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WHAT: Free public briefings (approximately 3 hours) to present:

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3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, October 23, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741-6008

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Federal Register

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Monday, September 17, 2012

Presidential Documents

Title 3—

The President

Proclamation 8861 of September 12, 2012

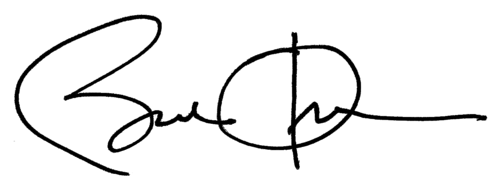
Honoring the Victims of the Attack in Benghazi, Libya

By the President of the United States of America

A Proclamation

As a mark of respect for the memory of John Christopher Stevens, United States Ambassador to Libya, and American personnel killed in the senseless attack on our diplomatic facility in Benghazi, by the authority vested in me as President of the United States by the Constitution and the laws of the United States of America, I hereby order that the flag of the United States shall be flown at half-staff at the White House and upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset, September 16, 2012. I also direct that the flag shall be flown at half-staff for the same length of time at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of September, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.



[FR Doc. 2012–22951

Filed 9–14–12; 8:45 am]

Billing code 3295–F2–P

Rules and Regulations

Federal Register

Vol. 77, No. 180

Monday, September 17, 2012

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0634; Directorate Identifier 2012–CE–016–AD; Amendment 39–17182; AD 2012–18–06]

RIN 2120–AA64

Airworthiness Directives; PIAGGIO AERO INDUSTRIES S.p.A Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Piaggio Aero Industries S.p.A. Model P–180 Airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as jamming of the external bearing of the screwjack drive gear, which resulted in failure of the main wing outboard flap external actuator. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective October 22, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of October 22, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at 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 service information identified in this AD, contact Piaggio Aero Industries S.p.A—Airworthiness Office, Via Luigi Cibrario, 4–16154 Genova-Italy; phone: +39 010 6481353; fax: +39 010 6481881; email: *airworthiness@piaggioaero.it;* Internet: *http://www.piaggioaero.com/#/en/aftersales/service-support.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

FOR FURTHER INFORMATION CONTACT: Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@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 June 15, 2012 (77 FR 35888). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> Failures of the Main Wing Outboard Flap external actuator have been reported by P.180 operators.
>
> The investigation revealed that due to jamming of the external bearing, the screwjack drive gear disengaged from its seat and the external actuator stopped, while the inner one continued its run.
>
> This condition, if not corrected, could lead to an asymmetrical flap actuators operation and cause an interference between the flap and adjacent aileron, possibly resulting in reduced control of the aeroplane.
>
> For the reasons described above, this AD requires the installation of a covering cage on the screwjack, as a temporary corrective action, which does not allow the disengagement of the affected gear.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data 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 35888, June 15, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD will affect 110 products of U.S. registry. We also estimate that it would take about 6 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts would cost about $2,770 per product.

Based on these figures, we estimate the cost of the AD on U.S. operators to be $360,800, or $3,280 per product.

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

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),

(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.

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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is 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:

2012–18–06 PIAGGIO AERO INDUSTRIES S.p.A: Amendment 39–17182; Docket No. FAA–2012–0634; Directorate Identifier 2012–CE–016–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective October 22, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to PIAGGIO AERO INDUSTRIES S.p.A Model P–180 airplanes, serial numbers (S/Ns) 1002 and 1004 through 1223, certificated in any category.

(d) Subject

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

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. We are issuing this AD to require actions to address the unsafe condition on these products.

(f) Actions and Compliance

Unless already done, before October 22, 2012 (the effective date of this AD), following the Accomplishment Instructions of Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 2, dated March 28, 2012, do the following actions:

(1) *For S/Ns 1002 and 1004 through 1135:*

(i) *For aircraft with less than 1,500 hours total time-in-service (TIS) at the effective date of this AD:* Within 1,500 hours TIS after October 22, 2012 (the effective date of this AD) or within 12 calendar months after October 22, 2012 (the effective date of this AD), whichever occurs first, install covering cages on both left and right wing outboard flap external screwjacks. Follow the Accomplishment Instructions of Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 2, dated March 28, 2012.

(ii*) For aircraft with 1,500 hours total TIS or more but less than 2,800 hours total TIS at October 22, 2012 (the effective date of this AD):* Upon or before reaching a total of 3,000 hours TIS after October 22, 2012 (the effective date of this AD) or within 12 calendar months after October 22, 2012 (the effective date of this AD), whichever occurs first, install covering cages on both left and right wing outboard flap external screwjacks. Follow the Accomplishment Instructions of Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 2, dated March 28, 2012.

(iii) *For aircraft with 2,800 hours total TIS or more at October 22, 2012 (the effective date of this AD):* Within 200 hours TIS after October 22, 2012 (the effective date of this AD) or within 12 calendar months after October 22, 2012 (the effective date of this AD), whichever occurs first, install covering cages on both left and right wing outboard flap external screwjacks. Follow the Accomplishment Instructions of Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 2, dated March 28, 2012.

(2) *For S/Ns 1136 through 1223 (inclusive):* Within 1,500 hours TIS after October 22, 2012 (the effective date of this AD) or within 12 calendar months after October 22, 2012 (the effective date of this AD), whichever occurs first, install covering cages on both left and right wing outboard flap external screwjacks. Follow the Accomplishment Instructions of Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 2, dated March 28, 2012.

Note to paragraph (f) of this AD: S/Ns 1224 and subsequent have covering cages on both left and right wing outboard flap external screwjacks installed during production.

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

This AD provides credit for the actions required in this AD if already done before October 22, 2012 (the effective date of this AD) following Service Bulletin No. 80–0318, dated October 24, 2011; Service Bulletin No. 80–0318, revision 1, dated February 3, 2012; and Service Bulletin No. 80–0318, revision 2, dated March 28, 2012.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not 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 current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(i) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2012–0066, dated April 24, 2012; Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, dated October 24, 2011; Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 1, dated February 3, 2012; and Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 2, dated March 28, 2012, for related information.

(j) 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.

(i) Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, dated October 24, 2011;

(ii) Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 1, dated February 3, 2012; and

(iii) Piaggio Aero Industries S.p.A. Mandatory Service Bulletin No. 80–0318, revision 2, dated March 28, 2012.

(3) For PIAGGIO AERO INDUSTRIES S.p.A service information identified in this AD, contact Piaggio Aero Industries S.p.A—Airworthiness Office, Via Luigi Cibrario, 4–16154 Genova-Italy; phone: +39 010 6481353; fax: +39 010 6481881; email: *airworthiness@piaggioaero.it;* Internet: *http://www.piaggioaero.com/#/en/aftersales/service-support*.

(4) You may view this service information at FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) 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 Kansas City, Missouri, on August 29, 2012.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–22542 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0267; Directorate Identifier 2011–NM–174–AD; Amendment 39–17192; AD 2012–18–15]

RIN 2120–AA64

Airworthiness Directives; Bombardier Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier Inc. Model DHC–8–400 series airplanes. This AD was prompted by reports that the automatic de-icing mode became unavailable due to a failure of the timer and monitor unit (TMU). This AD requires replacing the TMU. We are issuing this AD to prevent loss of the automatic de-icing mode and consequent increased workload for the flightcrew, which, depending on additional failures, could lead to loss of control of the airplane.

DATES: This AD becomes effective October 22, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of October 22, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

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 March 20, 2012 (77 FR 16191). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> There have been multiple reports of in-service incidents where the automatic deicing mode became unavailable due to a failure of the Timer and Monitor Unit (TMU).
>
> Investigation has revealed that the failures were attributed to overstressed capacitors installed in the circuit board of the TMU ''Module 300'' power supply. The failure of the capacitors leads to failure of the TMU ''Module 300'' power supply and subsequent loss of the automatic deicing mode.
>
> This [Transport Canada Civil Aviation (TCCA)] directive mandates the replacement of the TMU, part number (P/N) 4100S018–06, with a new improved unit, P/N 4100S018–07.

The unsafe condition is loss of the automatic de-icing mode and consequent increased workload for the flightcrew, which, depending on additional failures, could lead to loss of control of the airplane. 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 have considered the comments received.

Support for the NPRM (77 FR 16191, March 20, 2012)

The Air Line Pilots Association, International (ALPA) supports the intent of the NPRM (77 FR 16191, March 20, 2012).

Request To Withdraw the NPRM (77 FR 16191, March 20, 2012)

Katherine Carpenter, a private citizen, stated that it seems unnecessary to require a law for replacing a faulty part, and that common sense indicates that companies should replace the parts to limit their liability in case of an accident.

We infer that the commenter was requesting that we withdraw the NPRM (77 FR 16191, March 20, 2012). According to section 39.1 (''Airworthiness Directives'') of the Federal Aviation Regulations (14 CFR 39.1), we issue an AD based on our finding that an unsafe condition exists and is likely to exist or develop in products of the same type design. We have the responsibility, placed on us by the Federal Aviation Act (49 U.S.C. App. 1301 *et seq.*), to make an unsafe condition—whether resulting from maintenance, design defect, or otherwise—the subject of an AD, and to issue an AD when that unsafe condition is likely to exist or develop on other products of the same type design.

Further, it is within our authority to issue ADs to require corrective actions to address unsafe conditions that are not being addressed (or not addressed adequately) by operators' normal maintenance procedures. An AD is the appropriate means for mandating this action. As a result, we are issuing this AD to eliminate the identified unsafe condition by requiring replacement of the TMU.

Request To Reduce Compliance Time

ALPA requested that the compliance time be reduced from 3,000 flight hours or 18 months, to 1,000 flight hours or 6 months, in order to reduce the operating exposure of the affected airplanes to two winter seasons.

We disagree to reduce the compliance time for two reasons. First, the DEICE PRESS or DEICE TIMER caution lights annunciate a failure to the flightcrew; the airplane flight manual (AFM) provides procedures to address this failure and instructs the flightcrew to use the manual mode of the pneumatic ice protection system and to exit icing conditions as soon as possible. While an increased pilot workload is classified as ''major'' in a fictional hazard assessment, the actual number of these events decreases that probability to a ''medium'' safety risk. Second, the manufacturer indicated that the mean time between TMU replacements has been 3,000 flight hours, consistent with the compliance time for this AD action. For these reasons, we determined that the compliance time is justified, and we have not changed the final rule in this regard.

Conclusion

We reviewed the available data, including the comments 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 16191, March 20, 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 16191, March 20, 2012).

Costs of Compliance

We estimate that this AD will affect about 81 products of U.S. registry. We also estimate that it will take about 3 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $20,655, or $255 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that 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);
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.

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 the NPRM (77 FR 16191, March 20, 2012), the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the ADDRESSES section. Comments will be available in the AD docket shortly after receipt.

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:

2012–18–15 Bombardier, Inc.: Amendment 39–17192. Docket No. FAA–2012–0267; Directorate Identifier 2011–NM–174–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective October 22, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes, certificated in any category, serial numbers 4001 and subsequent, equipped with Aerazur timer and monitor unit(TMU), part number (P/N) 4100S018–06.

(d) Subject

Air Transport Association (ATA) of America Code 30: Ice and rain protection.

(e) Reason

This AD was prompted by reports that the automatic de-icing mode became unavailable due to a failure of the TMU. We are issuing this AD to prevent loss of the automatic de-icing mode and consequent increased workload for the flightcrew, which, depending on additional failures, could lead to loss of control of the airplane.

(f) Compliance

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

(g) Replacement of the TMU

Within 3,000 flight hours or 18 months after the effective date of this AD, whichever occurs first: Replace TMU P/N 4100S018–06 with new TMU P/N 4100S018–07, by incorporating Bombardier ModSum 4–126525, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–30–14, dated May 20, 2011.

(h) Parts Installation Prohibition

As of the effective date of this AD, no person may install a TMU, P/N 4100S018–06, on any airplane.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC,

notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

(j) Related Information

Refer to MCAI Canadian Airworthiness Directive CF–2011–34, dated August 16, 2011; and Bombardier Service Bulletin 84–30–14, dated May 20, 2011; for related information.

(k) Material Incorporated by Reference

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

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

(i) Bombardier Service Bulletin 84–30–14, dated May 20, 2011.

(ii) Reserved.

(3) For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(4) You may review copies of the 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.

(5) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 4, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–22335 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0816; Directorate Identifier 2011–CE–022–AD; Amendment 39–17180; AD 2012–18–04]

RIN 2120–AA64

Airworthiness Directives; Costruzioni Aeronautiche Tecnam srl Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Costruzioni Aeronautiche Tecnam srl Model P2006T airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as cracking, bulging, deformation, or oil leakage in the lower lid of the landing gear emergency accumulator, which could result in decreasing the airplane's structural integrity and jeopardizing the landing gear emergency extension in case of system failure in normal mode. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective October 22, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of October 22, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at 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 service information identified in this AD, contact Costruzioni Aeronautiche TECNAM Airworthiness Office, Via Maiorise—81043 Capua (CE) Italy; telephone: +39 0823 620134; fax: +39 0823 622899; email: *m.oliva@tecnam.com* or *g.paduano@tecnam.com;* Internet: *www.tecnam.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

FOR FURTHER INFORMATION CONTACT: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; phone: (816) 329–4119; fax: (816) 329–4090; email: *albert.mercado@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That SNPRM was published in the **Federal Register** on June 13, 2012 (77 FR 35304). That SNPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> During a pre-flight inspection of a P2006T aeroplane, the lower skin of the fuselage aft tail cone was found damaged. This damage was caused by the lower lid of the LG emergency accumulator, which had detached from the LG emergency accumulator, violently hitting the lower skin of the fuselage aft tail cone and damaging the accumulator cylinder.
>
> This condition, if not detected and corrected, could impair the aeroplane structural integrity and jeopardize the LG emergency extension in case of system failure in normal mode.
>
> For the reasons described above, EASA issued Emergency AD 2011–0063–E to require a one-time inspection of the LG emergency accumulator cylinder for cracks, deformation or oil leakage and, depending on findings, the accomplishment of the applicable corrective actions.
>
> After that AD was issued, Costruzioni Aeronautiche TECNAM developed a modification (MOD 2006–108) and published Service Bulletin (SB) SB–048–CS Revision 1, dated 06 July 2011, that contained the instructions for that modification. Prompted by this development, EASA issued PAD 11–070 for consultation until 16 August 2011, proposing to require incorporation of this modification on all affected aeroplanes, and to require certain post-modification repetitive inspections.
>
> During the consultation period of PAD 11–070, an operator who had applied Costruzioni Aeronautiche TECNAM SB–048–CS on his aeroplane, reported finding abnormal deformation of the emergency accumulator, to such an extent that it would jeopardize the LG emergency extension in case of system failure in normal mode. To address this additional safety concern, Costruzioni Aeronautiche TECNAM issued SB–068–CS which contains instructions to inspect post-modification aeroplanes.
>
> For the reasons described above, EASA AD 2011–0153–E retained the requirements of EASA AD 2011–0063–E, which was superseded, and required modification of the landing gear emergency accumulator by installation of safety rings and repetitive inspections after modification. In addition,

prompted by the recent post-modification findings, EASA AD 2011–0153–E reduced the compliance time for the modification as originally proposed and required additional first-flight-of-the-day repetitive inspections for the LG emergency accumulator cylinder and replacement of the LG emergency accumulator if cracks, deformation, or oil leakage is detected.

AD Revision 2011–0153R1 was issued in order to allow Pilot-Owners to accomplish the daily pre-flight inspection of the modified LG emergency accumulator.

After that AD Revision, Costruzioni Aeronautiche TECNAM designed a new LG emergency accumulator part number 26–9–9500–000, identified as modification MOD 2006–121, and published SB–080–CS dated 02 January 2012, which contains instructions for replacement and installation of the newly designed LG emergency accumulator.

This AD, which supersedes EASA AD 2011–0153R1, requires the installation of the new landing gear emergency accumulator part number 26–9–9500–000, as well as to inspect after the installation the LG emergency accumulator and the LG retraction/extension system.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the SNPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data 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 SNPRM (77 FR 35304, June 13, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the SNPRM (77 FR 35304, June 13, 2012).

Costs of Compliance

We estimate that this proposed AD will affect 7 products of U.S. registry. We also estimate that it would take about 7 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $1,300 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $13,265, or $1,895 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

(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.

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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is 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:

2012–18–04 Costruzioni Aeronautiche Tecnam srl: Amendment 39–17180; Docket No. FAA–2011–0816; Directorate Identifier 2011–CE–022–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective October 22, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Costruzioni Aeronautiche Tecnam srl Model P2006T airplanes, serial numbers (S/N) 001/US through S/N 88/US, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 32: Landing Gear.

(e) Reason

This AD was prompted by cracking, bulging, deformation, or oil leakage in the lower lid of the landing gear emergency accumulator, which could result in decreasing the airplane's structural integrity and jeopardizing the landing gear emergency extension in case of system failure in normal mode. We are issuing this AD to require actions to address the unsafe condition on these products.

(f) Actions and Compliance

Unless already done, do the following actions:

(1) Within 90 days after October 22, 2012 (the effective date of this AD), replace the landing gear (LG) emergency accumulator with a new emergency accumulator part number 26–9–9500–000, following the instructions in Costruzioni Aeronautiche Tecnam Service Bulletin SB 80–CS, dated January 2, 2012.

(2) Within 300 hours time-in-service (TIS) after compliance with paragraph (f)(1) of this AD and repetitively thereafter at intervals not to exceed 300 hours TIS, inspect the LG emergency accumulator and the LG retraction/extension system for damage and leakage following the applicable instructions in Chapter 5, Section 5–20 Inspection Program Costruzioni Aeronautiche TECNAM P2006T Aircraft Maintenance Manual, Document No. 2006/045, 2nd Edition—Revision 1, dated April 27, 2011.

