from applications filed prior to November 29, 1999, are subject to 35 U.S.C. 103(c) in effect on November 28, 1999. *See* MPEP § 706.02(l).

The provisions of former § 1.104(c)(5) pertain to statutory invention registrations and are thus removed. *See* discussion of the provisions of §§ 1.293 through 1.297.

Section 1.109: Section 1.109 is added to specify the effective filing date of a claimed invention under the AIA. Section 1.109(a) provides that the effective filing date of a claimed invention in a patent or an application for patent, other than in a reissue application or reissued patent, is the earliest of: (1) The actual filing date of the patent or the application for the patent containing a claim to the invention; or (2) the filing date of the earliest application for which the patent or application is entitled, as to such invention, to a right of priority or the benefit of an earlier filing date under 35 U.S.C. 119, 120, 121, or 365. *See* 35 U.S.C. 100(i)(1). Section 1.109(b) provides that the effective filing date for a claimed invention in a reissue application or a reissued patent is determined by deeming the claim to the invention to have been contained in the patent for which reissue was sought. *See* 35 U.S.C. 100(i)(2).

Section 1.109 applies to any application for patent, and to any patent issuing thereon, that contains, or contained at any time, a claim to a claimed invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is on or after March 16, 2013, and to any application for patent, and to any patent issuing thereon, that contains, or contained at any time, a specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains, or contained at any time, a claim to a claimed invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is on or after March 16, 2013.

Section 1.110: Section 1.110 is revised to provide for both AIA applications and pre-AIA applications. Section 1.110 specifically provides that when one or more joint inventors are named in an application or patent, the Office may require an applicant or patentee to identify the inventorship and ownership or obligation to assign ownership, of each claimed invention on its effective filing date (as defined in § 1.109) or on its date of invention, as applicable, when necessary for purposes of an Office proceeding. Section 1.110 is amended to change the ownership inquiry to ownership: (1) On its effective filing date (as defined in § 1.109), which would be applicable to AIA applications; or (2) on its date of invention, which would be applicable to pre-AIA applications. Section 1.110 further provides that the Office may also require an applicant or patentee to identify the invention dates of the subject matter of each claim when necessary for purposes of an Office proceeding, which would be applicable to pre-AIA applications.

Section 1.130: Section 1.130 is amended to implement the exceptions provided under AIA 35 U.S.C. 102(b) by replacing its existing provisions (which are relocated to § 1.131) with provisions for: (1) Disqualifying a disclosure as prior art by establishing that the disclosure was by the inventor or a joint inventor or is a disclosure of the inventor's or a joint inventor's own work (affidavit or declaration of attribution); and (2) disqualifying a disclosure as prior art by establishing that there was a prior public disclosure of the subject matter disclosed by the inventor or a joint inventor or that there was a prior public disclosure by another of the inventor's or a joint inventor's own work (affidavit or declaration of prior public disclosure). Thus, § 1.130 applies to applications for patent (and patents issuing thereon) that are subject

to AIA 35 U.S.C. 102 and 103, and § 1.131 would apply to applications for patent (and patents issuing thereon) that are subject to pre-AIA 35 U.S.C. 102 and 103 (35 U.S.C. 102 and 103 as in effect on March 15, 2013, prior to the effective date of section 3 of the AIA). In an application for patent to which the provisions of § 1.130 apply, and to any patent issuing thereon, the provisions of § 1.131 are applicable only with respect to a rejection under 35 U.S.C. 102(g) as in effect on March 15, 2013.

Section 1.130 provides a mechanism for filing an affidavit or declaration to establish that a disclosure is not prior art in accordance with AIA 35 U.S.C. 102(b). Section 1.130, like §§ 1.131 and 1.132, provides a mechanism for the submission of evidence to disqualify a disclosure as prior art or otherwise traverse a rejection. An applicant's or patent owner's compliance with § 1.130 means that the applicant or patent owner is entitled to have the evidence considered in determining the patentability of the claim(s) at issue. It does not mean that the applicant or patent owner is entitled as a matter of right to have the rejection of or objection to the claim(s) withdrawn. *See Changes To Implement the Patent Business Goals,* 65 FR 54604, 54640 (Sept. 8, 2000) (discussing procedural nature of §§ 1.131 and 1.132). The examination guidelines will discuss the standard for evaluating the sufficiency of an affidavit or declaration attributing the disclosure or subject matter disclosed as the inventor's or a joint inventor's own work and the sufficiency of an affidavit or declaration of a prior public disclosure of the subject matter disclosed as the inventor's or a joint inventor's own work.

Section 1.130(a) provides that when any claim of an application or a patent under reexamination is rejected, the applicant or patent owner may submit an appropriate affidavit or declaration to disqualify a disclosure as prior art by establishing that the disclosure was made by the inventor or a joint inventor, or the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor. Section 1.130(a) pertains to the provisions of subparagraph (A) of AIA 35 U.S.C. 102(b)(1) and (b)(2). AIA 35 U.S.C. 102(b)(1)(A) provides that a disclosure made one year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under AIA 35 U.S.C. 102(a)(1) if the disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor, and AIA 35 U.S.C. 102(b)(2)(A) provides that a disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(2) if the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor. In these situations, the applicant or patent owner is attempting to show that: (1) The disclosure was made by the inventor or a joint inventor; or (2) the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor.

Affidavits or declarations seeking to attribute an activity, a reference, or part of a reference to the applicant to show that the activity or reference is not available as prior art under pre-AIA 35 U.S.C. 102(a) have been treated as affidavits or declarations under § 1.132. *See* MPEP § 716.10. Affidavits or declarations of attribution in pre-AIA applications remain as affidavits or declarations under § 1.132. Thus, the Office will treat affidavits or declarations of attribution in AIA applications as affidavits or declarations under § 1.130, and affidavits or declarations of attribution in pre-AIA applications as affidavits or declarations under § 1.132, regardless of whether the affidavit or declaration is designated as an affidavit or declaration under §§ 1.130, 1.131, or 1.132.

Section 1.130(b) provides that when any claim of an application or a patent under reexamination is rejected, the applicant or patent owner may submit an appropriate affidavit or declaration to disqualify a disclosure as prior art by establishing that the subject matter disclosed had, before such disclosure was made or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. Section 1.130(b) pertains to the provisions of subparagraph (B) of AIA 35 U.S.C. 102(b)(1) and (b)(2). AIA 35 U.S.C. 102(b)(1)(B) provides that a disclosure made one year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under AIA 35 U.S.C. 102(a)(1) if the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. AIA 35 U.S.C. 102(b)(2)(B) provides that a disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(2) if the subject matter disclosed had, before such subject matter was effectively filed under AIA 35 U.S.C. 102(a)(2), been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. In these situations, the disclosure on which the rejection is based is not by the inventor or a joint inventor, or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor, and the applicant or patent owner is attempting to show that the subject matter disclosed had, before such disclosure was made or before such subject matter was effectively filed, been publicly disclosed by: (1) The inventor or a joint inventor; or (2) another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. As pointed out in the examination guidelines, in response to public comments, the Office is clarifying that there is no requirement that the mode of disclosure by an inventor or joint inventor be the same as the mode of disclosure of an intervening disclosure (e.g., inventor discloses his invention at a trade show and the intervening disclosure is in a peer-reviewed journal). Additionally, there is no requirement that the disclosure by the inventor or a joint inventor be a verbatim or *ipsissimis verbis* disclosure of an intervening disclosure in order for the exception based on a previous public disclosure of subject matter by the inventor or a joint inventor to apply. The examination guidelines also clarify that the exception applies to subject matter of the intervening disclosure that is simply a more general description of the subject matter previously publicly disclosed by the inventor or a joint inventor.

Section 1.130(b) further provides that an affidavit or declaration under § 1.130(b) must identify the subject matter publicly disclosed and provide the date of the public disclosure of such subject matter by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. Section 1.130(b)(1) provides that if the subject matter publicly disclosed on the earlier date by the inventor or a joint inventor, or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor, was in a printed publication, the affidavit or declaration must be accompanied by a copy of the printed publication. Section 1.130(b)(2) provides that if the subject matter publicly disclosed on the earlier date was not in a printed publication, the affidavit or declaration must describe the subject matter with

sufficient detail and particularity to determine what subject matter had been publicly disclosed on the earlier date by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. The Office needs these details to determine not only whether the inventor is entitled to disqualify the disclosure under AIA 35 U.S.C. 102(b), but also because if the rejection is based on a U.S. patent application publication or WIPO publication of an international application to another and such application is also pending before the Office, this prior disclosure may be prior art under AIA 35 U.S.C. 102(a) to the other earlier filed application, and the Office may need this information to avoid granting two patents on the same invention.

Section 1.130 does not contain a provision that ''[o]riginal exhibits of drawings or records, or photocopies thereof, must accompany and form part of the affidavit or declaration or their absence must be satisfactorily explained'' in contrast to the requirement for such exhibits in § 1.131(b), because in some situations an affidavit or declaration under § 1.130 does not necessarily need to be accompanied by such exhibits (e.g., a statement by the inventor or a joint inventor may be sufficient). However, in situations where evidence is required, such exhibits must accompany an affidavit or declaration under § 1.130. In addition, an affidavit or declaration under § 1.130 must be accompanied by any exhibits that the applicant or patent owner wishes to rely upon.

Section 1.130(c) provides that the provisions of § 1.130 are not available if the rejection is based upon a disclosure made more than one year before the effective filing date of the claimed invention. A disclosure made more than one year before the effective filing date of the claimed invention is prior art under AIA 35 U.S.C. 102(a)(1), and may not be disqualified under AIA 35 U.S.C. 102(b)(1). Note that the provisions of § 1.130 are available to establish that a rejection under AIA 35 U.S.C. 102(a)(2) is based on an application or patent that was effectively filed more than one year before the effective filing date of the claimed invention under examination, but not publicly disclosed more than one year before such effective filing date, where the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor.

Section 1.130(c) also provides that the provisions of § 1.130 may not be available if the rejection is based upon a U.S. patent or U.S. patent application publication of a patented or pending application naming another inventor, the patent or pending application claims an invention that is the same or substantially the same as the applicant's or patent owner's claimed invention, and the affidavit or declaration contends that an inventor named in the U.S. patent or U.S. patent application publication derived the claimed invention from the inventor or a joint inventor named in the application or patent, in which case an applicant or patent owner may file a petition for a derivation proceeding pursuant to § 42.401 *et seq.* of this title. Permitting two different applicants to each aver or declare that an inventor named in the other application derived the claimed invention without a derivation proceeding to resolve who the true inventor is could result in the Office issuing two patents containing patentably indistinct claims to two different parties. Thus, the Office needs to provide that the provisions of § 1.130 are not available in certain situations to avoid the issuance of two patents containing patentably indistinct claims to two different parties. *See In re Deckler,* 977 F.2d 1449, 1451–52 (Fed. Cir. 1992) (35 U.S.C. 102, 103, and 135 ''clearly contemplate—where different inventive entities are concerned—that only one patent should issue for inventions which are either identical to or not patentably distinct from each other'') (quoting *Aelony* v. *Arni,* 547 F.2d 566, 570 (CCPA 1977)). The provisions of § 1.130, however, would be available if: (1) The rejection is based upon a disclosure other than a U.S. patent or U.S. patent application publication (such as nonpatent literature or a foreign patent document); (2) the rejection is based upon a U.S. patent or U.S. patent application and the patent or pending application did not claim an invention that is the same or substantially the same as the applicant's claimed invention; or (3) the rejection is based upon a U.S. patent or U.S. patent application and the patent or pending application that does claim an invention that is the same or substantially the same as the applicant's claimed invention, but the affidavit or declaration under § 1.130 does not contend that an inventor named in the U.S. patent or U.S. patent application publication derived the claimed invention from the inventor or a joint inventor named in the application or patent (e.g., the affidavit or declaration under § 1.130 contends that the subject matter disclosed had, before such disclosure was made or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor).

Section 1.130(d) provides that the provisions of § 1.130 apply to any application for patent, and to any patent issuing thereon, that is subject to AIA 35 U.S.C. 102 and 103.

Section 1.131: The title of § 1.131 is amended to include the provisions of former § 1.130.

Section 1.131(a) is amended to refer to a party qualified under § 1.42 or § 1.46 for consistency with the changes to § 1.42 *et seq. See Changes To Implement the Inventor's Oath or Declaration Provisions of the Leahy-Smith America Invents Act,* 77 FR at 48778–79. Section 1.131(a) is amended to refer to pre-AIA 35 U.S.C. 102(e) as 35 U.S.C. 102(e) as in effect on March 15, 2013. Section 1.131(a)(1) is amended to refer to an ''application naming another inventor which claims interfering subject matter as defined in § 41.203(a)'' rather than an ''application to another or others which claims the same patentable invention as defined in § 41.203(a)'' in view of the changes to 35 U.S.C. 102 in the AIA and the current provisions of § 41.203(a).

Section 1.131(b) is amended to provide that the showing of facts provided for in § 1.131(b) is applicable to an oath or declaration under § 1.131(a).

Section 1.131(c) is added to include the provisions of former § 1.130, but is revised to refer to 35 U.S.C. 103 as 35 U.S.C. 103 as in effect on March 15, 2013, to refer to pre-AIA 35 U.S.C. 102(b) as 35 U.S.C. 102(b) as in effect on March 15, 2013, and to refer to 35 U.S.C. 104 as 35 U.S.C. 104 as in effect on March 15, 2013.

Section 1.131(d) is added to provide that the provisions of § 1.131 apply to any application for patent, and to any patent issuing thereon, that contains, or contained at any time: (1) A claim to an invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is before March 16, 2013; or (2) a specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains, or contained at any time, a claim to an invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is before March 16, 2013.

Section 1.131(e) is added to provide that, in an application for patent to which the provisions of § 1.130 apply, and to any patent issuing thereon, the provisions of § 1.131 are applicable only with respect to a rejection under 35 U.S.C. 102(g) as in effect on March 15, 2013. Section 1.130(d) provides that the provisions of § 1.130 apply to applications for patent, and to any patent issuing thereon, that is subject to

AIA 35 U.S.C. 102 and 103. The date of invention is not relevant under AIA 35 U.S.C. 102 and 103. Thus, in an application for patent to which the provisions of § 1.130 apply, and to any patent issuing thereon, a prior art disclosure could not be antedated under AIA 35 U.S.C. 102 and 103 by way of an affidavit or declaration under § 1.131(a) showing that the inventor previously invented the claimed subject matter.

Sections 1.293 through 1.297: The AIA repeals the provisions of 35 U.S.C. 157 pertaining to statutory invention registrations. Thus, the statutory invention registration provisions of §§ 1.293 through 1.297 are removed.

Section 1.321: Section 1.321(d) is amended to remove reference to 35 U.S.C. 103(c) and to provide a reference to the provisions of § 1.104(c)(4)(ii) and § 1.104(c)(5)(ii) in order provide for both AIA and pre-AIA applications.

Comments and Responses to Comments

As discussed previously, the Office published a notice of proposed rulemaking and a notice of proposed examination guidelines on July 26, 2012, to implement the first inventor to file provisions of section 3 of the AIA, and conducted a roundtable on September 6, 2012, to obtain public input from organizations and individuals on issues relating to the Office's proposed implementation of the first inventor to file provisions of the AIA. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43742–59, *Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43759–73, and *Notice of Roundtable on the Implementation of the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 49427–28. The Office received approximately seventy written comments (from intellectual property organizations, industry, law firms, individual patent practitioners, and the general public) in response to these notices. The comments germane to the proposed changes to the rules of practice and the Office's responses to the comments follow.

A. Foreign Priority Claim and Certified Copy

Comment 1: Numerous comments either opposed or suggested revising the requirement for submission of a certified copy of the foreign priority document within the later of four months from the actual filing date of the application or sixteen months from the filing of the prior foreign application as set forth in proposed § 1.55. The majority of these comments stated that such filing deadlines for the certified copy are unrealistic because many delays can be beyond the control of the applicant, such as delays by the foreign intellectual property office, mailing and courier delays, and even delays by the Office in requesting delivery under the priority document exchange program. One comment suggested revising the timing requirement for filing the certified copy of the foreign priority document to no later than payment of the issue fee.

Response: Section 1.55(f) as adopted in this final rule requires that a certified copy of the foreign application must be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application. Section 1.55(f) as adopted in this final rule, however, also provides that this requirement does not apply if: (1) The priority application was filed in a participating foreign intellectual property office, or if a copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office that permits the Office to obtain such a copy, and the Office receives either a copy of the foreign application from the participating foreign intellectual property office or a certified copy of the foreign application within the pendency of the application and before the patent is granted; or (2) the applicant provides an interim copy of the original foreign application within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, and files a certified copy of the foreign application within the pendency of the application and before issuance of the patent.

Comment 2: Several comments asserted that there is no need for a certified copy of the foreign priority application because the Office can readily obtain priority documents through its exchange mechanisms (e.g., Digital Access Service (DAS) and Priority Document Exchange (PDX)) with other intellectual property offices. The comments suggested that the Office revise proposed § 1.55 to specifically exempt the time period for filing the certified copy of the priority document if the applicant has timely requested a certified copy or electronic transfer of that copy. One comment suggested that in such circumstances, the rule should not include the requirement for actual receipt of the foreign application by the Office.

Response: Section 1.55(h) as adopted in this final rule provides an exception for filing a certified copy of the foreign priority application when the priority application was filed in a participating foreign intellectual property office, or if a copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office that permits the Office to obtain such a copy, and the Office receives a copy of the foreign application from the participating foreign intellectual property office within the pendency of the application and before the patent is granted. Otherwise, the Office continues to require a certified copy of a foreign priority application pursuant to its authority in 35 U.S.C. 119(b). The requirement for a certified copy where a copy was not received from a participating intellectual property office is necessary to ensure that a true copy of the earlier filed application is of record before the patent is granted. The Office needs a copy of the foreign priority application for situations in which a U.S. patent or U.S. patent application publication has a prior art effect as of the filing date of a foreign priority application.

Comment 3: One comment noted that the electronic transmittal of priority documents by participating foreign intellectual property offices is not always available as an alternative to submitting a certified paper copy of the priority application, and further observed that several large patent offices (e.g., the German Patent and Trade Mark Office (DPMA)) do not participate in electronic priority document exchange programs with the Office.

Response: Section 1.55(i) as adopted in this final rule permits an applicant to provide an ''interim copy'' of the original foreign application from the applicant's own records to provide for the situation in which the applicant cannot obtain a certified copy of the foreign application within the time limit set forth in § 1.55(f). While providing an interim copy of a foreign application under § 1.55(i) satisfies the requirement for a certified copy of the foreign application to be filed within the time limit set forth in § 1.55(f), a certified copy of the foreign application ultimately must still be filed before a patent is granted as set forth in § 1.55(g).

Furthermore, § 1.55(h)(4) as adopted in this final rule provides that, under specified conditions, if the foreign application was not filed in a participating foreign intellectual property office, the applicant can file a request in a separate document that the Office obtain a copy of the foreign

application from a participating intellectual property office that permits the Office to obtain such a copy. Applicants can use Form PTO/SB/38 (Request to Retrieve Electronic Priority Application(s)) to file such a request. If the Office receives a copy of the foreign application from the participating foreign intellectual property office within the pendency of the application and before the patent is granted, the applicant need not file a certified paper copy of the foreign application. As a specific example, an application filed in the DPMA (which is not currently a participating foreign intellectual property office) may be retrieved via the priority document exchange program if it is identified in the claim for priority on the application data sheet, a subsequent application filed in the European Patent Office (EPO) or the Japan Patent Office (JPO) contains a certified copy of the DPMA application, and the applicant timely files a separate request for the Office to obtain from the EPO (or JPO) a copy of the certified copy of the DPMA application, wherein the request identifies the DPMA application and the subsequent application by their application number, country (EPO, JPO, or DE), day, month, and year of their filing.

Comment 4: Several comments suggested that where a priority application was published and available to the public by the time of publication of the U.S. application there is no need for a certified copy of the foreign application for the purpose of establishing an earlier effective prior art date under AIA 35 U.S.C. 102(d). One comment suggested that the Office waive the certified copy requirement for foreign priority applications filed in foreign intellectual property offices that publish at eighteen months. One comment argued that the requirement for the certified copy of the foreign priority document is obsolete because a certified copy is not required by statute. Another comment asserted that the filing of the certified copy of the foreign application is burdensome, costly, and not required unless an applicant relies on the foreign priority date to eliminate a prior art rejection.

Response: AIA 35 U.S.C. 102(d) provides that for purposes of determining whether a patent or application for patent is prior art to a claimed invention under AIA 35 U.S.C. 102(a)(2), the patent or application shall be considered to have been effectively filed, with respect to any subject matter described in the patent or application, as of the earliest of the actual filing date of the patent or the application for patent, or the filing date of the earliest application for which the patent or application for patent is entitled to claim a right of priority under 35 U.S.C. 119, 365(a), or 365(b), or to claim the benefit of an earlier filing date under 35 U.S.C. 120, 121, or 365(c), that describes the subject matter. It is thus necessary for a copy of any foreign application to which a patent or application for patent claims a right of priority under 35 U.S.C. 119 or 365(a) to be available for review in order to determine the date that the patent or application for patent was effectively filed with respect to subject matter described in the patent or application for patent. The requirement in § 1.55 for a certified copy of the foreign application is specifically authorized by 35 U.S.C. 119(b) and is consistent with international requirements (see, e.g., PCT Rule 17).

Comment 5: Several comments requested that a provision be added to proposed § 1.55 to allow for late submission of the certified copy of the foreign priority application. One comment observed that if a remedy for late submission of the certified copy is provided for in the rule, an applicant would not need to file a petition for waiver of the applicable rule for late filing of the certified copy of the foreign application that is due to actions beyond the control of the applicant. The comment further suggested that the Office consider following the approach set forth in PCT Rule 17.1 to address delays attributable to the actions of the patent offices.

Response: Section 1.55(f) as adopted in this final rule provides for the belated filing of a certified copy of the foreign application. Section 1.55(f) specifically provides that a certified copy of the foreign application filed after the time period set forth therein must be accompanied by a petition including a showing of good and sufficient cause for the delay and the petition fee set forth in § 1.17(g). As compared to a petition to seek the suspension or waiver under § 1.183 of the requirement to submit a certified copy of the foreign application within the specified time frame, § 1.55(f) provides a lower standard (good and sufficient cause versus an extraordinary situation) and fee ($200 petition fee set forth in § 1.17(g) versus the $400 petition fee set forth in § 1.17(f)).

Comment 6: Several comments questioned whether an applicant is required to repeatedly check to see if the Office has received a copy of the foreign application under the priority document exchange program. Two comments questioned whether the Office will mail a notice setting a due date for compliance to file the certified copy of the foreign application.

Response: The Office will not send a notice setting a time period for filing a certified copy of the priority document. Upon receipt of a Notice of Allowance, applicants should check to see whether the Office has received a copy of the foreign application under the priority document exchange program. To be entitled to priority, the Office must receive a copy of the foreign application from the participating foreign intellectual property office within the pendency of the application and before the patent is granted, or receive a certified copy of the foreign application within that time period. If a certified copy of the foreign application is filed after the date the issue fee is paid, it must be accompanied by the processing fee set forth in § 1.17(i), but the patent will not include the priority claim unless corrected by a certificate of correction under 35 U.S.C. 255 and § 1.323.

Comment 7: One comment noted that the Office automatically retrieves foreign applications from participating foreign intellectual property offices and questioned whether this practice will continue or whether an applicant must file a separate document requesting that the Office retrieve a copy of the foreign application. One comment suggested modifying proposed § 1.55(d)(2) to indicate that if the foreign application was not filed in a participating foreign intellectual property office, the request that the Office obtain a copy of the foreign application from a participating intellectual property office may be provided in an application data sheet instead of a separate request.

Response: The Office is continuing the practice of treating a priority claim to an application filed in a participating foreign intellectual property office as a request that the Office obtain a copy of the foreign application from the participating intellectual property office. A separate written request may be used when the applicant wishes the Office to retrieve a foreign application from a foreign intellectual property office that becomes a participating foreign intellectual property office after the foreign priority has been claimed, so long as the time period set in § 1.55(f) has not expired. A separate written request is required in the situation where the foreign application is not originally filed in a participating office, but a certified copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office. The suggestion to include the request that the Office obtain a copy of the foreign application from the participating intellectual property office in the

application data sheet is not adopted in this final rule. Including information regarding the subsequent application for which priority is not claimed in an application data sheet, instead of in a separate request, could lead to incorrect processing of the subsequent application as the foreign priority document.

Comment 8: One comment asserted that the late filing of a certified copy of a priority document due to circumstances beyond the control of the applicant should not result in a reduction of patent term adjustment.

Response: There are no provisions in the patent term adjustment regulations (i.e., §§ 1.702 *et seq.*) for a reduction of patent term adjustment due to the late filing of a certified priority document.

Comment 9: One comment suggested that proposed § 1.55 is unclear with respect to the deadline for submission of certified copies and priority claims for applications that claim priority to multiple prior filed foreign applications. The comment suggested that either the rule specify that the deadline is sixteen months from the earliest priority application to which a claim for priority is made, or sixteen months from the filing date of any priority application to which a claim of priority is made.

Response: Section 1.55(f) provides that in an original application filed under 35 U.S.C. 111(a), a certified copy of the foreign application must be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, except as provided in § 1.55(h) and (i). The sixteen-month time frame in § 1.55 for filing a certified copy of a foreign priority application is measured from the filing date of any foreign application for which priority is claimed.

Comment 10: One comment suggested that the Office clarify whether an applicant who files a 35 U.S.C. 111(a) application claiming the benefit of a PCT application (i.e., a ''bypass'' application) may establish compliance with § 1.55 either by complying with § 1.55(a)(2) (applicable to ''original applications'') or by establishing compliance with § 1.55(a)(3) (applicable to PCT national stage applications) during the international phase of the parent PCT application to provide applicants the greatest flexibility to choose the path of entry into the U.S. for an application filed under the PCT. The comment further requested clarification that the requirement in § 1.55 pertaining to 35 U.S.C. 371 applications refers to the filing of a certified copy of the foreign priority document during the international phase and not during the national phase.

Response: An application filed under 35 U.S.C. 111(a) (including a ''bypass'' application claiming the benefit of a PCT application, which PCT application claims priority to a foreign application) must comply with the time for filing a priority claim and a certified copy of a priority document set forth in § 1.55(d) and (f) as adopted in this final rule. Section 1.55(d) requires that in an application under 35 U.S.C. 111(a), a claim for priority must be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application. Section 1.55(f) requires that in an application under 35 U.S.C. 111(a), a certified copy of the foreign application must be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, except as provided in § 1.55((h) and (i). This timing differs from that for an international application entering the national stage under 35 U.S.C. 371, wherein the claim for priority must be made and a certified copy of the foreign application must be filed within the time limit set forth in the PCT and the Regulations under the PCT.

With respect to the requirements of § 1.55 as they pertain to applications entering the national stage under 35 U.S.C. 371, if the applicant submitted a certified copy of the foreign priority document in compliance with PCT Rule 17 during the international phase, the International Bureau will forward a copy of the certified priority document to each Designated Office that has requested a copy of the foreign priority document and the copy received from the International Bureau is acceptable to establish that applicant has filed a certified copy of the priority document. *See* MPEP § 1893.03(c). If, however, the International Bureau is unable to forward a copy of the certified priority document because the applicant failed to submit a certified copy of the foreign priority document during the international phase, the applicant will need to provide a certified copy of the priority document or have the document furnished in accordance with the priority document exchange program during the national stage to fulfill the requirements of § 1.55. *See id.*

Comment 11: One comment asked whether the requirement for the certified copy of the foreign application of proposed § 1.55(a)(2) would be met if a certified copy of the foreign application is submitted in a U.S. parent application within the time period specified in the proposed rule. The comment further asked if it would be necessary for the applicant to indicate that the certified copy of the foreign application was submitted in the U.S. parent application.

Response: Consistent with current practice, it is not necessary to file a certified copy of a foreign application in a later-filed application that claims the benefit of an earlier nonprovisional application where: (1) Priority to the foreign application is claimed in the later-filed application (i.e., continuation, continuation-in-part, division) or in a reissue application; and (2) a certified copy of the foreign application has been filed in the earlier nonprovisional application. When making such claim for priority, the applicant must identify the earlier nonprovisional application containing the certified copy. *See* MPEP § 201.14(b).

Comment 12: One comment requested clarification as to whether an applicant may obtain an extension of time to file an English-language translation when filing the English-language translation in response to an Office action, notwithstanding that proposed § 1.55(f) indicates that time periods under that section are not extendable.

Response: The time period for filing a translation is not set forth in § 1.55, which only sets time periods for filing a foreign priority claim and a certified copy of the priority application. The provisions of § 1.55(l) as adopted in this final rule apply to time periods actually set in § 1.55, and not to time periods that are set in an Office action. Thus, an applicant may obtain an extension of time to file an English-language translation when filing the English-language translation in response to an Office action, unless the Office action indicates that extensions of time are not available.

Comment 13: One comment suggested that the Office should not require applicants to file a translation of a non-English language provisional application as currently required by § 1.78(a)(5) because applicants are not required to file an English translation of foreign language priority documents except in limited circumstances.

Response: The Office will take this suggestion under consideration. The Office did not propose any change to this practice, and thus has not had the benefit of public comment on the issue. Furthermore, the Office would need to gain greater experience with examination under the AIA to determine how often it is necessary to obtain translations of priority documents for the purposes of

examination under AIA 35 U.S.C. 102 and 103. As discussed previously, the Office plans to seek additional public comment on the rules of practice pertaining to the first inventor to file provisions of section 3 of the AIA after the Office and the public have gained experience with the rules of practice pertaining to the first inventor to file provisions in operation.

Comment 14: One comment requested that the Office provide a rationale or statutory basis for the proposed requirement of a ''statement that the entire delay between the date the claim was due under paragraph (a) and the date the claim was filed was unintentional'' in a petition filed under proposed § 1.55(c)(4) for late presentation of a priority claim. The comment further asserted that requirement of proof of the subjective intent of the applicant runs counter to many statutory changes in the AIA, and suggested that the Office could impose the loss of patent term adjustment to dissuade applicants from intentionally delaying the presentation of the priority claim.

Response: The provisions for setting time periods for the filing of priority and benefit claims, and for accepting unintentionally delayed priority and benefit claims, were added by amendments to 35 U.S.C. 119(b), 119(e), and 120 in the American Inventors Protection Act of 1999 (AIPA). *See* Public Law 106–113, 113 Stat. 1501, 1501A–563 and 1501A–564 (1999); *see also Changes To Implement Eighteen-Month Publication of Patent Applications,* 65 FR 57024, 57024–25, 57030–31, 57054–55 (Sept. 20, 2000). The AIA did not revise these provisions for setting time periods for the filing of priority and benefit claims, and for accepting unintentionally delayed priority and benefit claims in 35 U.S.C. 119(b), 119(e), and 120.

B. Required Statements in Transition Applications

Comment 15: A number of comments opposed or expressed concerns with the statement requirements proposed in §§ 1.55 and 1.78 that an applicant must provide one of two alternative statements to assist the Office's determination of whether a nonprovisional application filed on or after March 16, 2013 (''transition date'') that claims priority/benefit to one or more pre-transition patent filings is subject to AIA 35 U.S.C. 102 and 103 or pre-AIA 35 U.S.C. 102 and 103. Several comments opined that it is the examiner's burden to determine whether post-AIA provisions are applicable, and that the statement requirements are inconsistent with the prima facie case requirement of 35 U.S.C. 102, 131, and 132, as well as costly, burdensome, unnecessary, and unjustified. One comment also stated that the number of applicants who will file applications of different scope that contain both pre-AIA and post-AIA disclosure will be miniscule.

One comment stated that the statement requirements were similar to an examination support document requirement that was at issue in the *Tafas* litigation. *See Tafas* v. *Kappos,* 586 F.3d 1369 (Fed. Cir. 2009) (*Tafas IV*); *Tafas* v. *Doll,* 559 F.3d 1345 (Fed. Cir. 2009) (*Tafas III*); *Tafas* v. *Dudas,* 541 F. Supp. 2d 805 (E.D. Va. 2008) (*Tafas II*).

Response: Sections 1.55 and 1.78 as adopted in this final rule require a statement from the applicant in a ''transition'' application (a nonprovisional application filed on or after March 16, 2013, that claims priority to, or the benefit of the filing date of an earlier application (i.e., foreign, provisional, or nonprovisional application, or an international application designating the United States) filed prior to March 16, 2013) only if the application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013. As discussed in the notice of proposed rulemaking, this statement is needed to assist the Office in determining whether the application is subject to AIA 35 U.S.C. 102 and 103 (an AIA application) or pre-AIA 35 U.S.C. 102 and 103 (a pre-AIA application). *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43745, 43747, and 43748. The Office is not requiring the applicant to indicate which particular claim or claims have a post March 16, 2013 effective filing date, or the effective filing date of each claim, as the Office does not need this information to determine whether the application is an AIA application or a pre-AIA application. *See id.* As also discussed in the notice of proposed rulemaking, if the Office must determine on its own the effective filing date of every claim ever presented in an application filed on or after March 16, 2013, that claims priority to or the benefit of an application filed prior to March 16, 2013, examination costs will significantly increase. *See id.*

The changes to §§ 1.55 and 1.78 as adopted in this final rule do not implicate the prima facie case requirement. The prima facie case requirement pertains to the making of rejections and objections under 35 U.S.C. 131 and 132. *See In re Jung,* 637 F.3d 1356, 1362 (Fed. Cir. 2012). While 35 U.S.C. 131 provides that the ''Director shall cause an examination to be made of the application,'' it does not preclude the Office from requiring the applicant to provide information that is reasonably necessary to the examination of the application. *See Star Fruits S.N.C.* v. *United States,* 393 F.3d 1277, 1283 (Fed. Cir. 2005). Sections 1.55 and 1.78 as adopted in this final rule do not require an applicant to engage in a ''self-examination'' of an application or make a prima facie case of entitlement to a patent. Rather, the requirement for a statement for certain transition applications in §§ 1.55 and 1.78 as adopted in this final rule simply requires the applicant to provide information that will be used by the Office as an aid in determining whether to examine the application under AIA 35 U.S.C. 102 and 103 or pre-AIA 35 U.S.C. 102 and 103.

With respect to the suggestion that the changes proposed to §§ 1.55 and 1.78 would add costs and burdens to the patent application process, the Office has revised §§ 1.55 and 1.78 in this final rule to: (1) Require the statement in a transition application only if the application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, (i.e., and not require a statement simply because the transition application discloses subject matter not also disclosed in the prior-filed application); and (2) indicate that no statement is required if the applicant reasonably believes on the basis of information already known to the individuals identified in § 1.56(c) that the nonprovisional application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013. Therefore, the changes to §§ 1.55 and 1.78 adopted in this final rule should not require additional investigation on the part of the applicant and thus should not be costly or burdensome. In any event, the applicant will have prepared both the transition application and its priority or benefit application(s) and thus should be far more familiar with the contents thereof than an examiner who was not involved in the preparation of any of the applications. Patent applicants would need to pay higher filing fees to recover the significantly higher examination costs if Office personnel were required to independently determine the effective filing date of each claim ever presented in an application. As a result of the statement requirement, the Office

and the public will have greater certainty as to whether any resulting patent is an AIA or pre-AIA patent. *See Star Fruits,* 393 F.3d at 1284. Therefore, the patent examination process will operate more effectively if this information (whether the application ever contained a claim to a claimed invention that has an effective filing date on or after March 16, 2013) is provided at the outset by the party having the best access to the information.

The requirement for a statement for certain transition applications in §§ 1.55 and 1.78 as adopted in this final rule bears no relationship to the examination support document at issue in the *Tafas* litigation. The requirement for a statement for certain transition applications in §§ 1.55 and 1.78 as adopted in this final rule involves a determination and statement that is comparable to determinations and statements required under pre-existing rules of practice regarding the absence of new matter. *See* § 1.57(f) (requires amendment inserting material incorporated by reference to be accompanied by a statement that the amendment contains no new matter), § 1.125(b) (requires a substitute specification to be accompanied by a statement that the substitute specification includes no new matter), and former § 1.63(d)(1)(iii) (permits use of an oath or declaration from a prior application in a continuation or divisional application that contains no matter that would have been new matter in the prior application). The concern with the examination support document in the *Tafas* litigation, meanwhile, was that it required a prior art search by the applicant and was viewed as shifting the burden of proving patentability onto the applicant. *See Tafas III,* 559 F.3d at 1373–74 (dissent), and *Tafas II,* 541 F. Supp. 2d at 817. Sections 1.55 and 1.78 as adopted in this final rule do not require an extensive investigation or search of the prior art, but instead simply require a statement for certain transition applications based upon information that is already in the applicant's possession.

With respect to the suggestion that the number of applicants who will file applications of different scope that contain both pre-AIA and post-AIA disclosure will be miniscule, an applicant who avoids filing serial applications of different scope that contain both pre-AIA and post-AIA disclosure is not required to provide any statement under §§ 1.55 and 1.78 as adopted in this final rule. Thus, if the number of serial applications of different scope that contain both pre-AIA and post-AIA disclosure is miniscule as suggested by the comment, then only the few patent applicants who engage in this atypical application filing practice will need to provide a statement under § 1.55 or 1.78 as adopted in this final rule.

Comment 16: A number of comments suggested removing the requirement for a statement when a transition application adds, but does not claim, subject matter that is not supported in a benefit or priority application filed before March 16, 2013. Several comments indicated that such a statement is burdensome and of limited use, with one comment noting that the statutory language makes clear that the determination of whether an application is subject to AIA or pre-AIA 35 U.S.C. 102 and 103 is governed solely by claims. Several comments stated that it is difficult to determine whether certain changes to the disclosure would be considered ''added'' subject matter. Several comments asked whether a statement would be required if only editorial or other minor changes were made to an application before it is filed.

Response: Sections 1.55 and 1.78 as adopted in this final rule do not require a statement if a transition application discloses, but does not claim, subject matter that is not supported in a benefit or priority application filed before March 16, 2013.

Comment 17: Several comments asserted that the required statements in proposed § 1.55 and 1.78 are unnecessary since an examiner can address in a rejection that certain subject matter or claims are not supported by the priority application, giving an applicant the opportunity to respond to either the prior art rejection or a rejection under 35 U.S.C. 112 for claim amendments that add subject matter. Several comments suggested deferring the determination of whether the application is an AIA application or a pre-AIA application until and unless a rejection is addressed with a pre-AIA § 1.131 affidavit or declaration. Several comments asserted that by dealing with this issue in the context of a rejection, the dispute of whether the application ever contained a claim having an effective filing date that is on or after March 16, 2013, can be resolved through appeal.