(3) If any damage or leakage is found as a result of any inspection required in paragraph (f)(2) of this AD, before further flight, do the applicable corrective actions following the instructions in Costruzioni Aeronautiche TECNAM P2006T Aircraft Maintenance Manual, Document No. 2006/045, 2nd Edition—Revision 1, dated April 27, 2011.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4119; fax: (816) 329–4090; email: *albert.mercado@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not 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 current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(h) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2012–0043, dated March 19, 2012; Costruzioni Aeronautiche Tecnam Service Bulletin SB 80–CS, dated January 2, 2012; and Costruzioni Aeronautiche Tecnam P2006T Maintenance Manual, 2nd Edition, Revision 1, dated April 7, 2011, for related information. For service information related to this AD, contact Costruzioni Aeronautiche TECNAM Airworthiness Office, Via Maiorise—81043 Capua (CE) Italy; telephone: +39 0823 620134; fax: +39 0823 622899; email: *m.oliva@tecnam.com,* or *g.paduano@tecnam.com;* Internet: *www.tecnam.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(i) 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.

(i) Costruzioni Aeronautiche TECNAM Service Bulletin SB 80–CS, dated January 2, 2012; and

(ii) Costruzioni Aeronautiche TECNAM P2006T Aircraft Maintenance Manual, Document No. 2006/045, 2nd Edition—Revision 1, dated April 27, 2011.

(3) For Costruzioni Aeronautiche TECNAM service information identified in this AD, contact Costruzioni Aeronautiche TECNAM Airworthiness Office, Via Maiorise—81043 Capua (CE) Italy; telephone: +39 0823 620134; fax: +39 0823 622899; email: *m.oliva@tecnam.com,* or *g.paduano@tecnam.com;* Internet: *www.tecnam.com.*

(4) You may review copies of the service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) 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 Kansas City, Missouri, on August 29, 2012.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–21927 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0639; Directorate Identifier 2011–CE–016–AD; Amendment 39–17169; AD 2012–17–06]

RIN 2120–AA64

Airworthiness Directives; Piper Aircraft, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Piper Aircraft, Inc. Models PA–24, PA–24–250, and PA–24–260 airplanes. This AD was prompted by reports of cracks developing in the stabilator horn assembly. This AD requires replacement of the stabilator horn assembly and/or repetitive inspections of the stabilator horn assembly for corrosion or cracks, as applicable. Corrosion or cracks could lead to failure of the stabilator horn. Consequently, failure of the stabilator horn could lead to a loss of pitch control in flight. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective October 22, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of October 22, 2012.

ADDRESSES: For service information identified in this AD, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida 32960; telephone: (772) 567–4361; fax: (772) 978–6573; Internet: *http://www.newpiper.com/company/publications.asp.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust St., Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

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: Gregory K. Noles, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474–5551; fax: (404) 474–5606; email: *gregory.noles@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 published in the **Federal Register** on June 22, 2011 (76 FR 36395). That NPRM proposed to require replacement of the stabilator horn assembly and/or repetitive inspections of the stabilator horn assembly for corrosion or cracks, as applicable.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and the FAA's response to each comment.

Support for the Proposed Initial Inspection

Comments from Kristin Amelia Winter, Charles Parker, Carl Schoolcraft, Dave Fitzgerald for the International Comanche Society (ICS), Hans Neubert for the ICS, Brian Kotso, and John F. Murray were supportive of the AD's requirement for an initial inspection.

We did not change this final rule AD action based on these comments.

Request FAA To Withdraw NPRM (76 FR 36395, June 22, 2011) Due to Adequacy of External Inspections

Phil Ciholas requested we reconsider the NPRM (76 FR 36395, June 22, 2011) requirements and noted that even the most severe horn cracking reported (propagated through the part to an exterior surface and was visually detectable without disassembly) had not resulted in complete horn failure or the severity of loss of control postulated in the justification for the AD. The commenter stated that no loss of control incidents or accidents have ever been documented that can be attributed to this failure mode. Given the statistical distribution of cracks reported, the ability of existing external inspections to detect cracks prior to complete failure of the horn, and the lack of any actual complete failures; the commenter felt the internal inspection requiring disassembly is unwarranted on most aircraft, especially recent serial number aircraft, unless there is other evidence of potential issues observed on a particular aircraft. We infer the commenter requested to withdraw the current proposal.

We disagree with the request to withdraw the NPRM (76 FR 36395, June 22, 2011). A cracked stabilator horn coupled with the aircraft flight envelope conditions could create an unsafe scenario even though there has not been an in-flight event. A cracked stabilator horn reduces the aircraft's structural load limits.

We did not change this final rule AD action based on these comments.

Request To Clarify Applicability (Affected Part Numbers (P/Ns) and Configurations)

David Ray Fitzgerald, Robert (no last name given), Patrick D. Donovan, Edward P. Horan, Steven Fischer, Phil Ciholas, Dave Fitzgerald for ICS, Daniel Jacob Katz, Arthur John Beyer, Hans Neubert for the ICS, Brian Kotso, John F. Murray, and Dennis Boykin requested we clarify the applicability to clearly state the affected horn P/Ns and clarify whether other current and future horns (supplemental type certificates (STC), and so forth) are/will be affected. The commenters noted that the text of the proposed AD did not clearly state the affected part numbers.

Robert (no last name given), Steven Fischer, Daniel Jacob Katz, Hans Neubert for ICS, and John F. Murray also requested we address the configuration of Models PA–24, PA–24–250, and PA–24–260 airplanes using the same horn but installed with thicker torque tubes used on the Models PA–24–400, PA–30, and PA–39 airplanes as the proposed AD did not currently make mention of this configuration. They requested we consider excluding the airplanes configured with the thicker torque tubes from the applicability or including them as terminating action.

Phil Ciholas, Arthur John Beyer, and Dennis Boykin requested we address potential material and process changes during production of the Models PA–24, PA–24–250, and PA–24–260 airplanes, amending the NPRM (76 FR 36395, June 22, 2011) to apply to only those aircraft that have experienced issues.

Dennis Boykin noted that the manufacturing cycle between the original castings (about 1957) and the final production in 1972 of the Model PA–24–260 airplane precluded the requirement to ensure that similar castings, raw materials, and processes were in place, not just a similar design. Dennis Boykin was not aware of any Model PA–24–260 airplane's stabilator horn that has been separated, inspected, and found deficient.

We partially agree with the commenters. We agree with clarifying the affected P/Ns because the issue is specific to the combination of the P/N and models in the original NPRM (76 FR 36395, June 22, 2011). However, we disagree with excluding aircraft with the thicker torque tube installed or making the installation of the thicker torque tube a terminating action. No documentation has been supplied to provide approval for the installation of thicker torque tubes on the Models PA–24, PA–24–250, or PA–24–260 airplanes, and the torque tube is not the only contributing factor to the unsafe condition. The FAA has determined the condition is likely to exist or develop in other products of the same type design. We have insufficient data to show that airplanes modified with the thicker torque tube do not have the unsafe condition.

We also disagree with excluding stabilator horns manufactured later in the production cycle. We have no record of castings, raw materials, and/or processes changing significantly enough to provide justification to exclude those airplanes from this AD action.

If an owner/operator submits substantiating data to support the installation of the thicker torque tube as an alternative method of compliance (AMOC) to this requirement, the FAA will review and consider all AMOC requests we receive provided they follow the procedures in 14 CFR 39.19 and this AD.

We changed the AD's applicability in this final rule AD action to include the horn P/N.

Request To Lower Torque Value for Horn Installation

Lawrence La Beau, Charles Parker, Eric Paul, Tom Veatch, Ivan R. Wilson, Patrick D. Donovan, Ken E. Shaffer, Patric Barry, John Trudel, Carl Schoolcraft, Phil Ciholas, Dave Fitzgerald for the ICS, Andrew Detsch, Hans Neubert for the ICS, Brian Kotso, John F. Murray, and Allan H. Bieck requested that the AD state an appropriate lower shear nut torque value for the bolts common to the stabilator horn and torque tube. Phil Ciholas requested we add horn deformation limits as a way to control the installation torque and related stress corrosion cracking. Charles Parker, Eric Paul, Tom Veatch, Ivan R. Wilson, Patric Barry, John Trudel, Dave Fitzgerald for the ICS, Hans Neubert for the ICS, and Brian Kotso requested we consider an initial inspection and reinstallation with the lower torque value as terminating action for the AD. Eric Paul and John F. Murray requested we lower the torque value of the stop collar bolts. Phil Ciholas requested we consider switching to shear nuts when any work is done on the joint.

The commenters stated over-torque is the root cause of the stress corrosion condition and the procedure does not clearly require a lower torque value. None of the commenters provided justification for the use of stop collar bolts separate from the horn bolts or for the shear nuts.

We agree with adding the installation torque value for the bolts common to the horn and torque tube into the AD procedures because it is a factor in mitigating the unsafe condition. We will also coordinate with the airplane's manufacturer on clarifying the airplane maintenance manual procedures for torque of these bolts. However, we disagree with adding an initial inspection and reinstallation of the torque tube with the lower torque value as terminating action for the AD. Although the torque value is a contributing factor, it is not the only factor (others are balance arm interference fit, basic material susceptibility, and corrosion potential).

No sufficient correlation has been established between the torque value and deformation and subsequent stress corrosion cracking. Consequently, we disagree with adding horn deformation limits as a way to control the installation torque and related stress corrosion cracking.

We disagree with mandating a lower torque value of the stop collar bolts or mandating a switch to shear nuts when any work is done on the joint. The stop collar bolts did not contribute to the unsafe condition, and we cannot mandate actions through an AD that are unnecessary to correct the unsafe condition. There is no current data for approval to change the configuration to shear nuts.

We changed the AD by adding the installation torque value for the bolts common to the horn and torque tube into the AD procedures.

Request To Use Thicker Torque Tube With Horn

Lawrence La Beau, Randy Black, Anonymous, Donald Dummer, Albert Powers, Steven Fischer, Stewart Campbell, Miller Duffield Einsel, Robert, Eric Paul, Tom Veatch, Patric Barry, John Trudel, Edward P. Horan, Carl Schoolcraft, Steven Fischer, Phil Ciholas, Dave Fitzgerald for the ICS, Daniel Jacob Katz, Hans Neubert for the ICS, Lawrence E. Pride, Jim Ritter, Brian Kotso, and John F. Murray noted thicker torque tubes discovered during the ICS' survey targeted inspections at the horn. This survey was beyond the current maintenance program. The commenters cited the thicker torque tube could lessen the potential for stress corrosion cracking due to horn deformation. Robert, Steven Fischer, Daniel Jacob Katz, Hans Neubert for ICS, and John F. Murray requested we address the configuration of Models PA–24, PA–24–250, and PA–24–260 airplanes with the subject horn but installed with thicker torque tubes.

We do not agree with the commenters. We disagree with authorizing the installation of the thicker torque tube. No documentation has been supplied to provide approval for installation of the thicker torque tube configuration on any airplanes affected by this AD.

The FAA will review and consider any AMOC to support the installation of the thicker tube provided it follows the procedures in 14 CFR 39.19 and this AD.

We did not change this final rule AD action based on these comments.

Request To Provide for a Terminating Action to the Repetitive Inspections

Kristin Amelia Winter, Lawrence Zubel, Charles Parker, Randy Black, Donald Dummer, Steven Fischer, Stewart Campbell, Miller Duffield Einsel, Eric Paul, Tom Veatch, Ivan R. Wilson, Patric Barry, Steven Fischer, Phil Ciholas, Dave Fitzgerald for the ICS, Daniel Jacob Katz, Hans Neubert for the ICS, Jim Ritter, Brian Kotso, and John F. Murray requested a terminating action to the repetitive inspections. All the commenters proposed various actions (that is, use of lower installation torque value, installation of a thicker torque tube, installation of replacement horn by way of Australian Civil Aviation Safety Authority (CASA) CASA Supplemental Type Certificate (STC) SVA 532, and terminating action based on additional data collected during the inspections) with varying levels of supporting data.

We disagree because no proposed terminating action eliminates all the contributing factors to the unsafe condition. The individual proposed actions have been addressed in other requested changes to the AD. The inspection or replacement programs will manage the issue to an acceptable level of risk.

We will consider proposals for a terminating action as an AMOC provided the procedures of 14 CFR 39.19 and this AD are followed.

We did not change this final rule AD action based on these comments.

Request To Credit for Previous Compliance

Commenters David Charles Meigs, Randy Black, Steven Fischer, Hans Neubert for the ICS, and Brian Kotso noted that operators have typically been allowed credit for previous compliance in AD actions. All commenters requested provision for credit when compliance to the requirements has already been accomplished.

We agree that credit should be given when compliance to the requirements has already been done. The AD already allows for such credit by stating ''unless already done'' in paragraph (f) of the AD. As long as the requirements of the AD are followed, credit is available. Any other actions taken would need to be submitted as an AMOC following paragraph (h) of the AD.

We did not change this final rule AD action based on these comments.

Request To Clarify the AD Applicability to Replacement Parts

Commenters David Charles Meigs, Randy Black, Steven Fischer, Hans Neubert for the ICS, Brian Kotso stated that the AD applicability is not clearly defined in terms of both the susceptible horn part number and the affected models. Several commenters request clarification of the AD applicability to replacement parts, particularly the horn in CASA STC SVA 532.

We partially agree with clarification on the applicability because the focus of this AD is the horn P/N as discussed in the previous issue ''Request To Clarify Applicability.'' We disagree with specifically addressing the CASA STC because the STC is still under review for FAA validation and not all design issues have been addressed at this point. Any action relating the STC to the AD will be documented during the FAA review of the CASA STC.

As discussed previously, we changed the AD's applicability to include the horn P/N.

Request To Increase Initial Compliance Time

Patric Barry and Phil Ciholas expressed concerns with the availability of parts and shop capacity. The commenters requested an increase in the initial compliance time.

We disagree with the commenters. The unsafe condition must be addressed in a timely manner. The FAA will consider AMOCs following the procedures in 14 CFR 39.19 and this AD to address any potential parts availability or shop capacity issues.

We did not change this final rule AD action based on these comments.

Request To Change Units of Compliance Times

Commenters Randy Black, Patrick D. Donovan, Carl Schoolcraft, Hans Neubert for the ICS, John F. Murray, and Allan H. Bieck requested changing compliance time criteria. Patrick D. Donovan, Hans Neubert for the ICS, and John F. Murray asked that only calendar time be used for compliance times. Carl Schoolcraft and Allan H. Bieck requested that only TIS be used for compliance times. The commenters noted that stress corrosion cracking (SCC) is a time-related function and not TIS. Carl Schoolcraft noted the calendar time limit to be arbitrary and to have no bearing on the condition of the horn. Allan H. Bieck commented TIS is what puts strain on the horn, not idle calendar time while the aircraft sits in a hangar.

We disagree with eliminating the calendar time compliance. Calendar time is a key factor in SCC. We also disagree with removing the operational time (TIS) requirement as corrosion in the torque tube is a contributing factor, and the established actions for the corrosion currently have both a calendar and TIS requirement. We will retain our compliance time using both calendar time and TIS.

We did not change this final rule AD action based on these comments.

Request To Eliminate the Repetitive Inspection Requirement

Kristin Amelia Winter, Charles Parker, Albert Powers, Ken E. Shaffer, John Trudel, Dave Fitzgerald for the ICS, Phil Ciholas, and Brian Kotso requested eliminating the repetitive inspection requirement. Commenters justify eliminating the repetitive inspections by stating the cracks do not appear to be time or use related, there is low or no history of cracking in the fleet, there have been no catastrophic horns failures in service, and there is potential for terminating action.

We do not agree because SCC is inherently time-related and indirectly driven by operational usage. Not all aircraft will crack, and those that do will not crack at the same time. SCC has several contributing factors that add to the variability. For instance, typical fatigue cracking includes scatter factors on the order of four to determine the appropriate intervals to take action. While high-time aircraft with no cracking is useful data, it does not eliminate the need for action. As for the volume of findings, the quantity compared to the entire fleet size is low. However, when measured against the quantity of valid inspections performed, the find rate is as high as 20 percent.

It is also true that no parts have failed catastrophically in flight and the findings have been during the ICS' survey targeted at the horn. Note that this survey was beyond the current required maintenance program. A cracked horn coupled with the aircraft flight envelope conditions could still create an unsafe scenario even though there has not been an in-flight event. In fact, the service history provides evidence of extensive cracking on both sides of the torque tube bore leading to the potential unsafe condition. As discussed in other responses to commenter requests, no proposed terminating action eliminates all the contributing factors to the unsafe condition. The inspection or replacement programs will manage the issue to an acceptable level of risk.

We did not change this final rule AD action based on these comments.

Request To Change Inspection Intervals

Eric Paul, Ivan R. Wilson, Patrick D. Donovan, Patric Barry, Carl Schoolcraft, Phil Ciholas, Dave Fitzgerald for the ICS, Andrew Detsch, John F. Murray, and Allan H. Bieck requested an increased repetitive interval from 100 hours to 200 hours, 500 hours, 1,000 hours, or 2,000 hours.

Patrick D. Donovan, Patric Barry, and Dave Fitzgerald for the ICS noted that taking half of the average discovery time (stated as 4,000 hours TIS) should be a reasonable approach to establish a repetitive interval. Ivan R. Wilson and Jim Ritter also referenced the long service history of the fleet (approximately 50 years and several thousand hours). Andrew Detsch asserted that the cracks occurred later in the service life or did not grow. Arthur John Beyer provided information that they inspected the component twice near 4,000 TIS at an interval of 4 years and 264 hours with no cracking observed at either inspection. Han Neubert recommended establishing intervals based on a study of 2014–T6 behavior under stress corrosion to define stress and environment thresholds similar to a provided report about stress corrosion susceptibility, Time Exposure Studies on Stress Corrosion Cracking of Aluminum 2014–T6, 2219–T87, 2014–T651, 7075–T651, and Titanium 6Al–4V, dated June 1, 1973 (*http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19730009798_1973009798.pdf*). Charles Parker, Arthur John Beyer, and Jim Ritter requested justification for the current intervals.

We partially agree with adjusting the repetitive interval from 3 years to 5 years because it would align with the rationale for the existing 10-year or 1,000-hour interval and other guidance used to establish the intervals. There is no need to decrease the interval to 200 hours as the AD provides an interval of 500 hours.

We disagree with increasing the repetitive interval beyond 500 hours for several reasons. We must consider many factors to define an appropriate inspection interval.

The first factor, the design safety requirement, does not allow strength degradation below design ultimate value or stiffness degradation for flutter. Advisory Circular (AC) 23–13A, Fatigue, Fail-Safe, and Damage Tolerance Evaluation of Metallic Structure for Normal, Utility, Acrobatic, and Commuter Category Airplanes, dated September 29, 2005, (*http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/list/AC%2023-13A/$FILE/ac23-13A.pdf*) describes how ensuring no detectable cracks within the operational life of the aircraft through an appropriate inspection interval meets the design requirement. The existing findings of cracks do not meet these requirements. Simply, the aircraft is not certificated to meet airworthiness standards with a known crack.

A ''detectable'' size for a crack is a value established for the specific inspection method in a specific application. The discovered cracks had far exceeded detectable size before they were found during the targeted inspections. This is due in part to no targeted inspections until discovery of corrosion issues on the attached torque tube several years ago. Following the approach in AC 23–13A, the estimated service history would provide a test life of approximately 4,000 hours, then apply a scatter factor of approximately 4, yielding 1,000 hours. Again, this should be for detectable cracks that do not degrade the strength and stiffness. An additional factor of 2 (providing two inspection opportunities) could be applied to cover that portion, yielding an inspection at 500 hours. Note, this is only an example to show the reasonableness of the proposed interval based on service data. The interval is driven primarily by calendar time using a similar approach.

The second factor is the probabilistic nature of cracking. While some high-time or aged aircraft do not exhibit cracking, we expect this in the distribution and is insufficient rationale to shorten the interval. For example, the data point of a 4-year/264-hour interval is useful, but many more data points would be necessary to support an increased interval.

The third factor is associated with service history and the existing intervals for related issues on the stabilator control system. For the attached torque tube, Piper Aircraft, Inc. Service Bulletin No. 1160, dated December 26, 2005, specifies a 10-year repetitive inspection for corrosion. Also for the tube, Special Airworthiness Information Bulletin CE–04–88, dated September 15, 2004, (*http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgSAIB.nsf/0/77fc29bb15c8a85b8625721f0052ecb4/$FILE/CE-04-88.pdf*) specifies a 3-year or 500-hour repetitive inspection, and AD 74–13–03 (41 FR 17371, April 26, 1976) requires a 3-year or 500-hour repetitive inspection. These issues are corrosion-related and corrosion is a factor in the SCC of the horn.

The assertion that cracks occurred later or early in service and then did not grow has no supporting data to use in establishing intervals.

The FAA reviewed the report provided by Hans Neubert, Time Exposure Studies on Stress Corrosion Cracking of Aluminum 2014–T6, 2219–T87, 2014–T651, 7075–T651, and Titanium 6Al–4V, dated June 1, 1973, (*http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19730009798_1973009798.pdf*). While additional work could be coordinated if funding is available, we must first manage the known condition. The report already alludes to the fact that aluminum 2014–T6 is particularly susceptible to SCC which invalidates the assumption that aluminum 2014–T6 would have equivalent behavior to other test material. There is no true stress corrosion threshold (similar to a fatigue endurance limit) for aluminum 2014–T6. Additional work would be required to validate the stresses from all contributing factors once any type of threshold was tested.

We changed the repetitive interval for inspected parts in paragraph (g)(1) of the AD from 3 years to 5 years.

Request To Reconsider the Requirement for Repetitive Inspection of the Assembly

Kristin Amelia Winter, Steven Fischer, George Edward White, Patric Barry, Carl Schoolcraft, Dave Fitzgerald for the ICS, Andrew Detsch, Arthur John Beyer, Jim Ritter, and John F. Murray requested we reconsider the requirement for repetitive, intrusive inspection of the assembly. The commenters were concerned that repetitive disassembly and re-assembly of the structure could introduce new risks from wear, assembly errors, etc.

We disagree with the commenters. While we agree that there are potential risks with the repeated inspection, the current issue is a higher risk and we must address the known unsafe condition. The need for a repetitive inspection has been addressed elsewhere in this final rule AD action. Installation of the new parts would minimize the stated risk of repeated disassembly and reassembly and achieve the maximum interval of 10 years or 1,000 hours.

We did not change this final rule AD action based on these comments.

Request To Allow Alternative Inspection Methods

George Edward White, Patrick D. Donovan, Patric Barry, Phil Ciholas, and Dave Fitzgerald for the ICS requested allowance for alternative, less intrusive, inspection methods such as X-ray, magnetic particle inspection, or bolt torque and measured torque tube deformation. The commenters reasoned that the alternative inspection methods could avoid disassembly and reassembly.

We do not agree with this request because:

- X-ray does not provide a sufficiently high probability (reliability) of detection for cracks at sizes needed to control the unsafe condition.
- Magnetic particle inspection is for magnetic materials and would not be appropriate for the aluminum horn.
- While the bolt torque value or torque tube deformation could be a partial indicator, it is not a full measure of all the contributing factors. The viability of such a method would also be affected by manufacturing variability (machining, drawing tolerances, and so forth) making it difficult to build an appropriate model to ensure an adequate inspection method.

We did not change this final rule AD action based on these comments.

Request To Clarify What the AD Requires

Dave Fitzgerald for the ICS requested we clarify the statement in the summary of the NPRM (76 FR 36395, June 22, 2011) of what parts are being replaced.

We agree with the commenter that it is important to clearly state what parts are required in the AD action.

We changed the summary of the final rule to require replacement of the stabilator horn assembly and/or repetitive inspection of the stabilator horn assembly, as applicable.

Request To Allow Re-Use of Inspected Horns

Ivan R. Wilson, Patrick D. Donovan, Carl Schoolcraft, Andrew Detsch, and John F. Murray requested a change in compliance time to allow inspected parts to have the same inspection interval as new replacement parts. Carl Schoolcraft also requested the option of installing serviceable parts in lieu of new parts.

We agree with allowing used parts as replacement parts provided they have been inspected before installation and found free of cracks (serviceable) and they continue the repetitive inspection option in this AD. However, we disagree with allowing the same interval on used inspected replacement parts as on new replacement parts because a single penetrant inspection method does not provide the same confidence level for a crack-free part as a new part does. Such an inspection could not reliably detect sufficiently small cracks; therefore, an approach similar to damage tolerance requiring multiple inspections is warranted.

We added language to:

- Clarify compliance and procedures for the replacement of the stabilator horn assembly with a serviceable stabilator horn assembly, provided it is inspected before installation and found free of cracks or corrosion and continues with the repetitive inspections required for a used part; and
- Clarify the initial inspection for owner/operators who may have already installed a used serviceable stabilator horn assembly on their airplane.

Request To Validate and/or Revise the Cost Estimate

Randy Black and Arthur John Beyer requested we validate and/or revise the cost estimate. One commenter ordered parts including a new horn, new torque tube, new bearings, and new hardware estimated at $1,500 for only the parts cost. Another commenter noted the cost on U.S. operators does not include subsequent inspections.

We do not agree with this request because the parts cost only includes those parts required by the AD actions (the horn assembly). Optional parts, such as the tube, are not mandated and not required in the associated cost. Repetitive inspections are not included in AD cost estimates as it cannot be determined which option an owner/operator may choose, or the number of times the action(s) may be executed on an individual aircraft.

We did not change this final rule AD action based on these comments.

Request To Have Manufacturer Show Ability To Meet Parts Demand

Commenters Bob Rosansky, Patrick D. Donovan, Patric Barry, John Trudel, and Phil Ciholas are associated with this request. Some commenters requested that the airplane manufacturer demonstrate the ability to meet the parts demand before the AD is issued. One commenter requested time to create a parts supply for the replacement horn from the Australian CASA STC SVA 532. Several commenters estimated that it might require one year or more for the manufacturer to provide the required parts and are concerned that the manufacturer's parts ordering system will be unable to meet the demand. The request for the CASA-approved horn is to alleviate the AD actions.

We do not agree because the manufacturer has told the FAA they can support the parts requirements for this AD. This AD is necessary to address an unsafe condition. If parts availability becomes a problem, the FAA will consider AMOC requests and determine whether they provide an acceptable level of safety when they are submitted following the procedures in 14 CFR 39.19 and this AD. The AD initial compliance time should provide sufficient time to create a parts supply.

The AD is not addressing the CASA-approved horn since the horn is not FAA-approved at this time.

We did not change this final rule AD action based on these comments.

Request To Change Compliance Time Because Quality Issues Might Occur

Patrick D. Donovan, Patric Barry, and John Trudel requested changes to the compliance time based on possible quality issues in manufacturing or delivering required parts. The commenters referenced instances where the manufacturer supplied parts that did not meet/specifications or delivered the wrong part numbers.

We do not agree because if non-conforming parts or the wrong parts are distributed by the manufacturer, then the problem will be addressed through the current regulations, including potential AD action. The FAA cannot address this problem unless it occurs and is appropriately reported.

We did not change this final rule AD action based on these comments.

Request To Have Manufacturer Provide Parts Kit

Randy Black suggested the manufacturer combine the replacement horn into a kit with the torque tube and noted that a combined kit would provide a convenience to owners/operators.

We disagree because the additional parts beyond the horn assembly are not required by this AD because they are not necessary to address the unsafe condition.

We did not change this final rule AD action based on these comments.

Request To Have FAA Directly Notify Owners/Operators of the NPRM (76 FR 36395, June 22, 2011)

Dennis Boykin stated the FAA failed to send the NPRM (76 FR 36395, June 22, 2011) to him. The commenter stated he was not notified of the NPRM by the FAA, but by the type club. We conclude that the commenter requested direct notification of the NPRM.

We disagree with the request. The FAA does not mail NPRMs. Effective March 1, 2010, the FAA stopped mailing paper copies of ADs. We have continued to fax and/or use the US Postal Service to mail Emergency ADs. To continue receiving ADs at no cost, please subscribe to our GovDelivery email service by visiting the Regulatory and Guidance Library home page (*http://rgl.faa.gov*). For those desiring paper copies, we will continue to provide the AD Biweekly, which is a paid subscription of all ADs issued in the **Federal Register** over the previous 2-week period. The AD Biweekly is printed and mailed by the Government Printing Office (GPO). Contact the GPO directly at phone: (202) 512–1806 to subscribe.

We did not change this final rule AD action based on these comments.

Request To Include Reporting Requirement and Analysis of Data To Refine AD

Kristin Amelia Winter, George Edward White, Patrick D. Donovan, Arthur John Beyer, Hans Neubert for the ICS, and Dennis Boykin requested adding a reporting requirement with subsequent use of the data to evaluate (or eliminate) the inspection intervals and to evaluate potential terminating actions. Two of the commenters requested the reporting be provided to both the FAA and ICS. One commenter also requested a provision for rescinding the AD or extending the inspection intervals based on the number of non-findings, especially if a new part is installed. Finally, one commenter proposed to exclude the Model PA–24–260 and evaluate it at a later date.

The commenters noted that the initial inspection cycle would provide three years of time to collect and evaluate the data which would allow the FAA and interested parties an opportunity to formulate a more narrowly targeted AD that would better balance the cost with the hoped for improvement in airworthiness and hence safety. Lastly, it would provide the data necessary to design and obtain approval of an AMOC or STC that effectively addresses this unsafe condition and terminates any final recurring AD.

We disagree with adding a reporting requirement. Based on the Paperwork Reduction Act, a reporting requirement must meet the following conditions:

- Help develop a corrective action;
- Determine the scope of the problem and how adequate the Design Approval Holder's corrective actions are; and
- Avoid unsafe consequences if we do not collect the information.

To eliminate the repetitive inspections and develop a terminating action depends on a combination of factors. The following three factors would require a re-design to eliminate the repetitive inspections: Balance arm interference fit, basic material properties, and use of a thicker torque tube previously discussed. Lowering the installation torque value was addressed earlier. Reduction of corrosion potential is currently addressed via repetitive inspections as discussed below. As all major contributing factors are not eliminated, reporting would not provide sufficient information to eliminate the inspections or directly provide terminating action.

Any individual or group is free to work independently to coordinate data collection supporting a potential concept as an AMOC or design change (STC).

We also disagree with evaluating the Model PA–24–260 airplane only in the future because that model meets the regulatory requirement where the unsafe condition is likely to exist or develop in other products of the same type design.

We did not change this final rule AD action based on these comments.

Request To Have FAA Determine Status of Type Certificate Holder

Patric Barry and John Trudel expressed concern that the manufacturer 's engineering/design work on the corrective action and parts supply issues are evidence of abandonment of the responsibilities of a type certificate holder. We conclude the commenters requested the FAA determine the status of the type certificate holder.

We disagree with this request. The manufacturer met its obligation as a type certificate holder by working with the FAA and industry to generate a corrective action program addressing the unsafe condition.

Based on these comments, we made no change to the AD action.

Request To Require Inspection of the Torque Tube Assembly/Control Horn

Hans Neubert for the ICS commented that the reason that the torque tube assembly/control horn has not been previously inspected for cracks is due to the fact there is no prior manufacturer requirement to inspect. We infer the commenter requested the FAA require inspection of the torque tube assembly/control horn.

We agree with the commenter. There was not a known need for inspection of the assembly. With discovery of the unsafe condition, a program is now being put into place.

Based on these comments, we made no change to the AD action.

Request To Make Piper Aircraft, Inc. Service Bulletin No. 1189, dated April 29, 2010, Only Advisory for the AD

Hans Neubert for the ICS recommended that this service information be considered as advisory only to the corrective action. The commenter stated that the preliminary and final versions of the service information were based on an industry magazine article and were without substantiating data, field service history, or engineering evaluation.

We disagree because the FAA independently evaluated all available data. We incorporated the intent of this service information into the AD, with the exception of adjustments to the applicability and compliance time.

We did not change this final rule AD action based on these comments.

Request To Incorporate Corrosion Preventive Measures in the AD

George Edward White recommended incorporation of corrosion preventive measures into the AD. The commenter noted known corrosion issues on the adjacent torque tube.

We disagree because corrosion preventive measures are already covered by the following documents and are not necessary to address the unsafe condition identified in this AD:

- Piper Aircraft, Inc. Service Bulletin No. 1160, dated December 26, 2005, at *http://www.piper.com/Company/Publications/SB%201160%20Stab%20Torque%20Tube%20Assy%20Insp.pdf;*
- Special Airworthiness Information Bulletin CE–04–88, dated September 15, 2004, at *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgSAIB.nsf/0/77fc29bb15c8a85b8625721f0052ecb4/$FILE/CE-04-88.pdf;*
- AD 74–13–03, Amendment 39–2588 (41 FR 17371, April 26, 1976), at *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAD.nsf/0/5CBFDEAB5E2AC41586256E1200498F02?OpenDocument&Highlight=74-13-03;*
- AC 43.13–1B, Acceptable Methods, Techniques, and Practices—Aircraft Inspection and Repair, at *http://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document.information/documentID/99861;* and
- AC 43–4A, Corrosion Control for Aircraft, at *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/list/AC%2043-4A/$FILE/AC%2043-4a%20.pdf.*

Based on these comments, we made no change to the AD action.

Request To Require Inspection of the Tail of the Aircraft

Patric Barry stated that periodically opening up the tail of the aircraft for inspection may be beneficial, suggesting that routine servicing of the entire area should be included in this AD. Dave Fitzgerald for the ICS stated that opening up the tail area for service of the trim drum, torque tube bearings, and associated areas is beneficial as part of normal maintenance, but is not part of this AD since the AD addresses the horn and torque tube and not associated components.

We agree that maintenance of the trim drum, torque tube bearings, and associated areas is important but disagree with including it in this AD action. These components are not directly related to the unsafe condition so are not part of this AD.

We did not change this final rule AD action based on these comments.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously and minor editorial changes. We have determined that these changes:

- Are consistent with the intent that was proposed in the NPRM (76 FR 36395, June 22, 2011) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (76 FR 36395, June 22, 2011)

We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

We estimate that this AD affects 3,100 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
Stabilator horn assembly inspection	12 work-hours × $85 per hour = $1,020	Not applicable	$1,020	$3,162,000

We estimate the following costs to do any necessary replacements that would be required based on the results of the proposed inspection. We have no way of determining the number of airplanes that might need this replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Stabilator horn assembly replacement	12 work-hours × $85 per hour = $1,020	$572	$1,592

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

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

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, 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 adding the following new airworthiness directive (AD):

2012–17–06 Piper Aircraft, Inc.: Amendment 39–17169; Docket No. FAA–2011–0639; Directorate Identifier 2011–CE–016–AD.

(a) Effective Date

This AD is effective October 22, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the following Piper Aircraft, Inc. airplanes, certificated in any category:

(1) Model PA–24, serial numbers (S/Ns) 24–1 through 24–3687, with horn part number (P/N) 20397–00 (assembly P/N 20399) installed;

(2) Model PA–24–250, S/Ns 24–1 and 24–103 through 24–3687, with horn P/N 20397–00 (assembly P/N 20399) installed; and

(3) Model PA–24–260, S/Ns 24–3642 and 24–4000 through 24–5034, with horn P/N 20397–00 (assembly P/N 20399) installed.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 27: Flight Controls.

(e) Unsafe Condition

This AD was prompted by reports of cracks developing in the stabilator horn assembly. We are issuing this AD to detect and correct corrosion or cracks in the stabilator horn assembly. Corrosion or cracks could lead to failure of the stabilator horn. Consequently, failure of the stabilator horn could lead to a loss of pitch control in flight.

(f) Compliance

Comply with this AD following Piper Aircraft, Inc. Service Bulletin No. 1189, dated April 29, 2010, within the compliance times specified in this AD, unless already done (does not eliminate the repetitive actions of this AD).