Response: The suggested alternative of having the examiner address the issue of entitlement to priority or the benefit of an earlier filing date, and allowing the applicant to address the issue in a response to the Office action, would entail the same examination costs that the Office would incur to determine on its own whether an application is an AIA application or a pre-AIA application prior to issuing an Office action. Moreover, a claim is not subject to a rejection under AIA 35 U.S.C. 102 or 103 (unless there is intervening prior art) or under 35 U.S.C. 112(a) simply because the claim is to a claimed invention that has an effective filing date on or after March 16, 2013. Lastly, the differences between AIA 35 U.S.C. 102 and 103 and pre-AIA 35 U.S.C. 102 and 103 are not limited to the ability to antedate prior art by showing prior invention under § 1.131.

Comment 18: One comment questioned whether the statement requirement under §§ 1.55 and 1.78 is part of the applicant's duty of disclosure. Several comments were concerned that the requirement to make these statements would increase the likelihood of charges of inequitable conduct. Two comments requested clarification of the Office's suggestion to include the ''reasonable belief'' language in the required statements. Another comment suggested that the Office include in the rules that the required statements made by applicant would not impact the validity of the patent.

Response: The Office is providing in this final rule that an applicant is not required to provide such a statement if the applicant reasonably believes on the basis of information already known to the individuals designated as having a duty of disclosure with respect to the application that the transition application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013. However, § 1.56 also includes a general duty of candor and good faith in dealing with the Office, which could be implicated if an applicant is aware that a transition application contains a claim to a claimed invention that has an effective filing date on or after March 16, 2013, but nonetheless chooses not to provide the statement when required under § 1.55 or 1.78.

Comment 19: One comment questioned how long the statement requirement would be applicable, noting that an application may claim the benefit under 35 U.S.C. 120 and § 1.78 of an application filed many years earlier.

Response: The requirement for a statement for certain transition applications in §§ 1.55 and 1.78 as adopted in this final rule is implicated whenever an application filed on or after March 16, 2013, claims a right of priority to or the benefit of the filing date of an application filed prior to March 16, 2013. This requirement, however, should not affect continuation

or divisional applications because a continuation or divisional application discloses and claims only subject matter also disclosed in the prior-filed application. *See* MPEP § 201.06 (defines divisional application), and § 201.07 (defines continuation application). In addition, an application claiming a right of priority to a foreign application or the benefit of a provisional application must be filed within one year of the filing date of the foreign or provisional application. *See* 35 U.S.C. 119(a) and 119(e). In view of the one-year filing period requirement in 35 U.S.C. 119(a) and 119(e), this requirement should not affect applications filed after May 16, 2014, that claim only a right of priority to one or more foreign applications, or that only claim the benefit of one or more provisional applications (the critical date is May 16, 2014, rather than March 16, 2014, in view of the changes to 35 U.S.C. 119 in section 201(c) of the the *Patent Law Treaties Implementation Act of 2012,* Public Law 112–211 (2012)). Therefore, after March 16, 2014, (or May 16, 2014, the statement required by §§ 1.55 and 1.78 as adopted in this final rule for certain transition applications should be necessary only in certain continuation-in-part applications.

Comment 20: One comment suggested that the Office extend the four-month deadline for making the statements required under §§ 1.55 and 1.78 because it is burdensome on applicants to identify the existence of claims having an effective filing date after March 16, 2013, and missing the deadline would trigger a requirement for information under § 1.105 that the applicant identify where there is written description support for the remaining claims in the nonprovisional application. One comment asserted that this requirement for information under § 1.105 is punitive, arbitrary, and capricious. One comment asserted that a request for admission (with sanctions for failure to be accurate) is inappropriate, especially where it is unclear whether a statement is necessary. One comment questioned whether the Office would require a statement under §§ 1.55 or 1.78 if no statement is made prior to examination, but it is later determined that a statement should be made regarding either new subject matter or new claims not supported by a pre-AIA application for which priority or benefit is claimed. One comment raised concerns that a practitioner may be forced to choose between violating state bar rules by making a statement adverse to a client's interests or violating the Office's rules of practice.

Response: This final rule does not provide that the Office will issue a requirement for information under § 1.105 as a sanction or penalty for non-compliance with the statement requirement under §§ 1.55 and 1.78. Rather, the Office is simply indicating that the Office may issue a requirement for information under § 1.105 if an applicant takes conflicting positions on whether an application contains, or contained at any time, a claim to a claimed invention having an effective filing date on or after March 16, 2013. For example, the Office may require the applicant to identify where there is written description support under 35 U.S.C. 112(a) in the pre-AIA application for each claim to a claimed invention if an applicant provides a statement under § 1.55 or § 1.78, but later argues that the application should have been examined as a pre-AIA application because the application does not actually contain a claim to a claimed invention having an effective filing date on or after March 16, 2013. The Office would not issue a requirement for information under § 1.105 simply because of a disagreement with the applicant's statement under § 1.55 or § 1.78 or the lack of such a statement.

Comment 21: Several comments suggested that the Office provide a mechanism (e.g., a check box) on the application data sheet to enable applicants to make the required statements. One comment stated that stakeholders should be able to identify which law applies with ease and transparency, and further suggested putting notice on the face of the patent to indicate whether the patent was issued under pre-AIA law or AIA law.

Response: The Office is revising the application data sheet to include a check box to allow applicants to easily indicate whether a transition application contains or ever contained a claim to a claimed invention having an effective filing date that is on or after March 16, 2013. The Office plans to indicate in the Office's Patent Application Locating and Monitoring (PALM) system whether the Office is treating an application as subject to pre-AIA 35 U.S.C. 102 and 103 (a pre-AIA application) or AIA 35 U.S.C. 102 and 103 (an AIA application). Members of the public may access this information via the Patent Application Information Retrieval (PAIR) system. Furthermore, form paragraphs for use in Office actions will be developed which will identify whether the provisions of pre-AIA 35 U.S.C. 102 and 103 or AIA 35 U.S.C. 102 and 103 apply if there is a rejection based upon 35 U.S.C. 102 or 103.

Comment 22: Several comments proposed that the Office initially examine all applications filed on or after March 16, 2013, as if they were subject to the post-AIA provisions. Specifically, if an application is subject to a prior art rejection based on post-AIA provisions, applicants would have the opportunity to provide evidence that the application is subject to pre-AIA provisions. One comment noted that a prior art search conducted under AIA 35 U.S.C. 102 and 103 is broader than a search conducted under pre-AIA 35 U.S.C. 102 and 103, and therefore would encompass substantially all prior art under pre-AIA 35 U.S.C. 102 and 103, with two possible limited exceptions for commonly owned or joint research agreement patents and patent application publications and certain grace period disclosures measured from the filing date of a foreign priority application (instead of from the earliest effective U.S. filing). One comment noted that conducting searches under a single standard would minimize the training burden on examiners and the confusion that would arise if searches are conducted under different standards for different applications.

Response: The suggested alternative of treating all applications filed on or after March 16, 2013, as subject to AIA 35 U.S.C. 102 and 103 (e.g., as AIA applications) entails the risk of issuing patents containing unpatentable claims. For example, the provision in pre-AIA 35 U.S.C. 103(c) concerning the availability of commonly owned prior art applies only to pre-AIA 35 U.S.C. 103 for a pre-AIA application, and thus a claimed invention in a pre-AIA application examined under AIA 35 U.S.C. 102 and 103 could appear to be patentable where a rejection under pre-AIA 35 U.S.C. 102(e) on the basis of commonly owned prior art might be appropriate. In addition, such a practice would also shift the burden of determining whether an issued patent is really an AIA patent or a pre-AIA patent to the public.

Comment 23: One comment requested clarification regarding whether a continuation or a divisional application filed after March 16, 2013, and having a claim not presented in the prior pre-AIA application, but not containing new matter, would require a statement to that effect. Another comment requested clarification as to whether subject matter not claimed, but fully supported, in a pre-AIA application that is later claimed in a continuation or divisional filed after March 16, 2013, would make the application subject to AIA 35 U.S.C. 102 and 103.

Response: The addition of a claim in a transition application that is directed to subject matter fully supported in a pre-AIA benefit or priority application would not itself trigger the statement requirement under § 1.55 or § 1.78 and would not make the application subject to AIA 35 U.S.C. 102 and 103.

Comment 24: Several comments suggested that the Office should clarify that an amendment to the claims that lacks support under 35 U.S.C. 112(a) does not convert that application into an AIA application.

Response: For an application filed on or after March 16, 2013, that discloses and claims only subject matter also disclosed in a previously filed pre-AIA application to which the application filed on or after March 16, 2013, is entitled to priority or benefit under 35 U.S.C. 119, 120, 121, or 365, an amendment (other than a preliminary amendment filed on the same day as such application) seeking to add a claim to a claimed invention that is directed to new matter would not convert the application into an AIA application. 35 U.S.C. 132(a) prohibits the introduction of new matter into the disclosure and thus an application may not actually ''contain'' a claim to a claimed invention that is directed to new matter. The Office notes that the MPEP sets forth the following process for treating amendments that are believed to contain new matter: (1) A new drawing should not be entered if the examiner discovers that the drawing contains new matter (MPEP § 608.02); and (2) amendments to the written description or claims involving new matter are ordinarily entered, but the new matter is required to be cancelled from the written description and the claims directed to the new matter are rejected under 35 U.S.C. 112(a) (MPEP § 608.04). This process for treating amendments containing new matter is purely an administrative process for handling an amendment seeking to introduce new matter into the disclosure of the invention in violation of 35 U.S.C. 132(a) and resolving disputes between the applicant and an examiner as to whether a new drawing or amendment to the written description or claims would actually introduce new matter.

Comment 25: One comment suggested that the rules should provide recourse in the situation where there has been an inadvertent addition of a claim, or a specific reference to a prior-filed application, that causes the application to be subject to AIA 35 U.S.C. 102 and 103. The comment suggested that the applicant be permitted to file an oath or declaration asserting such inadvertence, such that the application may be examined under pre-AIA 35 U.S.C. 102 and 103.

Response: There is no provision in the AIA for an application (or any patent issuing thereon) that contains, or contained at any time, such a claim or specific reference to be subject to pre-AIA 35 U.S.C. 102 and 103 instead of AIA 35 U.S.C. 102 and 103 on the basis of the claim or specific reference being submitted by inadvertence or on the basis of an oath or declaration asserting that the claim or specific reference was submitted by inadvertence. As discussed previously, however, for an application filed on or after March 16, 2013, that discloses and claims only subject matter also disclosed in a previously filed pre-AIA application to which the application filed on or after March 16, 2013, is entitled to priority or benefit under 35 U.S.C. 119, 120, 121, or 365, an amendment (other than a preliminary amendment filed on the same day as such application) seeking to add a claim to a claimed invention that is directed to new matter would not convert the application into an AIA application.

Comment 26: One comment suggested that the Office provide an applicant with the opportunity to: (1) Cancel any claims to a claimed invention having an effective filing date before March 16, 2013, from the application; and/or (2) file a divisional application directed to the cancelled subject matter to enable applicants to have the claims in the divisional application examined under pre-AIA 35 U.S.C 102 and 103.

Response: If an application on filing contains at least one claim having an effective filing date before March 16, 2013, and at least one claim having an effective filing date on or after March 16, 2013, the application will be examined under AIA even if the latter claims are cancelled. However, if a pre-AIA parent application is pending and an applicant inadvertently files a continuing application with claims having an effective filing date on or after March 16, 2013, the applicant could file a continuation or divisional application from the pre-AIA parent application without any claim to the benefit of the AIA application and without any claim to a claimed invention having an effective filing date on or after March 16, 2013. In this situation, the continuation or divisional application would be examined as a pre-AIA application under pre-AIA 35 U.S.C. 102 and 103.

Comment 27: One comment suggested that the statements required under § 1.55 or § 1.78 for transition applications containing a claim having an effective filing date that is on or after March 16, 2013, that was first presented after the four-month deadline could be made in an amendment or response during prosecution. One comment questioned whether the statement could be submitted during the period set in § 1.53 for reply to a notice to file missing parts of an application.

Response: Sections 1.55(j), 1.78(a)(6), and (c)(6) set out the time period within which such a statement (when required) must be submitted. Such a statement (when required) must be submitted within the later of four months from the actual filing date of the nonprovisional application, four months from the date of entry into the national stage as set forth in § 1.491 in an international application, sixteen months from the filing date of the prior-filed foreign application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the nonprovisional application. The time frame specified in § 1.55 or § 1.78 is not affected by the issuance of a notice to file missing parts of an application under § 1.53. In addition, the Office has enlarged the time period for filing the inventor's oath or declaration, which should reduce the situations in which it is necessary to issue a notice to file missing parts of an application under § 1.53. *See Changes To Implement the Inventor's Oath or Declaration Provisions of the Leahy-Smith America Invents Act,* 77 FR 48776, 48779–80 (Aug. 14, 2012). Permitting the statement required by § 1.55 or § 1.78 for certain transition applications to be submitted during the period set in § 1.53 for reply to a notice to file missing parts of an application would encourage applicants to file applications that are not in condition for examination.

C. Prior Inventor Disclosures (Sections 1.130 and 1.77)

Comment 28: One comment suggested that the organization of § 1.130 be improved to clarify the different requirements for a declaration depending on the applicable circumstances. One comment suggested that proposed § 1.130 should be revised to remove the requirement that the ''subject matter disclosed'' be shown to have been ''invented'' by one of the coinventors of the application because such subject matter may not necessarily correspond to the claimed invention. The comment further suggested that the rule be revised to conform to the statute and require instead that the declaration establish that the subject matter that is disclosed was obtained directly or indirectly from an inventor of the invention that is claimed. One comment

expressed concern that the language ''subject matter of the disclosure'' used in proposed § 1.130 did not track the statutory language of ''subject matter disclosed.'' Another comment suggested that the Office take a general approach, similar to that taken in current affidavit practice under §§ 1.131 and 1.132 regarding the submission of evidence under proposed § 1.130, leaving out the details regarding the sufficiency of the evidence which will develop on a case-by-case basis.

Response: Section 1.130 as adopted in this final rule has been revised to more closely track the language of the statute and has been streamlined to set forth only the procedural requirements for submitting a declaration or affidavit of attribution under § 1.130(a) and a declaration or affidavit of prior public disclosure by the inventor or a joint inventor under § 1.130(b). The rule only requires the information necessary for the Office to make a decision (i.e., a copy or description of the prior disclosure where applicable). The showing required for establishing sufficiency of a declaration or affidavit under § 1.130 is discussed in the Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act.

Comment 29: One comment suggested that proposed § 1.130 reallocates the burden of proof to show derivation to the inventor and is thus substantive.

Response: As discussed above, § 1.130 as adopted in this final rule simply sets forth the procedural requirements for an affidavit or declaration under § 1.130.

Comment 30: One comment questioned the requirement in proposed § 1.130 that a declaration be accompanied by evidence and requested that the Office clarify whether a later submission of evidence which supports, but does not initially accompany, a § 1.130 affidavit or declaration would be rejected.

Response: The submission of evidence with a declaration must be timely or seasonably filed to be entered and entitled to consideration. This is the current standard for declaration/affidavit practice under pre-existing §§ 1.131 and 1.132 as set forth in MPEP §§ 715.09 and 716.01, respectively. Specifically, affidavits and declarations and other evidence traversing rejections are considered timely if submitted: (1) Prior to a final rejection; (2) before appeal in an application not having a final rejection; (3) after final rejection, but before or on the same date of filing an appeal, upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented in compliance with § 1.116(e); or (4) after the prosecution is closed (e.g., after a final rejection, after appeal, or after allowance) if applicant files the affidavit or other evidence with a request for continued examination (RCE) under § 1.114 in a utility or plant application filed on or after June 8, 1995, or a continued prosecution application (CPA) under § 1.53(d) in a design application. *See* MPEP section 715.09 and 716.01.

Comment 31: One comment requested that declarations submitted under proposed § 1.130(b) for a *Katz*-type declaration (an affidavit or declaration of attribution as discussed in MPEP § 716.10) and under proposed § 1.130(d) for a showing of derivation be permitted to be filed confidentially.

Response: Declarations or affidavits filed by an applicant or patent owner to overcome a rejection or an objection cannot be filed confidentially because the public needs to know what evidence the examiner relied upon in determining the patentability of the claims. Current practice does not provide for the confidential filing of an affidavit or declaration of attribution or an affidavit or declaration to show derivation. However, applicants may submit proprietary information with a petition to expunge under limited circumstances as explained in MPEP § 724.

Comment 32: One comment suggested that the Office instruct patent applicants to come forward with any disclosures of which they are aware that may qualify as a prior art exception under AIA 35 U.S.C. 102(b). Another comment suggested that the final rules require an applicant's disclosure of prior secret commercial use of the claimed invention for more than one year prior to the original filing date given the ambiguities in the statute.

Response: Section 1.77 permits, but does not require, an applicant to provide a statement regarding prior disclosures by the inventor or a joint inventor. An applicant is not ''required'' to identify any prior disclosures by the inventor or a joint inventor unless the prior disclosure is not a grace period disclosure and is ''material to patentability'' or the prior disclosure is a grace period disclosure and the applicant is seeking to rely upon the prior disclosure to overcome a rejection. However, identifying any prior disclosures by the inventor or a joint inventor may save applicants (and the Office) the costs related to an Office action and reply and expedite examination of the application.

Comment 33: One comment suggested that the Office should not permit the mere listing of prior disclosures in an application under proposed § 1.77 but rather by way of affidavit or declaration, unless it is readily apparent that these prior disclosures originated with the inventor because the inventor's oath or declaration only attests to the claims of the application and not to the origin of the prior disclosures listed in the application.

Response: Sections 1.63(c) and 1.64(c) state that a person may not execute an inventor's oath or declaration for an application unless that person has reviewed and understands the contents of the application, including the claims, and is aware of the duty to disclose to the Office all information known to the person to be material to patentability as defined in § 1.56. *See Changes To Implement the Inventor's Oath or Declaration Provisions of the Leahy-Smith America Invents Act,* 77 FR at 48818–19. Therefore, it is not necessary to have a person executing an inventor's oath or declaration under § 1.63 or 1.64 provide a separate affidavit or declaration attesting to the statements in the application as filed.

Comment 34: One comment suggested that the Office add a corroboration requirement to proposed §§ 1.130 and 1.131.

Response: The Office does not consider a *per se* requirement for corroboration to be necessary in *ex parte* examination (i.e., application examination or *ex parte* patent reexamination) proceedings. The need for corroboration in *ex parte* proceedings is a case-by-case determination based upon the specific facts of the case.

Comment 35: One comment asserted that there is a difference between a ''disclosure'' and a ''public disclosure'' from the provision set forth in proposed § 1.130(c) (which stated that if an earlier disclosure was not a printed publication, the affidavit or declaration must describe the disclosure with sufficient detail and particularity to determine that the disclosure is a public disclosure of the subject matter on which the rejection is based) and requested clarification in the MPEP or other materials on what facts are needed to establish a public disclosure.

Response: The term ''disclosure'' includes disclosures that are not public. For example, prior filed, later published U.S. patent applications are considered disclosures on their earliest effective filing dates, which is not the date on which the disclosure was made publicly available. The showing required to establish a public disclosure is discussed in the Examination Guidelines for Implementing the First

Inventor To File Provisions of the Leahy-Smith America Invents Act.

Comment 36: One comment suggested revising the last sentences of proposed § 1.130(c) and (e) to make the standard for evaluating both non-publications and publications the same and to eliminate the potentially confusing reference to the language ''the subject matter on which the rejection is based.''

Response: Section 1.130 as adopted in this final rule does not include the standard for evaluating the sufficiency of a declaration or attribution or refer to ''the subject matter on which the rejection is based.'' The details regarding the showing needed to establish a successful declaration or affidavit under § 1.130 are discussed in the Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act.

Comment 37: One comment suggested amending proposed §§ 1.130 and 1.131 to indicate that a disclosure on which the rejection is based is not prior art when the disclosure is based on the public disclosure or subject matter published by the inventor or joint inventor.

Response: As discussed previously, § 1.130 has been streamlined to set forth only the procedural requirements for submitting a declaration or affidavit of attribution under this section. The showing required for establishing sufficiency of a declaration or affidavit under § 1.130 as adopted in this final rule is discussed in the Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act.

Comment 38: One comment requested an explanation of how the Office would use statements made in a declaration under proposed § 1.130 in the examination of other applications. The comment further asked whether the Office would provide a way for the examiners and the public to search the contents of the declarations.

Response: The Office plans to include information on the cover sheet of U.S. patents if an affidavit or declaration containing evidence of a prior public disclosure under § 1.130(b) was filed during the prosecution of the application for that patent in order to facilitate search by examiners and the public of prior public disclosures brought to the Office's attention under § 1.130(b).

D. Proposed Requirement in § 1.130 To Initiate Derivation Proceedings

Comment 39: Several comments opposed the Office requiring a petition for a derivation proceeding in proposed § 1.130(f). One comment asserted that such a requirement would be unduly burdensome and premature if based on the published claims of an unexamined application which may not be patentable to the earlier applicant. One comment stated that there was no basis for requiring the filing of a derivation petition when an applicant may avoid a rejection in another way such as by amending the claims. One comment asserted that since derivation requests are statutorily permissive, the Office should suggest or recommend, but not require a derivation proceeding. One comment stated that applicants, not the Office, are in the best position to decide if a derivation proceeding should be instituted. One comment requested that the Office establish standards for determining whether an applicant is required to file a petition for a derivation proceeding.

Response: Section 1.130 as adopted in this final rule does not include a requirement to file a petition for a derivation proceeding and instead provides that an applicant or patent owner may file a petition for a derivation proceeding if the patent or pending application naming another inventor claims an invention that is the same or substantially the same as the applicant's or patent owner's claimed invention.

Comment 40: One comment suggested that instead of requiring the initiation of a derivation proceeding, the Office should implement a rule that would allow an AIA 35 U.S.C. 102(b)(2)(A) exception from prior art to extend only to disclosed but unclaimed subject matter in an earlier patent filing, and that a patent be permitted to issue on a claimed invention only if the claims with the earlier effective filing date are cancelled via a derivation proceeding or post-grant review proceeding. Another comment questioned whether there are any cases where the Office would not require the applicant to file a petition for a derivation proceeding even if the claims are the same and the inventors are different.

Response: Section 1.130 as adopted in this final rule does not include a requirement to file a petition for a derivation proceeding. An applicant or patent owner has the discretion to file a petition for a derivation proceeding pursuant to § 42.401 *et seq.* of this title. In the event that a patent is issued on a later filed application claiming subject matter disclosed in an earlier filed application, the applicant in the earlier filed application may request early publication of the application under § 1.219 and may cite the resulting patent application publication in the file of the patent on the later filed application under 35 U.S.C. 301 and § 1.501.

E. Miscellaneous

Comment 41: One comment suggested that the Office implement a rule wherein claiming in a U.S. application priority to, or the benefit of, an earlier application is considered an express consent by the applicant to provide anyone the right to obtain a copy of the priority document from the applicable patent office upon providing evidence of the U.S. application and the priority claim to the earlier application at issue.

Response: The Office does not have jurisdiction to grant or deny access to patent applications filed in other intellectual property offices. Access to any patent application is determined by the national law of each country and cannot be governed by the regulations of another intellectual property office.

Comment 42: One comment suggested that the proposed rules would be clearer if the Office consistently used the terms ''benefit claim'' or ''priority claim'' when using the term ''claim'' in the context of the applicant asserting the benefit of an earlier priority date for a given claimed invention in order to differentiate the exact same term for two different purposes.

Response: The Office will endeavor to be consistent with the use of the terms benefit claim and priority claim where it is necessary for clarity in the rule.

Comment 43: One comment suggested retaining the provisions pertaining to pre-AIA applications in the regulations so that the public is not required to keep old copies of title 37 CFR for the next twenty years. The comment also suggested changes to the structure of § 1.55 and § 1.78.

Response: The Office is retaining in the regulations the provisions pertaining to pre-AIA applications (e.g., § 1.131) or modifying provisions in the regulations such that they pertain to both or either AIA or pre-AIA applications (e.g., §§ 1.104 and 1.110). Certain provisions apply to any application filed on or after March 16, 2013, regardless of whether the application is an AIA or pre-AIA application (e.g., §§ 1.55 and 1.78 apply to any application filed on or after March 16, 2013). In this situation, the regulations generally do not include provisions that apply only to applications filed prior to March 16, 2013. The Office has simplified the structure of §§ 1.55 and 1.78 and included paragraph headings for clarity.

Comment 44: Two comments requested that the Office take the opportunity to clarify what is meant by ''conflicting claims'' in proposed § 1.78(e) as the rule does not explicitly

recite the standard. One comment suggested that the standard should be that the claims are drawn to the same or substantially the same invention (as required in a derivation proceeding under the AIA or the pre-AIA interference provisions).

Response: The term ''conflicting claims'' in § 1.78 has been changed to ''patentably indistinct claims'' in this final rule for clarity.

Comment 45: One comment suggested deleting the requirement set forth in proposed § 1.55 to ''identify foreign applications with the same subject matter having a filing date before that of the application for which priority is claimed'' because this requirement appears unnecessarily burdensome and there does not appear to be a need for this information to determine foreign priority. One comment asserted that there is an inconsistency between proposed § 1.78(c)(5), which does not permit cross references to applications for which benefit is not claimed in an application data sheet, and proposed § 1.55(a)(3), which permits the identification of foreign application for which priority is claimed, as well as any foreign application for the same subject matter having a filing date before that of the application for which priority is claimed.

Response: The requirement to ''identify foreign applications with the same subject matter having a filing date before that of the application for which priority is claimed'' has been removed from § 1.55 in this final rule. The Office also revised § 1.77 to indicate that cross-references to related applications should appear in the specification (rather than in an application data sheet).

Comment 46: One comment requested that the Office exercise its regulatory authority to clarify what kind of grant qualifies as a joint research agreement and what type of cooperative agreement which is not a written contract qualifies as a joint research agreement for the purpose of disqualifying prior art under AIA 35 U.S.C. 102(b)(2)(C) and (c). Another comment suggested that the Office confirm an expansive or liberal interpretation of what constitutes a joint research agreement, so that entities who enter into collaborative agreements without formal written contracts drafted by legal experts can still rely on the provisions of AIA 35 U.S.C. 102(b)(2)(C).

Response: AIA 35 U.S.C. 100(h) defines what constitutes a joint research agreement for purposes of AIA 35 U.S.C. 102. There was no substantive change to the definition of joint research agreement under the AIA.

Comment 47: One comment requested that the Office provide a means for an applicant to confidentially make of record any joint research agreement, and require that only minimal disclosure of the parties involved in the joint research agreement in the specification in accordance with proposed § 1.104. The comment further requested that the Office permit the amendment of the specification pursuant to § 1.71(g)(1) regarding the parties involved in the joint research agreement throughout examination and without a fee because inventorship is necessarily an on-going determination throughout examination.

Response: AIA 35 U.S.C. 102(c) does not require that a joint research agreement be made of record in the application, but does require the application to disclose or be amended to disclose the names of the parties to the joint research agreement. The Office will not enter an amendment to the specification regarding the parties involved in the joint research agreement throughout examination without a fee because the fee simply recovers the Office's costs of updating the record of the application.

Comment 48: One comment suggested that a listing of parties to a joint research agreement be provided for in § 1.77, which concerns arrangement of application elements.

Response: Section 1.77(b)(4) provides for the disclosure of names of parties to a joint research agreement.

Comment 49: One comment requested that proposed § 1.104(c)(5)(i) and (ii) specify that those sections apply to a claimed invention in an application ''pending'' on or after December 10, 2004.

Response: Section 1.104 has been revised in this final rule to clearly specify which applications and patents are entitled to the provisions of § 1.104(c)(5)(i) and (ii).

Comment 50: One comment suggested that references to a joint inventor be added in proposed §§ 1.78(a)(2) and 1.110 when the term inventor is not intended to apply to the entire inventive entity.

Response: Sections 1.78 and 1.110 as adopted in this final rule refer to the inventor or a joint inventor as appropriate.

Comment 51: One comment requested that the Office explain why the request for information regarding inventorship and ownership of the subject matter of individual claims set forth in proposed § 1.110 is not provided for in current § 1.105 (Requirements for Information).

Response: This specific provision was provided for in § 1.110 before § 1.105 was implemented and was retained for examination purposes.

Comment 52: One comment suggested that proposed § 1.78(e) would give the Office the authority to require cancellation of claims and that the cancellation of claims is substantive.

Response: Section 1.78(e) as adopted in this final rule does not represent a change in Office practice. *See* former § 1.78(b) (''Where two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application'').

Comment 53: One comment suggested amending proposed § 1.131(b) to provide an appropriate example to show conception of an invention with due diligence.

Response: MPEP § 715 *et seq.* and the case law cited therein provide guidance regarding conception of an invention and due diligence.

Comment 54: One comment suggested that the Office take the opportunity to revise § 1.77(b) to separate out those items of information currently required under separate headings in a patent application that are now going to be tracked by the application data sheet (such as name, citizenship and residence of applicant, related applications, federally sponsored joint research, joint research agreements, and the proposed rule for prior disclosures by or for an inventor under § 1.130). The comment further suggested that since the timeline for filing the information required by proposed § 1.77(b)(6) is not coextensive with the filing of the application, the requirement to include this information in the patent application seems out of place. The comment also suggested that keeping all of this information tracked and published as part of the application data sheet available on PAIR, or as part of the cover page of a patent or published application, would keep the public informed in a more efficient manner.

Response: The arrangement of the specification as set out in § 1.77 is a suggested and preferred arrangement, but is not an arrangement that an applicant is required to follow. In addition, information such as related applications, federally sponsored joint research, joint research agreements, and prior inventor disclosures are not provided for in an application data sheet.

Comment 55: One comment suggested that the Office should avoid using old rule numbers for new rules.

Response: In general, the Office avoids using old rule numbers. The Office also prefers to group related rules together. In this instance, there are no rule numbers available in the vicinity of §§ 1.130, 1.131, and 1.132. Furthermore, former § 1.130 has been rarely invoked. Thus, the potential confusion from relocating the provisions of former § 1.130 to § 1.131 and using § 1.130 for AIA applications is minimal.

Comment 56: One comment requested that the Office provide a clear definition in § 1.9 regarding what constitutes a divisional application.

Response: MPEP § 201.06 indicates that a divisional application is an application for an independent or distinct invention, carved out of a pending application and disclosing and claiming only subject matter disclosed in the earlier or parent application. This definition of divisional application located in the MPEP is adequate for current Office proceedings.

Comment 57: One comment suggested that § 1.110 be revised to include the phrase ''or obligation to assign ownership'' for completeness.

Response: Section 1.110 as adopted in this final rule includes the phrase ''or obligation to assign ownership.''

Rulemaking Considerations

A. Administrative Procedure Act

The changes in this final rule do not change the substantive criteria of patentability. These changes in this final rule involve rules of agency practice and procedure and/or interpretive rules. *See Bachow Commc'ns Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are procedural under the Administrative Procedure Act); *Inova Alexandria Hosp.* v. *Shalala,* 244 F.3d 342, 350 (4th Cir. 2001) (rules for handling appeals were procedural where they did not change the substantive standard for reviewing claims); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001) (rule that clarifies interpretation of a statute is interpretive).

Accordingly, prior notice and opportunity for public comment are not required pursuant to 5 U.S.C. 553(b) or (c) (or any other law). *See Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), does not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'') (quoting 5 U.S.C. 553(b)(A)). The Office, however, published proposed changes and a Regulatory Flexibility Act certification as it sought the benefit of the public's views on the Office's proposed implementation of this provision of the AIA.

One comment suggested that the Office's reliance upon *Cooper Technologies* is misplaced and that the Federal Circuit's decision in *Tafas* v. *Kappos,* 586 F.3d 1369 (Fed. Cir. 2009) (*Tafas IV*) requires notice and comment for all Office rulemakings. The Federal Circuit in *Tafas IV* granted the parties' request to dismiss the appeal in the *Tafas* litigation as moot and denied GlaxoSmithKline's and the Office's request to vacate the district court's decision in *Tafas* v. *Dudas,* 541 F. Supp. 2d 805 (E.D. Va. 2008) (*Tafas II*). The Federal Circuit in *Tafas IV* did not reach the merits of the district court's decision in *Tafas II* and thus is not an ''affirmance'' of that decision. Moreover, the Federal Circuit in *Tafas IV* did not discuss its previous decision in *Cooper Technologies*. Thus, the Federal Circuit's decision in *Tafas IV* cannot reasonably be viewed as casting doubt on its prior statement in *Cooper Technologies* that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), does not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'' *See Cooper Techs.,* 536 F.3d at 1336–37; *see also Mikkilineni* v. *Stoll,* 410 Fed. Appx. 311, 313 (Fed. Cir. 2010) (Office's 2009 guidelines concerning 35 U.S.C. 101 are interpretive, rather than substantive, and are thus exempt from the notice and comment requirements of 5 U.S.C. 553). However, as discussed previously, the Office published the proposed changes for comment as it sought the benefit of the public's views on the Office's proposed implementation of this provision of the AIA.

The comment also stated that the Office did not make the data (statistics, mathematical or computer models, and assumptions, including spreadsheets or other models that the Office uses to project growth and future filing rates) relied upon in the notice of proposed rulemaking publicly available in a rulemaking docket at the time of the notice of proposed rulemaking so that the public had fair notice and a meaningful opportunity to comment and challenge the data forming the basis for the proposed changes in the notice of proposed rulemaking. The notice of proposed rulemaking specified the legal authority under which the changes were proposed, the basis and purpose of the proposed changes, the terms and substance of the proposed rule changes, and a description of the subjects and issues involved in the proposed changes. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43742–51. The Office relied upon the changes to the patent laws in section 3 of the AIA as opposed to scientific or technical information or data as the basis or reason for the proposed rule changes. The data pertaining to the Regulatory Flexibility Act and Paperwork Reduction Act discussion were from the Office's PALM system and the basis for the Office estimates was stated in the Regulatory Flexibility Act and the Information Collection Review submission to OMB (which was made available to the public). *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43752, and the proposed information collection posted on OMB's Information Collection Review Web page on July 27, 2012, at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201207–0651–008*. The Office relied predominately upon the changes to the patent laws in section 3 of the AIA, and not these data and estimates published pursuant to the Regulatory Flexibility Act and Paperwork Reduction Act, as the basis or reason for the proposed changes or changes being adopted in this final rule. The public was not deprived of fair notice or a meaningful opportunity to comment and challenge any data forming the basis for the proposed changes. Also, the issue of a meaningful opportunity to comment and challenge data forming the basis for the proposed changes is relevant only where there is a requirement for prior notice and opportunity for public comment. As discussed previously, prior notice and opportunity for public comment are not required pursuant to 5 U.S.C. 553(b) or (c) (or any other law).

B. Regulatory Flexibility Act

As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, neither a regulatory flexibility analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is required. *See* 5 U.S.C. 603.

Nevertheless, for the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that the changes in this final rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). As discussed previously, the Office is adopting the following changes to address the

examination issues raised by the changes in section 3 of the AIA.

The Office is providing for the submission of affidavits or declarations showing that: (1) A disclosure upon which a claim rejection is based was by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or (2) there was a prior public disclosure by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor of an application. The requirements of these provisions are comparable to requirements for affidavits and declarations under 37 CFR 1.132 for an applicant to show that a prior art disclosure is the applicant's own work (*see* case law cited in MPEP sections 716.10 and 2132.01) or that a disclosure was derived from the applicant (*see* case law cited in MPEP section 2137). The changes in this final rule will not result in additional small entities being subject to the need to submit such an affidavit or declaration.

The Office is also requiring that the certified copy of the foreign application be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, except if: (1) The priority application was filed in a participating foreign intellectual property office (or a copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office) and the Office either receives a copy of the foreign application from the participating foreign intellectual property office or a certified copy of the foreign application within the pendency of the application and before the patent is granted; or (2) the applicant provides an interim copy of the original foreign application within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, and files a certified copy of the foreign application within the pendency of the application and before the patent is granted.

An applicant is currently required to file the certified copy of the foreign application when deemed necessary by the examiner, but no later than the date the patent is granted (*see* former 37 CFR 1.55(a)). The time period of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application should not have a significant economic impact as sixteen months from the filing date of the prior foreign application is the international norm for when the certified copy of the foreign application needs to be filed in an application (PCT Rule 17). In addition, this final rule permits applicants to provide an interim copy of the original foreign application in the event that the applicant cannot obtain a certified copy of the foreign application from the foreign patent authority in time to file it within four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application. Based upon the data in the Office's PALM system, 375,484 (103,976 small entity) nonprovisional applications were filed in fiscal year (FY) 2012. Of these, 67,790 (8,371 small entity) nonprovisional applications claimed priority to a foreign priority application, and 68,769 (15,541 small entity) nonprovisional applications resulted from the entry of an international application into the national stage.

The Office is also adopting the following requirement for a nonprovisional application filed on or after March 16, 2013, that claims priority to or the benefit of the filing date of an earlier application (i.e., foreign, provisional, or nonprovisional application, or international application designating the United States) filed prior to March 16, 2013 (a transition application): If a transition application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the later-filed application, four months from the date of entry into the national stage in an international application, sixteen months from the filing date of the prior-filed application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the application. The Office, however, is also providing that an applicant is not required to provide such a statement if the applicant reasonably believes on the basis of information already known to the individuals designated as having a duty of disclosure with respect to the application that the transition application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013. Thus, an applicant is not required to conduct any additional investigation or analysis to determine the effective filing date of the claims in their applications.

Based upon the data in the Office's PALM system, of the 375,484 (103,976 small entity) nonprovisional applications filed in FY 2012, 12,246 (7,079 small entity) nonprovisional applications were identified as continuation-in-part applications; 59,819 (15,024 small entity) nonprovisional applications were identified as continuation applications; 22,162 (5,246 small entity) nonprovisional applications were identified as divisional applications; and 57,591 (28,200 small entity) nonprovisional applications claimed the benefit of provisional application. As discussed above, 67,790 (8,371 small entity) nonprovisional applications claimed priority to a foreign priority application, and 68,769 (15,541 small entity) nonprovisional applications resulted from the entry of an international application into the national stage. The Office's experience is that the majority of nonprovisional applications that claim priority to or the benefit of the filing date of an earlier application do not disclose or claim subject matter not also disclosed in the earlier application, but the Office generally makes such determinations only when necessary to the examination of the nonprovisional application. *See, e.g.,* MPEP § 201.08 (''Unless the filing date of the earlier nonprovisional application is actually needed, for example, in the case of an interference or to overcome a reference, there is no need for the Office to make a determination as to whether the requirement of 35 U.S.C. 120, that the earlier nonprovisional application discloses the invention of the second application in the manner provided by the first paragraph of 35 U.S.C. 112, is met and whether a substantial portion of all of the earlier nonprovisional application is repeated in the second application in a continuation-in-part situation''). In addition, one comment indicated that the number of applicants who file applications with claims directed to both pre-AIA and AIA subject matter would be miniscule. In any event, Office staff with experience and expertise in a wide range of patent prosecution matters as patent practitioners estimate that this will require, on average, an additional two hours for a practitioner who drafted the later-filed application (including the claims) and is familiar with the prior foreign, provisional, or nonprovisional application.