(g) Inspection/Replacement

(1) When a new stabilator horn assembly has been installed (during production or replacement) and the stabilator horn assembly reaches a total of 1,000 hours time-in-service (TIS) or 10 years after installation, or within the next 100 hours TIS after October 22, 2012 (the effective date of this AD), whichever occurs later, do one of the following actions:

(i) Initially inspect the stabilator horn assembly for corrosion or cracks. Repetitively thereafter inspect at intervals not to exceed 500 hours TIS or 5 years, whichever occurs first.

(ii) Replace the stabilator horn assembly with a new stabilator horn assembly. When the new stabilator horn assembly reaches a total of 1,000 hours TIS after replacement or within 10 years after replacement, whichever occurs first, you must do one of the actions in paragraph (g)(1) of this AD.

(iii) Replace the stabilator horn assembly with a used serviceable stabilator horn assembly that has been inspected before installation and found free of cracks or corrosion. Repetitively thereafter inspect at intervals not to exceed 500 hours TIS or 5 years, whichever occurs first.

(2) When a used serviceable stabilator horn assembly that has been inspected before installation and found free of cracks or corrosion has been installed and the stabilator horn assembly reaches a total of 500 hours TIS or 5 years after installation, or within the next 100 hours TIS after October 22, 2012 (the effective date of this AD), whichever occurs later, do one of the following actions:

(i) Initially inspect the stabilator horn assembly for corrosion or cracks. Repetitively thereafter inspect at intervals not to exceed 500 hours TIS or 5 years, whichever occurs first.

(ii) Replace the stabilator horn assembly with a new stabilator horn assembly. When the new stabilator horn assembly reaches a total of 1,000 hours TIS after replacement or within 10 years after replacement, whichever occurs first, you must do one of the actions in paragraph (g)(1) of this AD.

(iii) Replace the stabilator horn assembly with a used serviceable stabilator horn assembly that has been inspected before installation and found free of cracks or corrosion. Repetitively thereafter inspect at intervals not to exceed 500 hours TIS or 5 years, whichever occurs first.

(3) If you do not know the total hours TIS on the stabilator horn assembly, within the next 100 hours TIS after October 22, 2012 (the effective date of this AD) do one of the actions required in paragraph (g)(1)(i), (g)(1)(ii), (g)(1)(iii), (g)(2)(i), (g)(2)(ii), or (g)(2)(iii) of this AD.

(4) If any corrosion or cracks are found during any of the inspections required in paragraph (g)(1)(i), (g)(1)(iii), (g)(2)(i), or (g)(2)(iii) of this AD, before further flight, you must replace the stabilator horn assembly as specified in paragraph (g)(1)(ii), (g)(1)(iii). (g)(2)(ii), or (g)(2)(iii) of this AD, as applicable.

(5) For the bolts common to the torque tube and stabilator horn, install the nuts using a torque of 120–145 in.-lbs. for the actions required by paragraphs (g)(1), (g)(2), or (g)(3) of this AD.

Note 1 to paragraph (g) of this AD: The stated torque value of 120–145 in.-lbs. includes friction drag from the nut's locking element, which is assumed to be 60 in.-lbs. The installation torque can be adjusted according to the actual, measured friction drag. For example, if the friction-drag torque is measured to be 40 in.-lbs. (20 in.-lbs. less than the assumed value of 60 in.-lbs.), then the installation torque will be adjusted to be 100–125 in.-lbs. of torque.

(6) You may at any time replace the stabilator horn assembly with a new stabilator horn assembly, provided no corrosion or cracks were found during an inspection that would require replacement before further flight. When the new stabilator horn assembly reaches a total of 1,000 hours TIS after replacement or within 10 years after replacement, whichever occurs first, you must do one of the actions in paragraph (g)(1) of this AD.

Note 2 to paragraph (g) of this AD: Piper Aircraft, Inc. Service Bulletin No. 1160, dated December 26, 2005; Special Airworthiness Information Bulletin CE–04–88, dated September 15, 2004, at *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgSAIB.nsf/0/77fc29bb15c8a85b8625721f0052ecb4/$FILE/CE-04-88.pdf;* and AD 74–13–03, Amendment 39–2588 (41 FR 17371, April 26, 1976), are related to this AD action. For the attached torque tube, you may consider combining that inspection with the requirements of this AD.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta Aircraft 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.

(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.

(i) Related Information

For more information about this AD, contact Gregory K. Noles, Aerospace Engineer, FAA, Atlanta ACO, 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474–5551; fax: (404) 474–5606; email: *gregory.noles@faa.gov.*

(j) 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.

(i) Piper Aircraft, Inc. Service Bulletin No. 1189, dated April 29, 2010.

(ii) Reserved.

(3) For Piper Aircraft, Inc. service information identified in this AD, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida 32960; telephone: (772) 567–4361; fax: (772) 978–6573; Internet: *http://www.piper.com/company/publications.asp.*

(4) You may view this service information at the FAA, Small Airplane Directorate, 901 Locust St., Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) 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 Kansas City, Missouri, on August 20, 2012.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–22529 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0071; Directorate Identifier 2012–NE–05–AD; Amendment 39–17191; AD 2012–18–14]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Canada, Auxiliary Power Units

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain serial numbers of Pratt & Whitney Canada (P&WC) PW901A auxiliary power units (APUs) approved under Technical Standard Order TSO–C77A and installed on, but not limited to, Boeing 747–400 series airplanes. This AD requires modifications of the rear gas generator case, exhaust duct support, and turbine exhaust duct flanges. This AD was prompted by several events of high-pressure turbine blade fracture leading to separation of the rear gas generator case and release of high energy debris. We are issuing this AD to prevent separation of the rear gas generator case and release of high energy debris, which could result in injury and damage to the airplane.

DATES: This AD becomes effective October 22, 2012. The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of October 22, 2012.

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: Mazdak Hobbi, Aerospace Engineer, New York Aircraft Certification Office, FAA, Engine & Propeller Directorate, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 516–228–7330; fax: 516–794–5531; email: *mazdak.hobbi@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 February 27, 2012 (77 FR 11421). That NPRM proposed to correct an unsafe condition for the specified products. Transport Canada, which is the aviation authority for Canada, has issued AD CF–2011–40, dated October 26, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> The PW901A Auxiliary Power Units have experienced several events of High Pressure Turbine (HPT) blade fracture, some of which have resulted in the separation of the rear gas generator case, exhaust duct support, the turbine exhaust duct flanges and the release of high energy debris. Subsequent investigation revealed the turbine exhaust duct can separate under excessive load conditions resulting from extreme engine distress such as HPT blade fractures.

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 considered the comments received. The following presents the comments received on the proposal and the FAA's response to each comment.

Support for the NPRM

The Boeing Company indicated it supported the content of the proposed rule.

Request To Increase Compliance Time

Several commenters believed the compliance time in the AD should be extended. Atlas Air requested that the compliance time be increased from 42 to 60 months. Atlas Air noted that the 42-month requirement would force them to remove APUs prior to their 8,000 hours soft time threshold which is based on their budget and operating experience and reliability. This threshold would increase the maintenance burden and cost to Atlas Air.

KLM Royal Dutch Airlines (KLM) also requested that the compliance date be extended. KLM indicated that requiring all the affected APUs be modified in 42 months would require forced unscheduled replacements.

United Airlines (UAL) also requested that the compliance time be extended from 42 to 48 months. United indicated that the 42-month compliance time would require engines to be removed prematurely and cause capacity problems for repair shops.

We do not agree. We have no data that justifies extending the compliance time to 48 months. Operators who want to a longer compliance interval may request an AMOC using the procedures in 14 CFR part 39. Operators contemplating an AMOC request are reminded that they must show that their extension will provide the same level of safety as provided by the 42-month compliance interval.

Request To Increase Compliance Time for Those APUs Incorporating Previous SB

KLM also requested a longer compliance period for APU's modified per SB 3910001–49–16250. KLM commented that the risk for these blades is lower than the pre-SB blades. United Parcel Service Company also requested that the compliance period be increased from 42 to 60 months for APUs having SB–16250 previously incorporated (improved HPT blades).

We do not agree. We have no data supporting the conclusion that APUs modified per SB 3910001–49–16250 have a lower risk of separation of the rear gas generator case or that an increased compliance time is justified for these blades. We did not change the AD based on this comment.

Question on Compliance Date

KLM asked what the compliance date for this AD would be, since the compliance date in AD CF–2011–40, dated October 26, 2011, is different from the date in Pratt & Whitney Canada Service Bulletin (SB) 3910001–49–16255, Revision No. 2, dated March 1, 2011.

The compliance date for this AD will be 35 days after the date the AD is published in the **Federal Register**. We did not change the AD based on this comment.

Comment on Failure To Address Root Cause

KLM indicated that accomplishing SB 391001–49–16255, Revision No. 2, dated March 1, 2011, and our AD will not prevent high pressure turbine blades from failing.

We do not agree. The root cause of the failure of the HPT blades is excessive load resulting from extreme engine distress, which leads to turbine exhaust duct separation. Accomplishing SB 391001–49–A16255, Revision No. 2, dated March 1, 2011, will mitigate excessive load by modifying the rear gas generator case, exhaust duct support and the turbine exhaust duct flanges. We did not change the AD based on this comment.

Comment on Increased Man-hours Needed To Accomplish the AD

KLM noted that not all APUs can be modified during an overhaul. Therefore, extra man-hours will be required to perform this modification.

We do not agree. The man-hours indicated in the SB and in this AD are sufficient to modify the APU. The number of hours required to perform an engine overhaul is not the subject of this AD. We did not change the AD based on this comment.

Request To Clarify ''Preventative Maintenance'' in Compliance Statement

Southern Air indicated that compliance paragraph (e)(1) is misleading wherein it states ''within 42 months after effective date of the AD or the first time any maintenance is done other than preventative maintenance, whichever occurs first * * *.'' Southern Air believes the statement should read: ''42 months after the effective date of the AD or when maintenance which requires unmating of the flanges, or overhaul, whichever occurs first.''

UAL indicated the term ''preventative maintenance'' in paragraph (e)(1) is vague and ambiguous. UAL noted that as currently stated the AD would have to be accomplished if one was replacing a line replaceable unit like an exciter or starter. UAL suggested that the maintenance be accomplished when the exhaust support duct is accessible, i.e., removed from the APU.

We agree. We changed paragraph (e)(1) of the AD to read ''Within 42 months after the effective date of this AD or the first time the APU or module is at a maintenance facility that can perform the modifications, regardless of the maintenance action or reason for APU removal, whichever occurs first, modify the rear gas generator case, exhaust duct support, and turbine exhaust duct flanges.''

Request Not To Mandate Use of Service Bulletin in Compliance Section

UAL commented that several steps in the accomplishment instructions in P&WC SB No. 3910001–49–A16255, Revision No. 2, do not offer an increase in safety and should not be mandated by the AD. UAL noted that the component maintenance manual offers sufficient instructions to perform the required modifications.

We do not agree. UAL did not identify any unnecessary steps, we know of none, and our inquiry of the OEM did not identify any unnecessary steps. If the OEM determined that the component maintenance manual was adequate, it would have been referenced in SB No. 3910001–49–A16255, Revision No. 2. We did not change the AD based on this comment.

Questions on APU Continuing To Meet Type Certification Requirements

KLM asked that since the APU was originally certified to a TSO should the certification basis be maintained during the lifetime of operation.

We reply to KLM's multi-layered comment as follows. First, we granted TSO approval to PWC for this APU on September 20, 1988. Second, the corrective actions required by this AD should return the product to the level of safety intended by its certification basis. Finally, whether or not an OEM covers the cost of actions mandated by our AD actions is between the OEM and the product owner/operator.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

Based on the service information, we estimate that this AD affects about 135 APUs installed on airplanes of U.S. registry. The average labor rate is $85 per work-hour. Required parts cost about $39,899 per APU. Based on these figures, we estimate the cost of the AD on U.S. operators to be $5,386,365.

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:

2012–18–14 Pratt & Whitney Canada: Amendment 39–17191; Docket No. FAA–2012–0071; Directorate Identifier 2012–NE–05–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective October 22, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pratt & Whitney Canada (P&WC) PW901A auxiliary power units (APUs) approved under Technical Standard Order TSO–C77A and installed on, but not limited to, Boeing 747–400 series airplanes. The affected APU serial numbers are PCE 900001 through PCE 900776 inclusive.

(d) Reason

This AD was prompted by several events of high-pressure turbine blade fracture leading to separation of the rear gas generator case and release of high energy debris. We are issuing this AD to prevent separation of the rear gas generator case and release of high energy debris, which could result in injury and damage to the airplane.

(e) Actions and Compliance

Unless already done, do the following actions.

(1) Within 42 months after the effective date of this AD or the first time the APU or module is at a maintenance facility that can perform the modifications, regardless of the maintenance action or reason for APU removal, whichever occurs first, modify the rear gas generator case, exhaust duct support, and turbine exhaust duct flanges.

(2) Use paragraphs 3.A. through 3.B(3)(f) of Accomplishment Instructions, and paragraph 4.A. of Appendix, of P&WC Alert Service Bulletin (SB) No. 39100001–49–A16255, Revision No. 2, dated March 1, 2011, to do the modifications.

(f) Credit for Previous Action

APUs modified before the effective date of this AD using P&WC Alert SB No. A16255R1, dated September 12, 2008, or P&WC Alert SB No. A16255, dated December 12, 2007, meet the modification requirements of this AD.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, New York Aircraft Certification Office, FAA, 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 Mazdak Hobbi, Aerospace Engineer, New York Aircraft Certification Office, FAA, Engine & Propeller Directorate, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 516–228–7330; fax: 516–794–5531; email: *mazdak.hobbi@faa.gov.*

(2) Refer to Transport Canada AD CF–2011–40, dated October 26, 2011, and P&WC SB No. A16255R2, dated March 1, 2011, for related information.

(i) Material Incorporated by Reference

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

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

(i) Pratt & Whitney Canada Alert Service Bulletin No. 3910001–49 A16255, Revision No. 2, dated March 1, 2011.

(ii) Reserved.

(3) For service information identified in this AD, contact Pratt & Whitney Canada Corp., 1000 Marie-Victorin, Longueuil, Quebec, Canada J4G 1A1; phone: 450–677–9411.

(4) 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.

(5) You may view this service information 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 Burlington, Massachusetts, on August 27, 2012.

Colleen M. D'Alessandro,

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

[FR Doc. 2012–22532 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1167; Directorate Identifier 2011–NM–058–AD; Amendment 39–17189; AD 2012–18–12]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Airbus Model A318, A319, and A320 series airplanes. This AD was prompted by a report of a torn out aspirator due to the aspirator interfering with the extrusion lip of the off-wing escape slide (OWS) enclosure during the initial stage of the deployment sequence. This AD requires modifying the OWS enclosures on both sides. We are issuing this AD to prevent both off-wing exits from being inoperative, which, during an emergency, would impair the safe evacuation of occupants, possibly resulting in personal injuries.

DATES: This AD becomes effective October 22, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of October 22, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1405; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That SNPRM was published in the **Federal Register** on June 11, 2012 (77 FR 34283). That SNPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> One operator has reported a torn out aspirator following scheduled (for on-ground testing purposes) deployment of the Left Hand (LH) OWS [off-wing escape slide].
>
> Investigations have revealed that the aspirator of the off-wing ramp/slide system interferes with the extrusion lip of the OWS enclosure during the initial stage of the deployment sequence.
>
> This condition, if not corrected, could result in both LH and Right Hand (RH) off-wing exits being unserviceable which, during an emergency, would impair the safe evacuation of occupants, possibly resulting in personal injuries.
>
> For the reasons described above, this [European Aviation Safety Agency (EASA)] AD requires the modification of the OWS enclosures on both sides.

* * * * *

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 SNPRM (77 FR 34283, June 11, 2012) or on the determination of the cost to the public.

Conclusion

We reviewed the available data 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 SNPRM (77 FR 34283, June 11, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the SNPRM (77 FR 34283, June 11, 2012).

Costs of Compliance

We estimate that this AD will affect about 694 products of U.S. registry. We also estimate that it will take about 14 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $825,860, or $1,190 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that 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);
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.

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 the NPRM (76 FR 67625, November 2, 2011), SNPRM (77 FR 34283, June 11, 2012), the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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:

2012–18–12 Airbus: Amendment 39–17189. Docket No. FAA–2011–1167; Directorate Identifier 2011–NM–058–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective October 22, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; and Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes; certificated in any category; all manufacturer serial numbers; except for airplanes on which off-wing escape slides (OWS) having part number (P/N) D31865–111 and P/N D31865–112 are installed.

(d) Subject

Air Transport Association (ATA) of America Code 25: Equipment/furnishings.

(e) Reason

This AD was prompted by a report of a torn out aspirator due to the aspirator interfering with the extrusion lip of the OWS enclosure during the initial stage of the deployment sequence. We are issuing this AD to prevent both off-wing exits from being inoperative, which, during an emergency, would impair the safe evacuation of occupants, possibly resulting in personal injuries.

(f) Compliance

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

(g) Modification

Within 36 months after the effective date of this AD, modify both left-hand and right-hand OWS enclosures, in accordance with the instructions in Airbus Service Bulletin A320–25–1649, dated February 16, 2010.

(h) Parts Installation Prohibition

After accomplishing the modification required by paragraph (g) of this AD, no person may install an OWS having P/N D31865–109, P/N D31865–110, P/N D31865–209, or P/N D31865–210 on that airplane.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

(j) Related Information

Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0210, dated October 21, 2010 (corrected October 27, 2010); and Airbus Service Bulletin A320–25–1649, dated February 16, 2010; for related information.

(k) 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.

(i) Airbus Service Bulletin A320–25–1649, dated February 16, 2010.

(ii) Reserved.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

(4) You may review copies of the 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.

(5) 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/index.html. http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on August 31, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–22041 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0337; Directorate Identifier 2010–SW–090–AD; Amendment 39–17185; AD 2012–18–09]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Canada Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the Bell Helicopter Textron Canada Limited (BHTC) Model 407 helicopters. This AD requires you to replace tailboom-attachment hardware (attachment hardware), and perform initial and recurring determinations of the torque on the nuts of the tailboom-attachment bolts (bolts) at all four attachment locations. This AD was prompted by a review of the tailboom-attachment installation, which revealed that the torque value of the bolts specified in the BHTC Model 407 Maintenance Manual and applied during manufacturing was incorrect and exceeded the torque range recommended for the bolts. The actions required by this AD are intended to prevent an over-torque of a bolt, bolt failure, loss of the tailboom, and subsequent loss of control of the helicopter.

DATES: This AD is effective October 22, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain document listed in this AD as of October 22, 2012.

ADDRESSES: For service information identified in this AD, contact Bell Helicopter Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4, telephone (450) 437–2862 or (800) 363–8023, fax (450) 433–0272, or at *http://www.bellcustomer.com/files/.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

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, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:
Sharon Miles, Aerospace Engineer, FAA, Regulations and Policy Group, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–5122; fax: (817) 222–5961; email: *sharon.y.miles@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

On March 29, 2012, at 77 FR 18970, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 to include an AD that would apply to BHTC Model 407 helicopters. That NPRM proposed to require replacing attachment hardware and performing initial and recurring determinations of the torque on the nuts of the tailboom-attachment bolts at all four attachment locations. The proposed requirements were intended to prevent an over-torque of a bolt, bolt failure, loss of the tailboom, and subsequent loss of control of the helicopter.

Transport Canada, which is the aviation authority for Canada, has issued Canadian AD No. CF–2010–33, dated September 30, 2010, to correct an unsafe condition for the BHTC Model 407 helicopters, serial numbers (S/N) 53000 through 53990. Transport Canada advises that a review of the tailboom-attachment installation determined that the torque value of the bolts specified in the BHTC Model 407 Maintenance Manual and applied during manufacturing, exceeded the torque range recommended for the bolts. Transport Canada states that this situation, if not corrected, could lead to a bolt failure, detachment of the tailboom, and subsequent loss of control of the helicopter.

Comments

We gave the public the opportunity to participate in developing this AD, but we did not receive any comments on the NPRM.

FAA's Determination

These helicopters have been approved by the aviation authority of Canada and are approved for operation in the United States. Pursuant to our bilateral agreement with Canada, Transport Canada, its technical representative, has notified us of the unsafe condition described in the Transport Canada AD. We are issuing this AD because we evaluated all information provided by Transport Canada and determined the unsafe condition exists and is likely to exist or develop on other helicopters of the same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Differences Between This AD and the Transport Canada AD

The differences between this AD and the Transport Canada AD are as follows:

• This AD uses the term ''hours time-in-service'' to describe compliance times, and Transport Canada AD uses the term ''air time'';

• For helicopters with 7000 hours or less TIS, the Transport Canada AD requires accomplishing the actions in the AD at the next scheduled 600-hour inspection or by December 31, 2010, whichever occurs first. This AD requires accomplishing the actions at the next scheduled 600-hour inspection or 90 days, whichever occurs first.

• This AD uses the term ''determine the torque'' when referring to the torque on a nut, and the Transport Canada AD uses the term ''perform a torque check.''

Related Service Information

BHTC has issued Alert Service Bulletin No. 407–10–93, Revision A, dated August 30, 2010 (ASB), which specifies installing new attachment hardware with a reduced torque value. This ASB specifies performing a torque check of the newly installed bolts and nuts every one to five flight hours until the torque stabilizes at all locations, and thereafter at intervals not to exceed 300 flight hours. Transport Canada classified this ASB as mandatory and issued AD CF–2010–33 to ensure the continued airworthiness of these helicopters.

Costs of Compliance

We estimate that this AD will affect 552 helicopters of U.S. registry. We estimate it will take about two work-hours per helicopter to replace the hardware and one work-hour per helicopter to determine the recurring torque value at an average labor rate of $85 per work hour. Required parts will cost about $498 per helicopter. Based on these figures, we estimate for the first year the total cost per helicopter to be $923, and the total cost impact on U.S. operators to be $509,496. This estimated total cost assumes attachment hardware will be replaced on all affected helicopters, the torque will be considered stabilized after determining the torque value once, and the 300-hour TIS recurring torque determination will be accomplished twice a year.

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 helicopters identified in this rulemaking action.

Regulatory Findings

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 to the extent that it justifies making a regulatory distinction; 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.

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

List of Subjects in 14 CFR Part 39

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

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 airworthiness directive (AD):

2012–18–09 Bell Helicopter Textron Canada (BHTC): Amendment 39–17185; Docket No. FAA–2012–0337; Directorate Identifier 2010–SW–090–AD.

(a) Applicability

This AD applies to BHTC Model 407 helicopters, serial numbers 53000 through 53990, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as an incorrect torque value of the tailboom attachment bolt (bolt) specified in the BHTC Model 407 Maintenance Manual and applied during manufacturing, which exceeds the torque range recommended for the bolts. This condition could result in an over-torque of the bolt, bolt failure, loss of the tailboom, and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective October 22, 2012.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless accomplished previously.

(e) Required Actions

(1) For helicopters with 7000 hours or less time-in-service (TIS), at the next 600 hours scheduled inspection, or 90 days, whichever comes first; and for helicopters with more than 7000 hours TIS, within 150 hours TIS or 90 days, whichever comes first, replace the tailboom-attachment hardware (attachment hardware) as follows:

(i) Remove the left upper bolt, washers, and nut.

(ii) Install a new bolt, part number (P/N) NAS627–30; washer, P/N 140–007–29S25E6; washer(s), P/N NAS1149G0732P; and new nut, P/N 42FLW–720 in accordance with paragraphs 2.a) through paragraph 3.e) of the ''Accomplishment Instructions: Replacement of tailboom attachment bolts and nuts'' section and Figure 2 in the BHTC Alert Service Bulletin No. 407–10–93, Revision A, dated August 30, 2010 (ASB).

(iii) Remove the opposite right upper bolt, washers, and nut, and accomplish the requirements in paragraph (e)(1)(ii) of this AD.

(iv) Remove the left lower bolt, washers, and nut.

(v) Install a new bolt, (P/N) NAS626–26; washer, P/N 140–007–25S22E6; washer(s), P/N NAS1149G0663P; and new nut, P/N 42FLW–624 in accordance with paragraphs 6.a) through 7.e) of the ''Accomplishment Instructions: Replacement of tailboom attachment bolts and nuts'' section and Figure 2 in the ASB.

(vi) Remove the right lower bolt, washers, and nut, and accomplish the requirements in paragraph (e)(1)(v) of this AD.

(2) After installation of the new attachment hardware, at intervals of not less than 1 hour TIS but not exceeding 5 hours TIS, determine the torque of each nut until the torque stabilizes at each attachment location, referring to Figure 2 of the ASB. Apply the minimum specified torque of the range, plus the minimum acceptable tare torque of 14 inch/lbs (1.58 Nm) for the upper nuts, and 9.5 inch/lbs (1.07 Nm) for the lower nuts.

(3) At intervals not to exceed 300 hours TIS, determine the torque of each of the four attachment nuts, referring to Figure 2 of the ASB. Apply the minimum specified torque of the range plus the minimum acceptable tare torque of 14 inch/lbs (1.58 Nm) for the upper nuts, and 9.5 inch/lbs (1.07 Nm) for the lower nuts. If the proper torque has not been retained since the last torque determination, remove and inspect the tailboom assembly for damage, corrosion, improper assembly, and condition. If the tailboom assembly is airworthy, replace the attachment hardware in accordance with the requirements in paragraphs (e)(1)(i) through (e)(1)(vi) and determine that the torque has stabilized in accordance with paragraph (e)(2) of this AD. Replace any unairworthy tailboom assembly with an airworthy tailboom assembly.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Sharon Miles, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–5122; fax: 817–222–5961; email: *sharon.y.miles@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

The subject of this AD is addressed in the Transport Canada Civil Aviation (TCCA) AD CF–2010–33, dated September 30, 2010.

(h) Subject

Joint Aircraft Service Component (JASC) Code: Rotorcraft tailboom.

(i) 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.

(i) Bell Helicopter Textron Canada Limited Alert Service Bulletin No. 407–10–93, Revision A, dated August 30, 2010.

(ii) Reserved.

(3) For service information identified in this AD, contact Bell Helicopter Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4, telephone (450) 437–2862 or (800) 363–8023, fax (450) 433–0272, or at *http://www.bellcustomer.com/files/.*

(4) You may review a copy of this service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) 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 Fort Worth, Texas, on August 30, 2012.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–22038 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0217; Directorate Identifier 2009–NE–23–AD; Amendment 39–17194; AD 2012–18–17]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Division Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for all Pratt & Whitney Division (Pratt & Whitney) PW4052, PW4056, PW4060, PW4062, PW4062A, PW4074, PW4077, PW4077D, PW4084D, PW4090, PW4090–3, PW4152, PW4156A, PW4158, PW4164, PW4168, PW4168A, PW4460, and PW4462 turbofan engines. That AD currently requires initial and repetitive fluorescent penetrant inspections (FPI) for cracks in the blade loading and locking slots of the high-pressure compressor (HPC) drum rotor disk assembly rear drum. This new AD requires the same actions, requires replacement of the 13th, 14th, and 15th stage HPC seals with redesigned HPC seals as an additional action, and adds an optional terminating action to the repetitive inspection requirements by allowing replacement of the entire HPC drum rotor disk assembly with a redesigned HPC drum rotor disk assembly. This AD was prompted by Pratt & Whitney developing a redesigned HPC drum rotor disk assembly for certain affected engine models. We are issuing this AD to prevent failure of the HPC drum rotor disk assembly, which could lead to an

uncontained engine failure, and damage to the airplane.

DATES: This AD is effective October 22, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of October 22, 2012.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of October 18, 2010 (75 FR 55459, September 13, 2010).

ADDRESSES: For service information identified in this AD, contact Pratt & Whitney, 400 Main St., East Hartford, CT 06108; phone: 860–565–7700; fax: 860–565–1605. 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.

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: James Gray, Aerospace Engineer, Engine & Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7742; fax: 781–238–7199; email: *james.e.gray@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2010–18–13, Amendment 39–16427 (75 FR 55459, September 13, 2010). That AD applies to the specified products. The NPRM published in the **Federal Register** on May 24, 2012 (77 FR 30926). That NPRM proposed to retain all of the requirements of AD 2010–18–13. That NPRM also proposed to require replacement of the 13th, 14th, and 15th stage HPC seals with redesigned seals and add an optional terminating action to the repetitive inspection requirement by allowing replacement of the HPC drum rotor disk assembly with a redesigned HPC drum rotor disk assembly.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and the FAA's response to each comment.

In Agreement With the Proposed AD

The Boeing Company and FedEx Express are in agreement with the proposed AD.

Request To Allow for Previous Credit

FedEx Express requested that we allow credit for prior compliance with the AD actions.

We do not agree. The proposed AD already allows credit for prior compliance in paragraph (e), which states to comply within the compliance times specified unless already done. We did not change the AD.

Request To Reference the Latest Revisions of Two Service Bulletins (SBs)

United Airlines, Korean Air, and Atlas Air, requested that we reference the latest revisions of two SBs which were revised since the proposed AD was issued.

We agree. We now reference Pratt & Whitney SB No. PW4ENG 72–816, Revision 1, dated June 12, 2012, and Pratt & Whitney SB No. PW4G–100–72–240, Revision 1, dated June 12, 2012, in the AD.

Request To Revise Paragraph (g)

United Airlines requested that we change paragraph (g) of the proposed AD to only require use of paragraphs 1.A. through 1.C. of the Accomplishment Instructions of SB No. PW4ENG 72–816 since additional paragraphs of the SB are not needed to comply with the AD.

We agree. We changed paragraphs (g)(1) and (g)(2) to only require use of paragraphs 1.A through 1.C. of that SB to comply with the AD.

Request To Add Previously Approved Alternate Methods of Compliance (AMOCs)

Japan Airlines and Korean Air requested that we add the previously approved AMOCs to the AD. The commenters referenced two previously approved AMOCs related to taking credit for the inspections required by AD 2005–25–09 (70 FR 73358, December 12, 2005), and use of the disk replacement repair included in the PW4000 Engine Cleaning Inspection and Repair (CIR) Manual to return non-cracked stages of the drum rotor disk assembly to service.

We do not agree. We did not list the previously approved AMOCs in the proposed AD because paragraph (j) of the proposed AD already allows use of previously approved AMOCs to paragraph (f) of the existing AD. Paragraph (f) was specified because the content of this paragraph did not change in the proposed AD supersedure. We did not change the AD.

Request To Revise Paragraph (f)(2)

Atlas Air requested that we revise paragraph (f)(2) of the proposed AD to remove only the cracked disk in the HPC drum rotor disk assembly from service. The commenter stated that currently paragraph (f)(2) requires the entire drum rotor disk assembly to be removed from service if a crack is found. The commenter believes it would be acceptable to remove from service only the cracked disk in the drum rotor disk assembly and use the repair in the PW4000 Engine CIR manual to replace it with a serviceable disk.

We partially agree. We agree that an acceptable level of safety would be maintained by returning the other stages of the drum rotor disk assembly to service if they were not cracked, if the cracked stages of the HPC drum rotor disk assembly were replaced by new disks per the disk replacement repairs in the PW4000 Engine CIR manual. We do not agree with revising the proposed AD because this is already an approved global AMOC covered under paragraph (j) of the proposed AD. We did not change the AD.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously.

Costs of Compliance

We estimate that this AD will affect 911 engines installed on airplanes of U.S. registry. We also estimate that it will take about 1 work-hour per engine to perform an inspection using an average labor rate of $85 per work-hour. We estimate that there are 770 PW4000–94″ and PW4000–100″ engines that will require replacement of 13th, 14th, and 15th stage HPC seals, at a parts cost of $3,000 per engine. No additional labor is assumed when the replacement is done at piece-part exposure of the HPC drum rotor disk assembly. The replacement parts cost of the redesigned HPC drum rotor disk assembly is $630,000. Based on these figures, we estimate that the total cost of the AD to U.S. operators will be $2,387,435.

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) 2010–18–13, Amendment 39–16427 (75 FR 55459, September 13, 2010), and adding the following new AD:

2012–18–17 Pratt & Whitney Division: Amendment 39–17194; Docket No. FAA–2010–0217; Directorate Identifier 2009–NE–23–AD.

(a) Effective Date

This airworthiness directive (AD) is effective October 22, 2012.

(b) Affected ADs

This AD supersedes AD 2010–18–13, Amendment 39–16427 (75 FR 55459, September 13, 2010).

(c) Applicability

This AD applies to the following Pratt & Whitney Division (Pratt & Whitney) turbofan engines:

(1) PW4000–94″ engine models PW4052, PW4056, PW4060, PW4062, PW4062A, PW4152, PW4156A, PW4158, PW4460, and PW4462, including those models with any dash number suffix, with a high-pressure compressor (HPC) drum rotor disk assembly listed in Table 1 to paragraph (c) of this AD installed.

(2) PW4000–100″ engine models PW4164, PW4168, and PW4168A, with a HPC drum rotor disk assembly listed in Table 1 to paragraph (c) of this AD installed.

(3) PW4000–112″ engine models PW4074, PW4077, PW4077D, PW4084D, PW4090, and PW4090–3, with a HPC drum rotor disk assembly listed in Table 1 to paragraph (c) of this AD installed.

TABLE 1 TO PARAGRAPH (c)—AFFECTED HPC DRUM ROTOR DISK ASSEMBLIES

Engine models	Affected HPC drum rotor disk assembly part numbers
PW4000–94″	50H936; 50H936–002; 53H923–01; 53H923–001; 53H973–01; 53H973–001; 54H803–01; 54H803–001; 54H803–002; 56H013–01; 56H013–001; 58H236–01
PW4000–100″	53H973–01; 53H973–001; 54H803–01; 54H803–001; 54H803–002; 56H013–01; 56H013–001; 58H236–01
PW4000–112″	55H722–01; 55H410–01; 57H010–01; 57H210–01; 57H610–01; 57H910–01

(d) Unsafe Condition

This AD was prompted by Pratt & Whitney developing a redesigned HPC drum rotor disk assembly for certain affected engine models. We are issuing this AD to prevent failure of the HPC drum rotor disk assembly, which could lead to an uncontained engine failure, and damage to the airplane.

(e) Compliance

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

(f) Local Fluorescent Penetrant Inspection

(1) Perform a local fluorescent penetrant inspection for cracks in the HPC drum rotor disk assembly rear drum blade loading and locking slots of the specific stages of the HPC drum rotor disk assemblies from which any of the blades are removed as specified in Table 2 to paragraph (f) of this AD.

TABLE 2 TO PARAGRAPH (f)—COMPLIANCE TIMES AND SERVICE BULLETINS BY ENGINE MODEL

For engine model	Inspect whenever . . .	To inspect, use . . .
PW4074, PW4077, PW4077D, PW4084D, PW4090, and PW4090–3.	Any of the HPC 13th or 14th stage blades are removed during a shop visit.	Paragraphs 1.A. through 1.B. of the Accomplishment Instructions of PW4G–112–72–264, Revision 2, dated February 23, 2010.
PW4164, PW4168, and PW4168A	Any of the HPC 13th, 14th, or 15th stage blades are removed during a shop visit.	Paragraphs 1.A. through 1.C of the Accomplishment Instructions of PW4G–100–72–186, Revision 1, dated September 2, 2004.
PW4052, PW4056, PW4060, PW4062, PW4062A, PW4152, PW4156A, PW4158, PW4460, and PW4462.	Any of the HPC 13th, 14th, or 15th stage blades are removed during a shop visit.	Paragraphs 1.A. through 1.C. of the Accomplishment Instructions of PW4ENG 72–796, dated June 11, 2009.