Several comments questioned the statement in the notice of proposed rulemaking that the changes proposed in the rulemaking will not have a significant economic impact on a substantial number of small entities.

One comment questioned this statement on the basis that the conversion of the U.S. patent system from a ''first to invent'' to a ''first inventor to file'' system is arguably one of the most comprehensive overhauls of the U.S. patent system since its inception. Another comment also cited statements by the AIA's legislative sponsors and Administration officials and several articles concerning the first inventor to file system, and argued that the Office in its implementation of the first inventor to file system has ignored a number of economic effects, such as: (1) Loss of access to investment capital; (2) diversion of inventor time into patent applications; (3) weaker patent protection due to hasty filing; (4) higher patent prosecution costs due to a hastily-prepared initial application; (5) higher abandonment rates; and (6) changes in ways of doing business. One comment questioned this statement on the basis of the translation costs that will result from the statement required by 37 CFR 1.55.

Section 3 of the AIA amends the patent laws pertaining to the conditions of patentability to convert the U.S. patent system from a ''first to invent'' system to a ''first inventor to file'' system. This final rule does not convert the U.S. patent system from a ''first to invent'' to a ''first inventor to file'' system (i.e., the U.S. patent system converts from a ''first to invent'' to a ''first inventor to file'' system by operation of section 3 of the AIA, regardless of the changes that are adopted in this final rule) or even introduce the conditions of patentability as provided for in section 3 of the AIA into the rules of practice. This final rule merely revises the rules of practice in patent cases for consistency with, and to address the examination issues raised by, the changes in section 3 of the AIA. Thus, the discussions of the significance or impacts of section 3 of the AIA by the AIA's legislative sponsors and Administration officials, in articles concerning the first inventor to file system, and in the discussions in the comment relating to the impacts of the adoption of a first inventor to file system pertain to the changes to the conditions of patentability provided for in section 3 of the AIA and are not pertinent to the changes being adopted in this final rule. This final rule: (1) Requires applicants to provide a statement if a nonprovisional application filed on or after March 16, 2013, claims priority to or the benefit of the filing date of an earlier application (i.e., foreign, provisional, or nonprovisional application, or an international application designating the United States of America), filed prior to March 16, 2013, and also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013; (2) provides that an applicant may be required to identify the inventorship and ownership or obligation to assign ownership, of each claimed invention on its effective filing date or on its date of invention, as applicable, in an application or patent with more than one named joint inventor, when necessary for purposes of an Office proceeding; and (3) provides a mechanism for an applicant to show that a disclosure was by the inventor or joint inventor, or was by another who obtained the subject matter from the inventor or a joint inventor, or that there was a prior public disclosure by the inventor or a joint inventor, or by another who obtained the subject matter from the inventor or a joint inventor. For the reasons discussed previously, the changes that are being adopted in this final rule will not have a significant economic impact on a substantial number of small entities.

The change to 37 CFR 1.55 will not result in translation costs for applicants that would not otherwise exist for applicants claiming priority to a non-English-language application. Initially, a nonprovisional application claiming priority to a foreign application could not be competently prepared without an understanding of the subject matter disclosed in the foreign application, as a claim in a nonprovisional is entitled to the benefit of a foreign priority date only if the foreign application supports the claims in the manner required by 35 U.S.C. 112(a). *See In re Gosteli,* 872 F.2d 1008 (Fed. Cir. 1989). Thus, it is not clear how this requirement would result in the need for translations not otherwise necessary to competently prepare a nonprovisional application that claims priority to a foreign application. Nevertheless, the changes to 37 CFR 1.55 will not increase translation costs over what these costs would be in the absence of such a requirement. Pre-existing 35 U.S.C. 119(b)(3) and 37 CFR 1.55 provide that the Office may require a translation of any non-English-language priority application when deemed necessary by the examiner. The examiner would need to require a translation in all nonprovisional applications filed on or after March 16, 2013, that claim priority to a non-English-language application that was filed prior to March 16, 2013, to determine whether AIA or pre-AIA 35 U.S.C. 102 and 103 apply to the application in the absence of information from the applicant.

In addition, it should be noted that a small business concern for purposes of Regulatory Flexibility Act analysis is a business or other concern that: (1) Meets the SBA's definition of a ''business concern or concern'' set forth in 13 CFR 121.105; and (2) meets the size standards set forth in 13 CFR 121.802 for the purpose of paying reduced patent fees. *See Business Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-Related Regulations,* 71 FR 67109, 67112 (Nov. 20, 2006). 13 CFR 121.105 defines a business or other concern as a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. *See* 37 CFR 121.105(a)(1).

Accordingly, the changes in this final rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12866 (Regulatory Planning and Review

This rulemaking has been determined to be significant for purposes of Executive Order 12866 (Sept. 30, 1993). Several comments suggested that this rulemaking should be designated as ''economically significant'' under Executive Order 12866. The comments argued that the notice of proposed rulemaking indicates that the paperwork burden alone would be over $100,000,000 per year. One comment (discussed previously) also cited statements by the AIA's legislative sponsors and Administration officials and several articles concerning the first inventor to file system, and argued that the first inventor to file system will result in: (1) Loss of access to investment capital; (2) diversion of inventor time into patent applications; (3) weaker patent protection due to hasty filing; (4) higher patent prosecution costs due to a hastily prepared initial application; (5) higher abandonment rates; and (6) changes in ways of doing business.

The notice of proposed rulemaking indicated that this rulemaking has been determined to be significant for purposes of Executive Order 12866, but that this rulemaking is not economically significant as that term is defined in Executive Order 12866. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43743 (''This

rulemaking is not economically significant as that term is defined in Executive Order 12866''), and 43752 (''This rulemaking has been determined to be significant for purposes of Executive Order 12866'').

The Paperwork Reduction Act information provided with the notice of proposed rulemaking indicated that the majority of the burden hour costs pertain to affidavits and declarations under 37 CFR 1.131 and 1.132, which are provided for in pre-existing regulations to overcome rejections under pre-AIA 35 U.S.C. 102 and 103. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43753 (''[t]he collection of information submitted to OMB under OMB control number 0651–00xx also includes information collections (e.g., affidavits and declarations under 37 CFR 1.130, 1.131, and 1.132) previously approved and currently being reviewed under OMB control number 0651–0031''). While the Office is providing for the filing of affidavits and declarations under AIA 35 U.S.C. 102(b) in new 37 CFR 1.130, the change from pre-AIA 35 U.S.C. 102 to AIA 35 U.S.C. 102 will not result in an increase in affidavits and declarations under 37 CFR 1.130, 1.131 and 1.132. Rather, the change from pre-AIA 35 U.S.C. 102 to AIA 35 U.S.C. 102 should result in a decrease in such affidavits and declarations as well as a decrease in the burden hours associated with such affidavits and declarations. In any event, there are no instances in which an applicant needs to file an affidavit and declaration under 37 CFR 1.130 in an AIA application where the applicant would not have needed to file an affidavit and declaration under 37 CFR 1.131 or under 37 CFR 1.132 in the same situation in a pre-AIA application. Moreover, the information required for an affidavit and declaration under 37 CFR 1.130 in an AIA application to show that a disclosure is the inventor's own work or a prior disclosure of inventor's own work is significantly less than the proofs required to show prior invention in a pre-AIA application. Also, the requirement for a statement in certain applications claiming priority to or the benefit of a prior foreign, provisional, or nonprovisional application, or international application designating the United States of America, will not be an ''annual'' impact. A nonprovisional application claiming priority to or the benefit of a foreign or provisional application must be filed not later than twelve months from the filing date of the foreign or provisional application. *See* 35 U.S.C. 119(a) and (e). Thus, a statement should not be required in any application filed after March 16, 2014, unless the application is itself a continuation-in-part application. In any event, to avoid underestimating the respondent estimate for this requirement, the Paperwork Reduction Act estimate is based upon all applications filed in a fiscal year that claim priority to or the benefit of a prior foreign, provisional, or nonprovisional application, or international application designating the United States of America. The statement, however, is not required unless the application actually claims an invention with an effective filing date on or after March 16, 2013. Thus, the Paperwork Reduction Act burden hour cost estimates pertaining to these statements overestimate the actual impact of this requirement.

Finally, as discussed previously, this final rule does not convert the U.S. patent system from a ''first to invent'' to a ''first inventor to file'' system. The U.S. patent system converts from a ''first to invent'' to a ''first inventor to file'' system by operation of section 3 of the AIA regardless of the changes that are adopted in this final rule. This final rule merely revises the rules of practice in patent cases for consistency with, and to address the examination issues raised by, the changes in section 3 of the AIA. Thus, the discussions of the significance or impact of section 3 of the AIA by the AIA's legislative sponsors and Administration officials, in articles concerning the first inventor to file system, and in the discussion in the comment relating to the impacts of the adoption of a first inventor to file system pertain to the changes in section 3 of the AIA *per se* and not to the changes being adopted in this final rule.

D. Executive Order 13563 (Improving Regulation and Regulatory Review)

The Office has complied with Executive Order 13563. Specifically, the Office has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, and provided on-line access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13132 (Federalism)

This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

F. Executive Order 13175 (Tribal Consultation)

This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

G. Executive Order 13211 (Energy Effects)

This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform)

This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

I. Executive Order 13045 (Protection of Children)

This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property)

This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

K. Congressional Review Act

Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the United States Patent and Trademark Office will

submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this notice are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this notice is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995

The changes set forth in this notice do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

M. National Environmental Policy Act

This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

N. National Technology Transfer and Advancement Act

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions which involve the use of technical standards.

O. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires that the Office consider the impact of paperwork and other information collection burdens imposed on the public. This rulemaking involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3549). The collection of information involved in this notice was submitted to OMB for its review and approval when the notice of proposed rulemaking was published, and was reviewed and preapproved by OMB under OMB control number 0651–0071 on September 12, 2012. The collection of information submitted to OMB also included an information collection (i.e., affidavits and declarations under 37 CFR 1.130, 1.131, and 1.132) previously approved and currently being reviewed under OMB control number 0651–0031. The proposed collection is available at OMB's Information Collection Review Web site (*www.reginfo.gov/public/do/PRAMain*).

The Office also published the title, description, and respondent description of the information collection, with an estimate of the annual reporting burdens, in the notice of proposed rulemaking, and indicated that any comments on this information must be submitted by September 24, 2012. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43753–54. The Office received a comment on the proposed information collection suggesting that the notice of proposed rulemaking fails to comply with numerous provisions of the Paperwork Reduction Act. The comment specifically suggested that: (1) The Office did not submit a proposed information collection for the notice of proposed rulemaking and the information provided in the notice of proposed rulemaking does not supply transparent specific burden estimates (e.g., number of responses, hours per response, hourly rate, and the underlying objective support), to permit public comment; (2) the notice of proposed rulemaking has immense ripple effects in the information to be collected under OMB control numbers 0651–0031 (patent processing, updating) and 0651–0032 (initial applications) as the number of newly filed patent applications is almost certain to increase due to the ripple effects of the AIA, and requires ''extensive'' ''adjusting [of] the existing ways to comply with any previously applicable instructions and requirements;'' and (3) the Office is creating new collections of information rather than updating existing OMB information collections under control numbers OMB 0651–0031 and 0651–0032.

The Office submitted a proposed information collection for the notice of proposed rulemaking providing the specific burden estimates (e.g., number of responses, hours per response, hourly rate) for each individual information collection item and the Office's basis for these estimates. The proposed information collection was posted on OMB's Information Collection Review Web page on July 27, 2012 (at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201207-0651-008*).

The collection of information submitted to OMB with the notice of proposed rulemaking pertains to the impact resulting from the changes being proposed by the Office in this rulemaking. The changes in this rulemaking have no impact on the information to be collected under OMB control numbers 0651–0031 (patent processing, updating) and 0651–0032 (initial applications). As discussed previously, this final rule does not convert the U.S. patent system from a ''first to invent'' to a ''first inventor to file'' system. The U.S. patent system converts from a ''first to invent'' to a ''first inventor to file'' system by operation of section 3 of the AIA regardless of the changes that are adopted in this final rule. Section 3 of the AIA amends the patent laws pertaining to the conditions of patentability to convert the U.S. patent system from a ''first to invent'' system to a ''first inventor to file'' system. This final rule merely revises the rules of practice in patent cases for consistency with, and to address the examination issues raised by, the changes in section 3 of the AIA. The changes being adopted in this final rule do not require any ''extensive'' ''adjusting [of] the existing ways to comply with any previously applicable instructions and requirements.''

Finally, the Paperwork Reduction Act does not prohibit the creation of a new collection of information (rather than updating existing OMB information collections) to implement a new program. Creation of a new collection of information for review and approval by OMB when implementing a new program having Paperwork Reduction Act implications is an option for agencies to use at their discretion.

This final rule contains provisions for applicants to: (1) Provide a statement if a nonprovisional application filed on or after March 16, 2013, claims priority to or the benefit of the filing date of an earlier application (i.e., foreign, provisional, or nonprovisional application, or an international application designating the United States of America), filed prior to March 16, 2013, and also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013; (2) identify the inventorship and ownership or obligation to assign ownership, of each claimed invention

on its effective filing date or on its date of invention, as applicable, in an application or patent with more than one named joint inventor, when necessary for purposes of an Office proceeding; and (3) show that a disclosure was by the inventor or joint inventor, or was by another who obtained the subject matter from the inventor or a joint inventor, or that there was a prior public disclosure by the inventor or a joint inventor, or by another who obtained the subject matter from the inventor or a joint inventor.

The Office will use the statement that a nonprovisional application filed on or after March 16, 2013, that claims priority to or the benefit of the filing date of an earlier application (i.e., foreign, provisional, or nonprovisional application, or international application designating the United States of America), filed prior to March 16, 2013, contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, to readily determine whether the nonprovisional application is subject to the changes to 35 U.S.C. 102 and 103 in the AIA. The Office will use the identification of the inventorship and ownership or obligation to assign ownership, of each claimed invention on its effective filing date (as defined in 37 CFR 1.109), or on its date of invention, as applicable, when it is necessary to determine whether a U.S. patent or U.S. patent application publication resulting from another nonprovisional application qualifies as prior art under AIA 35 U.S.C. 102(a)(2) or pre-AIA 35 U.S.C. 102(e). The Office will use information concerning whether a disclosure was by the inventor or joint inventor, or was by another who obtained the subject matter from the inventor or a joint inventor, or that there was a prior public disclosure by the inventor or a joint inventor, or by another who obtained the subject matter from the inventor or a joint inventor, to determine whether the disclosure qualifies as prior art under AIA 35 U.S.C. 102(a)(1) or (a)(2).

The Office is not resubmitting the proposed information collection requirements under 0651–0071 to OMB. The Office will accept OMB's September 12, 2012 preapproval. The proposed information collection requirements under 0651–0071 remain available at the OMB's Information Collection Review Web site (*www.reginfo.gov/public/do/PRAMain*).

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, the 37 CFR part 1 is amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

■ 2. Section 1.9 is amended by adding paragraphs (d), (e), and (f) to read as follows:

§ 1.9 Definitions.

* * * * *

(d)(1) The term inventor or inventorship as used in this chapter means the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention.

(2) The term joint inventor or coinventor as used in this chapter means any one of the individuals who invented or discovered the subject matter of a joint invention.

(e) The term joint research agreement as used in this chapter means a written contract, grant, or cooperative agreement entered into by two or more persons or entities for the performance of experimental, developmental, or research work in the field of the claimed invention.

(f) The term claimed invention as used in this chapter means the subject matter defined by a claim in a patent or an application for a patent.

* * * * *

■ 3. Section 1.14 is amended by revising paragraph (f) to read as follows:

§ 1.14 Patent applications preserved in confidence.

* * * * *

(f) *Notice to inventor of the filing of an application.* The Office may publish notice in the *Official Gazette* as to the filing of an application on behalf of an inventor by a person who otherwise shows sufficient proprietary interest in the matter.

* * * * *

■ 4. Section 1.17 is amended by revising paragraphs (g) and (i) and removing and reserving paragraphs (n) and (o).

The revisions read as follows:

§ 1.17 Patent application and reexamination processing fees.

* * * * *

(g) For filing a petition under one of the following sections which refers to this paragraph: $200.00

§ 1.12—for access to an assignment record.

§ 1.14—for access to an application.

§ 1.46—for filing an application on behalf of an inventor by a person who otherwise shows sufficient proprietary interest in the matter.

§ 1.55(f)—for filing a belated certified copy of a foreign application.

§ 1.59—for expungement of information.

§ 1.103(a)—to suspend action in an application.

§ 1.136(b)—for review of a request for extension of time when the provisions of § 1.136(a) are not available.

§ 1.377—for review of decision refusing to accept and record payment of a maintenance fee filed prior to expiration of a patent.

§ 1.550(c)—for patent owner requests for extension of time in *ex parte* reexamination proceedings.

§ 1.956—for patent owner requests for extension of time in *inter partes* reexamination proceedings.

§ 5.12—for expedited handling of a foreign filing license.

§ 5.15—for changing the scope of a license.

§ 5.25—for retroactive license.

* * * * *

(i) Processing fee for taking action under one of the following sections which refers to this paragraph: $130.00

§ 1.28(c)(3)—for processing a non-itemized fee deficiency based on an error in small entity status.

§ 1.41(b)—for supplying the name or names of the inventor or joint inventors in an application without either an application data sheet or the inventor's oath or declaration, except in provisional applications.

§ 1.48—for correcting inventorship, except in provisional applications.

§ 1.52(d)—for processing a nonprovisional application filed with a specification in a language other than English.

§ 1.53(c)(3)—to convert a provisional application filed under § 1.53(c) into a nonprovisional application under § 1.53(b).

§ 1.55—for entry of a priority claim or certified copy of a foreign application after payment of the issue fee.

§ 1.71(g)(2)—for processing a belated amendment under § 1.71(g).

§ 1.103(b)—for requesting limited suspension of action, continued

prosecution application for a design patent (§ 1.53(d)).

§ 1.103(c)—for requesting limited suspension of action, request for continued examination (§ 1.114).

§ 1.103(d)—for requesting deferred examination of an application.

§ 1.217—for processing a redacted copy of a paper submitted in the file of an application in which a redacted copy was submitted for the patent application publication.

§ 1.221—for requesting voluntary publication or republication of an application.

§ 1.291(c)(5)—for processing a second or subsequent protest by the same real party in interest.

§ 3.81—for a patent to issue to assignee, assignment submitted after payment of the issue fee.

* * * * *

■ 5. Section 1.53 is amended by:

■ a. Revising paragraphs (b) introductory text and (c)(2)(ii) and (iii);

■ b. Removing paragraph (c)(2)(iv);

■ c. Revising paragraph (c)(4); and

■ d. Removing paragraph (j).

The revisions read as follows:

§ 1.53 Application number, filing date, and completion of application.

* * * * *

(b) *Application filing requirements—Nonprovisional application.* The filing date of an application for patent filed under this section, except for a provisional application under paragraph (c) of this section or a continued prosecution application under paragraph (d) of this section, is the date on which a specification as prescribed by 35 U.S.C. 112 containing a description pursuant to § 1.71 and at least one claim pursuant to § 1.75, and any drawing required by § 1.81(a) are filed in the Patent and Trademark Office. No new matter may be introduced into an application after its filing date. A continuing application, which may be a continuation, divisional, or continuation-in-part application, may be filed under the conditions specified in 35 U.S.C. 120, 121, or 365(c) and § 1.78(c) and (d).

* * * * *

(c) * * *

(2) * * *

(ii) Payment of the issue fee on the application filed under paragraph (b) of this section; or

(iii) Expiration of twelve months after the filing date of the application filed under paragraph (b) of this section.

* * * * *

(4) A provisional application is not entitled to the right of priority under 35 U.S.C. 119 or 365(a) or § 1.55, or to the benefit of an earlier filing date under 35 U.S.C. 120, 121, or 365(c) or § 1.78 of any other application. No claim for priority under 35 U.S.C. 119(e) or § 1.78(a) may be made in a design application based on a provisional application. The requirements of §§ 1.821 through 1.825 regarding application disclosures containing nucleotide and/or amino acid sequences are not mandatory for provisional applications.

* * * * *

■ 6. Section 1.55 is revised to read as follows:

§ 1.55 Claim for foreign priority.

(a) *In general.* An applicant in a nonprovisional application may claim priority to one or more prior foreign applications under the conditions specified in 35 U.S.C. 119(a) through (d) and (f), 172, and 365(a) and (b) and this section.

(b) *Time for filing subsequent application.* The nonprovisional application must be filed not later than twelve months (six months in the case of a design application) after the date on which the foreign application was filed, or be entitled to claim the benefit under 35 U.S.C. 120, 121, or 365(c) of an application that was filed not later than twelve months (six months in the case of a design application) after the date on which the foreign application was filed. The twelve-month period is subject to 35 U.S.C. 21(b) (and § 1.7(a)) and PCT Rule 80.5, and the six-month period is subject to 35 U.S.C. 21(b) (and § 1.7(a)).

(c) *Time for filing priority claim and certified copy of foreign application in an application entering the national stage under 35 U.S.C. 371.* In an international application entering the national stage under 35 U.S.C., the claim for priority must be made and a certified copy of the foreign application must be filed within the time limit set forth in the PCT and the Regulations under the PCT.

(d) *Time for filing priority claim in an application filed under 35 U.S.C. 111(a).* In an original application filed under 35 U.S.C. 111(a), the claim for priority must be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application. The claim for priority must be presented in an application data sheet (§ 1.76(b)(6)), and must identify the foreign application for which priority is claimed, by specifying the application number, country (or intellectual property authority), day, month, and year of its filing. The time period in this paragraph does not apply in a design application.

(e) *Delayed priority claim in an application filed under 35 U.S.C. 111(a).* Unless such claim is accepted in accordance with the provisions of this paragraph, any claim for priority under 35 U.S.C. 119(a) through (d) or (f) or 365(a) in an original application filed under 35 U.S.C. 111(a) not presented in an application data sheet (§ 1.76(b)(6)) within the time period provided by paragraph (d) of this section is considered to have been waived. If a claim for priority is presented after the time period provided by paragraph (d) of this section, the claim may be accepted if the priority claim was unintentionally delayed. A petition to accept a delayed claim for priority under 35 U.S.C. 119(a) through (d) or (f) or 365(a) must be accompanied by:

(1) The priority claim under 35 U.S.C. 119(a) through (d) or (f) or 365(a) in an application data sheet (§ 1.76(b)(6)), identifying the foreign application for which priority is claimed, by specifying the application number, country (or intellectual property authority), day, month, and year of its filing, unless previously submitted;

(2) A certified copy of the foreign application if required by paragraph (f) of this section, unless previously submitted;

(3) The surcharge set forth in § 1.17(t); and

(4) A statement that the entire delay between the date the priority claim was due under paragraph (d) of this section and the date the priority claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

(f) *Time for filing certified copy of foreign application in an application filed under 35 U.S.C. 111(a).* In an original application filed under 35 U.S.C. 111(a), a certified copy of the foreign application must be filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, except as provided in paragraphs (h) and (i) of this section. If a certified copy of the foreign application is not filed within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior foreign application, and the exceptions in paragraphs (h) and (i) of this section are not applicable, the certified copy of the foreign application must be accompanied by a petition including a showing of good and sufficient cause for the delay and the petition fee set forth in § 1.17(g). The time period in this paragraph does not apply in a design application.

(g) *Requirement for filing priority claim, certified copy of foreign application, and translation in any application.* (1) The claim for priority and the certified copy of the foreign application specified in 35 U.S.C. 119(b) or PCT Rule 17 must, in any event, be filed within the pendency of the application and before the patent is granted. If the claim for priority or the certified copy of the foreign application is filed after the date the issue fee is paid, it must also be accompanied by the processing fee set forth in § 1.17(i), but the patent will not include the priority claim unless corrected by a certificate of correction under 35 U.S.C. 255 and § 1.323.

(2) The Office may require that the claim for priority and the certified copy of the foreign application be filed earlier than otherwise provided in this section:

(i) When the application is involved in an interference (see § 41.202 of this title) or derivation (see part 42 of this title) proceeding;

(ii) When necessary to overcome the date of a reference relied upon by the examiner; or

(iii) When deemed necessary by the examiner.

(3) An English language translation of a non-English language foreign application is not required except:

(i) When the application is involved in an interference (see § 41.202 of this title) or derivation (see part 42 of this title) proceeding;

(ii) When necessary to overcome the date of a reference relied upon by the examiner; or

(iii) When specifically required by the examiner.

(4) If an English language translation of a non-English language foreign application is required, it must be filed together with a statement that the translation of the certified copy is accurate.

(h) *Foreign intellectual property office participating in a priority document exchange agreement.* The requirement in paragraphs (c), (f), and (g) for a certified copy of the foreign application to be filed within the time limit set forth therein will be considered satisfied if:

(1) The foreign application was filed in a foreign intellectual property office participating with the Office in a bilateral or multilateral priority document exchange agreement (participating foreign intellectual property office), or a copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office that permits the Office to obtain such a copy;

(2) The claim for priority is presented in an application data sheet (§ 1.76(b)(6)), identifying the foreign application for which priority is claimed, by specifying the application number, country (or intellectual property authority), day, month, and year of its filing, and the applicant provides the information necessary for the participating foreign intellectual property office to provide the Office with access to the foreign application;

(3) The copy of the foreign application is received by the Office from the participating foreign intellectual property office, or a certified copy of the foreign application is filed, within the period specified in paragraph (g)(1) of this section; and

(4) The applicant files a request in a separate document that the Office obtain a copy of the foreign application from a participating intellectual property office that permits the Office to obtain such a copy if the foreign application was not filed in a participating foreign intellectual property office but a copy of the foreign application was filed in an application subsequently filed in a participating foreign intellectual property office that permits the Office to obtain such a copy. The request must identify the participating intellectual property office and the subsequent application by the application number, day, month, and year of its filing in which a copy of the foreign application was filed. The request must be filed within the later of sixteen months from the filing date of the prior foreign application or four months from the actual filing date of an application under 35 U.S.C. 111(a), within four months from the later of the date of commencement (§ 1.491(a)) or the date of the initial submission under 35 U.S.C. 371 in an application entering the national stage under 35 U.S.C. 371, or with a petition under paragraph (e) of this section.

(i) *Interim copy.* The requirement in paragraph (f) for a certified copy of the foreign application to be filed within the time limit set forth therein will be considered satisfied if:

(1) A copy of the original foreign application clearly labeled as ''Interim Copy,'' including the specification, and any drawings or claims upon which it is based, is filed in the Office together with a separate cover sheet identifying the foreign application by specifying the application number, country (or intellectual property authority), day, month, and year of its filing, and stating that the copy filed in the Office is a true copy of the original application as filed in the foreign country (or intellectual property authority);

(2) The copy of the foreign application and separate cover sheet is filed within the later of sixteen months from the filing date of the prior foreign application or four months from the actual filing date of an application under 35 U.S.C. 111(a), or with a petition under paragraph (e) of this section; and

(3) A certified copy of the foreign application is filed within the period specified in paragraph (g)(1) of this section.

(j) *Requirements for certain applications filed on or after March 16, 2013.* If a nonprovisional application filed on or after March 16, 2013, claims priority to a foreign application filed prior to March 16, 2013, and also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the nonprovisional application, four months from the date of entry into the national stage as set forth in § 1.491 in an international application, sixteen months from the filing date of the prior-filed foreign application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the nonprovisional application. An applicant is not required to provide such a statement if the applicant reasonably believes on the basis of information already known to the individuals designated in § 1.56(c) that the nonprovisional application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

(k) *Inventor's certificates.* An applicant in a nonprovisional application may under certain circumstances claim priority on the basis of one or more applications for an inventor's certificate in a country granting both inventor's certificates and patents. To claim the right of priority on the basis of an application for an inventor's certificate in such a country under 35 U.S.C. 119(d), the applicant when submitting a claim for such right as specified in this section, must include an affidavit or declaration. The affidavit or declaration must include a specific statement that, upon an investigation, he or she is satisfied that to the best of his or her knowledge, the applicant, when filing the application for the inventor's certificate, had the option to file an application for either a patent or an inventor's certificate as to the subject matter of the identified claim or claims forming the basis for the claim of priority.

(l) *Time periods not extendable.* The time periods set forth in this section are not extendable.

■ 7. Section 1.71 is amended by revising paragraph (g)(1) to read as follows:

§ 1.71 Detailed description and specification of the invention.

* * * * *

(g)(1) The specification may disclose or be amended to disclose the names of the parties to a joint research agreement as defined in § 1.9(e).

* * * * *

■ 8. Section 1.76 is amended by revising paragraphs (b)(5) and (6) to read as follows:

§ 1.76 Application data sheet.

* * * * *

(b) * * *

(5) *Domestic benefit information.* This information includes the application number, the filing date, the status (including patent number if available), and relationship of each application for which a benefit is claimed under 35 U.S.C. 119(e), 120, 121, or 365(c). Providing this information in the application data sheet constitutes the specific reference required by 35 U.S.C. 119(e) or 120, and § 1.78.

(6) *Foreign priority information.* This information includes the application number, country, and filing date of each foreign application for which priority is claimed. Providing this information in the application data sheet constitutes the claim for priority as required by 35 U.S.C. 119(b) and § 1.55.

* * * * *

■ 9. Section 1.77 is amended by revising paragraph (b)(2), redesignating paragraphs (b)(6) through (12) as paragraphs (b)(7) through (13), and adding a new paragraph (b)(6) to read as follows:

§ 1.77 Arrangement of application elements.

* * * * *

(b) * * *

(2) Cross-reference to related applications.

* * * * *

(6) Statement regarding prior disclosures by the inventor or a joint inventor.

* * * * *

■ 10. Section 1.78 is revised to read as follows:

§ 1.78 Claiming benefit of earlier filing date and cross-references to other applications.

(a) *Claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application.* An applicant in a nonprovisional application, other than for a design patent, or an international application designating the United States of America may claim the benefit of one or more prior-filed provisional applications under the conditions set forth in 35 U.S.C. 119(e) and this section.

(1) The nonprovisional application or international application designating the United States of America must be filed not later than twelve months after the date on which the provisional application was filed, or be entitled to claim the benefit under 35 U.S.C. 120, 121, or 365(c) of an application that was filed not later than twelve months after the date on which the provisional application was filed. This twelve-month period is subject to 35 U.S.C. 21(b) (and § 1.7(a)).

(2) Each prior-filed provisional application must name the inventor or a joint inventor named in the later—filed application as the inventor or a joint inventor. In addition, each prior-filed provisional application must be entitled to a filing date as set forth in § 1.53(c), and the basic filing fee set forth in § 1.16(d) must have been paid for such provisional application within the time period set forth in § 1.53(g).

(3) Any nonprovisional application or international application designating the United States of America that claims the benefit of one or more prior-filed provisional applications must contain, or be amended to contain, a reference to each such prior-filed provisional application, identifying it by the provisional application number (consisting of series code and serial number). If the later-filed application is a nonprovisional application, the reference required by this paragraph must be included in an application data sheet (§ 1.76(b)(5)).

(4) The reference required by paragraph (a)(3) of this section must be submitted during the pendency of the later-filed application. If the later-filed application is an application filed under 35 U.S.C. 111(a), this reference must also be submitted within the later of four months from the actual filing date of the later-filed application or sixteen months from the filing date of the prior-filed provisional application. If the later-filed application is a nonprovisional application entering the national stage from an international application under 35 U.S.C. 371, this reference must also be submitted within the later of four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in the later-filed international application or sixteen months from the filing date of the prior-filed provisional application. Except as provided in paragraph (b) of this section, failure to timely submit the reference is considered a waiver of any benefit under 35 U.S.C. 119(e) of the prior-filed provisional application.

(5) If the prior-filed provisional application was filed in a language other than English and both an English-language translation of the prior-filed provisional application and a statement that the translation is accurate were not previously filed in the prior-filed provisional application, the applicant will be notified and given a period of time within which to file, in the prior-filed provisional application, the translation and the statement. If the notice is mailed in a pending nonprovisional application, a timely reply to such a notice must include the filing in the nonprovisional application of either a confirmation that the translation and statement were filed in the provisional application, or an application data sheet eliminating the reference under paragraph (a)(3) of this section to the prior-filed provisional application, or the nonprovisional application will be abandoned. The translation and statement may be filed in the provisional application, even if the provisional application has become abandoned.

(6) If a nonprovisional application filed on or after March 16, 2013, claims the benefit of the filing date of a provisional application filed prior to March 16, 2013, and also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the nonprovisional application, four months from the date of entry into the national stage as set forth in § 1.491 in an international application, sixteen months from the filing date of the prior-filed provisional application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the nonprovisional application. An applicant is not required to provide such a statement if the applicant reasonably believes on the basis of information already known to the individuals designated in § 1.56(c) that the nonprovisional application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

(b) *Delayed claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application.* If the reference required by 35 U.S.C. 119(e) and paragraph (a)(3) of this section is presented in a nonprovisional

application after the time period provided by paragraph (a)(4) of this section, the claim under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application may be accepted if submitted during the pendency of the later-filed application and if the reference identifying the prior-filed application by provisional application number was unintentionally delayed. A petition to accept an unintentionally delayed claim under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application must be accompanied by:

(1) The reference required by 35 U.S.C. 119(e) and paragraph (a)(3) of this section to the prior-filed provisional application, unless previously submitted;

(2) The surcharge set forth in § 1.17(t); and

(3) A statement that the entire delay between the date the benefit claim was due under paragraph (a)(4) of this section and the date the benefit claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

(c) *Claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional or international application.* An applicant in a nonprovisional application (including an international application entering the national stage under 35 U.S.C. 371) or an international application designating the United States of America may claim the benefit of one or more prior-filed copending nonprovisional applications or international applications designating the United States of America under the conditions set forth in 35 U.S.C. 120, 121, or 365(c) and this section.

(1) Each prior-filed application must name the inventor or a joint inventor named in the later-filed application as the inventor or a joint inventor. In addition, each prior-filed application must either be:

(i) An international application entitled to a filing date in accordance with PCT Article 11 and designating the United States of America; or

(ii) A nonprovisional application under 35 U.S.C. 111(a) that is entitled to a filing date as set forth in § 1.53(b) or (d) for which the basic filing fee set forth in § 1.16 has been paid within the pendency of the application.

(2) Except for a continued prosecution application filed under § 1.53(d), any nonprovisional application, or international application designating the United States of America, that claims the benefit of one or more prior-filed nonprovisional applications or international applications designating the United States of America must contain or be amended to contain a reference to each such prior-filed application, identifying it by application number (consisting of the series code and serial number) or international application number and international filing date. If the later-filed application is a nonprovisional application, the reference required by this paragraph must be included in an application data sheet (§ 1.76(b)(5)). The reference also must identify the relationship of the applications, namely, whether the later-filed application is a continuation, divisional, or continuation-in-part of the prior-filed nonprovisional application or international application.

(3) The reference required by 35 U.S.C. 120 and paragraph (c)(2) of this section must be submitted during the pendency of the later-filed application. If the later-filed application is an application filed under 35 U.S.C. 111(a), this reference must also be submitted within the later of four months from the actual filing date of the later-filed application or sixteen months from the filing date of the prior-filed application. If the later-filed application is a nonprovisional application entering the national stage from an international application under 35 U.S.C. 371, this reference must also be submitted within the later of four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in the later-filed international application or sixteen months from the filing date of the prior-filed application. Except as provided in paragraph (d) of this section, failure to timely submit the reference required by 35 U.S.C. 120 and paragraph (c)(2) of this section is considered a waiver of any benefit under 35 U.S.C. 120, 121, or 365(c) to the prior-filed application. The time periods in this paragraph do not apply in a design application.

(4) The request for a continued prosecution application under § 1.53(d) is the specific reference required by 35 U.S.C. 120 to the prior-filed application. The identification of an application by application number under this section is the identification of every application assigned that application number necessary for a specific reference required by 35 U.S.C. 120 to every such application assigned that application number.

(5) Cross-references to other related applications may be made when appropriate (see § 1.14), but cross-references to applications for which a benefit is not claimed under title 35, United States Code, must not be included in an application data sheet (§ 1.76(b)(5)).

(6) If a nonprovisional application filed on or after March 16, 2013, claims the benefit of the filing date of a nonprovisional application or an international application designating the United States of America filed prior to March 16, 2013, and also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect within the later of four months from the actual filing date of the later-filed application, four months from the date of entry into the national stage as set forth in § 1.491 in an international application, sixteen months from the filing date of the prior-filed application, or the date that a first claim to a claimed invention that has an effective filing date on or after March 16, 2013, is presented in the later-filed application. An applicant is not required to provide such a statement if either:

(i) The application claims the benefit of a nonprovisional application in which a statement under § 1.55(j), paragraph (a)(6) of this section, or this paragraph that the application contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013 has been filed; or

(ii) The applicant reasonably believes on the basis of information already known to the individuals designated in § 1.56(c) that the later filed application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013.

(d) *Delayed claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional application or international application.* If the reference required by 35 U.S.C. 120 and paragraph (c)(2) of this section is presented after the time period provided by paragraph (c)(3) of this section, the claim under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed copending nonprovisional application or international application designating the United States of America may be accepted if the reference identifying the prior-filed application by application number or international application number and international filing date was unintentionally delayed. A petition to accept an unintentionally delayed claim under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed application must be accompanied by:

(1) The reference required by 35 U.S.C. 120 and paragraph (c)(2) of this section to the prior-filed application, unless previously submitted;

(2) The surcharge set forth in § 1.17(t); and

(3) A statement that the entire delay between the date the benefit claim was

due under paragraph (c)(3) of this section and the date the benefit claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

(e) *Applications containing patentably indistinct claims.* Where two or more applications filed by the same applicant contain patentably indistinct claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application.