(2) Remove from service any HPC drum rotor disk assembly rear drum found with a crack in any of the blade loading and locking slots.

(g) Replacement of 13th, 14th, and 15th HPC Seals

At the next piece-part exposure of the HPC drum rotor disk assembly after the effective date of this AD:

(1) Replace the 13th, 14th, and 15th stage HPC seals with redesigned HPC seals of engines listed in paragraph (c)(1) of this AD in accordance with paragraphs 1.A through 1.C of the Accomplishment Instructions of Pratt & Whitney Service Bulletin (SB) No. PW4ENG 72–816, Revision 1, dated June 12, 2012.

(2) Replace the 13th, 14th, and 15th stage HPC seals with redesigned HPC seals of engines listed in paragraph (c)(2) of this AD in accordance with paragraphs 1.A through 1.C of the Accomplishment Instructions of Pratt & Whitney SB No. PW4G–100–72–240, Revision 1, dated June 12, 2012.

(h) Optional Terminating Action

As optional terminating action to the repetitive inspection requirements of this AD:

(1) Replace the HPC drum rotor disk assembly of engines listed in paragraph (c)(1) of this AD with a redesigned HPC drum rotor disk assembly in accordance with the Accomplishment Instructions of Pratt & Whitney SB No. PW4ENG 72–817, dated December 7, 2011.

(2) Replace the HPC drum rotor disk assembly of engines listed in paragraph (c)(2) of this AD with a redesigned HPC drum rotor disk assembly in accordance with the Accomplishment Instructions of Pratt & Whitney SB No. PW4G–100–72–241, dated November 15, 2011.

(i) Definition

For the purpose of this AD, piece-part exposure means that the HPC drum rotor disk assembly is removed from the engine and completely disassembled.

(j) 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. AMOCs approved previously in accordance with AD 2010–18–13, Amendment 39–16427 (75 FR 55459, September 13, 2010) are approved as AMOCs for the corresponding requirements in paragraph (f) of this AD.

(k) Related Information

For more information about this AD, contact James Gray, Aerospace Engineer, Engine & Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7742; fax: 781–238–7199; email: *james.e.gray@faa.gov*.

(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 22, 2012.

(i) Pratt & Whitney Service Bulletin No. PW4G–100–72–240, Revision 1, dated June 12, 2012.

(ii) Pratt & Whitney Service Bulletin No. PW4G–100–72–241, dated November 15, 2011.

(iii) Pratt & Whitney Service Bulletin No. PW4ENG 72–816, Revision 1, dated June 12, 2012.

(iv) Pratt & Whitney Service Bulletin No. PW4ENG 72–817, dated December 7, 2011.

(4) The following service information was approved for IBR on October 18, 2010 (75 FR 55459, September 13, 2010).

(i) Pratt & Whitney Service Bulletin No. PW4G–100–72–186, Revision 1, dated September 2, 2004.

(ii) Pratt & Whitney Service Bulletin No. PW4G–112–72–264, Revision 2, dated February 23, 2010.

(iii) Pratt & Whitney Service Bulletin No. PW4ENG 72–796, dated June 11, 2009.

(5) For Pratt & Whitney service information identified in this AD, contact Pratt & Whitney, 400 Main St., East Hartford, CT 06108; phone: 860–565–7700; fax: 860–565–1605.

(6) You may view this service information at 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.

(7) You may view this service information 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 Burlington, Massachusetts, on September 4, 2012.

Colleen M. D'Alessandro,

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

[FR Doc. 2012–22534 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1407; Airspace Docket No. 11–AGL–25]

RIN 2120–AA66

Modification of Area Navigation (RNAV) Route Q–62; Northeast United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies area navigation (RNAV) route Q–62 by extending it further west and incorporating two additional navigation fixes. The route extension links two RNAV Standard Terminal Arrival Routes (STARs) serving the Chicago O'Hare International Airport, IL, terminal area with the high altitude route. The FAA is taking this action to increase National Airspace System (NAS) efficiency and enhance flight safety as aircraft transition from the en route airway structure to the terminal area airspace phase of flight.

DATES: Effective date 0901 UTC, November 15, 2012. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace, Regulations and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On Monday, February 6, 2012, the FAA published in the **Federal Register** a notice of proposed rulemaking to modify RNAV route Q–62 in Northeast United States by extending it further west (77 FR 5733). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on this proposal to the FAA. No comments were received.

The Rule

The FAA is amending Title 14, Code of Federal Regulations (14 CFR) part 71 by extending high altitude RNAV route Q–62 to the west to include the WATSN and DAIFE fixes. This action links the WATSN and HALIE RNAV STARs serving Chicago O'Hare International Airport, IL, with the high altitude route and establishes a seamless transition for westbound air traffic from the New York metropolitan area into the Chicago O'Hare International Airport, IL, terminal area. Additionally, this action reduces ATC system complexity, air traffic controller and pilot workload, voice communication requirements, and aircraft fuel consumption. It also expands the use of RNAV within the NAS.

High altitude RNAV routes are published in paragraph 2006 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 route listed in this document will be subsequently published in the Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this 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 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 modifies the route structure of RNAV routes as required to preserve the safe and efficient flow of air traffic.

Environmental Review

The FAA has determined that this action is categorically excluded from further environmental documentation according to FAA Order 1050.1E, paragraphs 311a, 311b, and 311i. The implementation of this action will not result in any extraordinary circumstances in accordance with paragraph 304 of Order 1050.1E.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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

* * * * *

Q–62 WATSN, IN to SARAA, PA [Amended]

WATSN, IN	FIX	(Lat. 41°17′00″ N., long. 86°02′07″ W.)
DAIFE, IN	WP	(Lat. 41°16′08″ N., long. 85°51′19″ W.)
NOLNN, OH	WP	(Lat. 41°14′04″ N., long. 84°38′12″ W.)
WEEVR, OH	WP	(Lat. 41°13′21″ N., long. 84°13′04″ W.)
PSKUR, OH	WP	(Lat. 41°09′16″ N., long. 82°42′57″ W.)
FAALS, OH	WP	(Lat. 41°02′51″ N., long. 80°52′40″ W.)
ALEEE, OH	WP	(Lat. 41°00′28″ N., long. 80°31′54″ W.)
QUARM, PA	WP	(Lat. 40°49′45″ N., long. 79°04′39″ W.)
BURNI, PA	FIX	(Lat. 40°39′25″ N., long. 77°48′14″ W.)
MCMAN, PA	FIX	(Lat. 40°38′16″ N., long. 77°34′14″ W.)
VALLO, PA	FIX	(Lat. 40°37′37″ N., long. 77°26′18″ W.)
RAVINE, PA (RAV)	VORTAC	(Lat. 40°33′12″ N., long. 76°35′58″ W.)
SUZIE, PA	FIX	(Lat. 40°27′12″ N., long. 75°58′22″ W.)
SARAA, PA	FIX	(Lat. 40°26′22″ N., long. 75°53′16″ W.)

Issued in Washington, DC, on September 11, 2012.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2012–22802 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

[Public Notice: 8026]

22 CFR Parts 22 and 42

RIN 1400–AD06

Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates

AGENCY: Bureau of Consular Affairs, Department of State.

ACTION: Final rule.

SUMMARY: This rulemaking addresses public comments regarding an Interim Final Rule that makes changes to the Schedule of Fees for Consular Services (Schedule) for a number of different visa fees. The Department of State adopts the rule as final, without change.

DATES: Effective September 17, 2012.

FOR FURTHER INFORMATION CONTACT: Special Assistant, Office of the Comptroller, Bureau of Consular Affairs, Department of State; phone: 202–663–1576, telefax: 202–663–2526; email: *fees@state.gov*.

SUPPLEMENTARY INFORMATION: For the complete explanation of the background of this rule, including the rationale for the change, the authority of the Department of State (''Department'') to make the fee changes in question, and an explanation of the study that produced the fee amounts, consult the prior public notices: 77 FR 18907 (March 29, 2012); 77 FR 20294 (April 4, 2012); and 75 FR 14111 (March 24, 2010).

Background

The Department published an interim final rule in the **Federal Register** (77 FR 18907, March 29, 2012) amending 22 CFR parts 22 and 42. Specifically, the rule made changes to the Schedule of Fees for Consular Services for visa fees and provided 60 days for comments from the public. During the comment period 18 comments were received, either by email or through the submission process at *www.regulations.gov*. The Department analyzed these 18 comments and reproduces that analysis in the Analysis of Comments section below.

This rule finalizes the following fees for the categories below, as determined by the Cost of Service Model (CoSM), which took effect on April 13, 2012.

- Non-Petition based Nonimmigrant Visa Application (except E category): from $140 to $160
- H, L, O, P, Q and R visa categories: from $150 to $190
- E visa category: from $390 to $270
- K visa category: from $350 to $240
- BCC Adult: from $140 to $160
- BCC Minor: from $14 to $15
- Family-Based Immigrant visa: from $330 to $230
- Employment-Based Immigrant visa: from $720 to $405
- Other Immigrant visas (including I–360 self-petitioners and special immigrant visas): from $305 to $220
- Diversity Visa Lottery Fee (per person applying as a result of the lottery program): from $440 to $330
- Determining Returning Resident Status: from $380 to $275
- Transportation Letters for Lawful Permanent Residents of the United States: from $165 to $0

Analysis of Comments

The interim rule was published for public comment on March 29, 2012. During this period, the Department received 18 comments/questions. The following analysis addresses these 18 comments.

Four comments were questions regarding when the fee changes took effect. To answer: applicants paid the fee amount that was effective on the date they paid the fee. Receipts for fees paid under the prior fee schedule were accepted for 90 days following the effective fee change (i.e., July 12, 2012). In short, if a fee was paid on or before April 12, 2012 the receipt for the prior fee was valid until July 12, 2012. If a fee was paid April 13, 2012 or later, an applicant paid the new fee.

Four comments criticized the increase of the nonimmigrant visa application processing fee, arguing that the increase would make it more difficult for visitors to bring their families to the United States to visit. Although the Department understands the financial difficulties that may result from a fee increase, the Department must recover the cost of providing those services and sets the fees for those services accordingly, including nonimmigrant visa application processing fees.

Seven comments from H–2 employers opposed the H visa fee increase from $150 to $190. Those comments stated that the fee increase would be an added tax burden and competitive disadvantage for U.S. domestic food producers who compete in a global marketplace. The comments also stated that increasing the cost of the H–2 visa to fund expanded adjudication capacity and physical infrastructure improvements at consulates in China and Brazil was unfair because very few H–2 workers come from either of these countries. In addition, the comments questioned whether the H–2 fee increase would lead to any improvements in the H–2 program, particularly in Mexico where most employers hire their H–2 workers.

The Department is adjusting the processing fee for H-category visas from $150 to $190 because processing an H visa application requires a review of extensive documentation and a more in-depth interview of the applicant than for other categories of nonimmigrant visas. Because the fees are set based on cost, a more time-consuming process necessarily will result in a higher fee. Although some of the comments expressed the belief that adjudicating H category visas should require simpler processing for repeat applicants, the Cost of Service Model (CoSM) showed that H visas require more time and resources to process than others. The Department determined it would be fairer to charge a higher fee for those visa categories requiring more complex processing (H, L, O, P, Q, R, E, and K), rather than spreading those additional costs out across all other visa categories. In addition, the fees established by this rule are based on unit costs, which represent the global average costs for each service as a whole. The most recent CoSM, the activity-based costing model the Department used to determine the new processing fees, improved substantially upon prior cost of service models by identifying unit costs not just for nonimmigrant visas as a whole, but for specific visa classes that involved more work to process. The CoSM did not, however, distinguish between subcategories of visas within a single category, such as an H–1B versus an H–2. Instead, the cost model averaged together the cost of processing all subcategories within a particular category of visa, which the Department used to calculate a single processing fee for that visa category. Although the time to process individual visa applications will vary from application to application, the fee is set based on the average cost to process a visa application from that visa category.

The costs for worldwide physical upgrades and personnel increases, including in China and Brazil, were spread out across all nonimmigrant visa categories in order to keep the impact minimal. In addition to the upgrades to the Department's facilities in China and Brazil, the Department opened a new consulate facility in Tijuana in 2010 and plans to open a new facility in Monterrey in 2014. The Department also recently opened application service centers in Mexicali, Piedras Negras, and Reynosa to accommodate additional applicants along the U.S.-Mexico border.

Of the three remaining comments, one noted its support for the reduced K visa fee and one applauded the Department for decreasing consular fees on certain nonimmigrant, immigrant, and special visa services, while also expressing concern for the increases to the other visa categories. One comment expressed a desire for a discount on all minor NIVs, not just minor BCCs. We note that the Department is required by law to set the fee for the minor BCC below cost at $15. The same requirement does not apply to other minor NIVs, which the Department sets on the basis of cost as described more fully above.

Conclusion

The Department has adjusted the fees to ensure that sufficient resources are available to meet the costs of providing consular services in light of the CoSM's findings. Pursuant to OMB guidance and federal law, the Department endeavors to recover the cost of providing services that benefit specific individuals rather than the public at large. See OMB Circular A–25, sections 6(a)(1), (a)(2)(a); 31 U.S.C. 9701(b). For this reason, the Department has adjusted the Schedule.

Regulatory Findings

For a summary of the regulatory findings and analyses regarding this rulemaking, please refer to the findings and analyses published with the interim final rule, which can be found at 77 FR 18907, which are adopted herein. The rule became effective April 13, 2012. As noted above, the Department has considered the comments submitted in response to the interim final rule, and does not adopt them. Thus, the rule remains in effect without modification.

In addition, as noted in the interim final rule, this rule was submitted to and reviewed by OMB pursuant to E.O. 12866. The Department of State has also considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Accordingly, the Interim Final Rule amending 22 CFR parts 22 and 42 which was published at 77 FR 18907 on March 29, 2012, is adopted as final without change.

Dated: September 4, 2012.

Patrick F. Kennedy,

Under Secretary of State for Management, U.S. Department of State.

[FR Doc. 2012–22862 Filed 9–14–12; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9598]

RIN 1545–BK98

Integrated Hedging Transactions of Qualifying Debt

Correction

In rule document 2012–21986 appearing on pages 54808–54811 in the issue of Thursday, September 6, 2012 make the following correction:

On page 54811, in the first column, on the eleventh line from the bottom of the page, ''(i) *Expiration date.* This section expires on September 4, 2012'', should read ''(i) *Expiration date.* This section expires on September 4, 2015.''

[FR Doc. C1–2012–21986 Filed 9–14–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0102]

32 CFR Part 319

Privacy Act; Implementation

AGENCY: Defense Intelligence Agency, DoD.

ACTION: Direct final rule with request for comments.

SUMMARY: The Defense Intelligence Agency is updating the Defense Intelligence Agency Privacy Act Program, by adding the (k)(2) exemption to accurately describe the basis for exempting the records in the system of records notice LDIA 10–0002, Foreign Intelligence and Counterintelligence Operation Records. This direct final rule makes non-substantive changes to the Defense Intelligence Agency Privacy Program rules. These changes will allow the Department to exempt records from certain portions of the Privacy Act. This will improve the efficiency and effectiveness of DoD's program by ensuring the integrity of ongoing Foreign Intelligence and Counterintelligence Operations Records related to the protection of national security, DoD personnel, facilities and equipment of the Defense Intelligence Agency and the Department of Defense.

This rule is being published as a direct final rule as the Department of Defense does not expect to receive any adverse comments, and so a proposed rule is unnecessary.

DATES: The rule will be effective on November 26, 2012 unless comments are received that would result in a contrary determination. Comments will be accepted on or before November 16, 2012. If adverse comment is received, DoD will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Theresa Lowery at (202) 231–1193.

SUPPLEMENTARY INFORMATION:

Direct Final Rule and Significant Adverse Comments

DoD has determined this rulemaking meets the criteria for a direct final rule because it involves non-substantive changes dealing with DoD's management of its Privacy Programs. DoD expects no opposition to the changes and no significant adverse comments. However, if DoD receives a significant adverse comment, the Department will withdraw this direct final rule by publishing a notice in the **Federal Register**. A significant adverse comment is one that explains: (1) Why the direct final rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a comment necessitates withdrawal of this direct final rule, DoD will consider whether it warrants a substantive response in a notice and comment process.

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, 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 set forth in these Executive orders.

Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

Public Law 96–511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been determined that Privacy Act rules for the Department of Defense impose no additional information collection requirements on the public under the Paperwork Reduction Act of 1995.

Section 202, Public Law 104–4, "Unfunded Mandates Reform Act"

It has been determined that Privacy Act rules for the Department of Defense do not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, "Federalism"

It has been determined that Privacy Act rules for the Department of Defense do not have federalism implications. The rules do 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.

List of Subjects in 32 CFR Part 319

Privacy.

Accordingly, 32 CFR part 319 is amended as follows:

PART 319—DEFENSE INTELLIGENCE AGENCY PRIVACY PROGRAM

■ 1. The authority citation for 32 CFR Part 319 continues to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

■ 2. Section 319.13 is amended by adding paragraph (h) to read as follows:

§ 319.13 Specific exemptions.

* * * * *

(h) *System identifier and name:* LDIA 10–0002, Foreign Intelligence and Counterintelligence Operation Records.

(1) *Exemption:* (i) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source. NOTE: When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(ii) The specific sections of 5 U.S.C. 552a from which the system is to be exempted are 5 U.S.C. 552a (c)(3) and (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H), and (I), (e)(5), (f), and (g).

(2) *Authority:* 5 U.S.C. 552a(k)(2).

(3) *Reasons:* (i) From subsection (c)(3) because to grant access to an accounting of disclosures as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prospective interest by DIA or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(ii) From subsections (c)(4), (d), and (f) because providing access to this information could result in the concealment, destruction or fabrication of evidence and jeopardize the safety and well being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component and could result in the invasion of privacy of individuals only incidentally related to an investigation. Investigatory material is exempt to the extent that the disclosure of such material would reveal the identity of a source who furnished the information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975 under an implied promise that the identity of the source would be held in confidence. This exemption will protect the identities of certain sources that would be otherwise unwilling to provide information to the Government. The exemption of the individual's right of access to his/her records and the reasons therefore necessitate the exemptions of this system of records from the requirements of the other cited provisions.

(iii) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(iv) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal investigation.

(v) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(vi) From subsections (e)(4)(G), (H), and (I) because it will provide protection against notification of investigatory material which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise). In addition, this system of records is exempt from the access provisions of subsection (d).

(vii) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(viii) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to the individual and record amendment procedures for this record system.

(ix) From subsection (g) because this system of records should be exempt to the extent that the civil remedies relate to provisions of 5 U.S.C. 552a from which this rule exempts the system.

* * * * *

Dated: September 11, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–22655 Filed 9–14–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0104]

32 CFR Part 319

Privacy Act; Implementation

AGENCY: Defense Intelligence Agency, DoD.

ACTION: Direct final rule with request for comments.

SUMMARY: The Defense Intelligence Agency (DIA) is adding a new exemption rule for LDIA 0209, entitled ''Litigation Case Files'' to exempt those records that have been previously claimed for the records in another Privacy Act system of records. DIA is updating the DIA Privacy Act Program by adding the (k)(2) and (k)(5) exemptions to accurately describe the basis for exempting the records in the system of records notice LDIA 0209, Litigation Case Files. In addition, exempt materials from other systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this case record, the Defense Intelligence Agency hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary systems of records, which they are a part.

This direct final rule makes non-substantive changes to the Defense Intelligence Agency Program rules. This will improve the efficiency and effectiveness of DoD's program by ensuring the integrity of the security and counterintelligence records by the Defense Intelligence Agency and the Department of Defense. This rule is being published as a direct final rule as the Department of Defense does not expect to receive any adverse comments, and so a proposed rule is unnecessary.

DATES: The rule will be effective on November 26, 2012 unless comments are received that would result in a contrary determination. Comments will be accepted on or before November 16, 2012. If adverse comment is received, DoD will publish a timely withdrawal of the rule in the **Federal Register.**

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive; East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Theresa Lowery at (202) 231–1193.

SUPPLEMENTARY INFORMATION:

Direct Final Rule and Significant Adverse Comments

DoD has determined this rulemaking meets the criteria for a direct final rule because it involves nonsubstantive changes dealing with DoD's management of its Privacy Programs. DoD expects no opposition to the changes and no significant adverse comments. However, if DoD receives a significant adverse comment, the Department will withdraw this direct final rule by publishing a notice in the **Federal Register.** A significant adverse comment is one that explains: (1) Why the direct final rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a comment necessitates withdrawal of this direct final rule, DoD will consider whether it warrants a substantive response in a notice and comment process.

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, 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 set forth in these Executive Orders.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that Privacy Act rules for the Department of Defense impose no additional information collection requirements on the public under the Paperwork Reduction Act of 1995.

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been determined that the Privacy Act rulemaking for the Department of Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, ''Federalism''

It has been determined that the Privacy Act rules for the Department of Defense do not have federalism implications. The rules do 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.

List of Subjects in 32 CFR Part 319

Privacy.

Accordingly, 32 CFR part 319 is amended as follows:

PART 319—DEFENSE INTELLIGENCE AGENCY PRIVACY PROGRAM

■ 1. The authority citation for 32 CFR Part 319 continues to read as follows:

Authority: Pub. L. 93–579, 5 U.S.C. 552a(f) and (k).

■ 2. Section 319.13 is amended by adding paragraph (l) to read as follows:

§ 319.13 Specific exemptions.

* * * * *

(l) *System identifier and name:* LDIA 0209, Litigation Case Files.

(1) *Exemptions:* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C 552a(j)(2), may be exempt pursuant to 5 U.S.C 552(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or which he would otherwise be eligible, as a result of maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. This exemption provides limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2)and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d)(1)(2)(3)(4)(5), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I). Exempt materials from other systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this case record, the Defense Intelligence Agency hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary systems of records, which they are a part.

(2) *Authority:* 5 U.S.C. 552a(j)(2), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(3) *Reasons:* The reason for asserting these exemptions (k)(2) and (k)(5) is to ensure the integrity of the litigation process.

Dated: September 11, 2012.

Aaron Siegel,

Alternate OSD **Federal Register** *Liaison Officer, Department of Defense.*

[FR Doc. 2012–22745 Filed 9–14–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0103]

32 CFR Part 319

Privacy Act; Implementation

AGENCY: Defense Intelligence Agency, DoD.

ACTION: Direct final rule with request for comments.

SUMMARY: Defense Intelligence Agency (DIA) is updating the DIA Privacy Act Program by adding the (k)(2) and (k)(5) exemptions to accurately describe the basis for exempting the records in the system of records notice LDIA 12–0002, Privacy and Civil Liberties Case Management System.

This direct final rule makes non-substantive changes to the Defense Intelligence Agency Program rules. These changes will allow the Department to add exemption rules to the DIA Privacy Program rules that will exempt applicable Department records and/or material from certain portions of the Privacy Act. This will improve the efficiency and effectiveness of DoD's program by ensuring the integrity of the security and counter-intelligence records by the Defense Intelligence Agency and the Department of Defense.

This rule is being published as a direct final rule as the Department of Defense does not expect to receive any adverse comments, and so a proposed rule is unnecessary.

DATES: The rule will be effective on November 26, 2012 unless comments are received that would result in a contrary determination. Comments will be accepted on or before November 16, 2012. If adverse comment is received, DoD will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Theresa Lowery at Defense Intelligence Agency, DAN 1–C, 600 MacDill Blvd., Washington, DC 20340–0001 or by phone at (202) 231–1193.

SUPPLEMENTARY INFORMATION:

Direct Final Rule and Significant Adverse Comments

DoD has determined this rulemaking meets the criteria for a direct final rule because it involves non-substantive changes dealing with DoD's management of its Privacy Programs. DoD expects no opposition to the changes and no significant adverse comments. However, if DoD receives a significant adverse comment, the Department will withdraw this direct final rule by publishing a notice in the **Federal Register**. A significant adverse comment is one that explains: (1) Why the direct final rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a comment necessitates withdrawal of this direct final rule, DoD will consider whether it warrants a substantive response in a notice and comment process.

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, 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 set forth in these Executive orders.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that Privacy Act rules for the Department of Defense impose no additional information collection requirements on the public under the Paperwork Reduction Act of 1995.

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''. It has been determined that Privacy Act rules for the Department of Defense do not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, ''Federalism''

It has been determined that Privacy Act rules for the Department of Defense do not have federalism implications. The rules do 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.

List of Subjects in 32 CFR Part 319

Privacy.

Accordingly, 32 CFR part 319 is amended as follows:

PART 319—DEFENSE INTELLIGENCE AGENCY PRIVACY PROGRAM

■ 1. The authority citation for 32 CFR Part 319.13 continues to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

■ 2. Section 319.13 is amended by adding paragraph (k) to read as follows:

§ 319.13 Specific exemptions.

* * * * *

(k) *System identifier and name:* LDIA 12–0002, Privacy and Civil Liberties Case Management System.

(1) *Exemptions:* Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2)and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a:(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I).

(2) *Authority:* 5 U.S.C. 552a(k)(2)and (k)(5).

(3) The reasons for asserting these exemptions is to ensure the integrity of the privacy and civil liberties process. The execution requires that information be provided in a free and open manner without fear of retribution or harassment in order to facilitate a just, thorough, and timely resolution of the complaint or inquiry. Disclosures from this system can enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying, or fabricating evidence or documents. In addition, disclosures can subject sources and witnesses to harassment or intimidation which may cause individuals not to seek redress for wrongs through privacy and civil liberties channels for fear of retribution or harassment.

Dated: September 10, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–22764 Filed 9–14–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0101]

32 CFR Part 319

Privacy Act; Implementation

AGENCY: Defense Intelligence Agency, DoD.

ACTION: Direct final rule with request for comments.

SUMMARY: Defense Intelligence Agency (DIA) is proposing to update the DIA Privacy Act Program by adding the (k)(2) exemption to accurately describe the basis for exempting the records in the system of records notice LDIA 10–0001, Equal Opportunity, Diversity and Alternate Dispute Resolution Records. This direct final rule makes nonsubstantive changes to the Defense Intelligence Agency Program rules. This will improve the efficiency and effectiveness of DoD's program by ensuring the integrity of the equal opportunity program, alternate dispute records and reasonable accommodation cases conducted by the Defense Intelligence Agency and the Department of Defense. This rule is being published as a direct final rule as the Department of Defense does not expect to receive any adverse comments, and so a proposed rule is unnecessary.

DATES: The rule will be effective on November 26, 2012 unless comments are received that would result in a contrary determination. Comments will be accepted on or before November 16, 2012. If adverse comment is received, DoD will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Theresa Lowery at (202) 231–1193.

SUPPLEMENTARY INFORMATION:

Direct Final Rule and Significant Adverse Comments

DoD has determined this rulemaking meets the criteria for a direct final rule because it involves nonsubstantive changes dealing with DoD's management of its Privacy Programs. DoD expects no opposition to the changes and no significant adverse comments. However, if DoD receives a significant adverse comment, the Department will withdraw this direct final rule by publishing a notice in the **Federal Register**. A significant adverse comment is one that explains: (1) Why the direct final rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a comment necessitates withdrawal of this direct final rule, DoD will consider whether it warrants a substantive response in a notice and comment process.

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, 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 set forth in these Executive orders.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that Privacy Act rules for the Department of Defense impose no additional information collection requirements on the public under the Paperwork Reduction Act of 1995.

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been determined that Privacy Act rules for the Department of Defense do not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, ''Federalism''

It has been determined that Privacy Act rules for the Department of Defense do not have federalism implications. The rules do 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.

List of Subjects in 32 CFR Part 319

Privacy.

Accordingly, 32 CFR part 319 is amended as follows:

PART 319—DEFENSE INTELLIGENCE AGENCY PRIVACY PROGRAM

■ 1. The authority citation for 32 CFR Part 319 continues to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

■ 2. Section 319.13 is amended by adding paragraph (g) to read as follows:

§ 319.13 Specific exemptions.

* * * * *

(g) *System identifier and name:* LDIA 10–0001, Equal Opportunity, Diversity and Alternate Dispute Resolution Records.

(1) *Exemption:* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source. **Note:** When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

The specific sections of 5 U.S.C. 552a from which the system is to be exempted are 5 U.S.C. 552a (c)(3) and (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H), and (I), (e)(5), (f), and (g).

(2) *Authority:* 5 U.S.C. 552a(k)(2).

(3) *Reasons:* (i) From subsection (c)(3) because to grant access to an accounting of disclosures as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prospective interest by DIA or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(ii) From subsections (c)(4), (d), and (f) because providing access to this information could result in the concealment, destruction or fabrication of evidence and jeopardize the safety and well being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component and could result in the invasion of privacy of individuals only incidentally related to an investigation. Investigatory material is exempt to the extent that the disclosure of such material would reveal the identity of a source who furnished the information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975 under an implied promise that the identity of the source would be held in confidence. This exemption will protect the identities of certain sources that would be otherwise unwilling to provide information to the Government. The exemption of the individual's right of access to his/her records and the reasons therefore necessitate the exemptions of this system of records from the requirements of the other cited provisions.

(iii) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(iv) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal investigation.

(v) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(vi) From subsections (e)(4)(G), (H), and (I) because it will provide protection against notification of investigatory material which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise). In addition, this system of records is exempt from the access provisions of subsection (d).

(vii) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(viii) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to the individual and record amendment procedures for this record system.

(ix) From subsection (g) because this system of records should be exempt to the extent that the civil remedies relate to provisions of 5 U.S.C. 552a from which this rule exempts the system.

* * * * *

Dated: September 11, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–22656 Filed 9–14–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0857]

Drawbridge Operation Regulation; Lake Washington Ship Canal, Seattle, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Burlington Northern Santa Fe Railway Bridge across the Lake Washington Ship Canal, mile 0.1, at Seattle, WA. This deviation is necessary to facilitate heavy maintenance on the bridge including replacing operating strut guides on the bascule span. This deviation allows the bridge to remain in the down or closed position during the maintenance period.

DATES: This deviation is effective from 7 a.m. November 7, 2012 through 5 p.m. November 18, 2012.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2012–0857 and are available online by going to *http://www.regulations.gov*, inserting USCG–2012–0857 in the ''Keyword'' box and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email the Bridge Administrator, Coast Guard Thirteenth District; telephone 206–220–7282; email *randall.d.overton@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: BNSF Railway has requested that the draw of the BNSF Railway Bridge across the Lake Washington Ship Canal, mile 0.1 (Ballard-Salmon Bay), be locked in the closed position and not be required to open for the passage of vessels for a 12 day period to facilitate heavy maintenance on the bridge. The bridge provides 43 feet of vertical clearance above mean high water while in the closed position. Under normal operations this bridge opens on signal as required by 33 CFR 117.5 and 33 CFR 117.1051(c). The deviation period is from 7 a.m. November 7, 2012 through 5 p.m. November 18, 2012. This deviation allows the draw span of the BNSF Railway Bridge across the Lake Washington Ship Canal, mile 0.1, to remain in the closed position and to not open for maritime traffic from 7 a.m. November 7, 2012 through 5 p.m. November 18, 2012. This time frame was selected because it corresponds with the closure of the Army Corps of Engineering Hiram M. Chittenden lock immediately upstream or inland of the bridge on the Lake Washington Ship Canal. This stretch of the Lake Washington Ship Canal experiences heavy waterway usage and is utilized by vessels ranging from commercial tug and barge to pleasure craft. Mariners have been notified and will be kept informed of the bridge's operational status via the Coast Guard Notice to Mariners publication and Broadcast Notice to Mariners as appropriate. Vessels which do not require a bridge opening may continue to transit beneath the bridge during this closure period. Due to the nature of work being performed the draw span will be unable to open for maritime traffic during this maintenance period.

In accordance with 33 CFR 117.35(e), the drawbridges must return to their regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: August 5, 2012.

Randall D. Overton,

Bridge Administrator.

[FR Doc. 2012–22796 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0180]

RIN 1625–AA09

Drawbridge Operation Regulation; Carlin Bayou, LA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is adding a regulation to govern the Louisiana and Delta Railroad (LDRR) vertical lift bridge across Carlin Bayou in Delcambre, Iberia Parish, Louisiana. The bridge currently remains in the open-to-navigation position and only lowers for the passage of trains. This rule codifies the current schedule as a special operating regulation.

DATES: This rule is effective October 17, 2012.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2012–0180 and are available online by going to *http://www.regulations.gov,* inserting USCG–2012–0180 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this final rule, call or email David Frank, Bridge Administration Branch; telephone 504–671–2128, email *David.M.Frank@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking
§ Section Symbol
U.S.C. United States Code

A. Regulatory History and Information

On May 21, 2012, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulation; Carlin Bayou, LA'' in the **Federal Register** (77 FR 29927). We received no comments on the proposed rule. No public meeting was requested, and none was held.

B. Basis and Purpose

The LDRR vertical lift span bridge crosses the Carlin Bayou at mile 6.4 in Delcambre, Iberia Parish, Louisiana. The bridge is currently maintained in the open-to-navigation position, closing only for the passage of rail traffic. The railroad bridge has a vertical clearance of two feet above mean high water (MHW) in the closed-to-navigation position. The adjacent highway bridge has a vertical clearance of four feet above MHW in the closed-to-navigation position.

Due to the limited number of trains using the rail line, the bridge owner will maintain the bridge in the fully open position for navigation, only lowering the bridge for the passage of trains as needed. This operating schedule allows vessels to transit the waterway as they normally would while permitting railroad personnel to lower the bridge in conjunction with the existing highway bridge immediately adjacent to the railroad bridge so that the bridge will not be lowered if a vessel is transiting on the waterway.

Maintaining the bridge untended and in the open-to-navigation position also eliminates the need for a bridge tender. This rule codifies the current bridge operating practice and brings it into compliance with 33 CFR part 117.41(b)(1).

C. Discussion of Comments, Changes and the Final Rule

As part of the NPRM process, a 60-day comment period was provided to allow for comments regarding the proposed change. No comments were received and no changes were made to the rule as proposed.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

This rule is not a significant regulatory action because it codifies the current operating schedule for the LDRR bridge which is already understood, known and accepted by the local bridge and waterway users. Very few vessels will be impacted as the bridge remains open at all times except to allow rail traffic to pass trains two times a day, three days a week.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels wishing to transit Carlin Bayou above mile 6.4. This action will not have a significant economic impact on a substantial number of small entities because the bridge remains open at all times except to allow rail traffic to pass two times a day, three days a week.

This action will not have a significant economic impact on a substantial number of small entities because it only codifies the existing operation of the draw and there have been no documented economic impacts to small entities with regards to the present operation of the bridge.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

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

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

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. In § 117.435, the existing paragraph is designated as paragraph (b), and a new paragraph (a) is added to read as follows:

§ 117.435 Carlin Bayou.

(a) The draw of the Louisiana and Delta Railroad (LDRR) Bridge, mile 6.4, at Delcambre, shall operate as follows:

(1) The draw shall be maintained in the fully open position for navigation at all times, except during periods when it is closed for the passage of rail traffic.

(2) When a train approaches the bridge, it will stop and a crewmember from the train will observe the waterway for approaching vessels. If vessels are observed approaching the bridge, they will be allowed to pass prior to lowering the bridge. The crewmember will verify that the adjacent highway bridge is in the closed-to-navigation position prior to initiating the lowering sequence.

(3) After the train has completely passed over the bridge, the crewmember will initiate the raising sequence.

(4) To request openings of the bridge when the lift span is in the closed-to-navigation position, mariners may call the LDRR Signal Supervisor at 337–316–6015.