(f) *Applications or patents under reexamination naming different inventors and containing patentably indistinct claims.* If an application or a patent under reexamination and at least one other application naming different inventors are owned by the same person and contain patentably indistinct claims, and there is no statement of record indicating that the claimed inventions were commonly owned or subject to an obligation of assignment to the same person on the effective filing date (as defined in § 1.109), or on the date of the invention, as applicable, of the later claimed invention, the Office may require the applicant to state whether the claimed inventions were commonly owned or subject to an obligation of assignment to the same person on such date. Even if the claimed inventions were commonly owned, or subject to an obligation of assignment to the same person on the effective filing date (as defined in § 1.109), or on the date of the invention, as applicable, of the later claimed invention, the patentably indistinct claims may be rejected under the doctrine of double patenting in view of such commonly owned or assigned applications or patents under reexamination.

(g) *Time periods not extendable.* The time periods set forth in this section are not extendable.

■ 11. Section 1.84 is amended by revising paragraph (a)(2) introductory text to read as follows.

§ 1.84 Standards for drawings.

(a) * * *

(2) *Color.* On rare occasions, color drawings may be necessary as the only practical medium by which to disclose the subject matter sought to be patented in a utility or design patent application. The color drawings must be of sufficient quality such that all details in the drawings are reproducible in black and white in the printed patent. Color drawings are not permitted in international applications (see PCT Rule 11.13), or in an application, or copy thereof, submitted under the Office electronic filing system. The Office will accept color drawings in utility or design patent applications only after granting a petition filed under this paragraph explaining why the color drawings are necessary. Any such petition must include the following:

* * * * *

§ 1.103 [Amended]

■ 12. Section 1.103 is amended by removing paragraph (g).

■ 13. Section 1.104 is amended by revising paragraphs (c)(4) and (5) and adding paragraph (c)(6) to read as follows:

§ 1.104 Nature of examination.

(c) * * *

(4)(i) Subject matter which would otherwise qualify as prior art under 35 U.S.C. 102(a)(2) and a claimed invention will be treated as commonly owned for purposes of 35 U.S.C. 102(b)(2)(C) if the applicant or patent owner provides a statement to the effect that the subject matter and the claimed invention, not later than the effective filing date of the claimed invention, were owned by the same person or subject to an obligation of assignment to the same person.

(ii) Subject matter which would otherwise qualify as prior art under 35 U.S.C. 102(a)(2) and a claimed invention will be treated as commonly owned for purposes of 35 U.S.C. 102(b)(2)(C) on the basis of a joint research agreement under 35 U.S.C. 102(c) if:

(A) The applicant or patent owner provides a statement to the effect that the subject matter was developed and the claimed invention was made by or on behalf of one or more parties to a joint research agreement, within the meaning of 35 U.S.C. 100(h) and § 1.9(e), that was in effect on or before the effective filing date of the claimed invention, and the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and

(B) The application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement.

(5)(i) Subject matter which qualifies as prior art under 35 U.S.C. 102(e), (f), or (g) in effect prior to March 16, 2013, and a claimed invention in an application filed on or after November 29, 1999, or any patent issuing thereon, in an application filed before November 29, 1999, but pending on December 10, 2004, or any patent issuing thereon, or in any patent granted on or after December 10, 2004, will be treated as commonly owned for purposes of 35 U.S.C. 103(c) in effect prior to March 16, 2013, if the applicant or patent owner provides a statement to the effect that the subject matter and the claimed invention, at the time the claimed invention was made, were owned by the same person or subject to an obligation of assignment to the same person.

(ii) Subject matter which qualifies as prior art under 35 U.S.C. 102(e), (f), or (g) in effect prior to March 16, 2013, and a claimed invention in an application pending on or after December 10, 2004, or in any patent granted on or after December 10, 2004, will be treated as commonly owned for purposes of 35 U.S.C. 103(c) in effect prior to March 16, 2013, on the basis of a joint research agreement under 35 U.S.C. 103(c)(2) in effect prior to March 16, 2013, if:

(A) The applicant or patent owner provides a statement to the effect that the subject matter and the claimed invention were made by or on behalf of the parties to a joint research agreement, within the meaning of 35 U.S.C. 100(h) and § 1.9(e), which was in effect on or before the date the claimed invention was made, and that the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and

(B) The application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement.

(6) Patents issued prior to December 10, 2004, from applications filed prior to November 29, 1999, are subject to 35 U.S.C. 103(c) in effect on November 28, 1999.

* * * * *

■ 14. Section 1.109 is added to read as follows:

§ 1.109 Effective filing date of a claimed invention under the Leahy-Smith America Invents Act.

(a) The effective filing date for a claimed invention in a patent or application for patent, other than in a reissue application or reissued patent, is the earliest of:

(1) The actual filing date of the patent or the application for the patent containing a claim to the invention; or

(2) The filing date of the earliest application for which the patent or application is entitled, as to such invention, to a right of priority or the benefit of an earlier filing date under 35 U.S.C. 119, 120, 121, or 365.

(b) The effective filing date for a claimed invention in a reissue application or a reissued patent is determined by deeming the claim to the invention to have been contained in the patent for which reissue was sought.

■ 15. Section 1.110 is revised to read as follows:

§ 1.110 Inventorship and ownership of the subject matter of individual claims.

When one or more joint inventors are named in an application or patent, the Office may require an applicant or patentee to identify the inventorship and ownership or obligation to assign ownership, of each claimed invention on its effective filing date (as defined in § 1.109) or on its date of invention, as applicable, when necessary for purposes of an Office proceeding. The Office may also require an applicant or patentee to identify the invention dates of the subject matter of each claim when necessary for purposes of an Office proceeding.

■ 16. Section 1.130 is revised to read as follows:

§ 1.130 Affidavit or declaration of attribution or prior public disclosure under the Leahy-Smith America Invents Act.

(a) *Affidavit or declaration of attribution.* When any claim of an application or a patent under reexamination is rejected, the applicant or patent owner may submit an appropriate affidavit or declaration to disqualify a disclosure as prior art by establishing that the disclosure was made by the inventor or a joint inventor, or the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor.

(b) *Affidavit or declaration of prior public disclosure.* When any claim of an application or a patent under reexamination is rejected, the applicant or patent owner may submit an appropriate affidavit or declaration to disqualify a disclosure as prior art by establishing that the subject matter disclosed had, before such disclosure was made or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. An affidavit or declaration under this paragraph must identify the subject matter publicly disclosed and provide the date such subject matter was publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

(1) If the subject matter publicly disclosed on that date was in a printed publication, the affidavit or declaration must be accompanied by a copy of the printed publication.

(2) If the subject matter publicly disclosed on that date was not in a printed publication, the affidavit or declaration must describe the subject matter with sufficient detail and particularity to determine what subject matter had been publicly disclosed on that date by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

(c) *When this section is not available.* The provisions of this section are not available if the rejection is based upon a disclosure made more than one year before the effective filing date of the claimed invention. The provisions of this section may not be available if the rejection is based upon a U.S. patent or U.S. patent application publication of a patented or pending application naming another inventor, the patent or pending application claims an invention that is the same or substantially the same as the applicant's or patent owner's claimed invention, and the affidavit or declaration contends that an inventor named in the U.S. patent or U.S. patent application publication derived the claimed invention from the inventor or a joint inventor named in the application or patent, in which case an applicant or a patent owner may file a petition for a derivation proceeding pursuant to § 42.401 *et seq.* of this title.

(d) *Applications and patents to which this section is applicable.* The provisions of this section apply to any application for patent, and to any patent issuing thereon, that contains, or contained at any time:

(1) A claim to a claimed invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is on or after March 16, 2013; or

(2) A specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains, or contained at any time, a claim to a claimed invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is on or after March 16, 2013.

■ 17. Section 1.131 is revised to read as follows:

§ 1.131 Affidavit or declaration of prior invention or to disqualify commonly owned patent or published application as prior art.

(a) When any claim of an application or a patent under reexamination is rejected, the inventor of the subject matter of the rejected claim, the owner of the patent under reexamination, or the party qualified under § 1.42 or § 1.46, may submit an appropriate oath or declaration to establish invention of the subject matter of the rejected claim prior to the effective date of the reference or activity on which the rejection is based. The effective date of a U.S. patent, U.S. patent application publication, or international application publication under PCT Article 21(2) is the earlier of its publication date or the date that it is effective as a reference under 35 U.S.C. 102(e) as in effect on March 15, 2013. Prior invention may not be established under this section in any country other than the United States, a NAFTA country, or a WTO member country. Prior invention may not be established under this section before December 8, 1993, in a NAFTA country other than the United States, or before January 1, 1996, in a WTO member country other than a NAFTA country. Prior invention may not be established under this section if either:

(1) The rejection is based upon a U.S. patent or U.S. patent application publication of a pending or patented application naming another inventor which claims interfering subject matter as defined in § 41.203(a) of this title, in which case an applicant may suggest an interference pursuant to § 41.202(a) of this title; or

(2) The rejection is based upon a statutory bar.

(b) The showing of facts for an oath or declaration under paragraph (a) of this section shall be such, in character and weight, as to establish reduction to practice prior to the effective date of the reference, or conception of the invention prior to the effective date of the reference coupled with due diligence from prior to said date to a subsequent reduction to practice or to the filing of the application. Original exhibits of drawings or records, or photocopies thereof, must accompany and form part of the affidavit or declaration or their absence must be satisfactorily explained.

(c) When any claim of an application or a patent under reexamination is rejected under 35 U.S.C. 103 as in effect on March 15, 2013, on a U.S. patent or U.S. patent application publication which is not prior art under 35 U.S.C. 102(b) as in effect on March 15, 2013, and the inventions defined by the claims in the application or patent under reexamination and by the claims in the patent or published application are not identical but are not patentably distinct, and the inventions are owned by the same party, the applicant or owner of the patent under reexamination may disqualify the patent or patent application publication as prior art. The patent or patent application publication can be disqualified as prior art by submission of:

(1) A terminal disclaimer in accordance with § 1.321(c); and

(2) An oath or declaration stating that the application or patent under reexamination and patent or published application are currently owned by the same party, and that the inventor named in the application or patent under reexamination is the prior inventor under 35 U.S.C. 104 as in effect on March 15, 2013.

(d) The provisions of this section apply to any application for patent, and to any patent issuing thereon, that contains, or contained at any time:

(1) A claim to an invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is before March 16, 2013; or

(2) A specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains, or contained at any time, a claim to an invention that has an effective filing date as defined in 35 U.S.C. 100(i) that is before March 16, 2013.

(e) In an application for patent to which the provisions of § 1.130 apply, and to any patent issuing thereon, the provisions of this section are applicable only with respect to a rejection under 35 U.S.C. 102(g) as in effect on March 15, 2013.

§§ 1.293 through 1.297 [Removed and Reserved]

■ 18. Sections 1.293 through 1.297 are removed and reserved.

■ 19. Section 1.321 is amended by revising paragraph (d) introductory text to read as follows:

§ 1.321 Statutory disclaimers, including terminal disclaimers.

* * * * *

(d) A terminal disclaimer, when filed in a patent application or in a reexamination proceeding to obviate double patenting based upon a patent or application that is not commonly owned but was disqualified as prior art as set forth in either § 1.104(c)(4)(ii) or (c)(5)(ii) as the result of activities undertaken within the scope of a joint research agreement, must:

* * * * *

Dated: February 11, 2013.

Teresa Stanek Rea,

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office.

[FR Doc. 2013–03453 Filed 2–13–13; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2012–0024]

Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Examination guidelines.

SUMMARY: The United States Patent and Trademark Office (Office) is publishing examination guidelines concerning the first inventor to file provisions of the Leahy-Smith America Invents Act (AIA). The AIA amends the patent laws pertaining to the conditions of patentability to convert the U.S. patent system from a ''first to invent'' system to a ''first inventor to file'' system, treats patents and patent application publications as prior art as of their earliest effective U.S., foreign, or international filing date, eliminates the requirement that a prior public use or sale activity be ''in this country'' to be a prior art activity, and treats commonly owned or joint research agreement patents and patent application publications as being by the same inventive entity for purposes of novelty, as well as nonobviousness. The changes to the conditions of patentability in the AIA result in greater transparency, objectivity, predictability, and simplicity in patentability determinations. The Office is providing these examination guidelines to Office personnel, and notifying the public of these guidelines, to assist in the implementation of the first inventor to file provisions of the AIA. These examination guidelines also clarify, in response to the public comment, that there is no requirement that the mode of disclosure by an inventor or joint inventor be the same as the mode of disclosure of an intervening disclosure (e.g., inventor discloses his invention at a trade show and the intervening disclosure is in a peer-reviewed journal). Additionally, there is no requirement that the disclosure by the inventor or a joint inventor be a verbatim or *ipsissimis verbis* disclosure of an intervening disclosure in order for the exception based on a previous public disclosure of subject matter by the inventor or a joint inventor to apply. These guidelines also clarify that the exception applies to subject matter of the intervening disclosure that is simply a more general description of the subject matter previously publicly disclosed by the inventor or a joint inventor.

DATES: Effective March 16, 2013.

FOR FURTHER INFORMATION CONTACT: Mary C. Till, Senior Legal Advisor (telephone (571) 272–7755; electronic mail message (*mary.till@uspto.gov*)) or Kathleen Kahler Fonda, Senior Legal Advisor (telephone (571) 272–7754; electronic mail message (*kathleen.fonda@uspto.gov*)), of the Office of the Deputy Commissioner for Patent Examination Policy.

SUPPLEMENTARY INFORMATION: The AIA [1] was enacted into law on September 16, 2011. Section 3 of the AIA amends the patent laws to: (1) Convert the patent system from a ''first to invent'' system to a ''first inventor to file'' system; (2) eliminate the requirement that a prior public use or sale activity be ''in this country'' to be a prior art activity; (3) treat U.S. patents and U.S. patent application publications as prior art as of their earliest effective filing date, regardless of whether the earliest effective filing date is based upon an application filed in the United States or in another country; and (4) treat commonly owned patents and patent application publications, or those resulting from a joint research agreement, as being by the same inventive entity for purposes of 35 U.S.C. 102 and 103. The changes in section 3 of the AIA take effect on March 16, 2013. The Office is providing these examination guidelines to Office personnel, and notifying the public of these guidelines, to assist in the implementation of the first inventor to file provisions of the AIA.

These examination guidelines do not constitute substantive rulemaking and do not have the force and effect of law. The examination guidelines set out the Office's interpretation of 35 U.S.C. 102 and 103 as amended by the AIA, and advise the public and Office personnel on how the changes to 35 U.S.C. 102 and 103 in the AIA impact the provisions of the *Manual of Patent Examining Procedure* (MPEP) [2] pertaining to 35 U.S.C. 102 and 103. The guidelines have been developed as a matter of internal Office management and are not intended to create any right or benefit, substantive or procedural, enforceable by any party against the Office. Rejections will continue to be based upon the substantive law, and it is these rejections that are appealable. Failure of Office personnel to follow the guidelines is not, in itself, a proper basis for either an appeal or a petition.

These examination guidelines apply the case law on pre-AIA 35 U.S.C. 102 and 103 to interpret the provisions of

AIA 35 U.S.C. 102 and 103 where the AIA retains principles of pre-AIA 35 U.S.C. 102 and 103. Office personnel may and should continue to rely upon pre-AIA 35 U.S.C. 102 and 103 case law and the discussion of that case law in MPEP chapter 2100, except where these guidelines specifically indicate that the AIA does not retain a principle of pre-AIA 35 U.S.C. 102 and 103. The provisions of AIA 35 U.S.C. 102 and 103 will be further clarified as the case law on the first inventor to file provisions of the AIA develops, and the Office will provide additional or revised guidelines as necessary.

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Discussion of the Public Comments: The Office published a notice of proposed rulemaking and a notice of proposed examination guidelines on July 26, 2012, to implement the first inventor to file provisions of section 3 of the AIA. *See Changes To Implement the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR 43742 (July 26, 2012) (notice of proposed rulemaking), and *Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR 43759 (July 26, 2012) (notice of proposed examination guidelines). The Office also conducted a roundtable discussion with the public on September 6, 2012, to obtain public input from organizations and individuals on issues relating to the Office's proposed implementation of the first inventor to file provisions of the AIA. *See Notice of Roundtable on the Implementation of the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR 49427 (Aug. 16, 2012). The Office also conducted a number of roadshow presentations in September of 2012 that included a discussion of the first inventor to file provisions of the AIA. The Office received approximately seventy comments (from intellectual property organizations, governmental organizations, academic and research institutions, industry, law firms, and individuals) in response to these notices. The comments germane to the proposed changes to the rules of practice will be discussed in the final rule that revises the rules of practice in title 37 of the Code of Federal Regulations (CFR) in light of the changes in section 3 of the AIA. The comments germane to the proposed examination guidelines (other than those specific to the proposed rules) and the Office's responses to the comments follow:

General Discussion of the Recurrent Issues Raised in the Comments: A number of comments addressed the following issues raised in the proposed examination guidelines.

The Office indicated in the proposed examination guidelines that AIA 35 U.S.C. 102(a)(1) does not expressly state whether a sale must be ''sufficiently'' public to preclude the grant of a patent on the claimed invention, and sought the benefit of public comment on the extent to which public availability plays a role in ''on sale'' prior art defined in AIA 35 U.S.C. 102(a)(1). *See Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43765. The Office received a number of comments on this question. These examination guidelines indicate that the Office views the ''or otherwise available to the public'' residual clause of the AIA's 35 U.S.C. 102(a)(1) as indicating that secret sale or use activity does not qualify as prior art. These examination guidelines also indicate that an activity (such as a sale, offer for sale, or other commercial activity) is secret (non-public) if, for example, it is among individuals having an obligation of confidentiality to the inventor. The specific comments on this issue are discussed in greater detail in

the Responses to Specific Comments section.

The Office also indicated in the proposed examination guidelines that the subject matter in the prior disclosure being relied upon under AIA 35 U.S.C. 102(a) must be the same ''subject matter'' as the subject matter previously publicly disclosed by the inventor for the exceptions in AIA 35 U.S.C. 102(b)(1)(B) and 102(b)(2)(B) to apply, and that the exceptions in AIA 35 U.S.C. 102(b)(1)(B) and 102(b)(2)(B) do not apply even if the only differences between the subject matter in the prior art disclosure that is relied upon under AIA 35 U.S.C. 102(a) and the subject matter previously publicly disclosed by the inventor are mere insubstantial changes, or only trivial or obvious variations. *See Examination Guidelines for Implementing the First Inventor To File Provisions of the Leahy-Smith America Invents Act,* 77 FR at 43767 and 43769. The Office also received a number of comments on this issue. These examination guidelines maintain the identical subject matter interpretation of AIA 35 U.S.C. 102(b)(1)(B) and 102(b)(2)(B). However, these examination guidelines also clarify that there is no requirement that the mode of disclosure by an inventor or joint inventor (e.g., publication, public use, sale activity) be the same as the mode of disclosure of the intervening disclosure, and also does not require that the disclosure by the inventor or a joint inventor be a verbatim or *ipsissimis verbis* disclosure of the intervening disclosure. In addition, these examination guidelines also clarify that if subject matter of the intervening disclosure is simply a more general description of the subject matter previously publicly disclosed by the inventor or a joint inventor, the exception in AIA 35 U.S.C. 102(b)(1)(B) applies to such subject matter of the intervening disclosure. The specific comments on this issue are also discussed in greater detail in the Responses to Specific Comments section.

Responses to Specific Comments:

Comment 1: One comment suggested that Office actions clearly indicate whether an application is examined under the pre-AIA first to invent provisions or the AIA first inventor to file provisions, and provide the reasons the pre-AIA first to invent provisions or the AIA first inventor to file provisions apply to the application.

Response: The Office plans to indicate in the Office's Patent Application Locating and Monitoring (PALM) system whether the Office is treating an application as subject to pre-AIA 35 U.S.C. 102 and 103 (a pre-AIA application) or AIA 35 U.S.C. 102 and 103 (an AIA application). Members of the public may access this information via the Patent Application Information Retrieval (PAIR) system. Furthermore, form paragraphs for use in Office actions will be developed which will identify whether the provisions of pre-AIA 35 U.S.C. 102 and 103 or AIA 35 U.S.C. 102 and 103 apply if there is a rejection based upon 35 U.S.C. 102 or 103. The Office does not plan to provide a specific explanation in an Office action of why the pre-AIA first to invent provisions or the AIA first inventor to file provisions apply to an application unless the matter is called into question.

Comment 2: One comment suggested that in determining whether an application is an AIA application or a pre-AIA application, a procedure should be available to ensure that disputes concerning whether an application is an AIA application or a pre-AIA application are readily resolved.

Response: The Office plans to have staff in each Technology Center who are able to assist Office personnel in determining whether the application is a pre-AIA application or an AIA application. If an issue arises during the course of examination about whether the application is a pre-AIA application or an AIA application, Office personnel may consult with these staff members. If a disagreement between the applicant and an examiner cannot be resolved informally and results in a rejection that would otherwise be inapplicable, the applicant may respond to the merits of the rejection with an explanation of why the Office's treatment of the application as a pre-AIA application or an AIA application is improper. Ultimately, if there is a disagreement between the applicant and an examiner as to whether the application is subject to pre-AIA 35 U.S.C. 102 and 103 or AIA 35 U.S.C. 102 and 103, and the propriety of a rejection turns on the resolution of this question, the disagreement would need to be resolved on appeal.

Comment 3: One comment questioned whether a patent is valid if examined under the wrong prior art regime.

Response: The bases for invalidity are specified in 35 U.S.C. 282(b) and have not changed with implementation of the AIA, except for the removal of best mode as a grounds to cancel, invalidate, or render unenforceable a claim of a patent. Specifically, AIA 35 U.S.C. 282(b) provides the following bases for invalidity: (1) Noninfringement, absence of liability for infringement, or *unenforceability; (*2) invalidity of the patent or any claim in suit on any ground specified in part II of title 35, United States Code, as a condition for patentability; (3) invalidity of the patent or any claim in suit for failure to comply with: (A) Any requirement of 35 U.S.C. 112, except that the failure to disclose the best mode shall not be a basis on which any claim of a patent may be canceled or held invalid or otherwise unenforceable; or (B) any requirement of 35 U.S.C. 251; and (4) any other fact or act made a defense by title 35.

Comment 4: One comment took issue with the use of the phrases ''claimed invention'' and ''claim to a claimed invention'' in the proposed examination guidelines. The comment argued that AIA 35 U.S.C. 100(j), 102, and 103 use the phrase ''claimed invention,'' and that the phrase ''a claim to a claimed invention'' is used only in section 3(n) of the AIA (the effective date provisions for section 3).

Response: The examination guidelines have been revised to use the phrase ''claimed invention'' when discussing the provisions of AIA 35 U.S.C. 100(j), 102, and 103.

Comment 5: One comment suggested clearly differentiating between ''claim'' in the sense of a claim to a claimed invention and ''claim'' in the sense of a benefit or priority claim.

Response: With respect to a claimed invention, the examination guidelines use the phrase ''claimed invention'' or the phrase ''a claim to a claimed invention.'' With respect to a claim to priority or benefit under 35 U.S.C. 119, 120, 121, or 365, the examination guidelines use the term ''claim'' along with either benefit or priority in the same sentence to distinguish a benefit or priority claim from a claimed invention.

Comment 6: Several comments suggested that the examination guidelines maintain the *status quo* with respect to the terms ''on sale'' and ''public use'' to force issues such as whether secret sales qualify as prior art to the courts as soon as possible. Another comment suggested that the Office serves a gatekeeper role and that ultimately the courts will provide clarity on open legal questions presented by the AIA. Thus, the comment recommended that the Office construe the statute in a manner biased against applicants so that issues concerning the meaning of AIA 35 U.S.C. 102 and 103 quickly and expeditiously move to the courts for resolution.

Response: The Office appreciates that the courts may ultimately address questions concerning the meaning of AIA 35 U.S.C. 102 and 103. However, as a practical matter, the Office needs to provide examination guidelines so that

the public is aware of how the Office will apply AIA 35 U.S.C. 102 and 103. The Office considers its interpretation of AIA 35 U.S.C. 102 and 103 as set forth in these examination guidelines to be the correct interpretation of AIA 35 U.S.C. 102 and 103 based upon the statutory language of the AIA and its legislative history.

Comment 7: A number of comments suggested that public availability should be a requirement for ''on sale'' activities under AIA 35 U.S.C. 102(a)(1), and that non-public uses and non-public sales or offers for sale do not qualify as prior art under the AIA. The comments suggesting that public availability should be a requirement for ''on sale'' activities under AIA 35 U.S.C. 102(a)(1) gave the following reasons: (1) The catch-all phrase ''otherwise available to the public'' in AIA 35 U.S.C. 102(a)(1) and case law cited in the legislative history of the AIA supports the view that ''available to the public'' should be read as informing the meaning of all of the listed categories of prior art in AIA 35 U.S.C. 102(a)(1); (2) the removal of derivation under pre-AIA 35 U.S.C. 102(f) and prior invention under pre-AIA 35 U.S.C. 102(g) as prior art indicates that the AIA intended to do away with ''secret'' prior art; (3) public availability is the intent of AIA, and for the Office to construe the statute otherwise would erode the availability of patent protection in the United States, and weaken the economy; (4) interpreting the ''on sale'' provision to require public availability is good public policy in that it would lower litigation costs by simplifying discovery, and would reduce unexpected prior art pitfalls for inventors who are not well-versed in the law.

Several comments, however, suggested that the legislative history of the AIA is insufficient to compel the conclusion that Congress intended to overturn pre-AIA case law [3] holding that an inventor's non-public sale before the critical date is a patent-barring ''on sale'' activity as to that inventor. One comment suggested that commercial uses that are not accessible to the public are nonetheless disqualifying prior art because *Metallizing Engineering* [4] and other pre-AIA case law interpreting ''public use'' and ''on sale'' continue to apply under the AIA, and do not require public availability. The comment further suggested that commercial uses that are accessible to the public, even if such accessibility is not widespread, are disqualifying prior art to all parties. Another comment suggested that *Metallizing Engineering* and other forfeiture doctrines should be preserved because they serve important public policies. Another comment suggested that if the Office does adopt the position that *Metallizing Engineering* is overruled, and that any sale under AIA 35 U.S.C. 102(a)(1) must be public, the Office should promulgate a rule requiring that any secret commercial use of the claimed invention more than one year prior to the effective filing date be disclosed to the Office. Another comment indicated that sales between joint ventures and sales kept secret from the ''trade'' should still be considered prior art under AIA 35 U.S.C. 102(a)(1).

One comment suggested that under AIA 35 U.S.C. 102(a)(1) there are two general categories of prior art, with each having subcategories: The first category is patents and printed publications, and the second category is ''on sale,'' ''public use,'' or ''otherwise available to the public.'' The comment suggested that ''otherwise available to the public'' clause only modifies the second category: ''public use'' and ''on sale.''

Response: The starting point for construction of a statute is the language of the statute itself.[5] A patent is precluded under AIA 35 U.S.C. 102(a)(1) if ''the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.'' AIA 35 U.S.C. 102(a)(1) contains the additional residual clause ''or otherwise available to the public.'' Residual clauses such as ''or otherwise'' or ''or other'' are generally viewed as modifying the preceding phrase or phrases.[6] Therefore, the Office views the ''or otherwise available to the public'' residual clause of the AIA's 35 U.S.C. 102(a)(1) as indicating that secret sale or use activity does not qualify as prior art.[7]

The Office's interpretation of AIA 35 U.S.C. 102(a)(1) also ensures that the AIA grace period can extend to all of the documents and activities enumerated in AIA 35 U.S.C. 102(a)(1) that would otherwise defeat patentability. In addition, this interpretation avoids the very odd potential result that the applicant who had made his invention accessible to the public for up to a year before filing an application could still obtain a patent, but the inventor who merely used his invention in secret one day before he filed an application could not obtain a patent. Finally, the Office's interpretation is consistent with the interpretation that was clearly expressed by the bicameral sponsors of the AIA during the congressional deliberations on the measure.[8]

With respect to suggestions concerning what information concerning patentability must be disclosed to the Office (secret commercial sale or use), 37 CFR 1.56 provides that applicants have a duty to disclose all information known to be material to patentability as defined in 37 CFR 1.56, and there is no reason to treat public or non-public commercial sale or use or activity differently from other information.

With respect to comments that *Metallizing Engineering* and other forfeiture doctrines should be preserved because they serve important public policies, the Office notes that the choice of which public policies to pursue through the definition of prior art is made by Congress, not by the Office. Also, some of the purposes ascribed to these doctrines in case law appear to be ill-suited to or inconsistent with the AIA. The problem of delayed filing of applications is unique to pre-AIA 35 U.S.C. 102, under which an applicant can rely on a secret invention date in order to establish a priority date.

Comment 8: A comment suggested that offers for sale must be public in order to constitute prior art under AIA 35 U.S.C. 102(a)(1) and that an offer for license is not an offer for sale.

Response: The case law distinguishing between offers for sale and offers for license under pre-AIA 35 U.S.C. 102(b) is equally applicable under AIA 35 U.S.C. 102(a)(1) as the AIA did not amend 35 U.S.C. 102 to change the treatment of the prior art effect of an offer for license. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has held that ''a 'license' that merely grants rights under a patent cannot per se trigger the application of the on-sale bar,''[9] and that ''[a]n offer to enter into a license under a patent for future sale of the invention covered by the patent when and if it has been developed * * * is not an offer to sell the patented invention that constitutes an on-sale bar.'' [10] If a transaction or offer with respect to an invention constitutes licensing within the meaning of these cases, the offer or transaction does not implicate the on sale bar. However, if the licensing of an invention makes the invention available to the public, patentability would be independently barred by the residual clause of AIA 35 U.S.C. 102, which precludes patenting of a claimed invention that was ''available to the public'' more than one year before the effective filing date of the claimed invention.

Comment 9: One comment requested guidance on what might be required for showing disclosure of a previously secret process to produce an ''on sale'' product, e.g., through reverse engineering.

Response: Any rejection of a claim under AIA 35 U.S.C. 102 requires evidence of a prior disclosure of the claimed invention via a document or activity as defined in AIA 35 U.S.C. 102(a)(1), or evidence that the claimed invention was effectively filed prior to the effective filing date of the application under examination as defined in AIA 35 U.S.C. 102(a)(2). Thus, any rejection of a claim under AIA 35 U.S.C. 102(a)(1) on the basis of a prior disclosure of the claimed invention via a sale or an offer for sale of a product produced by a previously secret process (e.g., a situation in which the public could learn the claimed process by examining the product) would need to be supported by some amount of documentary evidence or an affidavit or declaration. However, once any potentially patent-defeating sale or use is shown, evidence as to whether that sale or use made the invention available to the public should be accessible to the applicant and it is thus appropriate to require the applicant to come forward with that evidence.[11]

Comment 10: Several comments suggested that a public use or sale need not be enabling to constitute prior art under AIA 35 U.S.C. 102(a)(1).

Response: The case law provides that the enablement inquiry is applicable to the question of whether a claimed invention is described in a patent, published patent application, or printed publication, but is not applicable to the question of whether a claimed invention is ''in public use'' or ''on sale.'' [12] The Office does not view the AIA as changing this principle of pre-AIA case law.

Comment 11: One comment sought clarification on whether a ''motion for sale'' was included with the prior art category of ''on sale.''

Response: Insofar as a ''motion for sale'' is equal to an ''offer for sale,'' the Office understands that the pre-AIA case law on ''offers for sale'' would equally apply under the AIA. The on sale provision of pre-AIA 35 U.S.C. 102(b) is triggered if the invention is both: (1) The subject of a commercial offer for sale; and (2) ready for patenting.[13] Traditional contract law principles are applied when determining whether a commercial offer for sale has occurred.[14]

Comment 12: One comment questioned whether the experimental use exception to public use would continue under the AIA first inventor to file provisions.

Response: Under pre-AIA case law, the experimental use exception negates a use that would otherwise defeat patentability. Neither the AIA nor its legislative history expressly addresses whether the experimental use exception applies to a public use under AIA 35 U.S.C. 102(a)(1), or to a use that makes the invention available to the public under the residual clause of AIA 35 U.S.C. 102(a)(1). Because this doctrine arises infrequently before the Office, and is case-specific when it does arise, the Office will approach this issue when it arises on the facts presented.

Comment 13: One comment sought elaboration on what constitutes ''publicly available'' within the context of 35 U.S.C. 102(a)(1). The comment sought input on the transitory nature of on-line materials, economic factors regarding accessibility to public materials, restrictions on access, and password or user agreement access to on-line materials.

Response: MPEP § 2128 discusses whether material that is posted on the Internet or that is challenging to access is sufficiently accessible to the public to be considered a ''printed publication'' under pre-AIA 35 U.S.C. 102. Since the ''otherwise available to the public'' clause of AIA 35 U.S.C. 102(a)(1) encompasses these materials, the case law on whether material is available and accessible as discussed in MPEP § 2128 will guide the Office and the public in making determinations as to whether any particular disclosure is sufficiently publicly available under the ''otherwise available to the public'' clause of AIA 35 U.S.C. 102(a)(1). The Federal Circuit recently reiterated that the ultimate question is whether the material was ''available to the extent that persons interested and ordinarily skilled in the subject matter or art[,] exercising reasonable diligence, can locate it.'' [15] The determination of whether material was publicly available does not turn on the logistical or economic issues a person would face in gaining access to the material. For example, material whose distribution was restricted to persons involved in a specific project was considered not publicly accessible,[16] but material housed in a library that provides access to the public was considered publicly accessible even though a person would need to engage in considerable travel to actually gain access to the material.[17]

Comment 14: One comment questioned whether, in order for a WIPO publication to be considered prior art under AIA 35 U.S.C. 102(a)(2), the PCT application must enter the national stage in the United States (analogous to the requirement for a WIPO publication to enter the national stage in Japan in order to be considered prior art as of its priority date in Japan). The comment also suggested that if a WIPO publication will be prior art as of its priority date under AIA 35 U.S.C. 102(a)(2) when published in any language, the Office should provide a translation to the applicant against whose claims the WIPO publication has been cited.

Response: Under AIA 35 U.S.C. 102(a)(2), a person shall be entitled to a patent unless the claimed invention was described in an application for patent that was published or ''deemed published'' pursuant to 35 U.S.C. 122(b). In accordance with 35 U.S.C. 374, the WIPO publication of a PCT international application designating the United States is deemed a publication under 35 U.S.C. 122(b). Thus, the Office cannot set forth an interpretation that a WIPO publication can be prior art under AIA 35 U.S.C. 102(a)(2) only if the PCT application enters the national stage in the United States because that interpretation would conflict with AIA 35 U.S.C. 102(a)(2) and 35 U.S.C. 374. Patent documents and non-patent-literature are prior art under pre-AIA 35 U.S.C. 102(a) and 102(b) regardless of the language of the publication. Although the Office does not currently provide translations as a matter of course for non-English-language patent documents and non-patent-literature, translation services are available to Office personnel for use on a case-by-case basis. *See* MPEP § 901.05(d). If an Office action relies upon a document in a language other than English, a translation (machine or human) will be made of record if necessary for the record to be clear as to the precise facts relied upon in support of the rejection. *See* MPEP § 706.02 (section II).

Comment 15: One comment suggested that the Office adopt a process to avoid granting a patent on a later-filed application claiming subject matter disclosed in an earlier-filed application by another.

Response: The Office is in the process of developing a Patents End-to-End (PE2E) patent application processing system that will permit Office personnel to text search pending applications that have not yet been published, which will help avoid granting a patent on a later-filed application claiming subject matter disclosed in an earlier-filed application by another. However, in the event that a patent is issued on a later-filed application claiming subject matter disclosed in an earlier-filed application, the applicant in the earlier-filed application may request early publication of the application under 37 CFR 1.219 and cite the resulting patent application publication in the file of the

later-filed application under 35 U.S.C. 301 and 37 CFR 1.501.

Comment 16: One comment requested clarification as to whether the Office will continue to apply the *Hilmer*[18] doctrine to pre-AIA applications.

Response: Under the ''*Hilmer* doctrine,'' the foreign priority date of a U.S. patent (or U.S. patent application publication) may not be relied upon in determining the date that the U.S. patent (or U.S. patent application publication) is effective as prior art under pre-AIA 35 U.S.C. 102(e). AIA 35 U.S.C. 102(d) eliminates the *Hilmer* doctrine. The ''*Hilmer* doctrine'' as discussed in MPEP § 2136.03 remains applicable to pre-AIA applications because AIA 35 U.S.C. 102(d) does not apply to pre-AIA applications.

Comment 17: One comment expressed concern that Office personnel would rely on a foreign priority date as the applicable prior art date for rejecting a claim in an application under examination solely because the prior art patent document reference was ''entitled to claim priority to, or benefit of'' a prior-filed application. The comment suggested use of machine translations to ensure proper reliance on the earlier filing date.

Response: The issue is similar to the current situation in which a U.S. patent or U.S. patent application publication claims the benefit under 35 U.S.C. 119(e) of a provisional application, except that foreign priority applications are originally filed in a foreign patent office and may be in a language other than English. The Office is revising 37 CFR 1.55 in a separate action (RIN 0651–AC77) to ensure that a copy of a foreign priority application (a certified copy from the foreign patent office, an interim copy from the applicant, or a copy via a priority document exchange program) is available for situations in which a U.S. patent or U.S. patent application publication has a prior art effect as of the filing date of a foreign priority application. As discussed previously, if an Office action relies upon a document in a language other than English, a translation (machine or human) will be made of record if necessary for the record to be clear as to the precise facts relied upon in support of the rejection. *See* MPEP § 706.02 (section II).

Comment 18: One comment suggested that when applying prior art as of its earliest effective filing date to a claim in an application under 35 U.S.C. 102(a)(2), the applicant should be able to rebut the rejection by establishing that the subject matter relied upon for the rejection is not supported in the earlier filed application from which a benefit or priority is sought and hence may not be prior art under AIA 35 U.S.C. 102(a)(1) or 102(a)(2).

Response: AIA 35 U.S.C. 102(d) provides that for purposes of determining whether a patent or application for patent is prior art to a claimed invention under AIA 35 U.S.C. 102(a)(2), the patent or application shall be considered to have been effectively filed, with respect to any subject matter described in the patent or application, as of the earlier of the actual filing date of the patent or the application for patent, or the filing date of the earliest application that describes the subject matter and for which the patent or application for patent is entitled to claim a benefit or right of priority under 35 U.S.C. 119, 120, 121, or 365. Thus, if an applicant believes the subject matter relied on in a rejection under AIA 35 U.S.C. 102(a)(2) is not supported by a prior application for which benefit or priority is claimed under 35 U.S.C. 119, 120, 121, or 365, it is appropriate for the applicant to argue that the application does not contain support for the subject matter and that the patent or application is available as prior art under AIA 35 U.S.C. 102(a)(2) only as of the benefit or priority date of the earliest application that does describe the subject matter. This is similar to current practice under pre-AIA 35 U.S.C. 102(e).[19]

Comment 19: One comment suggested that the level of enablement for a prior art reference to be applicable to the claims of an application as described by the Office in accordance with *Donohue*[20] fails to consider a line of cases that *Donohue* recognizes.

Response: The Office cited to *Donohue* simply to indicate the level of enablement required for a prior art reference to anticipate a claim in an application. The Office does not view the AIA as changing the pre-AIA enablement requirement for prior art references.

Comment 20: One comment indicated that the examination guidelines were overly broad with respect to admissions as prior art. Another comment urged that the treatment of admissions, especially to transition applications (applications filed on or after March 16, 2013, that claim priority to or the benefit of the filing date of an earlier application that was filed prior to March 16, 2013), be treated on a case-by-case basis.

Response: The Office included a discussion of admissions as prior art in the examination guidelines simply to indicate that the Office does not view the AIA as changing the status quo with respect to the use of admissions as prior art. The Office's position on the use of admissions as prior art is discussed at MPEP § 2129.

Comment 21: One comment questioned how the time of day of a sale in a foreign jurisdiction would be determined for purposes of prior art.

Response: As with current practice under pre-AIA 35 U.S.C. 102, the Office does not take time of day into consideration in making determinations of activities or documents that constitute prior art under AIA 35 U.S.C. 102(a)(1).

Comment 22: One comment supported the Office's interpretation of the evidence needed to establish reliance on the AIA 35 U.S.C. 102(b)(1)(A) and 102(b)(2)(A) provisions relating to showing that the subject matter of a disclosure was obtained directly or indirectly from an inventor or a joint inventor.

Response: The Office has adopted 37 CFR 1.130(a) as a mechanism for an applicant to submit information to establish the facts and evidence when necessary to rely upon the exception provisions in AIA 35 U.S.C. 102(b)(1)(A) or 102(b)(2)(A). The showing should provide facts, not conclusions, to show that the disclosure, although not made directly by the inventor or joint inventor, originated with the inventor or joint inventor.

Comment 23: One comment suggested that when there are any discrepancies in inventorship on an application as compared to authorship of a prior art publication that is potentially excepted as prior art under AIA 35 U.S.C. 102(b)(1)(A), an applicant should be required to present a showing that the publication is not available as prior art even when it is apparent that the prior art disclosure is a grace period disclosure from an inventor. Several comments indicated that a grace period publication should be treated under the exception in AIA 35 U.S.C. 102(b)(1)(A) when there is any overlap between authorship and inventorship.

Response: AIA 35 U.S.C. 102(b)(1)(A) provides that a grace period disclosure ''shall not be prior art'' to a claimed invention if ''the disclosure was made by the inventor or a joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.'' When the Office can readily ascertain by examination of inventorship and authorship that a certain disclosure falls under AIA 35 U.S.C. 102(b)(1)(A), the Office will not apply such a document in a prior art rejection. Alternatively, when there are additional named individuals on a prior art publication as compared to the inventors named on a

patent application, it is incumbent upon the applicant to provide a satisfactory showing that the additional named authors did not contribute to the claimed subject matter.[21]

Comment 24: One comment requested clarification on what constitutes an ''unequivocal'' statement from the inventor or a joint inventor that he/she invented the subject matter of a publication such that the publication is not prior art in accordance with AIA 35 U.S.C. 102(b)(1)(A), and requested clarification on what constitutes a ''reasonable explanation'' to explain the presence of additional authors on the publication. Another comment suggested that the examination guidelines should define as precisely as possible what is needed to establish that a disclosure originated with an inventor, and questioned the intent of the statement in the examination guidelines that an unequivocal assertion may be accepted in the absence of evidence to the contrary. The comment also suggested that the examination guidelines should make clear whether or not evidence that a disclosure originated from the inventor will be rejected if it is not initially presented. Several comments requested examples of acceptable affidavits or declarations under 37 CFR 1.130.

Response: The evidence required to show that a disclosure originated with the inventor or a joint inventor (e.g., whether an ''unequivocal'' statement from the inventor or a joint inventor is sufficient, or an explanation is a reasonable explanation of the presence of additional authors on the publication) is necessarily a case-by-case determination. Given the fact-specific nature of affidavits and declarations, the Office cannot provide a ''template'' of an acceptable affidavit or declaration under 37 CFR 1.130. However, the case law on pre-AIA 35 U.S.C. 102(a) and (e) contains examples of affidavits or declarations that were found acceptable to show that a disclosure originated with the inventor.[22] There is no requirement that such evidence be present on filing, although early presentation will streamline prosecution.

Comment 25: One comment stated that to address situations where there are overlapping inventors between an application under examination and a prior art reference under AIA 35 U.S.C. 102(a)(2), a declaration to attribute certain inventive activities from the prior art to the named inventors should be a viable mechanism to overcome a rejection on this basis.

Response: Under pre-AIA 35 U.S.C. 102, attribution of inventive activities to disqualify prior art references was permitted pursuant to 37 CFR 1.132, as discussed in MPEP §§ 716.10 and 2131.01. The Office is promulgating a new 37 CFR 1.130 to provide for the disqualification of a disclosure as prior art on the basis of attribution (37 CFR 1.130(a)) or a prior public disclosure of the inventor's or a joint inventor's own work (37 CFR 1.130(b)) under AIA 35 U.S.C. 102(b). An applicant may establish attribution of a cited prior art reference to the inventor or joint inventor via an affidavit or declaration under 37 CFR 1.130(a).

Comment 26: One comment questioned whether a publication of a foreign patent application during the year preceding the filing of a patent application could qualify as AIA 35 U.S.C. 102(a)(1) prior art that is potentially excepted under AIA 35 U.S.C. 102(b)(1)(A) if it is ''a disclosure [during the grace period] by another who obtained the subject matter directly or indirectly from the inventor or joint inventor.''

Response: An applicant may establish that the foreign patent application publication was by another who obtained subject matter disclosed in the foreign patent application publication directly or indirectly from the inventor or joint inventor via an affidavit or declaration under 37 CFR 1.130(a).

Comment 27: One comment questioned whether an assignee, to whom the inventors are obligated to assign their rights, who was selling a product within the scope of the inventor's claims during the grace period, would be able to rely on the AIA 35 U.S.C. 102(b)(1)(A) provisions that the ''disclosure was made by another who obtained the subject matter directly or indirectly from the inventor or joint inventor.''

Response: A sale by an assignee, to whom the inventors are obligated to assign their rights, may qualify as a sale ''by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor'' within the meaning of AIA 35 U.S.C. 102(b)(1)(A).

Comment 28: One comment indicated that the Office's guidelines regarding the reliance on the AIA 35 U.S.C. 102(b)(1)(A) or 102(b)(2)(A) exception appear to apply to any inventor or inventor-originated disclosure which is prior art under AIA 35 U.S.C. 102(a)(1) or 102(a)(2) regardless of the relationship of the disclosed subject matter and the claimed invention.

Response: Strictly speaking, neither AIA 35 U.S.C. 102(b)(1)(A) nor 102(b)(2)(A) requires a relationship between ''the subject matter disclosed'' and the claimed invention. As a practical matter, however, if the subject matter disclosed (e.g., contained in a publication that would qualify as prior art under 35 U.S.C. 102(a)) is not relevant to the claimed invention, there will be no occasion to inquire into whether the disclosure could be disqualified as prior art under 35 U.S.C. 102(b)(1)(A) or 102(b)(2)(A).

Comment 29: One comment interpreted the provisions of AIA 35 U.S.C. 102(b)(2)(A) as requiring not only that the subject matter disclosed be ''obtained directly or indirectly from the inventor or a joint inventor,'' but also that the disclosure upon which the rejection is based in the application under examination be owned by the same entity.

Response: This interpretation appears to combine the provision of AIA 35 U.S.C. 102(b)(2)(A) with the common ownership disqualification provision of AIA 35 U.S.C. 102(b)(2)(C). Each of subparagraph (A) and subparagraph (C) of AIA 35 U.S.C. 102(b)(2) stands alone and forms an independent basis for disqualifying references that otherwise qualify as prior art under 35 U.S.C. 102(a)(2).

Comment 30: A number of comments, including comments from a number of universities and university groups, opposed the Office's interpretation of the subparagraph (B) provision of AIA 35 U.S.C. 102(b)(1) or 102(b)(2) (the subparagraph (B) provision), requiring that the subject matter previously publicly disclosed by the inventor be identical to the subject matter of the disclosure to be disqualified under the subparagraph (B) provision (identical subject matter approach). The comments opposing the Office's interpretation of the subparagraph (B) provision stated that: (1) The Office's identical subject matter approach is not supported by a reasonable reading of the statute and is contrary to the intent of the AIA; (2) the Office's identical subject matter approach violates the superfluity canon of statutory construction as it would render the provision worthless; (3) the Office's identical subject matter approach is disadvantageous to inventors who must seek venture capital, and to academics who must publish their results; (4) the Office's identical subject matter approach is unworkable due to the ease with which the Internet can be fraudulently used to publish trivial variations of an inventor's disclosed work, thereby depriving him or her of patent protection; and (5) the Office's identical subject matter approach is unworkable because even those acting in good faith, such as by publishing an editorial

commenting on a disclosed invention, may create prior art which would deprive an inventor of a patent on his or her invention. Several comments suggested that the Office's interpretation of the subparagraph (B) provision is an unwarranted extrapolation of the statute that constitutes substantive rulemaking, fails to maintain the bedrock of separation of powers, is contrary to the intent and function of the grace period, and exceeds the intended scope for interpretive rules.

The Office of Advocacy of the Small Business Administration (SBA-Advocacy) also indicated that it has heard from many patent stakeholders (within the university-based and non-profit research community, as well as the startup inventor community) that they have concerns with the Office's interpretation of the subparagraph (B) provision (discussed previously) and suggested there are alternative legal interpretations of the subparagraph (B) provision that would address these concerns. SBA-Advocacy encouraged the Office to examine the merits of alternative interpretations of the subparagraph (B) provision.

Several comments, by contrast, suggested that the proposal to require identity of disclosure in order for an inventor to invoke the subparagraph (B) provision is appropriate and entirely consistent with the intent of the AIA. According to these comments, the intent of the AIA was to provide a grace period with regard to inventor-originated disclosures, but not with regard to independently created third-party disclosures (except in the unlikely event of identity of disclosure). The comments stated that to provide a grace period for non-identical subject matter would thwart the intent to create a first inventor to file system, as well as the intent to provide a system that moves toward harmonizing U.S. patent law with the laws of other countries. Several comments suggested that the simplicity of the Office's interpretation of the subparagraph (B) provision, i.e., not permitting variations between the shielding disclosure and the cited prior art disclosure in order for the exception to apply, was appropriate and would reduce litigation costs.

Response: As discussed previously, the starting point for construction of a statute is the language of the statute itself.[23] Subparagraph (B) of each of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) provides that certain disclosures shall not be prior art if ''the subject matter disclosed had, before such disclosure [or before such subject matter was effectively filed under 102(a)(2)], been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.'' Subparagraph (B) of each of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) uses a single instance of the phrase ''the subject matter'' to describe both the content of the prior art disclosure and the content of the inventor's previous public disclosure. If ''the subject matter'' disclosed in the prior art varies from ''the subject matter'' that had been previously publicly disclosed by the inventor or a joint inventor (or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor), there are two discrete subject matters. The single instance of the phrase ''the subject matter'' in subparagraph (B) of each of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) cannot reasonably be read as concurrently describing two discrete subject matters. Therefore, the single instance of the phrase ''the subject matter'' in subparagraph (B) of each of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) cannot reasonably be interpreted as including variations within its ambit.

Next, other provisions in title 35 (pre-AIA and as amended by the AIA), help to inform the meaning of the phrase ''the subject matter'' in subparagraph (B) as like words in the same statute are presumed to carry the same meaning.[24] AIA 35 U.S.C. 100 defines inventor and joint inventor or coinventor with respect to the individual or individuals ''who invented or discovered the subject matter of the invention,'' and defines ''claimed invention'' as ''the subject matter defined by a claim in a patent or an application for a patent.'' [25] 35 U.S.C. 112(b) provides that ''[t]he specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.'' [26] The phrase ''the subject matter'' has never been read to permit the inclusion of variations within its ambit in these provisions, or in any other provision in title 35. In addition, pre-AIA title 35 and the AIA contain a modifier such as ''substantially'' where variation between subject matter is contemplated (e.g., pre-AIA 35 U.S.C. 135(b)(1),[27] AIA 35 U.S.C. 135(a),[28] 35 U.S.C. 154(d)(2),[29] and 35 U.S.C. 252[30]). The absence of the ''substantially'' modifier or similar terminology in subparagraph (B) of each of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) further supports the conclusion that this provision does not contemplate variation in subject matter.

Additionally, the Office's interpretation of this provision is consistent with the canon of statutory construction requiring effect to be given to every clause and every word of a statute where possible.[31] The Office's interpretation of the subparagraph provision (B) gives effect to each clause and each word in the subparagraph (B) provision. To reach the alternative interpretations proffered by the comments, the Office would need to ignore or re-write the words of the subparagraph (B) provision. Specifically, the Office would be required to re-draft the subparagraph (B) provision to provide that a disclosure shall not be prior art if ''substantially the same subject matter disclosed had, before such disclosure, or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor'' to embrace variations of the subject matter, and would be required to re-draft the subparagraph (B) provision to provide that a disclosure shall not be prior art if, ''the claimed invention had, before such disclosure, or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor,'' to embrace ''any disclosure'' or any subject matter disclosed after a disclosure of the claimed invention. The Office, however, has no authority to enforce concepts that simply do not square with the express language of subparagraph (B) of each of 35 U.S.C. 102(b)(1) and 102(b)(2).[32]

Further, the legislative history of subparagraph (B) of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) is inconclusive with respect to what is embraced by the phrase ''the subject matter.'' Committee Report 112–98 indicates that 35 U.S.C. 102(b) ''preserves the grace period, ensuring that during the year prior to filing, an invention will not be rendered unpatentable based on any of the inventor's own disclosures, or any disclosure made by any party after the inventor has disclosed his invention to the public.'' [33] The legislative history of subparagraph (B) of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) does not definitively specify whether ''any disclosure'' means ''any disclosure'' of the same subject matter, ''any disclosure'' of the same or substantially the same subject matter, ''any disclosure'' of the subject matter of the claimed invention, or ''any disclosure'' of any subject matter.[34]

The Office has considered the alternative interpretations of the subparagraph (B) provision submitted in the public comment. The Office has

clarified, in response to the public and SBA-Advocacy comment, that: (1) There is no requirement that the mode of disclosure by an inventor or joint inventor be the same as the mode of disclosure of an intervening disclosure (e.g., inventor discloses his invention at a trade show and the intervening disclosure is in a peer-reviewed journal); (2) there is no requirement that the disclosure by the inventor or a joint inventor be a verbatim or *ipsissimis verbis* disclosure of an intervening disclosure in order for the exception based on a previous public disclosure of subject matter by the inventor or a joint inventor to apply; and (3) the exception applies to subject matter of the intervening disclosure that is simply a more general description of the subject matter previously publicly disclosed by the inventor or a joint inventor. The more expansive alternative interpretations of the subparagraph (B) provision, however, are not supported by the language of the subparagraph (B) provision for the reasons stated in the responses to this comment and the comments that follow.

Comment 31: One comment indicated a need for clarification on what constitutes an insubstantial or trivial difference (and what constitutes ''same subject matter'') and suggested that mere wording changes should not be interpreted too strictly. Several comments suggested that slight variations or differences in wording should be permitted when relying on the subparagraph (B) provision of AIA 35 U.S.C. 102(b)(1) and 102(b)(2). Another comment similarly suggested that the subparagraph (B) provision should, to the extent the subject matter in the reference is within the scope of the inventor's public disclosure, shield the inventor from citation of the intervening prior art.

Response: The Office understands that not all inventors refer to the same inventive concepts using the exact same language. The Office is clarifying in these examination guidelines that the subparagraph (B) provisions of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) do not require that the mode of disclosure by an inventor or joint inventor (e.g., publication, public use, sale activity) be the same as the mode of disclosure of the intervening disclosure, and also does not require that the disclosure by the inventor or a joint inventor be a verbatim or *ipsissimis verbis* disclosure of the intervening disclosure. In addition, the Office is also clarifying that if subject matter of the intervening disclosure is simply a more general description of the subject matter previously publicly disclosed by the inventor or a joint inventor, the exception in AIA 35 U.S.C. 102(b)(1)(B) applies to such subject matter of the intervening disclosure.

Comment 32: Several comments suggested using approaches to the subparagraph (B) provisions of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) akin to that of 37 CFR 1.131, in that an intervening disclosure would be disqualified as prior art if the inventor's prior disclosure disclosed either the entire invention as claimed, or as much of the invention as was disclosed in the intervening disclosure. Several comments suggested that the subparagraph (B) provisions should apply if the inventor's disclosure discloses at least as much of the claimed invention as is disclosed in the intervening disclosure. Another comment suggested that an acceptable standard for determining whether claimed subject matter was described for the purpose of the subparagraph (B) provisions is whether one of ordinary skill in the art would have considered the claimed subject matter to have been described in the disclosure.

Response: Pre-AIA 35 U.S.C. 102(a) provided that a person was not entitled to a patent if ''the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, *before the invention thereof by the applicant for patent''* (emphasis added). Thus, under pre-AIA 35 U.S.C. 102(a), an applicant could disqualify (or antedate) a grace period disclosure by showing that the disclosure was the inventor's own work or that the disclosure was after the applicant's date of invention. AIA 35 U.S.C. 102(b) retains the pre-AIA principle that an applicant may disqualify a grace period disclosure by showing that the disclosure was the inventor's or a joint inventor's own work (AIA 35 U.S.C. 102(b)(1)(A)), but does not retain the principle that an inventor may antedate a grace period disclosure by showing that the disclosure was after the applicant's date of invention. Since the AIA does not retain the principle of pre-AIA 35 U.S.C. 102(a) that a grace period disclosure that does not represent the inventor's own work may be antedated by showing prior invention by the inventor, the pre-AIA 35 U.S.C. 102(a) case law and concepts pertaining to the antedating of a grace period disclosure that does not represent the inventor's own work by showing prior invention by the inventor is not instructive with respect to the applicability of the subparagraph (B) provisions of AIA 35 U.S.C. 102(b)(1) and 102(b)(2). Instead, under the subparagraph (B) provisions of AIA 35 U.S.C. 102(b)(1) and 102(b)(2), the question is whether the subject matter disclosed had, before such disclosure was made or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.[35]

The subparagraph (B) provisions do not provide for an analysis of what subject matter is claimed in order to determine when the subparagraph (B) provisions apply. An intervening grace period disclosure would be disqualified under the subparagraph (B) provisions if the inventor's prior public disclosure disclosed as much of the subject matter of the invention as was disclosed in the intervening disclosure. This, however, is a comparison of the subject matter of the inventor's prior public disclosure and the subject matter of the intervening disclosure as provided for in the subparagraph (B) provisions, and is not a comparison of the subject matter of inventor's prior public disclosure with the claimed invention. Additionally, any subject matter disclosed by the intervening disclosure not also disclosed in the inventor's prior public disclosure would not be disqualified under the subparagraph (B) provisions.

Comment 33: One comment stated that the identical disclosure approach to the subparagraph (B) provisions of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) is not consistent with treating the inventor's disclosure as if it were a patent application. The comment stated that a broad disclosure can support broad claims, and that later disclosure of a species within the claimed genus does not defeat patentability of the genus. Another comment suggested that the Office treat inventor disclosures like provisional applications under the subparagraph (B) provisions, such that any claimed feature that had been disclosed by the inventor is insulated from attack by an intervening disclosure.

Response: The subparagraph (B) provisions of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) do not provide for an inventor's public disclosure prior to filing a patent application to be treated as if it were the filing of a patent application.

Comment 34: One comment suggested that there is ''asymmetry'' between patent-defeating derivation proceedings under AIA 35 U.S.C. 135 and the subparagraph (B) provisions of AIA 35 U.S.C. 102(b)(1) and 102(b)(2), and indicated that the Federal courts have set forth rules to achieve symmetry in cases addressing pre-AIA 35 U.S.C.

102(g) and 37 CFR 1.131 practice. One comment suggested that the term ''subject matter'' in the subparagraph (B) provisions should be interpreted as it is when deciding to institute an interference proceeding, and that the phrase need not require identical disclosures in order for the exception to apply.

Response: There is ''asymmetry'' between patent defeating derivation proceedings under AIA 35 U.S.C. 135 and the subparagraph (B) provisions of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) due to the express statutory language differences between these provisions. AIA 35 U.S.C. 135 applies to a claim to an invention that is the ''same or substantially the same'' as a claim of an earlier application. As discussed previously, the subparagraph (B) provisions do not modify ''the subject matter'' with the phrase ''substantially the same.'' Given this statutory language difference, it would not be appropriate to interpret subparagraph (B) of AIA 35 U.S.C. 102(b)(1) and 102(b)(2) to provide symmetry with AIA 35 U.S.C. 135.

Comment 35: One comment requested clarification regarding what constitutes a public disclosure as compared to a disclosure within the meaning of the description of the prior art exception under AIA 35 U.S.C. 102(b)(1)(B). Another comment indicated that it is unclear what would constitute an earlier ''public disclosure'' by the inventor in order to rely on the AIA 35 U.S.C. 102(b)(1)(B) exception to shield the applicant from prior art that is available before the effective filing date but after the inventor's own public disclosure. The comment specifically questioned if a public oral disclosure would be such a public disclosure.

Response: In order for an inventor to be able to rely on an earlier disclosure under AIA 35 U.S.C. 102(b)(1)(B) (including an earlier oral disclosure), some evidence is necessary to show that the subject matter relied upon for the rejection had been previously publicly disclosed by the inventor. Whether a ''disclosure'' is a ''public disclosure'' such that it constitutes prior art under AIA 35 U.S.C. 102(a)(1) is a case-by-case analysis which is governed by the case law discussed in MPEP §§ 2126 through 2128.

Comment 36: One comment suggested that there is no justification for requiring that an inventor's prior public disclosure to another be enabling of anything.

Response: An affidavit or declaration under 37 CFR 1.130(a) or (b) need not demonstrate that the disclosure by the inventor, a joint inventor, or another who obtained the subject matter disclosed directly or indirectly from an inventor or a joint inventor was an ''enabling'' disclosure of the subject matter within the meaning of 35 U.S.C. 112(a). The question under AIA 35 U.S.C. 102(b) is whether: (1) The disclosure in question was made by the inventor or a joint inventor, or the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor (37 CFR 1.130(a)); [36] or (2) the subject matter disclosed had, before such disclosure was made or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor (37 CFR 1.130(b)).[37]

Comment 37: One comment requested clarification on how to show communication so as to enable one of ordinary skill in the art to make and use the invention when relying on the grace period inventor-originated disclosure exception (AIA 35 U.S.C. 102(b)(1)(A)) to disqualify prior art.

Response: The Office has revised the guidance on the grace period inventor-originated disclosure exception to indicate that what is required, within one year prior to the effective filing date, is communication of the subject matter by the inventor or a joint inventor prior to its disclosure by a non-inventor. The level of communication in the inventor's or joint inventor's disclosure need not be sufficient to teach one of ordinary skill how to make and use so as to comply with 35 U.S.C. 112(a).

Comment 38: One comment questioned what action an applicant could take when the applicant suspects that the prior art is derived from the applicant's own work, but the deriver has not submitted an application. The comment stated that the information necessary to show derivation is the state of mind of the deriver, and that the applicant does not always have access to the information to support a showing of derivation.

Response: Unless the other party (the suspected deriver) has submitted his or her own application, the issue for the applicant is disqualifying the prior art under AIA 35 U.S.C. 102(b) rather than showing derivation under AIA 35 U.S.C. 135. If the prior art disclosure was made one year or less before the effective filing date of the claimed invention, the applicant may submit an affidavit or declaration under 37 CFR 1.130 to show that the disclosure was by a party who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor and thus disqualify the prior art under 35 U.S.C. 102(b)(1)(A). As discussed in these examination guidelines, this does not require a showing of derivation under AIA 35 U.S.C. 135.

Comment 39: One comment suggested that prior art that is disqualified under AIA 35 U.S.C. 102(b)(2)(C) cannot be properly used to show the state of the art for purposes of, e.g., a lack of enablement rejection. The comment stated that the Office's position is in conflict with the MPEP.

Response: MPEP § 2124 indicates that documents published after the effective filing date may be used to show factual evidence regarding the factors needed to establish that undue experimentation would have been needed to make and use the invention. A document under AIA 35 U.S.C. 102(a)(2) by its very nature meets this criteria, i.e., it is a publication after the critical date which can be used as evidence to support a lack of enablement rejection by providing facts relevant to the weighing of the *Wands* factors [38] to support a 35 U.S.C. 112(a) lack of enablement rejection.

Comment 40: One comment suggested that the AIA 35 U.S.C. 102(b)(2)(C) provisions apply to prior art that qualifies under both AIA 35 U.S.C. 102(a)(1) and 102(a)(2) because there is no language in the statute which says that the AIA 35 U.S.C. 102(b)(2)(C) provision ''only'' applies to prior art under AIA 35 U.S.C. 102(a)(2) art.

Response: The introductory language of AIA 35 U.S.C. 102(b)(2) provides that: ''[a] disclosure shall not be prior art to a claimed invention under [AIA 35 U.S.C. 102(a)(2)] if * * * .'' Thus, by the terms of AIA 35 U.S.C. 102(b)(2), the provisions of subparagraphs (A), (B), and (C) of 35 U.S.C. 102(b)(2) apply only to disclosures under AIA 35 U.S.C. 102(a)(2). If a patent or published application qualifies as prior art under both AIA 35 U.S.C. 102(a)(1) and AIA 35 U.S.C. 102(a)(2), the disqualification under AIA 35 U.S.C. 102(b)(2)(C) would remove the patent or published application with respect to the patent or published application qualifying under AIA 35 U.S.C. 102(a)(2). Such a patent or published application would still qualify as prior art under AIA 35 U.S.C. 102(a)(1). The proposed examination guidelines indicated that AIA 35 U.S.C. 102(b)(2) provides an exception only for prior art under AIA 35 U.S.C. 102(a)(2). The proposed examination guidelines did not state that a disclosure must qualify as prior art only under AIA 35 U.S.C. 102(a)(2) in order for the AIA 35 U.S.C. 102(b)(2) exception to apply.

Comment 41: One comment indicated that the description of *Hazeltine* [39]

regarding interpretation of the AIA 35 U.S.C. 103 provisions is in conflict with the statutory language, in that the AIA shifted the temporal focus from the invention date to effective filing date.

Response: In *Hazeltine,* the U.S. Supreme Court held that a U.S. patent that qualified as prior art only under pre-AIA 35 U.S.C. 102(e) may be used in combination with other prior art to show that a claimed invention was obvious under pre-AIA 35 U.S.C. 103, notwithstanding that the disclosure of such U.S. patent may not have been known or available to the public on the date of invention or the effective filing date of the claimed invention.[40] The Office agrees that the temporal focus has shifted from the invention date to effective filing date. However, the principle in *Hazeltine* that certain prior art under 35 U.S.C. 102 that may not be publicly available on the critical date (i.e., prior art under pre-AIA 35 U.S.C. 102(e) or prior art under AIA 35 U.S.C. 102(a)(2)) is also applicable under AIA 35 U.S.C. 103.

Comment 42: A comment stated that 35 U.S.C. 115, which requires an oath or declaration by the inventor, is a more appropriate section than 35 U.S.C. 101 on which to base a rejection for failure to name the appropriate inventor. Another comment indicated that the case law on 35 U.S.C. 101 is not straightforward and hence might not be the appropriate avenue to resolve disputes regarding the proper naming of inventors.

Response: In addition to requiring an inventor's oath or declaration from each inventor, AIA 35 U.S.C. 115(a) provides that: ''[a]n application for patent that is filed under section 111(a) or commences the national stage under section 371 shall include, or be amended to include, the name of the inventor for any invention claimed in the application.'' While pre-AIA 35 U.S.C. 115 has not previously served as a statutory basis for rejecting a claim for failure to name the proper inventorship, pre-AIA 35 U.S.C. 115 did not require that an application include, or be amended to include, the name of the inventor for any invention claimed in the application. Therefore, until the courts clarify which, if any, statute forms the basis for rejecting a claim where the application fails to include, or has not been amended to include, the name of the inventor(s), the Office considers a rejection under both 35 U.S.C. 101[41] and 115 the best course of action. To the extent that there is a concern that the recent case law surrounding 35 U.S.C. 101 is unclear, the Office notes that this recent case law pertains only to subject matter eligibility, not to the application of 35 U.S.C. 101 to the inventorship question, and thus this case law would not aggravate the complexity of inventorship disputes.

Comment 43: One comment requested clarification from the Office regarding the use of a derivation proceeding where improper inventors are named in a patent.

Response: If a patent is issued to someone other than the inventor, a patent applicant can file a petition for derivation with respect to the issued patent pursuant to 35 U.S.C. 135. The Office has implemented the patent derivation proceedings provided for in the AIA in a separate rulemaking. *See Changes To Implement Derivation Proceedings,* 77 FR 56068 (Sept. 11, 2012). Additional information concerning patent derivation proceedings is available on the AIA micro site (under Inter Partes Disputes) on Office's Internet Web site at *http://www.uspto.gov/aia_implementation/bpai.jsp#heading-4.*

Comment 44: One comment requested clarification on how a defense of derivation could be used to invalidate a patent. The comment requested clarification on how a minor variation derived from one inventor and claimed by another could be invalidated under 35 U.S.C. 101.

Response: A patent applicant can use the provisions of 35 U.S.C. 135 to resolve derivation issues with a patent owner. Similarly, a patent owner can use the provisions of 35 U.S.C. 291 to resolve derivation issues with another patent owner. If the issue is one of inventorship in a granted patent, a party may raise the issue of compliance with 35 U.S.C. 101 before the Patent Trial and Appeal Board in a post-grant proceeding or before a Federal court involving patent infringement as a defense under 35 U.S.C. 282.

Comment 45: One comment took issue with the Office's interpretation of the effective date provisions indicating application of pre-AIA 35 U.S.C. 102(g) provisions to applications examined under AIA 35 U.S.C. 102 and 103 where the application contains claims supported by a pre-AIA application.

Response: Section 3(n)(1) of the AIA provides that amendments made by section 3 of the AIA ''shall apply to any application for patent, and to any patent issuing thereon'' that contains or contained at any time: (1) A claim to a claimed invention that has an effective filing date that is on or after March 16, 2013; or (2) a specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains or contained at any time such a claim. Section 3(n)(2) of the AIA provides that the provisions of 35 U.S.C. 102(g), 135, and 291 as in effect on March 15, 2013, ''shall apply to each claim of an application for patent, and any patent issued thereon,'' for which the amendments made by section 3 of the AIA also apply, if such application or patent contains or contained at any time: (1) A claim to an invention having an effective filing date that occurs before March 16, 2013; or (2) a specific reference under 35 U.S.C. 120, 121, or 365(c) to any patent or application that contains or contained at any time such a claim. While the ''shall apply to'' language of sections 3(n)(1) and 3(n)(2) is not parallel, section 3(n)(2) does indicate that the provisions of 35 U.S.C. 102(g), 135, and 291 as in effect on March 15, 2013, shall apply to ''each claim'' of an application for patent, and not simply the claim or claims having an effective filing date that occurs before March 16, 2013, if the condition specified in section 3(n)(2) occurs. Therefore, ''each claim'' of an application presenting a claim to a claimed invention that has an effective filing date before March 16, 2013, but also presenting claims to a claimed invention that has an effective filing date on or after March 16, 2013, is subject to AIA 35 U.S.C. 102 and 103 and is also subject to the provisions of 35 U.S.C. 102(g), 135, and 291 as in effect on March 15, 2013.

Comment 46: Several comments opposed changing from a ''first to invent'' system to a ''first inventor to file'' system, arguing that a ''first inventor to file'' system favors large corporations and negatively impacts independent inventors, small businesses, entrepreneurs, and technical professionals, and will have a significant economic impact on a substantial number of small entities. Several comments suggested that the examination guidelines are an economically significant guidance document and must comply with the requirements of the *Good Guidance Bulletin*[42] of the Office of Management and Budget (OMB) for economically significant guidance documents. One comment suggested that the examination guidelines are an economically significant guidance document because the conversion of the U.S. patent system from a ''first to invent'' to a ''first inventor to file'' system is arguably one of the most comprehensive overhauls of the U.S. patent system since its inception. Another comment cited statements by the AIA's legislative sponsors and Administration officials and several articles concerning the first inventor to

file system, and argued that the Office, in its implementation of the first inventor to file system, has ignored a number of economic effects, such as: (1) Loss of access to investment capital; (2) diversion of inventor time into patent applications; (3) weaker patent protection due to hasty filing; (4) higher patent prosecution costs due to a hastily prepared initial application; (5) higher abandonment rates; and (6) changes in ways of doing business. Several comments suggested that the Office's interpretation of certain provisions of the AIA is an unwarranted extrapolation of the statute that constitutes substantive rulemaking.

Response: The U.S. patent system is converted from a ''first to invent'' to a ''first inventor to file'' system by operation of section 3 of the AIA regardless of whether the Office issues or publishes examination guidelines. The Office must revise its practices to be consistent with the changes in ''first inventor to file'' provisions of section 3 of the AIA to conform to the new patent laws. In doing so, these examination guidelines do not modify the conditions of patentability specified in AIA 35 U.S.C. 102 and 103 and do not change the rights and obligations specified in AIA 35 U.S.C. 102 and 103 based upon the Office's view of what would be a better policy choice. Rather, these examination guidelines simply set out examination guidelines for Office personnel in order to explain AIA 35 U.S.C. 102 and 103 based upon the Office's understanding of the provisions of AIA 35 U.S.C. 102 and 103 as written by Congress, and place the public on notice of those examination guidelines. Therefore, these examination guidelines do not amount to substantive rulemaking.[43]

The discussion of the significance or impacts of section 3 of the AIA by the AIA's legislative sponsors and Administration officials, in articles concerning the first inventor to file system, and in the discussions in the comments relating to the impacts of the adoption of a first inventor to file system, pertains to the changes in section 3 of the AIA per se and not to these examination guidelines. The examination guidelines have been reviewed by OMB as a significant guidance document, but the examination guidelines are not considered to be economically significant as that term is defined in the *Good Guidance Bulletin.*

Comment 47: One comment suggested that the examination guidelines should state their precise legal effect. The comment suggested that the Office lacks the statutory authority to issue an interpretation of this statute, and as such the examination guidelines should make clear that they are only examination guidelines, not an interpretation. The comment further suggested that the examination guidelines should indicate that they have no binding effect on the public or on the courts and are not entitled to *Chevron*[44] deference, but that under 35 U.S.C. 3(a) and the *Good Guidance Bulletin* the examination guidelines are binding on Office employees and should be reviewable by petition under 37 CFR 1.181.

Response: As discussed previously, these examination guidelines do not constitute substantive rulemaking and do not have the force and effect of law. However, the Office has the authority to publish a notice setting out its interpretation of substantive patent law under 35 U.S.C. 101, 102, 103, 112, or other section of title 35, regardless of whether such interpretation has the force and effect of law.[45] These examination guidelines have been developed as a matter of internal Office management and (like the discussion of patentability in general in MPEP chapter 2100 and the *Good Guidance Bulletin*[46]) do not create any right or benefit, substantive or procedural, enforceable by any party against the Office. These examination guidelines are not ''binding'' on the public or Office personnel in that rejections will continue to be based upon the substantive law, and it is these rejections that are appealable. Failure of Office personnel to follow the guidelines is not, in itself, a proper basis for either an appeal or a petition. The question of the level of deference to which the examination guidelines are entitled is not a patent examination issue.

Comment 48: One comment questioned whether the amendments to 35 U.S.C. 102 and 103 in the AIA applied to plant applications and patents. The comment suggested that the Office make an exception for plant applications and patents and also continue to apply the one year grace period to plant applications and patents.

Response: 35 U.S.C. 161 provides that the provisions of 35 U.S.C. relating to patents for inventions shall apply to patents for plants, except as otherwise provided. There is nothing in section 3 of the AIA that provides for an exception for plant applications and patents with respect to any of the provisions of AIA 35 U.S.C. 102 and 103. Thus, the provisions of AIA 35 U.S.C. 102 and 103 (including the one-year grace period in AIA 35 U.S.C. 102(b)(1)(A) for inventor disclosures) are applicable to plant applications and patents.

Comment 49: Several comments requested that the Office provide examples, or suggested hypothetical situations for the Office to use as examples.

Response: The Office will post examples on the AIA micro site on Office's Internet Web site.

Comment 50: One comment requested clarification regarding the meaning of ''first inventor to file,'' specifically the terms ''first,'' ''inventor,'' and ''to file.''

Response: The phrase ''First Inventor to File'' is simply the title of section 3 of the AIA. The conditions for patentability based upon novelty and nonobviousness are set forth in AIA 35 U.S.C. 102 and 103, which do not always result in the first inventor to file an application being entitled to a patent (e.g., AIA 35 U.S.C. 102(a)(1) precludes an inventor who is the first person to file an application for patent, but who published an article describing the claimed invention more than one year before the application was filed, from being entitled to a patent). Thus, it is appropriate for these examination guidelines to place the focus on the provisions of AIA 35 U.S.C. 102 and 103, rather than on the meaning of the terms ''first,'' ''inventor,'' and ''to file.''

Examination Guidelines for 35 U.S.C. 102 and 103 as Amended by the First Inventor To File Provisions of the Leahy-Smith America Invents Act

I. Overview of the Changes to 35 U.S.C. 102 and 103 in the AIA

The AIA continues to employ 35 U.S.C. 102 to set forth the scope of prior art that will preclude the grant of a patent on a claimed invention, but adjusts what qualifies as such prior art. Specifically, the AIA sets forth what qualifies as prior art in two paragraphs of 35 U.S.C. 102(a). AIA 35 U.S.C. 102(a)(1) provides that a person is not entitled to a patent if the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention. AIA 35 U.S.C. 102(a)(2) provides that a person is not entitled to a patent if the claimed invention was described in a patent issued under 35 U.S.C. 151, or in an application for patent published or deemed published under 35 U.S.C. 122(b), in which the patent or application, as the case may be, names another inventor, and was effectively filed before the effective filing date of the claimed invention. AIA 35 U.S.C. 102(b) sets forth exceptions to prior art

established in AIA 35 U.S.C. 102(a). Specifically, AIA 35 U.S.C. 102(b)(1) sets forth exceptions to prior art established in AIA 35 U.S.C. 102(a)(1), and AIA 35 U.S.C. 102(b)(2) sets forth exceptions to prior art established in AIA 35 U.S.C. 102(a)(2).

The AIA also provides definitions in 35 U.S.C. 100 of the meaning of the terms ''claimed invention,'' ''effective filing date,'' ''the inventor,'' and ''joint inventor'' (or ''coinventor''). The AIA defines the term ''claimed invention'' in 35 U.S.C. 100(j) as the subject matter defined by a claim in a patent or an application for a patent. The AIA defines the term ''effective filing date'' for a claimed invention in a patent or application for patent (other than a reissue application or reissued patent) in 35 U.S.C. 100(i)(1) as meaning the earliest of: (1) The actual filing date of the patent or the application for the patent containing the claimed invention; or (2) the filing date of the earliest provisional, nonprovisional, international (PCT), or foreign patent application to which the patent or application is entitled to benefit or priority as to such claimed invention. The AIA defines the term ''the inventor'' as the individual or if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention in 35 U.S.C. 100(f), and defines the term ''joint inventor'' and ''co-inventor'' to mean any one of the individuals who invented or discovered the subject matter of a joint invention in 35 U.S.C. 100(g).

As discussed previously, AIA 35 U.S.C. 102(a)(1) provides that a person is not entitled to a patent if the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention. Under pre-AIA 35 U.S.C. 102(a) and (b), knowledge or use of the invention (pre-AIA 35 U.S.C. 102(a)), or public use or sale of the invention (pre-AIA 35 U.S.C. 102(b)), was required to be in the United States to qualify as a prior art activity. Under the AIA, a prior public use, sale activity, or other disclosure has no geographic requirement (i.e., need not be in the United States) to qualify as prior art.

AIA 35 U.S.C. 102(b)(1) provides that a disclosure made one year or less before the effective filing date of a claimed invention shall not be prior art under 35 U.S.C. 102(a)(1) with respect to the claimed invention if: (1) The disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or (2) the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. Thus, AIA 35 U.S.C. 102(b)(1) provides a one-year grace period (grace period) after a first disclosure of an invention within which the inventor, assignee, obligated assignee, or other party having sufficient interest may file a patent application. The one-year grace period in AIA 35 U.S.C. 102(b)(1) is measured from the filing date of the earliest U.S. or foreign patent application to which a proper benefit or priority claim as to such invention has been asserted in the patent or application. Notably, the one-year grace period in pre-AIA 35 U.S.C. 102(b) is measured from only the filing date of the earliest application filed in the United States (directly or through the PCT).

The date of invention is not relevant under AIA 35 U.S.C. 102. Thus, a prior art disclosure could not be disqualified or antedated by showing that the inventor invented the claimed invention prior to the effective date of the prior art disclosure of the subject matter (e.g., under the provisions of 37 CFR 1.131).

As discussed previously, AIA 35 U.S.C. 102(a)(2) provides that a person is not entitled to a patent if the claimed invention was described in a U.S. patent, a U.S. patent application publication, or an application for patent deemed published under 35 U.S.C. 122(b), that names another inventor and was effectively filed before the effective filing date of the claimed invention. Under 35 U.S.C. 374, a World Intellectual Property Organization (WIPO) publication of a Patent Cooperation Treaty (PCT) international application that designates the United States is an application for patent deemed published under 35 U.S.C. 122(b) for purposes of AIA 35 U.S.C. 102(a)(2). Thus, under the AIA, WIPO publications of PCT applications that designate the United States are treated as U.S. patent application publications for prior art purposes, regardless of the international filing date, whether they are published in English, or whether the PCT international application enters the national stage in the United States. Accordingly, a U.S. patent, a U.S. patent application publication, or a WIPO publication of a PCT application (WIPO published application) that designates the United States, that names another inventor and was effectively filed before the effective filing date of the claimed invention, is prior art under AIA 35 U.S.C. 102(a)(2). Under pre-AIA 35 U.S.C. 102(e), a WIPO published application designating the United States is treated as a U.S. patent application publication only if the PCT application was filed on or after November 29, 2000, and published under PCT Article 21(2) in the English language.[47]

AIA 35 U.S.C. 102(d) defines ''effectively filed'' for the purpose of determining whether a U.S. patent, U.S. patent application publication, or WIPO published application is prior art under AIA 35 U.S.C. 102(a)(2) to a claimed invention. A U.S. patent, U.S. patent application publication, or WIPO published application is considered to have been effectively filed for purposes of its prior art effect under 35 U.S.C. 102(a)(2) with respect to any subject matter it describes on the earliest of: (1) The actual filing date of the patent or the application for patent; or (2) if the patent or application for patent is entitled to claim the benefit of, or priority to, the filing date of an earlier U.S. provisional, U.S. nonprovisional, international (PCT), or foreign patent application, the filing date of the earliest such application that describes the subject matter of the claimed invention. Thus, a U.S. patent, a U.S. patent application publication, or WIPO published application is effective as prior art as of the filing date of the earliest application to which benefit or priority is claimed and which describes the subject matter relied upon, regardless of whether the earliest such application is a U.S. provisional or nonprovisional application, an international (PCT) application, or a foreign patent application.

AIA 35 U.S.C. 102(b)(2)(A) and (B) provide that a disclosure shall not be prior art to a claimed invention under 35 U.S.C. 102(a)(2) if: (1) The subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor; or (2) the subject matter disclosed had, before such subject matter was effectively filed under 35 U.S.C. 102(a)(2), been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. Thus, under the AIA, a U.S. patent, U.S. patent application publication, or WIPO published application that was not issued or published more than one year before the effective filing date of the claimed invention is not prior art to the claimed invention if: (1) The U.S. patent, U.S. patent application publication, or WIPO published application was by another who obtained the subject matter disclosed from the inventor or a joint inventor; or (2) the inventor or a joint inventor, or

another who obtained the subject matter disclosed from an inventor or joint inventor, had publicly disclosed the subject matter before the effective filing date of the U.S. patent, U.S. patent application publication, or WIPO published application.

Additionally, AIA 35 U.S.C. 102(b)(2)(C) provides that a disclosure made in a U.S. patent, U.S. patent application publication, or WIPO published application shall not be prior art to a claimed invention under 35 U.S.C. 102(a)(2) if, not later than the effective filing date of the claimed invention, the subject matter disclosed and the claimed invention were owned by the same person or subject to an obligation of assignment to the same person. This provision replaces the exception in pre-AIA 35 U.S.C. 103(c) that applied only in the context of an obviousness analysis under 35 U.S.C. 103 to prior art that was commonly owned at the time the claimed invention was made, and which qualified as prior art only under pre-AIA 35 U.S.C. 102(e), (f), and/or (g). Thus, the AIA provides that certain prior patents and published patent applications of co-workers and collaborators are not prior art either for purposes of determining novelty (35 U.S.C. 102) or nonobviousness (35 U.S.C. 103). This exception, however, applies only to prior art under AIA 35 U.S.C. 102(a)(2), namely, U.S. patents, U.S. patent application publications, or WIPO published applications effectively filed, but not published, before the effective filing date of the claimed invention. This exception does not apply to prior art that is available under 35 U.S.C. 102(a)(1), that is, patents, printed publications, public uses, sale activities, or other publicly available disclosures published or occurring before the effective filing date of the claimed invention. A prior disclosure, as defined in AIA 35 U.S.C. 102(a)(1), by a co-worker or collaborator is prior art under AIA 35 U.S.C. 102(a)(1) unless it falls within an exception under AIA 35 U.S.C. 102(b)(1), regardless of whether the subject matter of the prior disclosure and the claimed invention was commonly owned not later than the effective filing date of the claimed invention.

The AIA eliminates the provisions in pre-AIA 35 U.S.C. 102(c) (abandonment of the invention), 102(d) (premature foreign patenting), 102(f) (derivation), and 102(g) (prior invention by another). Under the AIA, abandonment of the invention or premature foreign patenting is not relevant to patentability. Prior invention by another is likewise not relevant to patentability under the AIA unless there is a prior disclosure or filing of an application by another. The situation in which an application names a person who is not the actual inventor as the inventor (pre-AIA 35 U.S.C. 102(f)) will be handled in a derivation proceeding under 35 U.S.C. 135, by a correction of inventorship under 37 CFR 1.48 to name the actual inventor, or through a rejection under 35 U.S.C. 101[48] and 35 U.S.C. 115.[49]

AIA 35 U.S.C. 102(c) provides for common ownership of subject matter made pursuant to joint research agreements. Under 35 U.S.C. 100(h), the term ''joint research agreement'' as used in AIA 35 U.S.C. 102(c) is defined as a written contract, grant, or cooperative agreement entered into by two or more persons or entities for the performance of experimental, developmental, or research work in the field of the claimed invention. AIA 35 U.S.C. 102(c) specifically provides that subject matter disclosed and a claimed invention shall be deemed to have been owned by the same person or subject to an obligation of assignment to the same person in applying the provisions of AIA 35 U.S.C. 102(b)(2)(C) if: (1) The subject matter disclosed was developed and the claimed invention was made by, or on behalf of, one or more parties to a joint research agreement that was in effect on or before the effective filing date of the claimed invention; (2) the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and (3) the application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement.

AIA 35 U.S.C. 103 provides that a patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in 35 U.S.C. 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. In addition, AIA 35 U.S.C. 103 provides that patentability shall not be negated by the manner in which the invention was made. This provision tracks pre-AIA 35 U.S.C. 103(a), except that the temporal focus for the obviousness inquiry is before the effective filing date of the claimed invention, rather than at the time of the invention. The provisions of pre-AIA 35 U.S.C. 103(c) have been replaced with AIA 35 U.S.C. 102(b)(2)(C) and (c), and the provisions of pre-AIA 35 U.S.C. 103(b) pertaining to biotechnological processes have been eliminated.

AIA 35 U.S.C. 102 and 103 take effect on March 16, 2013. These new provisions apply to any patent application that contains or contained at any time: (1) A claim to a claimed invention that has an effective filing date that is on or after March 16, 2013; or (2) a designation as a continuation, divisional, or continuation-in-part of an application that contains or contained at any time a claim to a claimed invention that has an effective filing date that is on or after March 16, 2013.[50] AIA 35 U.S.C. 102 and 103 also apply to any patent resulting from an application to which AIA 35 U.S.C. 102 and 103 were applied.[51]

The AIA provides that the provisions of pre-AIA 35 U.S.C. 102(g)[52] apply to each claim of an application for patent if the patent application: (1) Contains or contained at any time a claim to a claimed invention having an effective filing date that occurs before March 16, 2013; or (2) is ever designated as a continuation, divisional, or continuation-in-part of an application that contains or contained at any time a claim to a claimed invention that has an effective filing date before March 16, 2013.[53] Pre-AIA 35 U.S.C. 102(g) also applies to any patent resulting from an application to which pre-AIA 35 U.S.C. 102(g) applied.[54]

If an application (1) contains or contained at any time a claimed invention having an effective filing date that is before March 16, 2013, or ever claimed a right of priority or the benefit of an earlier filing date under 35 U.S.C. 119, 120, 121, or 365 based upon an earlier application that ever contained a claimed invention having an effective filing date that is before March 16, 2013, and (2) also contains or contained at any time any claimed invention having an effective filing date that is on or after March 16, 2013, or ever claimed a right of priority or the benefit of an earlier filing date under 35 U.S.C. 119, 120, 121, or 365 based upon an earlier application that ever contained a claimed invention having an effective filing date that is on or after March 16, 2013, then AIA 35 U.S.C. 102 and 103 apply to the application, and each claimed invention in the application is also subject to pre-AIA 35 U.S.C. 102(g).

II. Detailed Discussion of AIA 35 U.S.C. 102(a) and (b)

AIA 35 U.S.C. 102(a) defines the prior art that will preclude the grant of a patent on a claimed invention unless an exception in AIA 35 U.S.C. 102(b) is applicable. Specifically, AIA 35 U.S.C. 102(a) provides that:

[a] person shall be entitled to a patent unless—

(1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or

(2) the claimed invention was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.[55]

As an initial matter, Office personnel should note that the introductory phrase ''[a] person shall be entitled to a patent unless'' remains unchanged from the pre-AIA version of 35 U.S.C. 102. Thus, 35 U.S.C. 102 continues to provide that the Office bears the initial burden of explaining why the applicable statutory or regulatory requirements have not been met if a claim in an application is to be rejected. The AIA also does not change the requirement that whenever a claim for a patent is rejected or an objection or requirement is made, the Office shall notify the applicant thereof and state the reasons for such rejection, objection, or requirement, and provide such information and references as may be useful to the applicant in judging of the propriety of continuing the prosecution of the application.[56]

The categories of prior art documents and activities are set forth in AIA 35 U.S.C. 102(a)(1) and (a)(2). These documents and activities are used to determine whether a claimed invention is novel or nonobvious. The documents upon which a prior art rejection may be based are an issued patent, a published application, and a non-patent printed publication. Evidence that the claimed invention was in public use, on sale, or otherwise available to the public may also be used as the basis for a prior art rejection. Note that a printed publication that does not have a sufficiently early publication date to itself qualify as prior art under AIA 35 U.S.C. 102(a)(1) may be competent evidence of a previous public use, sale activity, or other availability of a claimed invention to the public where the public use, sale activity, or other public availability does have a sufficiently early date to qualify as prior art under AIA 35 U.S.C. 102(a)(1).[57]

AIA 35 U.S.C. 102(b) sets out exceptions to AIA 35 U.S.C. 102(a), in that prior art that otherwise would be included in AIA 35 U.S.C. 102(a) shall not be prior art if it falls within an exception in AIA 35 U.S.C. 102(b).

Exceptions to the categories of prior art defined in AIA 35 U.S.C. 102(a)(1) are provided in AIA 35 U.S.C. 102(b)(1). Specifically, AIA 35 U.S.C. 102(b)(1) states that a disclosure made one year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under subsection (a)(1) if—

- The disclosure was made by the inventor or a joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or
- The subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.'' [58]

Exceptions to the categories of prior art defined in AIA 35 U.S.C. 102(a)(2) are provided in AIA 35 U.S.C. 102(b)(2). Specifically, AIA 35 U.S.C. 102(b)(2) states that a disclosure shall not be prior art to a claimed invention under subsection (a)(2) if—

- The subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor;
- The subject matter disclosed had, before such subject matter was effectively filed under subsection (a)(2), been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or
- The subject matter disclosed and the claimed invention, not later than the effective filing date of the claimed invention, were owned by the same person or subject to an obligation of assignment to the same person.'' [59]

Although some of the prior art provisions of AIA 35 U.S.C. 102(a) and (b) will seem familiar, especially in comparison to pre-AIA 35 U.S.C. 102(a), (b), and (e), the AIA has introduced a number of important changes with respect to prior art documents and activities (collectively, ''disclosures''). First, the availability of a disclosure as prior art is measured from the effective filing date of the claimed invention no matter where that filing occurred. Second, the AIA adopts a global view of prior art disclosures and thus does not require that a public use or sale activity be ''in this country'' to be a prior art activity. Finally, a catch-all ''otherwise available to the public'' category of prior art is added.

A. Effective Filing Date of the Claimed Invention

Pre-AIA 35 U.S.C. 102(a) and (e) reference patent-defeating activities occurring before the applicant invented the claimed invention. AIA 35 U.S.C. 102(a)(1) and (a)(2) make no mention of the date of the invention, but instead concern documents that existed or activities that occurred ''before the effective filing date of the claimed invention.'' As a result, it is no longer possible to antedate or ''swear behind'' certain prior art disclosures by making a showing under 37 CFR 1.131 that the applicant invented the claimed subject matter prior to the effective date of the prior art disclosure.

The AIA defines the term ''effective filing date'' for a claimed invention in a patent or application for patent (other than a reissue application or reissued patent) as the earliest of: (1) The actual filing date of the patent or the application for the patent containing the claimed invention; or (2) the filing date of the earliest application for which the patent or application is entitled, as to such invention, to a right of priority or the benefit of an earlier filing date under 35 U.S.C. 119, 120, 121, or 365.[60] Thus, the one-year grace period in AIA 35 U.S.C. 102(b)(1) is measured from the filing date of any U.S. or foreign patent application to which the patent or application is entitled to benefit or priority as to such invention, whereas the one-year grace period in pre-AIA 35 U.S.C. 102(b) is measured from only the filing date of the earliest application filed in the United States (directly or through the PCT).

As under pre-AIA law, the effective filing date of a claimed invention is determined on a claim-by-claim basis and not an application-by-application basis. That is, the principle that different claims in the same application may be entitled to different effective filing dates vis-à-vis the prior art remains unchanged by the AIA.[61] However, it is important to note that although prior art is applied on a claim-by-claim basis, the determination of whether pre-AIA 35 U.S.C. 102 and 103 or AIA 35 U.S.C. 102 and 103 apply is made on an application-by-application basis. Section VI discusses the applicability date provisions of section 3 of the AIA.

Finally, the AIA provides that the ''effective filing date'' for a claimed invention in a reissued patent or application for a reissue patent shall be determined by deeming the claim to the claimed invention to have been contained in the patent for which reissue was sought.[62]

B. Provisions Pertaining to Disclosures Before the Effective Filing Date of the Claimed Invention

1. Prior Art Under AIA 35 U.S.C. 102(a)(1) (Patented, Described in a Printed Publication, or in Public Use, on Sale, or Otherwise Available to the Public)

Prior art documents and activities which may preclude patentability are set forth in AIA 35 U.S.C. 102(a)(1). Such documents and activities include prior patenting of the claimed invention, descriptions of the claimed invention in a printed publication, public use of the claimed invention, placing the claimed invention on sale, and otherwise making the claimed invention available to the public. These examination guidelines will discuss each prior art document and activity that might preclude patentability under AIA 35 U.S.C. 102(a)(1) in turn.

a. Patented. AIA 35 U.S.C. 102(a)(1) indicates that prior patenting of a claimed invention precludes the grant of a patent on the claimed invention. This means that if a claimed invention was patented in this or a foreign country before the effective filing date of the claimed invention, AIA 35 U.S.C. 102(a)(1) precludes the grant of a patent on the claimed invention. The effective date of the patent for purposes of determining whether the patent qualifies as prior art under AIA 35 U.S.C. 102(a)(1) is the grant date of the patent. There is an exception to this rule if the patent is secret as of the date the rights are awarded.[63] In such situations, the patent is available as prior art as of the date the patent was made available to the public by being laid open for public inspection or disseminated in printed form.[64] The phrase ''patented'' in AIA 35 U.S.C. 102(a)(1) has the same meaning as ''patented'' in pre-AIA 35 U.S.C. 102(a) and (b). For a discussion of ''patented'' as used in pre-AIA 35 U.S.C. 102(a) and (b), see generally MPEP § 2126.

Although an invention may be described in a patent and not claimed therein, the grant date would also be the applicable prior art date for purposes of relying on the subject matter disclosed therein as ''described in a printed publication,'' provided that the patent was made available to the public on its grant date. It is helpful to note that a U.S. patent that issues after the effective filing date of a claimed invention under examination is not available as prior art against that invention under AIA 35 U.S.C. 102(a)(1), but could be available as prior art under AIA 35 U.S.C. 102(a)(2).

b. Described in a printed publication. If a claimed invention is described in a patent, published patent application, or printed publication, such a document may be available as prior art under AIA 35 U.S.C. 102(a)(1). Both pre-AIA 35 U.S.C. 102(a) and (b) and AIA 35 U.S.C. 102(a)(1) use the term ''described'' with respect to an invention in a prior art printed publication. Likewise, AIA 35 U.S.C. 102(a)(2) uses that term with respect to U.S. patents, U.S. patent application publications, and WIPO published applications. Thus, the Office does not view the AIA as changing the extent to which a claimed invention must be described for a prior art document to anticipate the claimed invention under 35 U.S.C. 102.

While the conditions for patentability of AIA 35 U.S.C. 112(a) require a written description of the claimed invention that would have enabled a person skilled in the art to make as well as use the invention, the prior art provisions of AIA 35 U.S.C. 102(a)(1) and (a)(2) require only that the claimed invention be ''described'' [65] in a prior art document (patent, published patent application, or printed publication). The two basic requirements that must be met by a prior art document in order to describe a claimed invention such that it is anticipated under AIA 35 U.S.C. 102 are the same as those under pre-AIA 35 U.S.C. 102. First, ''each and every element of the claimed invention'' must be disclosed either explicitly or inherently, and the elements must be ''arranged or combined in the same way as in the claim.'' [66] Second, a person of ordinary skill in the art must have been enabled to make the invention without undue experimentation.[67] Thus, in order for a prior art document to describe a claimed invention such that it is anticipated under AIA 35 U.S.C. 102(a)(1) or (a)(2), it must disclose all elements of the claimed invention arranged as they are in the claim, and also provide sufficient guidance to enable a person skilled in the art to make the claimed invention. There is, however, no requirement that a prior art document meet the ''how to use'' requirement of 35 U.S.C. 112(a) in order to qualify as prior art.[68] Furthermore, compliance with the ''how to make'' requirement is judged from the viewpoint of a person of ordinary skill in the art, and thus does not require that the prior art document explicitly disclose information within the knowledge of such a person.[69]

There is an additional important distinction between the written description that is necessary to support a claim under 35 U.S.C. 112(a) and the description sufficient to anticipate the subject matter of the claim under AIA 35 U.S.C. 102(a)(1) or (a)(2).[70] To provide support for a claim under 35 U.S.C. 112(a), it is necessary that the specification describe and enable the entire scope of the claimed invention. However, in order for a prior art document to describe a claimed invention under AIA 35 U.S.C. 102(a)(1) or (a)(2), the prior art document need only describe and enable one skilled in the art to make a single species or embodiment of the claimed invention.[71]

An anticipatory description it is not required in order for a disclosure to qualify as prior art, unless the disclosure is being used as the basis for an anticipation rejection. In accordance with pre-AIA case law concerning obviousness, a disclosure may be cited for all that it would reasonably have made known to a person of ordinary skill in the art. Thus, the description requirement of AIA 35 U.S.C. 102(a)(1) and (a)(2) does not preclude an examiner from applying a disclosure in an obviousness rejection under AIA 35 U.S.C. 103 simply because the disclosure is not adequate to anticipate the claimed invention under AIA 35 U.S.C. 102(a)(1) or (a)(2).

c. In public use. Under pre-AIA 35 U.S.C. 102(b), that an invention was ''in public use'' precluded the grant of a patent only if such public use occurred ''in this country.''

Under AIA 35 U.S.C. 102(a)(1), there is no geographic limitation on where prior public use or public availability occurs. Furthermore, a public use would need to occur before the effective filing date of the claimed invention to constitute prior art under AIA 35 U.S.C. 102(a)(1).

The pre-AIA case law also indicates that a public use will bar patentability if the public use occurs before the critical date [72] and the invention is ready for patenting.[73] Under pre-AIA 35 U.S.C. 102(b), the uses of an invention before the patent's critical date that constitute a ''public use'' fall into two categories: The use either ''(1) was accessible to the public; or (2) was commercially exploited.'' [74] Whether a use is a pre-AIA 35 U.S.C. 102(b) public use also depends on who is making the use of the invention. ''[W]hen an asserted prior use is not that of the applicant, [pre-AIA 35 U.S.C.] 102(b) is not a bar when that prior use or knowledge is not available to the public.'' [75] In other words, a use by a third party who did not obtain the invention from the inventor named in the application or patent is an invalidating use under pre-AIA 35 U.S.C. 102(b) only if it falls into the first category: That the use was accessible to

the public. On the other hand, ''an inventor's own prior commercial use, albeit kept secret, may constitute a public use or sale under [pre-AIA 35 U.S.C.] 102(b), barring him from obtaining a patent.'' [76] Also, an inventor creates a public use bar under pre-AIA 35 U.S.C. 102(b) when the inventor shows the invention to, or allows it to be used by, another person who is ''under no limitation, restriction, or obligation of confidentiality'' to the inventor.[77]

Further, under pre-AIA 35 U.S.C. 102(a), ''in order to invalidate a patent based on prior knowledge or use'' by another in this country prior to the patent's priority date, ''that knowledge or use must have been available to the public.'' [78] Patent-defeating ''use,'' under pre-AIA 35 U.S.C. 102(a), includes only that ''use which is accessible to the public.'' [79]

As discussed previously, public use under AIA 35 U.S.C. 102(a)(1) is limited to those uses that are available to the public. The public use provision of AIA 35 U.S.C. 102(a)(1) thus has the same substantive scope, with respect to uses by either the inventor or a third party, as public uses under pre-AIA 35 U.S.C. 102(b) by unrelated third parties or uses by others under pre-AIA 35 U.S.C. 102(a).

As also discussed previously, once an examiner becomes aware that a claimed invention has been the subject of a potentially public use, the examiner may require the applicant to provide information showing that the use did not make the claimed process accessible to the public.

d. On sale. The pre-AIA case law indicates that on sale activity will bar patentability if the claimed invention was: (1) The subject of a commercial sale or offer for sale, not primarily for experimental purposes; and (2) ready for patenting.[80] Contract law principles apply in order to determine whether a commercial sale or offer for sale occurred. In addition, the enablement inquiry is not applicable to the question of whether a claimed invention is ''on sale'' under pre-AIA 35 U.S.C. 102(b).[81] The phrase ''on sale'' in AIA 35 U.S.C. 102(a)(1) is treated as having the same meaning as ''on sale'' in pre-AIA 35 U.S.C. 102(b), except that the sale must make the invention available to the public. For a discussion of ''on sale'' as used in pre-AIA 35 U.S.C. 102(b), see generally MPEP § 2133.03(b) *et seq.*

Under pre-AIA 35 U.S.C. 102(b), if an invention was ''on sale,'' patentability was precluded only if the invention was on sale ''in this country.'' Under AIA 35 U.S.C. 102(a)(1), there is no geographic limitation on where the sale or offer for sale may occur. When formulating a rejection, Office personnel should consider evidence of sales activity, regardless of where the sale activity took place.

The pre-AIA 35 U.S.C. 102(b) ''on sale'' provision has been interpreted as including commercial activity even if the activity is secret. AIA 35 U.S.C. 102(a)(1) uses the same ''on sale'' term as pre-AIA 35 U.S.C. 102(b). The ''or otherwise available to the public'' residual clause of AIA 35 U.S.C. 102(a)(1), however, indicates that AIA 35 U.S.C. 102(a)(1) does not cover secret sales or offers for sale. For example, an activity (such as a sale, offer for sale, or other commercial activity) is secret (non-public) if it is among individuals having an obligation of confidentiality to the inventor.[82]

e. Otherwise available to the public. AIA 35 U.S.C. 102(a)(1) provides a ''catch-all'' provision, which defines a new additional category of potential prior art not provided for in pre-AIA 35 U.S.C. 102. Specifically, a claimed invention may not be patented if it was ''otherwise available to the public'' before its effective filing date. This ''catch-all'' provision permits decision makers to focus on whether the disclosure was ''available to the public,'' rather than on the means by which the claimed invention became available to the public or on whether a disclosure constitutes a ''printed publication'' or falls within another category of prior art as defined in AIA 35 U.S.C. 102(a)(1). The availability of the subject matter to the public may arise in situations such as a student thesis in a university library,[83] a poster display or other information disseminated at a scientific meeting,[84] subject matter in a laid-open patent application,[85] a document electronically posted on the Internet,[86] or a commercial transaction that does not constitute a sale under the Uniform Commercial Code.[87] Even if a document or other disclosure is not a printed publication, or a transaction is not a sale, either may be prior art under the ''otherwise available to the public'' provision of AIA 35 U.S.C. 102(a)(1), provided that the claimed invention is made sufficiently available to the public.

f. No requirement of ''by others.'' A key difference between pre-AIA 35 U.S.C. 102(a) and AIA 35 U.S.C. 102(a)(1) is the requirement in pre-AIA 35 U.S.C. 102(a) that the prior art relied on was ''by others.'' Under AIA 35 U.S.C. 102(a)(1), there is no requirement that the prior art relied upon be by others. Thus, any prior art which falls under AIA 35 U.S.C. 102(a)(1) need not be by another to constitute potentially available prior art. However, disclosures of the subject matter made one year or less before the effective filing date of the claimed invention by the inventor or a joint inventor or another who obtained the subject matter directly or indirectly from the inventor or a joint inventor may fall within an exception under AIA 35 U.S.C. 102(b)(1) to AIA 35 U.S.C. 102(a)(1).

g. Admissions. The Office will continue to treat admissions by the applicant as prior art under the AIA. A statement by an applicant in the specification or made during prosecution identifying the work of another as ''prior art'' is an admission which can be relied upon for both anticipation and obviousness determinations, regardless of whether the admitted prior art would otherwise qualify as prior art under AIA 35 U.S.C. 102.[88] For a discussion of admissions as prior art, see generally MPEP § 2129.

h. The meaning of ''disclosure.'' The AIA does not define the term ''disclosure,'' and AIA 35 U.S.C. 102(a) does not use the term ''disclosure.'' AIA 35 U.S.C. 102(b)(1) and (b)(2), however, each state conditions under which a ''disclosure'' that otherwise falls within AIA 35 U.S.C. 102(a)(1) or 102(a)(2) is not prior art under AIA 35 U.S.C. 102(a)(1) or 102(a)(2).[89] Thus, the Office is treating the term ''disclosure'' as a generic expression intended to encompass the documents and activities enumerated in AIA 35 U.S.C. 102(a) (i.e., being patented, described in a printed publication, in public use, on sale, or otherwise available to the public, or being described in a U.S. patent, U.S. patent application publication, or WIPO published application).

2. Prior Art Exceptions Under 35 U.S.C. 102(b)(1) to AIA 35 U.S.C. 102(a)(1)

a. Prior art exception under AIA 35 U.S.C. 102(b)(1)(A) to AIA 35 U.S.C. 102(a)(1) (grace period inventor or inventor-originated disclosure exception). AIA 35 U.S.C. 102(b)(1)(A) provides exceptions to the prior art provisions of AIA 35 U.S.C. 102(a)(1). These exceptions limit the use of an inventor's own work as prior art, when the inventor's own work has been publicly disclosed by the inventor, a joint inventor, or another who obtained the subject matter directly or indirectly from the inventor or joint inventor. AIA 35 U.S.C. 102(b)(1)(A) provides that a disclosure which would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(1) is not prior art if the disclosure was made: (1) One year or less before the effective filing date of the claimed invention; and (2) by the inventor or a

joint inventor, or by another who obtained the subject matter directly or indirectly from the inventor or joint inventor. These guidelines will first discuss issues pertaining to disclosures within the grace period by the inventor or a joint inventor (''grace period inventor disclosures'') and then subsequently discuss issues pertaining to disclosures within the grace period by another who obtained the subject matter directly or indirectly from the inventor or joint inventor (''grace period inventor-originated disclosures''). Section II.A. of these examination guidelines discusses the ''effective filing date'' of a claimed invention.

i. Grace period inventor disclosure exception. AIA 35 U.S.C. 102(b)(1)(A) first provides that a disclosure which would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(1) may be disqualified as prior art if the disclosure is made: (1) One year or less before the effective filing date of the claimed invention; and (2) by the inventor or a joint inventor. Thus, a disclosure that would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(1) will not be treated as prior art by Office personnel if the disclosure is made one year or less before the effective filing date of the claimed invention, and the evidence shows that the disclosure is by the inventor or a joint inventor. What evidence is necessary to show that the disclosure is by the inventor or a joint inventor requires case-by-case treatment, depending upon whether it is apparent from the disclosure itself or the patent application specification that the disclosure is by the inventor or a joint inventor.

Office personnel will not apply a disclosure as prior art under AIA 35 U.S.C. 102(a)(1) if it is apparent from the disclosure itself that it is by the inventor or a joint inventor. Specifically, Office personnel will not apply a disclosure as prior art under AIA 35 U.S.C. 102(a)(1) if the disclosure: (1) Was made one year or less before the effective filing date of the claimed invention; (2) names the inventor or a joint inventor as an author or an inventor; and (3) does not name additional persons as authors on a printed publication or inventors on a patent. This means that in circumstances where an application names additional persons as inventors relative to the persons named as authors in the publication (e.g., the application names as inventors A, B, and C, and the publication names as authors A and B), and the publication is one year or less before the effective filing date, it is apparent that the disclosure is a grace period inventor disclosure, and the publication would not be treated as prior art under AIA 35 U.S.C. 102(a)(1). If, however, the application names fewer inventors than a publication (e.g., the application names as inventors A and B, and the publication names as authors A, B and C), it would not be readily apparent from the publication that it is by the inventor or a joint inventor and the publication would be treated as prior art under AIA 35 U.S.C. 102(a)(1).

The Office is also revising the rules of practice in a separate action (RIN 0651–AC77) to provide that applicants can include a statement of any grace period inventor disclosures in the specification (37 CFR 1.77(b)(6)). An applicant is not required to use the format specified in 37 CFR 1.77 or identify any prior disclosures by the inventor or a joint inventor (unless necessary to overcome a rejection), but identifying any prior disclosures by the inventor or a joint inventor may expedite examination of the application and save applicants (and the Office) the costs related to an Office action and reply. If the patent application specification contains a specific reference to a grace period inventor disclosure, the Office will consider it apparent from the specification that the disclosure is by the inventor or a joint inventor, provided that the disclosure does not name additional authors or inventors and there is no other evidence to the contrary. The applicant may also provide a copy of the disclosure (e.g., copy of a printed publication).

The Office is also revising the rules of practice in a separate action (RIN 0651–AC77) to provide a mechanism for filing an affidavit or declaration (under 37 CFR 1.130) to establish that a disclosure is not prior art under AIA 35 U.S.C. 102(a) due to an exception in AIA 35 U.S.C. 102(b). In the situations in which it is not apparent from the disclosure or the patent application specification that the disclosure is by the inventor or a joint inventor, the applicant may establish by way of an affidavit or declaration that a grace period disclosure is not prior art under AIA 35 U.S.C. 102(a)(1) because the disclosure was by the inventor or a joint inventor. Section II.D.1. of these examination guidelines discusses the use of affidavits or declarations to show that the disclosure was made by the inventor or a joint inventor under the exception of AIA 35 U.S.C. 102(b)(1)(A) for a grace period inventor disclosure.

ii. Grace period inventor-originated disclosure exception. AIA 35 U.S.C. 102(b)(1)(A) also provides that a disclosure which would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(1) may be disqualified as prior art if the disclosure was made: (1) One year or less before the effective filing date of the claimed invention; and (2) by another who obtained the subject matter directly or indirectly from the inventor or a joint inventor. Thus, if a disclosure upon which the rejection is based is by someone who obtained the subject matter from the inventor or a joint inventor, and was made one year or less before the effective filing date of the claimed invention, the applicant may establish by way of an affidavit or declaration that the disclosure is not prior art under AIA 35 U.S.C. 102(a)(1) because the disclosure was by another who obtained the subject matter directly or indirectly from the inventor or a joint inventor. Section II.D.3. of these examination guidelines discusses the use of affidavits or declarations to show that a disclosure was by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor under the exception of AIA 35 U.S.C. 102(b)(1)(A) for a grace period inventor-originated disclosure.

b. Prior art exception under AIA 35 U.S.C. 102(b)(1)(B) to AIA 35 U.S.C. 102(a)(1) (inventor or inventor-originated prior public disclosure exception). AIA 35 U.S.C. 102(b)(1)(B) provides additional exceptions to the prior art provisions of AIA 35 U.S.C. 102(a)(1). These exceptions disqualify a disclosure of subject matter that occurs after the subject matter had been publicly disclosed by the inventor, a joint inventor, or another who obtained the subject matter directly or indirectly from the inventor or joint inventor. Specifically, AIA 35 U.S.C. 102(b)(1)(B) provides that a disclosure which would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(1) (patent, printed publication, public use, sale, or other means of public availability) may be disqualified as prior art if: (1) The disclosure was made one year or less before the effective filing date of the claimed invention; and (2) the subject matter disclosed had been previously publicly disclosed by the inventor, a joint inventor, or another who obtained the subject matter directly or indirectly from the inventor or joint inventor. The previous public disclosure of the subject matter by the inventor, a joint inventor, or another who obtained the subject matter directly or indirectly from the inventor or joint inventor must itself be a disclosure within the one-year grace period (i.e., be either a grace period inventor disclosure by the inventor or a joint inventor or be a grace period inventor-originated disclosure by another who obtained the subject matter directly or indirectly from the inventor

or joint inventor). Otherwise, the previous public disclosure of the subject matter would qualify as prior art under AIA 35 U.S.C. 102(a)(1) that could not be disqualified under AIA 35 U.S.C. 102(b)(1). Section II.A. of these examination guidelines discusses the ''effective filing date'' of a claimed invention. Section II.D.2. of these examination guidelines discusses the use of affidavits or declarations to show that the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor, and section II.D.3. of these examination guidelines discusses the use of affidavits or declarations to show that another obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

The exception in AIA 35 U.S.C. 102(b)(1)(B) applies if the ''subject matter disclosed [in the intervening disclosure] had, before such [intervening] disclosure, been publicly disclosed by the inventor or a joint inventor * * *.'' [90] The exception in AIA 35 U.S.C. 102(b)(1)(B) focuses on the ''subject matter'' that had been publicly disclosed by the inventor or a joint inventor. There is no requirement under AIA 35 U.S.C. 102(b)(1)(B) that the mode of disclosure by the inventor or a joint inventor (e.g., patenting, publication, public use, sale activity) be the same as the mode of disclosure of the intervening grace period disclosure. There is also no requirement that the disclosure by the inventor or a joint inventor be a verbatim or *ipsissimis verbis* disclosure of the intervening grace period disclosure.[91] What is required for subject matter in an intervening grace period disclosure to be excepted under AIA 35 U.S.C. 102(b)(1)(B) is that the subject matter of the disclosure to be disqualified as prior art must have been previously publicly disclosed by the inventor or a joint inventor.

The exception in AIA 35 U.S.C. 102(b)(1)(B) applies to the subject matter in the disclosure being relied upon as prior art for a rejection under AIA 35 U.S.C. 102(a)(1) (an intervening disclosure) that was also publicly disclosed by the inventor or a joint inventor before such intervening disclosure. The subject matter of an intervening grace period disclosure that was not previously publicly disclosed by the inventor or a joint inventor is available as prior art under AIA 35 U.S.C. 102(a)(1). For example, the inventor or a joint inventor had publicly disclosed elements A, B, and C, and a subsequent intervening grace period disclosure discloses elements A, B, C, and D, then only element D of the intervening grace period disclosure is available as prior art under AIA 35 U.S.C. 102(a)(1).

In addition, if subject matter of an intervening grace period disclosure is simply a more general description of the subject matter previously publicly disclosed by the inventor or a joint inventor, the exception in AIA 35 U.S.C. 102(b)(1)(B) applies to such subject matter of the intervening grace period disclosure. For example, if the inventor or a joint inventor had publicly disclosed a species, and a subsequent intervening grace period disclosure discloses a genus (i.e., provides a more generic disclosure of the species), the intervening grace period disclosure of the genus is not available as prior art under AIA 35 U.S.C. 102(a)(1). Conversely, if the inventor or a joint inventor had publicly disclosed a genus, and a subsequent intervening grace period disclosure discloses a species, the intervening grace period disclosure of the species would be available as prior art under AIA 35 U.S.C. 102(a)(1). Likewise, if the inventor or a joint inventor had publicly disclosed a species, and a subsequent intervening grace period disclosure discloses an alternative species not also disclosed by the inventor or a joint inventor, the intervening grace period disclosure of the alternative species would be available as prior art under AIA 35 U.S.C. 102(a)(1).

Finally, AIA 35 U.S.C. 102(b)(1)(B) does not discuss ''the claimed invention'' with respect to either the subject matter disclosed by the inventor or a joint inventor, or the subject matter of the subsequent intervening grace period disclosure. Any inquiry with respect to the claimed invention is whether or not the subject matter in the prior art disclosure being relied upon anticipates or renders obvious the claimed invention. A determination of whether the exception in AIA 35 U.S.C. 102(b)(1)(B) is applicable to subject matter in an intervening grace period disclosure does not involve a comparison of the subject matter of the claimed invention to either the subject matter disclosed by the inventor or a joint inventor, or to the subject matter of the subsequent intervening grace period disclosure.

C. Provisions Pertaining to Subject Matter in a U.S. Patent or Application for a U.S. Patent Effectively Filed Before the Effective Filing Date of the Claimed Invention

1. Prior Art Under AIA 35 U.S.C. 102(a)(2) (U.S. Patents, U.S. Patent Application Publications, and World Intellectual Property Organization (WIPO) Publications of International Applications (WIPO Published Applications))

AIA 35 U.S.C. 102(a)(2) sets forth three types of patent documents that are available as prior art as of the date they were effectively filed with respect to the subject matter relied upon in the document if they name another inventor: (1) U.S. patents; (2) U.S. patent application publications; and (3) WIPO published applications. These documents may have different prior art effects under pre-AIA 35 U.S.C. 102(e) than under AIA 35 U.S.C. 102(a)(2).

a. WIPO published applications. AIA 35 U.S.C. 102(a)(2) explicitly references U.S. patents and U.S. patent application publications. Moreover, the WIPO publication of a PCT international application that designates the United States is an application for patent deemed published under 35 U.S.C. 122(b) for purposes of AIA 35 U.S.C. 102(a)(2) under 35 U.S.C. 374. Thus, under the AIA, WIPO publications of PCT applications that designate the United States are treated as U.S. patent application publications for prior art purposes, regardless of the international filing date, whether they are published in English, or whether the PCT international application enters the national stage in the United States. Accordingly, a U.S. patent, a U.S. patent application publication, or a WIPO published application that names another inventor and was effectively filed before the effective filing date of the claimed invention, is prior art under AIA 35 U.S.C. 102(a)(2). This differs from the treatment of a WIPO published application under pre-AIA 35 U.S.C. 102(e), where a WIPO published application is treated as a U.S. patent application publication only if the PCT application was filed on or after November 29, 2000, and published under PCT Article 21(2) in the English language.

A U.S. patent, U.S. patent application publication, or WIPO published application is prior art under AIA 35 U.S.C. 102(a)(1) if its issue or publication date is before the effective filing date of the claimed invention in question. If the issue date of the U.S. patent or publication date of the U.S. patent application publication or WIPO

published application is not before the effective filing date of the claimed invention, it may still be applicable as prior art under AIA 35 U.S.C. 102(a)(2) if it was ''effectively filed'' before the effective filing date of the claimed invention in question with respect to the subject matter relied upon to reject the claim. Section II.A. of these examination guidelines discusses the ''effective filing date'' of a claimed invention. AIA 35 U.S.C. 102(d) sets forth the criteria to determine when subject matter described in a U.S. patent, U.S. patent application publication, or WIPO published application was ''effectively filed'' for purposes of AIA 35 U.S.C. 102(a)(2).

b. Determining when subject matter was effectively filed under AIA 35 U.S.C. 102(d). AIA 35 U.S.C. 102(d) provides that a U.S. patent, U.S. patent application publication, or WIPO published application is prior art under AIA 35 U.S.C. 102(a)(2) with respect to any subject matter described in the patent or published application as of either its actual filing date (AIA 35 U.S.C. 102(d)(1)), or the filing date of a prior application to which there is a priority or benefit claim (AIA 35 U.S.C. 102(d)(2)). A U.S. patent, U.S. patent application publication, or WIPO published application ''is entitled to claim'' priority to, or the benefit of, a prior-filed application if it fulfills the ministerial requirements of: (1) Containing a priority or benefit claim to the prior-filed application; (2) being filed within the applicable filing period requirement (copending with or within twelve months of the earlier filing, as applicable); and (3) having a common inventor or being by the same applicant.[92]

The AIA draws a distinction between actually being entitled to priority to, or the benefit of, a prior-filed application in the definition of effective filing date of a claimed invention in AIA 35 U.S.C. 100(i)(1)(B), and merely being entitled to claim priority to, or the benefit of, a prior-filed application in the definition of effectively filed in AIA 35 U.S.C. 102(d).[93] As a result of this distinction, the question of whether a patent or published application is actually entitled to priority or benefit with respect to any of its claims is not at issue in determining the date the patent or published application was ''effectively filed'' for prior art purposes.[94] Thus, as was the case even prior to the AIA,[95] there is no need to evaluate whether any claim of a U.S. patent, U.S. patent application publication, or WIPO published application is actually entitled to priority or benefit under 35 U.S.C. 119, 120, 121, or 365 when applying such a document as prior art.

AIA 35 U.S.C. 102(d) requires that a prior-filed application to which a priority or benefit claim is made must describe the subject matter from the U.S. patent, U.S. patent application publication, or WIPO published application relied upon in a rejection. However, AIA 35 U.S.C. 102(d) does not require that this description meet the requirements of 35 U.S.C. 112(a). As discussed previously with respect to AIA 35 U.S.C. 102(a)(1), the Office does not view the AIA as changing the extent to which a claimed invention must be described for a prior art document to anticipate the claimed invention under AIA 35 U.S.C. 102.

The AIA also eliminates the so-called *Hilmer* doctrine.[96] Under the *Hilmer* doctrine, pre-AIA 35 U.S.C. 102(e) limited the effective filing date for U.S. patents (and published applications) as prior art to their earliest U.S. filing date. In contrast, AIA 35 U.S.C. 102(d) provides that if the U.S. patent, U.S. patent application publication, or WIPO published application claims priority to one or more prior-filed foreign or international applications under 35 U.S.C. 119 or 365, the patent or published application was effectively filed on the filing date of the earliest such application that describes the subject matter.[97] Therefore, if the subject matter relied upon is described in the application to which there is a priority or benefit claim, a U.S. patent, a U.S. patent application publication, or WIPO published application is effective as prior art as of the filing date of the earliest such application, regardless of where filed.

c. Requirement of ''names another inventor.'' To qualify as prior art under AIA 35 U.S.C. 102(a)(2), the prior art U.S. patent, U.S. patent application publication, or WIPO published application must ''name[s] another inventor.'' This means that if there is any difference in inventive entity between the prior art U.S. patent, U.S. patent application publication, or WIPO published application and the application under examination or patent under reexamination, the U.S. patent, U.S. patent application publication, or WIPO published application satisfies the ''names another inventor'' requirement of AIA 35 U.S.C. 102(a)(2). Thus, in the case of joint inventors, only one inventor needs to be different for the inventive entities to be different. Even if there are some inventors in common in a U.S. patent, a U.S. patent application publication, or WIPO published application and in a later-filed application under examination or patent under reexamination, the U.S. patent, a U.S. patent application publication, or WIPO published application qualifies as prior art under AIA 35 U.S.C. 102(a)(2) unless an exception in AIA 35 U.S.C. 102(b)(2) is applicable.

2. Prior Art Exceptions Under 35 U.S.C. 102(b)(2) to AIA 35 U.S.C. 102(a)(2)

a. Prior art exception under AIA 35 U.S.C. 102(b)(2)(A) to AIA 35 U.S.C. 102(a)(2) (inventor-originated disclosure exception). AIA 35 U.S.C. 102(b)(2)(A) provides an exception to the prior art provisions of AIA 35 U.S.C. 102(a)(2). This exception limits the use of an inventor's own work as prior art, when the inventor's own work is disclosed in a U.S. patent, U.S. patent application publication, or WIPO published application by another who obtained the subject matter directly or indirectly from the inventor or joint inventor.

Specifically, AIA 35 U.S.C. 102(b)(2)(A) provides that a disclosure which would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(2) may be disqualified as prior art if the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor. Thus, if the subject matter in a U.S. patent, U.S. patent application publication, or WIPO published application upon which the rejection is based is by another who obtained the subject matter from the inventor or a joint inventor, the applicant may establish by way of an affidavit or declaration that a disclosure is not prior art under AIA 35 U.S.C. 102(a)(2). Section II.D.3. of these examination guidelines discusses the use of affidavits or declarations to show that the disclosure was by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor under the exception of AIA 35 U.S.C. 102(b)(2)(A) for an inventor-originated disclosure.

b. Prior art exception under AIA 35 U.S.C. 102(b)(2)(B) to AIA 35 U.S.C. 102(a)(2) (inventor or inventor-originated prior public disclosure exception). AIA 35 U.S.C. 102(b)(2)(B) provides additional exceptions to the prior art provisions of AIA 35 U.S.C. 102(a)(2). These exceptions disqualify subject matter that was effectively filed by another after the subject matter had been publicly disclosed by the inventor, a joint inventor, or another who obtained the subject matter directly or indirectly from the inventor or joint inventor.

Specifically, AIA 35 U.S.C. 102(b)(2)(B) provides that a disclosure which would otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(2) (a U.S.

patent, U.S. patent application publication, or WIPO published application) may be disqualified as prior art if the subject matter disclosed had been previously publicly disclosed by the inventor, a joint inventor, or another who obtained the subject matter directly or indirectly from the inventor or joint inventor. The previous public disclosure of the subject matter by the inventor, a joint inventor, or another who obtained the subject matter directly or indirectly from the inventor or joint inventor must itself be a public disclosure (i.e., be either an inventor disclosure by the inventor or a joint inventor or be an inventor-originated disclosure by another who obtained the subject matter directly or indirectly from the inventor or joint inventor). If a previous public disclosure by the inventor or which originated with the inventor is not within the grace period of AIA 35 U.S.C. 102(b)(1), it would qualify as prior art under AIA 35 U.S.C. 102(a)(1), and could not be disqualified under AIA 35 U.S.C. 102(b)(1). Section II.D.2. of these examination guidelines discusses the use of affidavits or declarations to show that the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor, and section II.D.3. of these examination guidelines discusses the use of affidavits or declarations to show that another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

Similar to the previous discussion of AIA 35 U.S.C. 102(b)(1)(B), the exception in AIA 35 U.S.C. 102(b)(2)(B) applies if the ''subject matter disclosed [in the intervening disclosure] had, before such [intervening] disclosure [was effectively filed], been publicly disclosed by the inventor or a joint inventor * * *.'' [98] The exception in AIA 35 U.S.C. 102(b)(2)(B) focuses on the ''subject matter'' that had been publicly disclosed by the inventor or a joint inventor. There is no requirement under 35 U.S.C. 102(b)(2)(B) that the mode of disclosure by the inventor or a joint inventor (e.g., patenting, publication, public use, sale activity) be the same as the mode of disclosure of the intervening U.S. patent, U.S. patent application publication, or WIPO published application. There is also no requirement that the disclosure by the inventor or a joint inventor be a verbatim or *ipsissimis verbis* disclosure of the intervening U.S. patent, U.S. patent application publication, or WIPO published application. What is required for subject matter in the intervening U.S. patent, U.S. patent application publication, or WIPO published application to be excepted under AIA 35 U.S.C. 102(b)(2)(B) is that the subject matter must have been previously publicly disclosed by the inventor or a joint inventor or must have originated with the inventor.

The exception in AIA 35 U.S.C. 102(b)(2)(B) applies to the subject matter in the intervening U.S. patent, U.S. patent application publication, or WIPO published application being relied upon for a rejection under AIA 35 U.S.C. 102(a)(2) that was also publicly disclosed by the inventor or a joint inventor (or have originated with the inventor) before the date the subject matter relied upon was effectively filed. The subject matter of an intervening U.S. patent, U.S. patent application publication, or WIPO published application that was not previously publicly disclosed by the inventor or a joint inventor (or by another who obtained the subject matter from the inventor or joint inventor) is available as prior art under AIA 35 U.S.C. 102(a)(2). For example, if the inventor or a joint inventor had publicly disclosed elements A, B, and C, and a subsequent intervening U.S. patent, U.S. patent application publication, or WIPO published application discloses elements A, B, C, and D, then only element D of the intervening U.S. patent, U.S. patent application publication, or WIPO published application is available as prior art under AIA 35 U.S.C. 102(a)(2).

In addition, if subject matter of an intervening U.S. patent, U.S. patent application publication, or WIPO published application is simply a more general description of the subject matter previously publicly disclosed by the inventor or a joint inventor, the exception in AIA 35 U.S.C. 102(b)(1)(B) applies to such subject matter of the intervening U.S. patent, U.S. patent application publication, or WIPO published application disclosure. For example, if the inventor or a joint inventor had publicly disclosed a species, and a subsequent intervening U.S. patent, U.S. patent application publication, or WIPO published application discloses a genus (i.e., provides a more generic disclosure of the species), the disclosure of the genus in the intervening U.S. patent, U.S. patent application publication, or WIPO published application is not available as prior art under AIA 35 U.S.C. 102(a)(2). Conversely, if the inventor or a joint inventor had publicly disclosed a genus, and a subsequent intervening U.S. patent, U.S. patent application publication, or WIPO published application discloses a species, the disclosure of the species in the subsequent intervening U.S. patent, U.S. patent application publication, or WIPO published application would be available as prior art under AIA 35 U.S.C. 102(a)(2). Likewise, if the inventor or a joint inventor had publicly disclosed a species, and a subsequent intervening U.S. patent, U.S. patent application publication, or WIPO published application discloses an alternative species not also disclosed by the inventor or a joint inventor, the disclosure of the alternative species in the intervening U.S. patent, U.S. patent application publication, or WIPO published application would be available as prior art under AIA 35 U.S.C. 102(a)(2).

Finally, AIA 35 U.S.C. 102(b)(2)(B) does not discuss ''the claimed invention'' with respect to either the subject matter disclosed by the inventor or a joint inventor, or the subject matter of the subsequent intervening U.S. patent, U.S. patent application publication, or WIPO published application. Any inquiry with respect to the claimed invention is whether or not the subject matter in the prior art disclosure being relied upon anticipates or renders obvious the claimed invention. A determination of whether the exception in AIA 35 U.S.C. 102(b)(2)(B) is applicable to subject matter in an intervening U.S. patent, U.S. patent application publication, or WIPO published application does not involve a comparison of the subject matter of the claimed invention to either the subject matter disclosed by the inventor or a joint inventor, or to the subject matter of the subsequent intervening U.S. patent, U.S. patent application publication, or WIPO published application.

c. Prior art exception under AIA 35 U.S.C. 102(b)(2)(C) to AIA 35 U.S.C. 102(a)(2) (common ownership or obligation of assignment). AIA 35 U.S.C. 102(b)(2)(C) provides an additional exception to the prior art provisions of AIA 35 U.S.C. 102(a)(2). The exception of AIA 35 U.S.C. 102(b)(2)(C) disqualifies subject matter disclosed in a U.S. patent, U.S. patent application publication, or WIPO published application from constituting prior art under AIA 35 U.S.C. 102(a)(2) if the subject matter disclosed and the claimed invention, not later than the effective filing date of the claimed invention, ''were owned by the same person or subject to an obligation of assignment to the same person.'' AIA 35 U.S.C. 102(b)(2)(C) resembles pre-AIA 35 U.S.C. 103(c) in that both concern common ownership, and both offer an avenue by which an applicant may

avoid certain prior art. However, there are significant differences between AIA 35 U.S.C. 102(b)(2)(C) and pre-AIA 35 U.S.C. 103(c).

If the provisions of AIA 35 U.S.C. 102(b)(2)(C) are met, a U.S. patent, U.S. patent application publication, or WIPO published application that might otherwise qualify as prior art under AIA 35 U.S.C. 102(a)(2) is not available as prior art under either AIA 35 U.S.C. 102 or 103. Under pre-AIA 35 U.S.C. 103(c), such prior art could preclude patentability under pre-AIA 35 U.S.C. 102, even if the conditions of pre-AIA 35 U.S.C. 103(c) were met. The consequence of this distinction is that a published application or an issued patent that falls under the common ownership exception of AIA 35 U.S.C. 102(b)(2)(C) may not be applied in either an anticipation or an obviousness rejection.

It is important to note the circumstances in which the AIA 35 U.S.C. 102(b)(2)(C) exception does not remove U.S. patents, U.S. patent application publications, or WIPO published applications as a basis for any rejection. Even if the U.S. patent or U.S. published application is not prior art under AIA 35 U.S.C. 102 or 103 as a result of AIA 35 U.S.C. 102(b)(2)(C), a double patenting rejection (either statutory under 35 U.S.C. 101 or non-statutory, sometimes called obviousness-type) may still be made on the basis of the U.S. patent or U.S. patent application publication. Furthermore, the U.S. patent, U.S. patent application publication, or WIPO published application that does not qualify as prior art as a result of AIA 35 U.S.C. 102(b)(2)(C) may be cited, in appropriate situations, to indicate the state of the art when making a lack of enablement rejection under 35 U.S.C. 112(a). A document need not qualify as prior art to be applied in the context of double patenting [99] or enablement.[100] Also, the AIA 35 U.S.C. 102(b)(2)(C) exception does not apply to a disclosure that qualifies as prior art under AIA 35 U.S.C. 102(a)(1) (disclosures made before the effective filing date of the claimed invention). Thus, if the issue date of a U.S. patent or publication date of a U.S. patent application publication or WIPO published application is before the effective filing date of the claimed invention, it may be prior art under AIA 35 U.S.C. 102(a)(1), regardless of common ownership or the existence of an obligation to assign.

The Office is also revising the rules of practice in a separate action (RIN 0651–AC77) to include provisions that pertain to commonly owned or joint research agreement subject matter (37 CFR 1.104(c)(4) and (c)(5)). 37 CFR 1.104(c)(4) applies to an application that is subject to AIA 35 U.S.C. 102 and 103, and 37 CFR 1.104(c)(5) applies to an application that is subject to pre-AIA 35 U.S.C. 102 and 103. Commonly owned subject matter under AIA 35 U.S.C. 102 and 103 is treated under 37 CFR 1.104(c)(4)(i), and commonly owned subject matter under pre-AIA 35 U.S.C. 102 and 103 is treated under 37 CFR 1.104(c)(5)(i).

A clear and conspicuous statement by the applicant (or the applicant's representative of record) that the claimed invention of the application under examination and the subject matter disclosed in the U.S. patent, U.S. patent application publication, or WIPO published application (prior art) to be excluded under AIA 35 U.S.C. 102(b)(2)(C) were owned by the same person or subject to an obligation of assignment to the same person not later than the effective filing date of the claimed invention will be sufficient to establish that the AIA 35 U.S.C. 102(b)(2)(C) exception applies. When relying on the provisions of pre-AIA 35 U.S.C. 103(c), the applicant (or the applicant's representative) could provide a similar statement required to disqualify the cited prior art. The applicant may present supporting evidence such as copies of assignment documents, but is not required to do so. Furthermore, the Office will not request corroborating evidence in the absence of independent evidence which raises doubt as to the veracity of such a statement. The statement under AIA 35 U.S.C. 102(b)(2)(C) will generally be treated by Office personnel analogously to statements made under pre-AIA 35 U.S.C. 103(c).[101]

D. Use of Affidavits or Declarations Under 37 CFR 1.130 To Overcome Prior Art Rejections

The Office is also revising the rules of practice in a separate action (RIN 0651–AC77) to provide a mechanism in 37 CFR 1.130 for filing an affidavit or declaration to establish that a disclosure that was not made more than one year before the effective filing date of the claimed invention is not prior art under AIA 35 U.S.C. 102(a) due to an exception in AIA 35 U.S.C. 102(b). Under 37 CFR 1.130(a), an affidavit or declaration of attribution may be submitted to disqualify a disclosure as prior art because it was made by the inventor or a joint inventor, or by one who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. Under 37 CFR 1.130(b), an affidavit or declaration of prior public disclosure may be submitted to disqualify an intervening disclosure as prior art if: (1) The subject matter disclosed had been publicly disclosed by the inventor or a joint inventor before the disclosure of the subject matter on which the rejection is based; or (2) the subject matter disclosed had been publicly disclosed by the inventor or a joint inventor before the date the subject matter in the U.S. patent, U.S. patent application publication, or WIPO published application on which the rejection is based was effectively filed.

1. Showing That the Disclosure Was Made by the Inventor or a Joint Inventor

AIA 35 U.S.C. 102(b)(1)(A) provides that a grace period disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(1) if the disclosure was made by the inventor or a joint inventor. An applicant may show that a disclosure was made by the inventor or a joint inventor by way of an affidavit or declaration under 37 CFR 1.130(a) (an affidavit or declaration of attribution).[102] Where the authorship of the prior art disclosure includes the inventor or a joint inventor named in the application, an ''unequivocal'' statement from the inventor or a joint inventor that he/she (or some specific combination of named inventors) invented the subject matter of the disclosure, accompanied by a reasonable explanation of the presence of additional authors, may be acceptable in the absence of evidence to the contrary.[103] However, a mere statement from the inventor or a joint inventor without any accompanying reasonable explanation may not be sufficient where there is evidence to the contrary.[104] This is similar to the current process for disqualifying a publication as not being by ''others'' discussed in MPEP § 2132.01, except that AIA 35 U.S.C. 102(b)(1)(A) requires only that the disclosure be by the inventor or a joint inventor.

2. Showing That the Subject Matter Disclosed Had Been Previously Publicly Disclosed by the Inventor or a Joint Inventor

AIA 35 U.S.C. 102(b)(1)(B) provides that a grace period disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(1) if subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor. Similarly, AIA 35 U.S.C. 102(b)(2)(B) provides that a disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(2) if the subject matter disclosed had, before such subject matter was effectively filed

under AIA 35 U.S.C. 102(a)(2), been publicly disclosed by the inventor or a joint inventor. An applicant may show that the subject matter disclosed had been publicly disclosed by the inventor or a joint inventor before the disclosure or effective filing date of the subject matter on which the rejection was based by way of an affidavit or declaration under 37 CFR 1.130(b) (an affidavit or declaration of prior public disclosure). Specifically, the affidavit or declaration must identify the subject matter publicly disclosed and establish the date and content of their earlier public disclosure. If the earlier public disclosure was a printed publication, the affidavit or declaration must be accompanied by a copy of the printed publication in accordance with 37 CFR 1.130(b)(1). If the earlier disclosure was not a printed publication, the affidavit or declaration must describe the earlier disclosure with sufficient detail and particularity to determine that the earlier disclosure is a public disclosure of the subject matter, as required by 37 CFR 1.130(b)(2).

The manner of disclosure of subject matter referenced in an affidavit or declaration under 37 CFR 1.130(b) is not critical. Just as the prior art provision of AIA 35 U.S.C. 102(a)(1) encompasses any disclosure that renders a claimed invention ''available to the public,'' any manner of disclosure may be evidenced in an affidavit or declaration under 37 CFR 1.130(b). That is, when using an affidavit or declaration under 37 CFR 1.130(b) to disqualify an intervening disclosure as prior art based on a prior public disclosure by an inventor or a joint inventor, it is not necessary for the subject matter to have been disclosed in the same manner or using the same words. For example, the inventor or a joint inventor may have publicly disclosed the subject matter in question via a slide presentation at a scientific meeting, while the intervening disclosure of the subject matter may have been made in a journal article. This difference in the manner of disclosure or differences in the words used to describe the subject matter will not preclude the inventor from submitting an affidavit or declaration under 37 CFR 1.130(b) to disqualify the intervening disclosure (e.g., a journal article) as prior art.

3. Showing That the Disclosure was Made, or That Subject Matter had Been Previously Publicly Disclosed, by Another Who Obtained the Subject Matter Disclosed Directly or Indirectly From the Inventor or a Joint Inventor

AIA 35 U.S.C. 102(b)(1)(A), 102(b)(1)(B), 102(b)(2)(A), and 102(b)(2)(B) each provide similar treatment for disclosures of subject matter by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. Specifically, AIA 35 U.S.C. 102(b)(1)(A) provides that a grace period disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(1) if the disclosure was made by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor, and AIA 35 U.S.C. 102(b)(2)(A) provides that a disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(2) if the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor. In addition, AIA 35 U.S.C. 102(b)(1)(B) and 102(b)(2)(B) provide that a grace period disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(1), and that a disclosure shall not be prior art to a claimed invention under AIA 35 U.S.C. 102(a)(2), if the subject matter disclosed had, before such disclosure, been publicly disclosed by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. An applicant may also show that another obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor in an affidavit or declaration under 37 CFR 1.130(a) or (b). Thus, an applicant may make use of a prior public disclosure by another during the grace period if the applicant can establish that subject matter disclosed originated with the inventor or a joint inventor and that the subject matter was communicated by the inventor or a joint inventor, directly or indirectly. Any documentation which provides evidence of the communication of the subject matter by the inventor or a joint inventor to the entity that made the disclosure of the subject matter should accompany the affidavit or declaration.

4. Enablement

An affidavit or declaration under 37 CFR 1.130(a) or (b) need not demonstrate that the disclosure by the inventor, a joint inventor, or another who obtained the subject matter disclosed directly or indirectly from an inventor or a joint inventor was an ''enabling'' disclosure of the subject matter within the meaning of 35 U.S.C. 112(a). Rather, an affidavit or declaration under 37 CFR 1.130 must show that: (1) The disclosure in question was made by the inventor or a joint inventor, or the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor (37 CFR 1.130(a));[105] or (2) the subject matter disclosed had, before such disclosure was made or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor (37 CFR 1.130(b)).[106]

5. Who may File an Affidavit or Declaration Under 37 CFR 1.130

In accordance with 37 CFR 1.130, the applicant or patent owner may submit an affidavit or declaration. When an assignee, obligated assignee, or person showing sufficient proprietary interest is the applicant under 35 U.S.C. 118 rather than the inventor, the inventor may sign an affidavit or declaration under 37 CFR 1.130 to disqualify a disclosure of the invention as prior art, but the declaration must be filed by a party having authority to take action in the application. Authority to file papers in an application generally does not lie with the inventor if the inventor is not the applicant.

6. Situations in Which an Affidavit or Declaration Is Not Available

The provisions of 37 CFR 1.130 are not available if the rejection is based upon a disclosure made more than one year before the effective filing date of the claimed invention. The AIA retains the principle of the one-year statutory time bar of pre-AIA 35 U.S.C. 102(b) in that a disclosure more than one year before the effective filing date of a claimed invention is prior art under the AIA's 35 U.S.C. 102(a)(1) that cannot be disqualified under 35 U.S.C. 102(b)(1).

Additionally, the provisions of 37 CFR 1.130 may not be available if the rejection is based upon a U.S. patent or U.S. patent application publication of a patented or pending application naming another inventor if: (1) The patent or pending application claims an invention that is the same or substantially the same as the applicant's or patent owner's claimed invention; and (2) the affidavit or declaration contends that an inventor named in the U.S. patent or U.S. patent application publication derived the claimed invention from the inventor or a joint inventor named in the application or patent. The provisions of 37 CFR 1.130 are not available if it would result in the Office issuing or confirming two patents containing patentably indistinct claims to two different parties.[107] In this situation, an applicant or patent owner may file a petition for a derivation proceeding pursuant to 37 CFR 42.401 *et seq.* (37 CFR 1.130(c)).

III. Joint Research Agreements

AIA 35 U.S.C. 102(c) provides three conditions that must be satisfied in order for subject matter disclosed which might otherwise qualify as prior art, and a claimed invention, to be treated as having been owned by the same person or subject to an obligation of assignment to the same person in applying the joint research agreement provisions of AIA 35 U.S.C. 102(b)(2)(C). First, the subject matter disclosed must have been developed and the claimed invention must have been made by, or on behalf of, one or more parties to a joint research agreement that was in effect on or before the effective filing date of the claimed invention.[108] The AIA defines the term ''joint research agreement'' as a written contract, grant, or cooperative agreement entered into by two or more persons or entities for the performance of experimental, developmental, or research work in the field of the claimed invention.[109] Second, the claimed invention must have been made as a result of activities undertaken within the scope of the joint research agreement.[110] Third, the application for patent for the claimed invention must disclose, or be amended to disclose, the names of the parties to the joint research agreement.[111] Joint research agreement subject matter under AIA 35 U.S.C. 102 and 103 is treated under 37 CFR 1.104(c)(4)(ii), joint research agreement subject matter under pre-AIA 35 U.S.C. 102 and 103 is treated under 37 CFR 1.104(c)(5)(ii). If these conditions are met, the joint research agreement prior art is not available as prior art under AIA 35 U.S.C. 102(a)(2).

The provisions of AIA 35 U.S.C. 102(c) generally track those of the Cooperative Research and Technology Enhancement Act of 2004 (CREATE Act).[112] The major differences between AIA 35 U.S.C. 102(c) and the CREATE Act are that: (1) The new provision is keyed to the effective filing date of the claimed invention, while the CREATE Act focused on the date that the claimed invention was made; and (2) the CREATE Act provisions only applied to obviousness rejections and not to anticipation rejections.

In order to invoke a joint research agreement to disqualify a disclosure as prior art, the applicant (or the applicant's representative of record) must provide a statement that the disclosure of the subject matter on which the rejection is based and the claimed invention were made by or on behalf of parties to a joint research agreement under AIA 35 U.S.C. 102(c). The statement must also assert that the agreement was in effect on or before the effective filing date of the claimed invention, and that the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement. When relying on the provisions of pre-AIA 35 U.S.C. 103(c), the applicant or his attorney or agent of record could provide a similar statement to disqualify the cited prior art as to the issue of obviousness. If the names of the parties to the joint research agreement are not already stated in the application, it is necessary to amend the application to include the names of the parties to the joint research agreement in accordance with 37 CFR 1.71(g).

As is the case with establishing common ownership, the applicant may, but is not required to, present evidence supporting the existence of the joint research agreement. Furthermore, the Office will not request corroborating evidence in the absence of independent evidence which raises doubt as to the existence of the joint research agreement.

As discussed previously, the AIA 35 U.S.C. 102(b)(2)(C) exception does not apply to a disclosure that qualifies as prior art under AIA 35 U.S.C. 102(a)(1) (disclosures made before the effective filing date of the claimed invention). Thus, if the issue date of a U.S. patent or publication date of a U.S. patent application publication or WIPO published application is before the effective filing date of the claimed invention, it may be prior art under AIA 35 U.S.C. 102(a)(1), regardless of the fact that the subject matter disclosed and the claimed invention resulted from a joint research agreement.

IV. Improper Naming of Inventors

Although the AIA eliminated pre-AIA 35 U.S.C. 102(f), the patent laws still require the naming of the actual inventor or joint inventors of the claimed subject matter.[113] The Office presumes that the named inventor or joint inventors in the application are the actual inventor or joint inventors be named on the patent.[114] Where an application names an incorrect inventorship, the applicant should submit a request to correct inventorship under 37 CFR 1.48. In the rare situation where it clear that the application does not name the correct inventorship and the applicant has not filed a request to correct inventorship under 37 CFR 1.48, Office personnel should reject the claims under 35 U.S.C. 101 and 35 U.S.C. 115.[115]

V. AIA 35 U.S.C. 103

AIA 35 U.S.C. 103 continues to set forth the nonobviousness requirement for patentability.[116] There are, however, some important changes from pre-AIA 35 U.S.C. 103.

The most significant difference between the AIA 35 U.S.C. 103 and pre-AIA 35 U.S.C. 103(a) is that AIA 35 U.S.C. 103 determines obviousness as of the effective filing date of the claimed invention, rather than as of the time that the claimed invention was made. Under pre-AIA examination practice, the Office uses the effective filing date as a proxy for the invention date, unless there is evidence of record to establish an earlier date of invention. Thus, as a practical matter during examination, this distinction between the AIA 35 U.S.C. 103 and pre-AIA 35 U.S.C. 103 will result in a difference in practice only when the case under examination is subject to pre-AIA 35 U.S.C. 103, and there is evidence in the case concerning a date of invention prior to the effective filing date. Such evidence is ordinarily presented by way of an affidavit or declaration under 37 CFR 1.131.

Next, AIA 35 U.S.C. 103 differs from that of pre-AIA 35 U.S.C. 103 in that AIA 35 U.S.C. 103 requires consideration of ''the differences between the claimed invention and the prior art,'' while pre-AIA 35 U.S.C. 103 refers to ''the differences between the subject matter sought to be patented and the prior art.'' This difference in terminology does not indicate the need for any difference in approach to the question of obviousness.[117]

Further, AIA 35 U.S.C. 103 does not contain any provision similar to pre-AIA 35 U.S.C. 103(b). Pre-AIA 35 U.S.C. 103(b) is narrowly drawn, applying only to nonobviousness of biotechnological inventions, and even then, only when specifically invoked by the patent applicant. Pre-AIA 35 U.S.C. 103(b) provides that under certain conditions, ''a biotechnological process using or resulting in a composition of matter that is novel under section 102 and nonobvious under subsection [103(a)] of this section shall be considered nonobvious.'' In view of the case law since 1995,[118] the need to invoke pre-AIA 35 U.S.C. 103(b) has been rare.

Finally, AIA 35 U.S.C. 103 eliminates pre-AIA 35 U.S.C. 103(c), but corresponding provisions have been introduced in AIA 35 U.S.C. 102(b)(2)(C) and 102(c). Pre-AIA 35 U.S.C. 103(c) applied if subject matter qualified as prior art only under pre-AIA 35 U.S.C. 102(e), (f), and/or (g), and only in the context of obviousness under pre-AIA 35 U.S.C. 103(a). If subject matter developed by another person was commonly owned with the claimed invention, or if the subject matter was subject to an obligation of

assignment to the same person, at the time the claimed invention was made, then pre-AIA 35 U.S.C. 103(a) did not preclude patentability. Furthermore, under the pre-AIA 35 U.S.C. 103(c), if a joint research agreement was in place on or before the date that the claimed invention was made, the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement, and the application for patent was amended to disclose the names of the parties to the joint research agreement, common ownership or an obligation to assign was deemed to exist. As discussed previously, AIA 35 U.S.C. 102(b)(2)(C) and 102(c) expand on this concept. Under the AIA, the common ownership, the obligation to assign, or the joint research agreement must exist on or before the effective filing date of the claimed invention, rather than on or before the date the invention was made. If the provisions of AIA 35 U.S.C. 102(b)(2)(C) are met, a disclosure is not prior art at all, whereas under pre-AIA 35 U.S.C. 103(c), certain prior art merely was defined as not precluding patentability. Finally, disclosures disqualified as prior art under AIA 35 U.S.C. 102(b)(2)(C) and 102(c) may not be applied in either an anticipation or an obviousness rejection. However, such disclosures could be the basis for statutory double patenting or non-statutory (sometimes referred to as obviousness-type) double patenting rejections.

Generally speaking, and with the exceptions noted herein, pre-AIA notions of obviousness will continue to apply under the AIA. AIA 35 U.S.C. 102(a) defines what is prior art both for purposes of novelty under AIA 35 U.S.C. 102 as well as for purposes of obviousness under AIA 35 U.S.C. 103.[119] Thus, if a document qualifies as prior art under AIA 35 U.S.C. 102(a)(1) or (a)(2), and is not subject to an exception under AIA 35 U.S.C. 102(b), it may be applied for what it describes or teaches to those skilled in the art in a rejection under AIA 35 U.S.C. 103.[120] Office personnel should continue to follow guidance for formulating an appropriate rationale to support any conclusion of obviousness. See MPEP § 2141 *et seq.* and the guidance documents available at *http://www.uspto.gov/patents/law/exam/ksr_training_materials.jsp.*

VI. Applicability Date Provisions and Determining Whether an Application Is Subject to the First Inventor To File Provisions of the AIA

Because the changes to 35 U.S.C. 102 and 103 in the AIA apply only to specific applications filed on or after March 16, 2013, determining the effective filing date of a claimed invention for purposes of applying AIA 35 U.S.C. 102 and 103 provisions or pre-AIA 35 U.S.C. 102 and 103 provisions is critical.

A. Applications Filed Before March 16, 2013

The changes to 35 U.S.C. 102 and 103 in the AIA do not apply to any application filed before March 16, 2013. Thus, any application filed before March 16, 2013, is governed by pre-AIA 35 U.S.C. 102 and 103 (i.e., the application is a pre-AIA application). Note that neither the filing of a request for continued examination, nor entry into the national stage under 35 U.S.C. 371, constitutes the filing of a new application. Accordingly, even if a request for continued examination under 37 CFR 1.114 is filed after March 16, 2013, in an application that was filed before March 16, 2013, the application remains subject to pre-AIA 35 U.S.C. 102 and 103. Similarly, a PCT application filed under 35 U.S.C. 363 before March 16, 2013, is subject to pre-AIA 35 U.S.C. 102 and 103, regardless of whether the application enters the national stage under 35 U.S.C. 371 before or after March 16, 2013.

B. Applications Filed on or After March 16, 2013

AIA 35 U.S.C. 102 and 103 take effect on March 16, 2013. AIA 35 U.S.C. 102 and 103 apply to any patent application that contains or contained at any time a claim to a claimed invention that has an effective filing date that is on or after March 16, 2013. If a patent application contains or contained at any time a claim to a claimed invention having an effective filing date on or after March 16, 2013, AIA 35 U.S.C. 102 and 103 apply to the application (i.e., the application is an AIA application). If there is ever even a single claim to a claimed invention in the application having an effective filing date on or after March 16, 2013, AIA 35 U.S.C. 102 and 103 apply in determining the patentability of every claimed invention in the application. This is the situation even if the remaining claimed inventions all have an effective filing date before March 16, 2013, and even if the claim to a claimed invention having an effective filing date on or after March 16, 2013, is canceled.

If an application filed on or after March 16, 2013, that did not previously contain any claim to a claimed invention having an effective filing date on or after March 16, 2013, (a pre-AIA application) is amended to contain a claim to a claimed invention having an effective filing date on or after March 16, 2013, the application becomes an AIA application (AIA 35 U.S.C. 102 and 103 apply to the application), provided that the newly added claimed invention has support under 35 U.S.C. 112(a) in the application filed on or after March 16, 2013. The application also remains subject to AIA 35 U.S.C. 102 and 103 even if the claim to a claimed invention having an effective filing date on or after March 16, 2013, is subsequently canceled. If an amendment after an Office action causes the application to change from being governed by pre-AIA 35 U.S.C. 102 and 103 (from being a pre-AIA application) to being governed by AIA 35 U.S.C. 102 and 103 (to being a AIA application), any new ground of rejection necessitated by the change in applicable law would be considered a new ground of rejection necessitated by an amendment for purposes of determining whether the next Office action may be made final.[121]

As 35 U.S.C. 132(a)[122] prohibits the introduction of new matter into the disclosure, an application may not contain a claim to a claimed invention that does not have support under 35 U.S.C. 112(a) in the application (that is directed to new matter). Thus, an application cannot ''contain'' a claim to a claimed invention that is directed to new matter for purposes of determining whether the application ever contained a claim to a claimed invention having an effective filing date on or after March 16, 2013.[123] Therefore, an amendment (other than a preliminary amendment filed on the same day as such application) seeking to add a claim to a claimed invention that is directed to new matter in an application filed on or after March 16, 2013, that, as originally filed, discloses and claims only subject matter also disclosed in a previously filed pre-AIA application to which the application filed on or after March 16, 2013, is entitled to priority or benefit under 35 U.S.C. 119, 120, 121, or 365, would not change the application from a pre-AIA application into an AIA application.

C. Applications Subject to the AIA but Also Containing a Claimed Invention Having an Effective Filing Date Before March 16, 2013

Even if AIA 35 U.S.C. 102 and 103 apply to a patent application, pre-AIA 35 U.S.C. 102(g) also applies to every claim in the application if it: (1) contains or contained at any time a claimed invention having an effective filing date that occurs before March 16, 2013; or (2) is ever designated as a continuation, divisional, or

continuation-in-part of an application that contains or contained at any time a claimed invention that has an effective filing date that occurs before March 16, 2013. Pre-AIA 35 U.S.C. 102(g) also applies to any patent resulting from an application to which pre-AIA 35 U.S.C. 102(g) applied.

Thus, if an application contains, or contained at any time, any claimed invention having an effective filing date that occurs before March 16, 2013, and also contains, or contained at any time, any claimed invention having an effective filing date that is on or after March 16, 2013, each claim must be patentable under AIA 35 U.S.C. 102 and 103, as well as pre-AIA 35 U.S.C. 102(g), for the applicant to be entitled to a patent. However, an application will not otherwise be concurrently subject to both pre-AIA 35 U.S.C. 102 and 103 and AIA 35 U.S.C. 102 and 103.

For these reasons, when subject matter is claimed in an application having priority to or the benefit of a prior-filed application (e.g., under 35 U.S.C. 120, 121, or 365(c)), care must be taken to accurately determine whether AIA or pre-AIA 35 U.S.C. 102 and 103 applies to the application.

D. Applicant Statement in Transition Applications Containing a Claimed Invention Having an Effective Filing Date on or After March 16, 2013

The Office is revising 37 CFR 1.55 and 1.78 in a separate action (RIN 0651–AC77) to require that if a nonprovisional application filed on or after March 16, 2013, claims the benefit of or priority to the filing date of a foreign, U.S. provisional, U.S. nonprovisional, or international application that was filed prior to March 16, 2013, and also contains or contained at any time a claimed invention having an effective filing date on or after March 16, 2013, the applicant must provide a statement to that effect. This information will assist the Office in determining whether the application is subject to AIA 35 U.S.C. 102 and 103 or pre-AIA 35 U.S.C. 102 and 103.

Dated: February 11, 2013.

Teresa Stanek Rea,

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office.

[1] *See* Public Law 112–29, 125 Stat. 284 (2011).

[2] All MPEP references are to MPEP (8th ed. 2001) (Rev. 9 Aug. 2012).

[3] *See D.L. Auld Co.* v. *Chroma Graphics,* 714 F.2d 1144 (Fed. Cir. 1983) and *W.L. Gore & Assocs.* v. *Garlock, Inc.,* 721 F.2d 1540 (Fed. Cir. 1983).

[4] *Metallizing Engineering Co.* v. *Kenyon Bearing and Auto Parts,* 153 F.2d 516 (2d Cir. 1946).

[5] *See United States* v. *Hohri,* 482 U.S. 64, 69 (1987); *Kelly* v. *Robinson,* 479 U.S. 36, 43 (1986).

[6] *See Universal City Studios* v. *Reimerdes,* 111 F.Supp. 2d. 294, 325 (S.D.N.Y. 2000) (the phrase ''or otherwise traffic in'' modifies the preceding phrases ''offer'' and ''provide''); *Strom* v. *Goldman Sachs & Co.,* 202 F.3d 138, 146–47 (2nd. Cir. 1999) (the phrase ''or any other equitable relief'' modifies at least the immediately preceding phrase ''back pay'' demonstrating that Congress considered back pay a form of equitable relief).

[7] *See* 157 Cong. Rec. 1370 (Mar. 8, 2011) (''The Committee's understanding of the effect of adding the words 'or otherwise available to the public' is confirmed by judicial construction of this phraseology. Courts have consistently found that when the words 'or otherwise' or 'or other' when used to add a modifier at the end of a string of clauses, the modifier thus added restricts the meaning of the preceding clauses.'').

[8] 157 Cong. Rec. S1496 (Mar. 9, 2011) (''[S]ubsection 102(a) was drafted in part to do away with precedent under current law that private offers for sale or private uses or secret processes practiced in the United States that result in a product or service that is then made public may be deemed patent-defeating prior art. That will no longer be the case. In effect, the new paragraph 102(a)(1) imposes an overarching requirement for availability to the public, that is a public disclosure, which will limit paragraph 102(a)(1) prior art to subject matter meeting the public accessibility standard that is well-settled in current law, especially case law of the Federal Circuit.''); 157 Cong. Rec. H4429 (June 22, 2011) (''[C]ontrary to current precedent, in order to trigger the bar in the new 102(a) in our legislation, an action must make the patented subject matter 'available to the public' before the effective filing date''). One commenter suggested that Senator Leahy's remarks cannot be considered to be legislative history because they appeared in the Congressional Record on the day after the Senate acted on S. 23, the Senate version of the AIA. However, the bill that was eventually enacted into law, H.R. 1249, was considered in both the House and Senate after Senator Leahy's statement was printed in the record. Also, the committee report for the bill that became law cites to Senator Leahy's remarks in its discussion of AIA 35 U.S.C. 102. *See* H.R. Rep. No. 112–98 at 43, n.20 (2011). The same commenter also suggested that AIA 35 U.S.C. 102(a) should not be construed to impose an overarching public availability requirement because a bill that was introduced in Congress six years earlier more clearly imposed such a standard, even eliminating sales and uses entirely as independent bars to patentability. The Office's role, however, is not to determine whether Congress could have enacted a statute that is clearer and more forceful, but rather it is to determine the most likely meaning of the statute that Congress actually did enact.

[9] *See In re Kollar,* 286 F.3d 1326, 1330 n.3 (Fed. Cir. 2002).

[10] *See Elan Corp., PLC* v. *Andrx Pharmaceuticals, Inc.,* 366 F.3d 1336, 1341 (Fed. Cir. 2004).

[11] *See TP Laboratories, Inc.* v. *Professional Positioners, Inc.,* 724 F.2d 965, 971 (Fed. Cir. 1984) (''[I]f a prima facie case is made of public use, the patent owner must be able to point to or must come forward with convincing evidence to counter that showing.''); *Star Fruits S.N.C.* v. *U.S.,* 393 F.3d 1277, 1284 (Fed. Cir. 2005) (''So long as the request from the examiner for information is not arbitrary or capricious, the applicant cannot impede the examiner's performance of his duty by refusing to comply with an information requirement which proceeds from the examiner's view of the scope of the law to be applied to the application at hand. To allow such interference would have the effect of forcing the Office to make patentability determinations on insufficient facts and information. Such conduct inefficiently shifts the burden of obtaining information that the applicant is in the best position to most cheaply provide onto the shoulders of the Office and risks the systemic inefficiencies that attend the issue of invalid patents.'').

[12] *See In re Epstein,* 32 F.3d 1559, 1568 (Fed. Cir. 1994) (''the question is not whether the sale, even a third party sale, 'discloses' the invention at the time of the sale, but whether the sale relates to a device that embodies the invention'') (citing *J.A. La Porte, Inc.* v. *Norfolk Dredging Co.,* 787 F.2d 1577, 1583 (Fed. Cir. 1986)); *see also Zenith Elecs. Corp.* v. *PDI Commc'n Sys., Inc.,* 522 F.3d 1348, 1356 (Fed. Cir. 2008) (a public use itself need not be enabling).

[13] *See Pfaff* v. *Wells Elecs., Inc.,* 525 U.S. 55, 67 (1998).

[14] *See Linear Tech. Corp.* v. *Micrel, Inc.,* 275 F.3d 1040, 1048 (Fed. Cir. 2001), and *Group One, Ltd.* v.v. *Hallmark Cards, Inc.,* 254 F.3d 1041, 1047 (Fed. Cir. 2001); *see also* MPEP 2133.03(b).

[15] *See Voter Verified, Inc.* v. *Premier Election Solutions, Inc.,* 687 F.3d 1374, 1380 (Fed. Cir. 2012) (quoting *SRI Int'l, Inc.* v. *Internet Sec. Sys., Inc.,* 511 F.3d 1186, 1194 (Fed. Cir. 2008) and *Bruckelmyer* v. *Ground Heaters, Inc.,* 445 F.3d 1374, 1378 (Fed. Cir. 2006)) (indicating that indexing is a relevant factor, but not a prerequisite, to public availability).

[16] *See Northern Telecom Inc.* v. *Datapoint Corp.,* 908 F.2d 931, 936 (Fed. Cir. 1990).

[17] *See In re Lister,* 583 F.3d 1307, 1313 (Fed. Cir. 2009) (explaining the distinction between access to materials being restricted to authorized persons as in *Northern Telecom,* and a person needing to take steps to gain access to the materials, noting that significant travel that would have been necessary for a person to gain access to the dissertation in *In re Hall,* 781 F.2d 897 (Fed. Cir. 1986)).

[18] *See In re Hilmer,* 359 F.2d 859 (CCPA 1966).

[19] *See* MPEP § 2136.02 II and 2136.03 IV.

[20] *In re Donohue,* 766 F.2d 531 (Fed. Cir. 1985).

[21] *See In re Katz,* 687 F.2d 450, 455 (CCPA 1982) (stating that it is incumbent upon the appellant to provide a satisfactory showing which would lead to a reasonable conclusion

that appellant is the sole inventor where there is a grace period publication listing individuals in addition to appellant).

[22] *See, e.g., In re DeBaun,* 687 F.2d 459 (CCPA 1982), *In re Katz,* 687 F.2d 450 (CCPA 1982), and *In re Mathews,* 408 F.2d 1393 (CCPA 1969).

[23] *See United States* v. *Hohri,* 482 U.S. 64, 69 (1987); *Kelly* v. *Robinson,* 479 U.S. 36, 43 (1986).

[24] *See Brown* v. *Gardner,* 513 U.S. 115, 118 (1994) (presumption that a given term is used to mean the same thing throughout a statute).

[25] *See* 35 U.S.C. 100(f), (g), and (j).

[26] *See* 35 U.S.C. 112(b).

[27] Pre-AIA 35 U.S.C. 135(b)(2) provides that ''[a] claim which is the same as, or for the same or substantially the same subject matter as, a claim of an application published under section 122(b) of this title may be made in an application filed after the application is published only if the claim is made before one year after the date on which the application is published.''

[28] Pre-AIA 35 U.S.C. 135(a) provides that ''[a]ny such petition may be filed only within the 1-year period beginning on the date of the first publication of a claim to an invention that is the same or substantially the same as the earlier application's claim to the invention, shall be made under oath, and shall be supported by substantial evidence.''

[29] Pre-AIA 35 U.S.C. 154(d)(2) provides that ''[t]he ''right under [35 U.S.C. 154(d)(1)] to obtain a reasonable royalty shall not be available under this subsection unless the invention as claimed in the patent is substantially identical to the invention as claimed in the published patent application.''

[30] Pre-AIA 35 U.S.C. 252 provides that ''[t]he surrender of the original patent shall take effect upon the issue of the reissued patent, and every reissued patent shall have the same effect and operation in law, on the trial of actions for causes thereafter arising, as if the same had been originally granted in such amended form, but in so far as the claims of the original and reissued patents are substantially identical, such surrender shall not affect any action then pending nor abate any cause of action then existing, and the reissued patent, to the extent that its claims are substantially identical with the original patent, shall constitute a continuation thereof and have effect continuously from the date of the original patent.''

[31] *See Duncan* v. *Walker,* 533 U.S. 167, 174 (2001) (quoting *United States* v. *Menasche,* 348 U.S. 528, 538–39 (1955)).

[32] *See Shannon* v. *United States,* 512 U.S. 573, 584 (1994) (no authority to enforce concepts gleaned solely from legislative history that have no statutory reference point).

[33] *See* H.R. Rep. No. 112–98 at 73 (2011).

[34] There are floor statements that discuss what would be encompassed by the term ''the subject matter'' in subparagraph (B) of 35 U.S.C. 102(b)(1) and 102(b)(2). One can find support for the ''same subject matter'' standard (157 Cong. Rec. 1496–97 (Mar. 9, 2011) (''An additional clarification we have been asked about deals with subparagraph 102(b)(1)(B) * * * . The inventor is protected not only from the inventor's own disclosure being prior art against the inventor's claimed invention, but also against the disclosures of any of the same subject matter in disclosures made by others being prior art against the inventor's claimed invention under section 102(a) or section 103—so long as the prior art disclosures from others came after the public disclosure by the inventor.'')), as well as for the ''the subject matter of the claimed invention'' standard (157 Cong. Rec. 1370 (Mar. 8, 2011) (''Under the first subparagraph (B), at section 102(b)(1)(B), if an inventor publicly discloses his invention, no subsequent disclosure made by anyone, regardless of whether the subsequent discloser obtained the subject matter from the inventor, will constitute prior art against the inventor's subsequent application for patent in the United States. The parallel provision at section 102(b)(2)(B) applies the same rule to subsequent applications: If the inventor discloses his invention, a subsequently filed application by another will not constitute prior art against the inventor's later-filed application for patent in the United States, even if the other filer did not obtain the subject matter from the first-disclosing inventor.'')). *See also* H.R. Rep. No. 110–314 at 57 (2007) (the provision disqualifying prior art if ''the subject matter had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or others who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor'' disqualifies any prior art under section 102(a)(1) if ''the same subject matter'' had already been publicly disclosed by the inventor).

[35] *See* 35 U.S.C. 102(b)(1)(B) or 102(b)(2)(B).

[36] *See* 35 U.S.C. 102(b)(1)(A) or 102(b)(2)(A).

[37] *See* 35 U.S.C. 102(b)(1)(B) or 102(b)(2)(B).

[38] *In re Wands,* 858 F.2d 731, 737 (Fed. Cir. 1988). In *Wands,* the Federal Circuit set forth the following factors to consider when determining whether undue experimentation is needed: (1) The breadth of the claims; (2) the nature of the invention; (3) the state of the prior art; (4) the level of one of ordinary skill; (5) the level of predictability in the art; (6) the amount of direction provided by the inventor; (7) the existence of working examples; and (8) the quantity of experimentation needed to make or use the invention based on the content of the disclosure.

[39] *See Hazeltine Res., Inc.* v. *Brenner,* 382 U.S. 252 (1965).

[40] *See Hazeltine Res., Inc.* v. *Brenner,* 382 U.S. 252, 256 (1965) (a previously filed patent application to another pending in the Office, but not patented or published, at the time an application is filed constitutes part of the ''prior art'' within the meaning of 35 U.S.C. 103).

[41] The Office is also treating such a situation under 35 U.S.C. 101 because 35 U.S.C. 282 makes a distinction between a failure to comply with 35 U.S.C. 112 and a failure to comply with 35 U.S.C. 115, in that a failure to comply with any requirement of 35 U.S.C. 112 (except the failure to disclose the best mode) is listed in 35 U.S.C. 282(b)(3)(A) as a defense in any action involving the validity or infringement of a patent, whereas a failure to comply with 35 U.S.C. 115 is not discussed in 35 U.S.C. 282(b). In addition, 35 U.S.C. 115(i)(3) provides that a patent shall not be invalid or unenforceable based upon the failure to comply with a requirement under 35 U.S.C. 115 if the failure is remedied as provided under 35 U.S.C. 115(i)(1).

[42] *See Final Bulletin for Agency Good Guidance Practices,* 72 FR 3432 (Jan. 25, 2007).

[43] *See Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336 (Fed. Cir. 2008) (explaining that in distinguishing between substantive and interpretative rules, a rule is substantive when it affects a change in existing law or policy that affects individual rights and obligations, where a rule which merely clarifies or explains existing law or regulations is interpretative). As these examination guidelines are not substantive rulemaking, but merely examination guidelines that set out the Office's interpretation of 35 U.S.C. 102 and 103 as amended by the AIA, these examination guidelines are exempt from the notice-and-comment requirements of 5 U.S.C. 553(b) (or any other law) and the thirty day advance publication requirement of 5 U.S.C. 553(d). *See Cooper Techs.,* 536 F.3d at 1336–37 (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), does not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'') (quoting 5 U.S.C. 553(b)(A)); *see also Mikkilineni* v. *Stoll,* 410 Fed. Appx. 311, 313 (Fed. Cir. 2010) (Office's 2009 guidelines concerning 35 U.S.C. 101 are interpretive, rather than substantive, and are thus exempt from the notice and comment requirements of 5 U.S.C. 553). As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, neither a regulatory flexibility analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is required. *See* 5 U.S.C. 603.

[44] *Chevron* v. *Natural Res. Def. Council,* 467 U.S. 837 (1984).

[45] *See Animal Legal Def. Fund* v. *Quigg,* 932 F.2d 920, 930–31 (Fed. Cir. 1991); *see also* 35 U.S.C. 3(a)(2)(A) (''[t]he Director shall be responsible for providing policy direction and management supervision for the Office and for the issuance of patents and the registration of trademarks'' and ''shall perform these duties in a fair, impartial, and equitable manner'').

[46] *See Final Bulletin for Agency Good Guidance Practices,* 72 FR 3432, 3440 (Jan. 25, 2007).

[47] Under 35 U.S.C. 102(e) as amended by the American Inventors Protection Act of 1999 (AIPA) (Pub. L. 106–113, 113 Stat. 1501 (1999) and the Intellectual Property and High Technology Technical Amendments Act of 2002 (Pub. L. 107–273), the international filing date of a PCT application is a U.S. filing date for prior art purposes under 35 U.S.C. 102(e) if the international application: (1) Has an international filing date on or after November 29, 2000; (2) designated the United States; and (3) was published under PCT Article 21(2) in English. *See* MPEP

§ 706.02(f)(1). The AIA amends 35 U.S.C. 102, 363, and 374 to provide simply that the publication under the PCT of an international application designating the United States shall be deemed a publication under 35 U.S.C. 122(b).

[48] *See* 35 U.S.C. 101 (''[w]hoever invents or discovers * * *, may obtain a patent therefor, subject to the conditions and requirements of this title); *see also* P.J. Federico, *Commentary on the New Patent Act,* 75 J. Pat. & Trademark Off. Soc'y 161, 179 (1993) (noting that pre-AIA 35 U.S.C. 102(f) is perhaps unnecessary since 35 U.S.C. 101 provides that (''[w]hoever invents or discovers * * *, may obtain a patent therefor, subject to the conditions and requirements of this title'').

[49] *See* 35 U.S.C. 115 (''An application for patent that is filed under section 111(a) or commences the national stage under section 371 shall include, or be amended to include, the name of the inventor for any invention claimed in the application.'')

[50] *See* Pub. L. 112–29, § 3(n)(1), 125 Stat. at 293.

[51] *See* Pub. L. 112–29, § 3(n)(1), 125 Stat. at 293.

[52] 35 U.S.C. 102(g) precludes the grant of a patent if: (1) During the course of an interference conducted under 35 U.S.C. 135 or 291, another inventor involved therein establishes, to the extent permitted in 35 U.S.C. 104, that before such person's invention thereof the invention was made by such other inventor and not abandoned, suppressed, or concealed, or (2) before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it.

[53] *See* Pub. L. 112–29, § 3(n)(2), 125 Stat. at 293.

[54] *See* Pub. L. 112–29, § 3(n)(2), 125 Stat. at 293.

[55] *See* 35 U.S.C. 102(a).

[56] *See* 35 U.S.C. 132(a).

[57] *See In re Epstein,* 32 F.3d 1559 (Fed. Cir. 1994).

[58] *See* 35 U.S.C. 102(b)(1).

[59] *See* 35 U.S.C. 102(b)(2).

[60] *See* 35 U.S.C. 100(i)(1).

[61] *See* MPEP § 706.02(VI).

[62] *See* 35 U.S.C. 100(i)(2).

[63] *See In re Ekenstam,* 256 F.2d 321, 323 (CCPA 1958); *see also* MPEP § 2126.01.

[64] *See In re Carlson,* 983 F.2d 1032, 1037 (Fed. Cir. 1992); *see also* MPEP § 2126.

[65] *See Novo Nordisk Pharma., Inc.* v. *Bio-Tech. Gen. Corp.,* 424 F.3d 1347, 1355 (Fed. Cir. 2005) (discussing pre-AIA 35 U.S.C. 112, first paragraph, and pre-AIA 35 U.S.C. 102).

[66] *See In re Gleave,* 560 F.3d 1331, 1334 (Fed. Cir. 2009), citing *Eli Lilly & Co.* v. *Zenith Goldline Pharms., Inc.,* 471 F.3d 1369, 1375 (Fed. Cir. 2006); *Net MoneyIN, Inc.* v. *VeriSign, Inc.,* 545 F.3d 1359, 1370 (Fed. Cir. 2008); *In re Bond,* 910 F.2d 831, 832–33 (Fed. Cir. 1990).

[67] *See In re Gleave,* 560 F.3d 1331, 1334 (Fed. Cir. 2009) (citing *Impax Labs., Inc.* v. *Aventis Pharms. Inc.,* 545 F.3d 1312, 1314 (Fed. Cir. 2008), and *In re LeGrice,* 301 F.2d 929, 940–44 (CCPA 1962)).

[68] *See In re Gleave,* 560 F.3d 1331, 1334 (Fed. Cir. 2009); *see also In re Schoenwald,* 964 F.2d 1122, 1124 (Fed. Cir. 1992) (holding that a claimed compound was anticipated even though the prior art reference did not disclose a use for the compound); *Schering Corp.* v. *Geneva Pharms., Inc.,* 339 F.3d 1373, 1380–81 (Fed. Cir. 2003) (pointing out that actually reducing the invention to practice is not necessary in order for a prior art reference to anticipate); *Impax Labs. Inc.* v. *Aventis Pharm. Inc.,* 468 F.3d 1366, 1382 (Fed. Cir. 2006) (stating that ''proof of efficacy is not required for a prior art reference to be enabling for purposes of anticipation'').

[69] *See In re Donohue,* 766 F.2d 531, 533 (Fed. Cir. 1985).

[70] *See Rasmussen* v. *SmithKline Beecham Corp.,* 413 F.3d 1318 (Fed. Cir. 2005).

[71] *See Vas-Cath Inc.* v. *Mahurkar,* 935 F.2d 1555, 1562 (Fed. Cir. 1991) (''As the court pointed out, 'the description of a single embodiment of broadly claimed subject matter constitutes a description of the invention for anticipation purposes * * *, whereas the same information in a specification might not alone be enough to provide a description of that invention for purposes of adequate disclosure.' '') (quoting *In re Lukach,* 442 F.2d 967 (CCPA 1971)); *see also In re Van Langenhoven,* 458 F.2d 132 (CCPA 1972), and *In re Ruscetta,* 255 F.2d 687 (CCPA 1958).

[72] Under pre-AIA 35 U.S.C. 102(b), the critical date is the date that is one year prior to the date of application for patent in the United States.

[73] *See Invitrogen Corp.* v. *Biocrest Mfg. L.P.,* 424 F.3d 1374, 1379–80 (Fed. Cir. 2005).

[74] *See American Seating Co.* v. *USSC Group, Inc.,* 514 F.3d 1262, 1267 (Fed. Cir. 2008).

[75] *See Woodland Trust* v. *Flowertree Nursery, Inc.,* 148 F.3d 1368, 1371 (Fed. Cir. 1998).

[76] *See Woodland Trust* v. *Flowertree Nursery, Inc.,* 148 F.3d 1368, 1370 (Fed. Cir. 1998).

[77] *See American Seating Co.* v. *USSC Group, Inc.,* 514 F.3d 1262, 1267 (Fed. Cir. 2008).

[78] *See Woodland Trust* v. *Flowertree Nursery, Inc.,* 148 F.3d 1368, 1370 (Fed. Cir. 1998).

[79] *See Woodland Trust* v. *Flowertree Nursery, Inc.,* 148 F.3d 1368, 1370 (Fed. Cir. 1998) (quoting *Carella* v. *Starlight Archery,* 804 F.2d 135, 139 (Fed. Cir. 1986)).

[80] *See Pfaff* v. *Wells Elecs., Inc.,* 525 U.S. 55, 67 (1998).

[81] *See In re Epstein,* 32 F.3d 1559, 1568 (Fed. Cir. 1994).

[82] *Cf. Clock Spring, L.P.* v. *Wrapmaster, Inc.,* 560 F.3d 1317, 1325 (Fed. Cir. 2009) (an invention is in public use if it is shown to or used by an individual other than the inventor under no limitation, restriction, or obligation of confidentiality to the inventor).

[83] *See, e.g, In re Cronyn,* 890 F.2d 1158 (Fed. Cir. 1989); *In re Hall,* 781 F.2d 897 (Fed. Cir. 1986); *In re Bayer,* 568 F.2d 1357 (CCPA 1978).

[84] *See, e.g, In re Klopfenstein,* 380 F.3d 1345 (Fed. Cir. 2004), *Massachusetts Institute of Technology* v. *AB Fortia,* 774 F.2d 1104 (Fed. Cir. 1985).

[85] *See, e.g, In re Wyer,* 655 F.2d 221 (CCPA 1981); *see also Bruckelmyer* v. *Ground Heaters, Inc.,* 445 F.3d 1374 (Fed. Cir. 2006).

[86] *See, e.g, Voter Verified, Inc.* v. *Premier Election Solutions, Inc.,* 687 F.3d 1380–81 (Fed. Cir. 2012), *In re Lister,* 583 F.3d 1307 (Fed. Cir. 2009), and *SRI Int'l, Inc.* v. *Internet Sec. Sys., Inc.,* 511 F.3d 1186 (Fed. Cir. 2008).

[87] *See, e.g, Group One, Ltd.* v. *Hallmark Cards, Inc.,* 254 F.3d 1041 (Fed. Cir. 2001).

[88] *See Riverwood Int'l Corp.* v. *R.A. Jones & Co.,* 324 F.3d 1346, 1354 (Fed. Cir. 2003); *Constant* v. *Advanced Micro-Devices Inc.,* 848 F.2d 1560, 1570 (Fed. Cir.1988).

[89] *See* 35 U.S.C. 102(b)(1) (''[a] disclosure made one year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under [35 U.S.C. 102](a)(1)'') and 102(b)(2) (''[a] disclosure shall not be prior art to a claimed invention under [35 U.S.C. 102](a)(2)''); *see also* H.R. Rep. No. 112–98 at 43 (2011) (indicating that the grace period provision of 35 U.S.C. 102(b) would apply to all patent applicant actions during the grace period that would create prior art under 35 U.S.C. 102(a)).

[90] *See* 35 U.S.C. 102(b)(1)(B).

[91] *See In re Kao,* 639 F.3d 1057, 1066 (Fed. Cir. 2011) (subject matter does not change as a function of how one chooses to describe it).

[92] *See* 157 Cong. Rec. 1370 (Mar. 8, 2011) (distinguishing between the core requirement that the prior-filed application include an enabling disclosure and the ministerial requirements that the applications be copendent and specifically referenced); *see also* MPEP § 201.08 (permitting a claim to the benefit of a prior-filed application in a continuation-in-part application provided that the continuation-in-part application has a common inventor, has copendency with the prior-filed application, and includes a specific reference to the prior-filed application, regardless of whether the prior-filed application contains support under 35 U.S.C. 112 for any claim in the continuation-in-part application).

[93] The legislative history of the AIA discusses an important distinction between ministerial entitlement to make a priority or benefit claim, and actual legal entitlement to the priority or benefit. In section 100(i), which defines the effective filing date of the patent under review, the patent must be entitled to the priority or benefit itself under the relevant sections. In section 102(d), however, the application need only be entitled to claim the benefit or priority under those sections. This difference in language distinguishes between the core requirement of section 120 et al.—that the application include an enabling disclosure—and the ministerial requirements of that section—that the application be copendent and specifically referenced. In effect, an application that meets the ministerial requirements of copendency and specific reference is entitled to claim the benefit or priority, but only an application that also offers an enabling disclosure is actually entitled to the benefit or priority itself. *See* 157 Cong. Rec. 1370 (Mar. 8, 2011).

[94] *See In re Wertheim,* 646 F.2d 527 (CCPA 1981), which relies upon *Alexander Milburn Co.* v. *Davis-Bournonville,* 270 U.S. 390

(1926), for its conclusion that the patent must actually be entitled to the benefit of the prior-application for any subject matter in the patent to have a prior art date under 35 U.S.C. 102(e) as of the filing date of the prior application. The legislative history of the AIA indicates that paragraph (2) of AIA 102(d) is intended to overrule what remained of *In re Wertheim,* 646 F.2d 527 (CCPA 1981), which appeared to hold that only an application that could have become a patent on the day that it was filed can constitute prior art against another application or patent. *See* 157 Cong. Rec. 1369–70 (Mar. 8, 2011). The Office has previously indicated that the reasoning of *In re Wertheim,* 646 F.2d 527 (CCPA 1981), did not survive the amendment to 35 U.S.C. 102(e) in the American Inventor's Protection Act. *See, e.g, Ex parte Yamaguchi,* 88 U.S.P.Q.2d 1606, 1610–12 (Bd. Pat. App. & Interf. 2008). In *In re Giacomini,* 612 F.3d 1380 (Fed. Cir. 2010), the Federal Circuit held that a patent was effective as prior art as of the filing date of a provisional application claimed under 35 U.S.C. 119(e), so long as the subject matter upon which the rejection was based was described in the provisional application filing.

[95] *See* MPEP § 2136.03 IV (''In other words, the subject matter used in the rejection must be disclosed in the earlier-filed application in compliance with 35 U.S.C. 112, first paragraph, in order for that subject matter to be entitled to the earlier filing date under 35 U.S.C. 102(e).''); *see also Ex parte Yamaguchi,* 88 U.S.P.Q.2d 1606, 1610–12 (Bd. Pat. App. & Interf. 2008) (discussing the legislative displacement of *In re Wertheim,* 646 F.2d 527 (CCPA 1981), prior to enactment of the AIA by the provisional application provisions of the Uruguay Round Agreements Act (URAA) (Pub. L. 103–465, 108 Stat. 4809 (1994)), and the eighteen-month publication provisions of the American Inventor's Protection Act of 1999 (AIPA)).

[96] As discussed previously, in *In re Hilmer,* 359 F.2d 859 (CCPA 1966), the CCPA held that reliance on the foreign priority date of a reference applied in a rejection under pre-AIA 35 U.S.C. 102(e) was improper.

[97] When examining an application to which the changes in 35 U.S.C. 102 and 103 do not apply, Office personnel will continue to apply the *Hilmer* doctrine, and foreign priority dates may not be used in determining 35 U.S.C. 102(e) prior art dates. Note that the international filing date of a published PCT application may be the 35 U.S.C. 102(e) prior art date under pre-AIA law under certain circumstances. *See* MPEP § 706.02(f).

[98] *See* 35 U.S.C. 102(b)(2)(B).

[99] *See* MPEP § 804.03 (prior art disqualified under the CREATE Act may be the basis for a double patenting rejection).

[100] *See* MPEP § 2124 (publications after the critical date may be used to show factual evidence that, as of an application's filing date, undue experimentation would have been required to make or use the invention, that a parameter absent from the claims was or was not critical, that a statement in the specification was inaccurate, that the invention was inoperative or lacked utility, that a claim was indefinite, or that characteristics of prior art products were known).

[101] *See* MPEP § 706.02(l)(2)(II).

[102] *See In re Katz,* 687 F.2d 450, 455 (CCPA 1982).

[103] *See In re DeBaun,* 687 F.2d 459, 463 (CCPA 1982).

[104] *See Ex parte Kroger,* 219 USPQ 370 (Bd. App. 1982) (affirming rejection notwithstanding declarations by the alleged actual inventors as to their inventorship in view of a nonapplicant author submitting a letter declaring the nonapplicant author's inventorship).

[105] *See* 35 U.S.C. 102(b)(1)(A) or 102(b)(2)(A).

[106] *See* 35 U.S.C. 102(b)(1)(B) or 102(b)(2)(B).

[107] *See In re Deckler,* 977 F.2d 1449, 1451–52 (Fed. Cir. 1992) (35 U.S.C. 102, 103, and 135 ''clearly contemplate—where different inventive entities are concerned—only one patent should issue for inventions which are either identical to or not patentably distinct from each other'') (quoting *Aelony* v. *Arni,* 547 F.2d 566, 570 (CCPA 1977)).

[108] *See* 35 U.S.C. 102(c)(1).

[109] *See* 35 U.S.C. 100(h).

[110] *See* 35 U.S.C. 102(c)(2).

[111] *See* 35 U.S.C. 102(c)(3).

[112] *See* Public Law 108–453, 118 Stat. 3596 (2004), which was an amendment to pre-AIA 35 U.S.C. 103(c). Congress has made it clear that the intent of AIA 35 U.S.C. 102(c) is to continue the promotion of joint research activities that was begun under the CREATE Act, stating in section 3(b) of the AIA that ''[t]he United States Patent and Trademark Office shall administer section 102(c) of title 35, United States Code, in a manner consistent with the legislative history of the CREATE Act that was relevant to its administration by the United States Patent and Trademark Office.'' *See* 125 Stat. at 287.

[113] *See* 35 U.S.C. 115(a) (''[a]n application for patent that is filed under [35 U.S.C.] 111(a) or commences the national stage under [35 U.S.C.] 371 shall include, or be amended to include, the name of the inventor for any invention claimed in the application'').

[114] *See* MPEP § 2137.01.

[115] As discussed previously, 35 U.S.C. 101 provides that ''[w]hoever invents or discovers * * *, may obtain a patent therefor, subject to the conditions and requirements of this title,'' while 35 U.S.C. 115 requires that ''[a]n application for patent that is filed under section 111(a) or commences the national stage under section 371 shall include, or be amended to include, the name of the inventor for any invention claimed in the application.''

[116] AIA 35 U.S.C. 103 provides: ''A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.''

[117] As pointed out by the Federal Circuit, ''[t]he term 'claims' has been used in patent legislation since the Patent Act of 1836 to define the invention that an applicant believes is patentable.'' *Hoechst-Roussel Pharms., Inc.* v. *Lehman,* 109 F.3d 756, 758 (Fed. Cir. 1997) (citing Act of July 4, 1836, ch. 357, § 6, 5 Stat. 117). Furthermore, in *Graham* v. *John Deere,* 383 U.S. 1 (1966), the second of the Supreme Court's factual inquiries (the ''*Graham* factors'') is that the ''differences between the prior art and the claims at issue are to be ascertained.'' *Graham,* 383 U.S. at 17. Thus, in interpreting 35 U.S.C. 103 as enacted in the 1952 Patent Act—language that remained unchanged until enactment of the AIA—the Court equated ''the subject matter sought to be patented'' with the claims.

[118] As stated in MPEP § 706.02(n), in view of the Federal Circuit's decisions in *In re Ochiai,* 71 F.3d 1565 (Fed. Cir. 1995) and *In re Brouwer,* 77 F.3d 422 (Fed. Cir. 1996), the need to invoke pre-AIA 35 U.S.C. 103(b) rarely arose. Those cases continue to retain their validity under the AIA.

[119] *See Hazeltine Res., Inc.* v. *Brenner,* 382 U.S. 252, 256 (1965) (a previously filed patent application to another pending in the Office, but not patented or published, at the time an application is filed constitutes part of the ''prior art'' within the meaning of 35 U.S.C. 103).

[120] This is in accordance with pre-AIA case law indicating that in making determinations under 35 U.S.C. 103, ''it must be known whether a patent or publication is in the prior art under 35 U.S.C. 102.'' *Panduit Corp.* v. *Dennison Mfg. Co.,* 810 F.2d 1561, 1568 (Fed. Cir. 1987). However, while a disclosure must enable those skilled in the art to make the invention in order to anticipate under 35 U.S.C. 102, a non-enabling disclosure is prior art for all it teaches for purposes of determining obviousness under 35 U.S.C. 103. *Symbol Techs. Inc.* v. *Opticon Inc.,* 935 F.2d 1569, 1578 (Fed. Cir. 1991); *Beckman Instruments* v. *LKB Produkter AB,* 892 F.2d 1547, 1551 (Fed. Cir. 1989) (''Even if a reference discloses an inoperative device, it is prior art for all that it teaches.'').

[121] *See* MPEP § 706.07(a).

[122] 35 U.S.C. 132(a) provides that ''[n]o amendment shall introduce new matter into the disclosure of the invention.''

[123] The MPEP set forth the following process for treating amendments that are believed to contain new matter: (1) A new drawing should not be entered if the examiner discovers that the drawing contains new matter (MPEP § 608.02); and (2) amendments to the written description or claims involving new matter are ordinarily entered, but the new matter is required to be canceled from the written description and the claims directed to the new matter are rejected under 35 U.S.C. 112(a) (MPEP § 608.04). This process for treating amendments containing new matter is purely an administrative process for handling an amendment seeking to introduce new matter into the disclosure of the invention in violation of 35 U.S.C. 132(a), and for resolving disputes between the applicant and an examiner as to whether a new drawing or amendment to the written description or

claims would actually introduce new matter into the disclosure of the invention.

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