* * * * *

Dated: August 25, 2012.

Roy A. Nash,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 2012–22776 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0854]

Drawbridge Operation Regulation; Shark River, Avon, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the operation of the draws of three bridges which operate as one unit, specifically, the S71 bridge, mile 0.8, the railroad bridge, mile 0.9, and the S35 bridge, mile 0.9, all of which are across the Shark River (South Channel), at Avon Township, NJ. This deviation is necessary to facilitate stringer replacement on the Shark River railroad bridge. This temporary deviation will allow the drawbridges, which operate in unison, to remain in the closed-to-navigation position on specific dates and times.

DATES: This deviation is effective from 10 p.m. September 21, 2012 until 6:00 a.m. on September 24, 2012 and from 10 p.m. September 28, 2012 until 6:00 a.m. October 1, 2012.

ADDRESSES: Documents mentioned in this preamble as being available in the docket USCG–2012–0854 and are available online by going to *http://www.regulations.gov,* inserting USCG–2012–0854 in the ''Keywords'' box, and then clicking ''Search''. This material is also available for inspection or copying the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Jim Rousseau, Bridge Management Specialist, Fifth Coast Guard District, telephone (757) 398–6557, email *James.L.Rousseau2@uscg.mil*. If you have questions on reviewing the docket, call Renee V. Wright, Program Manager, Docket Operations, 202–366–9826.

SUPPLEMENTARY INFORMATION: The New Jersey Transit, owner and operator of the Shark River Railroad Bridge across the Shark River (South Channel), mile 0.9, at Avon, NJ, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.751, to accommodate stringer replacement for the Shark River Bridge.

The Shark River Railroad Bridge across the Shark River, mile 0.9, is a bascule lift Bridge, in Avon Township, NJ, and has a vertical clearance in the closed position of 10 feet, above mean high water.

Because the draw of the Shark River bridge operates in unison with the S71 bridge, mile 0.8, and the S35 bridge, mile 0.9, all across Shark River at Avon Township, NJ, the draws of these two bridges will also be restricted under this deviation. These bridges are also bascule lift bridges and have a vertical clearance of 13 and 10 feet respectively.

The current schedule the Shark River Railroad Bascule Bridge operating regulations are set out in 33 CFR 117.751. Under normal operating conditions, the draws of S71 bridge, mile 0.8, the railroad bridge, mile 0.9, and the S35 bridge, mile 0.9, all at Avon, operate as one unit.

Under this temporary deviation, the above mentioned drawbridges will be allowed to remain in the closed-to-navigation position for the half hour opening requests and only open on the hour from 11:00 p.m. Friday September 21, 2012 to 6:00 a.m. on Monday September 24, 2012 and Friday September 28, 2012 to 6:00 a.m. on Monday October 1, 2012 to accommodate stringer replacement.

Vessels able to pass under the spans when closed may transit under the drawbridges while they are in the closed position. Mariners are advised to proceed with caution. The Coast Guard will inform mariners and other users of the waterway through local broadcast Notices to Mariners. These broadcasts will include information of the limited operating schedule for the drawbridge so that vessels can rearrange their transit in order to minimize any impacts caused by the temporary deviation. There are no alternate routes for vessels and the bridge will be able to open in the event of an emergency.

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

Dated: September 6, 2012.

G.D. Case,

Captain, U.S. Coast Guard, Fifth Coast Guard District.

[FR Doc. 2012–22774 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0181]

RIN 1625–AA09

Drawbridge Operation Regulation; Alabama River, AL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the regulation governing the Meridian and Bigbee Railroad (MNBR) swing span bridge across the Alabama River at Selma, Dallas County, Alabama. Due to the infrequent requirement to open the bridge for the passage of vessels, the owner has requested a change allowing the bridge to open only on signal if at least 24-hours advanced notification is given.

DATES: This rule is effective October 17, 2012.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2012–0181 and are available online by going to *http://www.regulations.gov,* inserting USCG–2012–0181 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this final rule, call or email David Frank, Bridge Administration Branch; telephone 504–671–2128, email *David.M.Frank@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking
§ Section Symbol
U.S.C. United States Code

A. Regulatory History and Information

On May 21, 2012, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulation; Alabama River, AL'' in the **Federal Register** (77 FR 29924). We received no comments on the proposed rule. No public meeting was requested, and none was held.

B. Basis and Purpose

The MNBR swing span bridge crosses the Alabama River at mile 205.9, at Selma, Dallas County, Alabama. The bridge is currently maintained in the closed-to-navigation position, opening only for the passage of marine traffic. The bridge has a vertical clearance of 26 feet above ordinary high water in the closed-to-navigation position and unlimited in the open-to-navigation position. No alternate routes are available.

Due to the limited number of openings of the drawbridge, an average of one opening per year, the bridge owner requested a change to the operating schedule that would allow the bridge to open on signal if at least 24-hour advanced notification is given. Presently, the bridge opens on signal for the passage of vessels; however, three other bridges on the waterway open on signal if at least 24-hour advanced notification is given. The existing bridges are located at mile 105.3, at Coy, Alabama, and mile 277.8 and mile 293.3, both in Montgomery, Alabama.

C. Discussion of Comments, Changes, and the Final Rule

As part of the NPRM process, a 60-day comment period was provided to allow for comments regarding the proposed change. No comments were received and no changes were made to the rule as proposed.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

Very few vessels will be impacted. Those few vessels should be able to provide adequate advanced notification of their arrivals as is already done on this waterway for three other movable bridges located upstream and downstream of this bridge.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels needing to transit the Alabama River above mile 205.9. This action will not have a significant economic impact on a substantial number of small entities because these few vessels should be able to provide adequate advanced notification of their arrivals as is already done on this waterway for three other movable bridges located upstream and downstream of this bridge.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

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

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

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. In § 117.101, paragraphs (b) and (c) are redesignated as paragraphs (c) and (d), and a new paragraph (b) is added to read as follows:

§ 117.101 Alabama River.

* * * * *

(b) The draw of the Meridian and Bigbee Railroad (MNBR) Bridge, mile 205.9, at Selma, shall open on signal if at least 24 hours notice is given. An opening can be arranged by contacting the Meridian and Bigbee Railroad Roadmaster at 601–480–5071.

* * * * *

Dated: August 25, 2012.

Roy A. Nash,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 2012–22778 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0179]

RIN 1625–AA09

Drawbridge Operation Regulation; Tombigbee River, AL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is adding a regulation to govern the Meridian and Bigbee Railroad (MNBR) vertical lift span bridge across the Tombigbee River at Naheola, Marengo and Choctaw Counties, Alabama. The bridge currently remains in the open-to-navigation position and only lowers for the passage of trains. This rule codifies the current schedule as a special operating regulation.

DATES: This rule is effective October 17, 2012.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2012–0179 and are available online by going to *http://www.regulations.gov,* inserting USCG–2012–0179 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this final rule, call or email David Frank, Bridge Administration Branch; telephone 504–671–2128, email *David.m.frank@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking
§ Section Symbol
U.S.C. United States Code

A. Regulatory History and Information

On May 1, 2012, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulation; Tombigbee River, AL'' in the **Federal Register** (77 FR 25655). We received no comments on the proposed rule. No public meeting was requested, and none was held.

B. Basis and Purpose

The MNBR vertical lift span bridge crosses the Tombigbee River at mile 128.6 (Black Warrior Tombigbee Waterway mile 173.6), Naheola, Marengo and Choctaw Counties, Alabama. The bridge is currently maintained in the open-to-navigation position, closing only for the passage of rail traffic. The bridge has a vertical clearance of 12.2 feet above ordinary high water (OHW), elevation 64.5 feet, in the closed-to-navigation position and 55 feet above OHW in the open-to-navigation position. Many of the vessels using the waterway transit under a fixed span of the bridge at periods of lower water due to the difficulty of transiting the navigation span, which only has a horizontal clearance of 150 feet between piers.

Due to the limited number of trains using the rail line in this area, maintaining the bridge in the fully open-to-navigation position and only lowering the bridge for rail traffic is the preferred operating schedule. Because this operating schedule has been in place for over ten years, and is understood and accepted by local traffic, the bridge owner requested that the Coast Guard publish the current operating schedule. This operating schedule allows vessels to transit the waterway normally while permitting railroad personnel to lower the bridge for the passage of train traffic after ensuring that no vessels are approaching the bridge.

Maintaining the bridge untended and in the open-to-navigation position also eliminates the need for a bridge tender. This rule codifies the current bridge operating practice and brings it into compliance with 33 CFR part 117.41(b)(1).

C. Discussion of Comments, Changes and the Final Rule

As part of the NPRM process, a 60-day comment period was provided to allow for comments regarding the proposed change. No comments were received and no changes were made to the rule as proposed.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

This rule is not a significant regulatory action because it codifies the current operating schedule for the MNBR bridge which is already understood, known and accepted by the local bridge and waterway users. Very few vessels will be impacted as the bridge remains open at all times except to allow rail traffic to pass trains two times a day, five days a week.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ‘‘small entities’’ comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels wishing to transit the Tombigbee River above mile 128.6 with vessel air drafts that would require the bridge to be open to navigation for them to pass safely through the bridge site. This action will not have a significant economic impact on a substantial number of small entities because the bridge remains open at all times except to allow rail traffic to pass two times a day, five days a week.

This action will not have a significant economic impact on a substantial number of small entities because it only codifies the existing operation of the draw and there have been no documented economic impacts to small entities with regards to the present operation of the bridge.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

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

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

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. Section 117.118 is added to read as follows:

§ 117.118 Tombigbee River.

The draw of the Meridian and Bigbee Railroad (MNBR) vertical lift span bridge across the Tombigbee River, mile 128.6 (Black Warrior Tombigbee (BWT) Waterway mile 173.6), at Naheola, shall operate as follows:

(a) The draw shall be maintained in the fully open-to-navigation position for vessels at all times, except during periods when it is closed for the passage of rail traffic.

(b) When a train approaches the bridge, it will stop and a crewmember from the train will observe the waterway for approaching vessels. If vessels are observed approaching the bridge, they will be allowed to pass prior to lowering the bridge. The crewmember will then announce via radiotelephone on VHF–FM channel 16 that the bridge is preparing to be lowered. If, after two minutes, no response has been received, the crewmember will initiate the lowering sequence.

(c) After the train has completely passed over the bridge, the crewmember will initiate the raising sequence. When the bridge is in the fully open-to-navigation position, the crewmember will announce via radiotelephone on VHF–FM channel 16 that the bridge is in the fully open-to-navigation position.

(d) To request openings of the bridge when the lift span is in the closed-to-navigation position, mariners may contact the MNBR via VHF–FM channel 16 or by telephone at 205–654–4364.

Dated: August 25, 2012.

Roy A. Nash,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 2012–22775 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0764]

RIN 1625–AA09

Drawbridge Operation Regulation; Black Warrior River, AL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is adding a special operating regulation governing the Alabama Gulf Coast Railroad (AGR) vertical lift span (Yo-Yo) bridge across the Black Warrior River, mile 219.0, at Demopolis, AL. The bridge is operated automatically and currently remains in the open-to-navigation position and only lowers for the passage of trains. This rule proposes to codify the current operating schedule of the bridge as a special operating regulation.

DATES: This rule is effective September 17, 2012.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket USCG–2012–0764 and are available by going to *http://www.regulations.gov,* inserting USCG–2012–0764 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email David Frank, Bridge Administration Branch; telephone 504–671–2128, email *David.m.frank@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking
§ Section Symbol
USACE U.S. Army Corps of Engineers
U.S.C. United States Code

A. Regulatory History and Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the Coast Guard is only codifying the known and accepted operation of the drawbridge that has been automated for over 50 years. Publication of the automated operation of the drawbridge will not modify the present operation of the bridge and mariners will notice no changes in the way the bridge operates for the passage of vessels. Therefore, it is unnecessary to provide the notice and comment period for this rule.

For similar reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register** (FR). The bridge has been operating under the automated system for over 50 years. Mariners presently understand that the bridge will remain in the open position and only be lowered for the passage of trains. They also understand that no tender is located at the bridge and the operation of the bridge is automated. The bridge is commonly referred to as the ''Yo-Yo'' bridge because of the automated operation of the bridge. This rule only codifies the operation of the automated bridge in the Code of Federal Regulations (CFR). Therefore, providing a 30 day notice before making this rule effective is unnecessary.

B. Basis and Purpose

The AGR vertical lift span (Yo-Yo) bridge across the Black Warrior River, mile 219.0, at Demopolis, AL, is currently maintained in the open-to-navigation position, closing only for the passage of rail traffic. The bridge has a vertical clearance of 18 feet above the Bridge Reference Elevation for Navigation Clearances (BRENC), elevation 79.8 feet NGVD, in the closed-to-navigation position and 62.9 feet above BRENC in the open-to-navigation position.

Due to the limited number of trains using the rail line in this area, maintaining the bridge in the fully open-to-navigation position and only lowering the bridge for rail traffic is the preferred operating schedule. The system for operation of the bridge is an automated system in place since 1961. The method of operation for the bridge to remain open to navigation and to signal and then close for the passage of a train and then to automatically reopen has been understood by mariners for over 50 years. Due to this method of operation, the bridge is commonly known as the Yo-Yo Bridge. Because this operating schedule has been in place for over 50 year and is understood and accepted by local traffic, the bridge owner requested that the Coast Guard publish the current operating schedule. This operating schedule allows vessels to transit the waterway as normal while permitting the bridge to lower for train traffic after ensuring that no vessels are approaching the bridge.

The automated system for operating the bridge allows the bridge to operate efficiently while remaining untended and in the open-to-navigation position. This rule codifies this practice by publishing the known and accepted operating schedule under 33 CFR 117.42.

C. Discussion of Final Rule

Under 33 CFR part 117.5, bridges are required to open on signal for the passage of vessels except as otherwise authorized or required. The Yo-Yo Bridge is currently untended and maintained in the open-to-navigation position and operates automatically to close for the passage of trains. As the bridge is presently operating as an automated drawbridge and this method of operation has been previously approved by the U.S. Army Corps of Engineers when they had oversight of the permitting and operations of drawbridges. Title 33 CFR 117.42(b) requires that, if approved, a description of the full operation of the remotely operated or automated drawbridge will be added to subpart B of this part.

This present method of operation is known and understood by the local waterway users, but this operating schedule is not reflected in the CFR. This rule publishes the known operating schedule, codifying the schedule as a Special Operating Requirement under 33 CFR part 117, Subpart B.

The automated operation of the draw of the AGR vertical lift span (Yo-Yo) bridge across the Black Warrior River, mile 219.0, at Demopolis, AL is as follows:

(a) The draw shall be maintained in the fully open-to-navigation position for vessels at all times, except during periods when it is closed for the passage of rail traffic.

(b) When rail traffic approaches, railroad track circuits will initiate the automatic bridge opening and closing sequences. (Estimated duration that the bridge will remain closed for passage of rail traffic is 10 to 15 minutes per closure.)

(c) Upon detecting approaching rail traffic, the track circuits will initiate bridge closing warnings consisting of continuous horn blowing and the navigation lights changing to flashing yellow. Photo-electric (infrared) boat detectors will monitor the waterway beneath the bridge for the presence of vessels.

(d) At the end of a six-minute warning period, if no vessels have been detected by the boat detectors, the bridge lowering sequence will automatically proceed taking approximately two minutes to complete. As soon as the bridge leaves the up position, the horn will silence but the navigation lights change to flashing red.

(e) Upon passage of the rail traffic, the bridge will automatically open unless another movement is detected. The navigation lights will continue to flash red until the bridge has returned to the full open position at which time they will change to steady green.

(f) The bridge can also be operated from two locked trackside control locations (key releases) on the approach spans, one on each side of the movable span.

(g) To request openings of the bridge when the lift span is in the closed-to-navigation position, mariners may contact the AGR via VHF–FM channel 16 or by telephone at 205–654–4364.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

This rule codifies the current operating schedule for the AGR bridge which is already understood, known and accepted by the local bridge and waterway users. Very few vessels will be impacted as the bridge remains open at all times except to allow rail traffic to pass.

2. Impact on Small Entities

This rule would affect the following entities, some of which may be small entities: the owners or operators of vessels wishing to transit the Black Warrior River above mile 219.0 with vessel air drafts that would require the bridge to be open to navigation for them to pass safely through the bridge site.

This action will not have a significant economic impact on a substantial number of small entities because the bridge remains open at all times except to allow rail traffic to pass.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–

121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

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

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. Section 117.106 is added to read as follows:

§ 117.106 Black Warrior River.

The draw of the Alabama Gulf Coast (AGR) vertical lift span (Yo-Yo) bridge across the Black Warrior River, mile 219.0, at Demopolis, shall operate as follows:

(a) The draw shall be maintained in the fully open-to-navigation position for vessels at all times, except during periods when it is closed for the passage of rail traffic.

(b) Railroad track circuits will initiate the automatic bridge opening and closing sequences. (Estimated duration that the bridge will remain closed for passage of rail traffic is 10 to 15 minutes.)

(c) Upon detecting an approaching train, the track circuits will initiate bridge closing warning consisting of continuous horn blowing and the navigation lights changing to flashing yellow. Photoelectric (infrared) boat detectors will monitor the waterway beneath the bridge for the presence of vessels.

(d) At the end of a six-minute warning period, if no vessels have been detected by the boat detectors, the bridge lowering sequence will automatically proceed taking approximately two minutes to complete. As soon as the bridge leaves the up position, the horn will silence but the navigation lights change to flashing red.

(e) Upon passage of the train, the bridge will automatically open unless another movement is detected. The navigation lights will continue to flash red until the bridge has returned to the full open position at which time they will change to steady green.

(f) The bridge can also be operated from two locked trackside control location (key releases) on the approach spans, one on each side of the movable span.

(g) To request openings of the bridge when the lift span is in the closed-to-navigation position, mariners may contact the AGR via VHF–FM channel 16 or by telephone at 205–654–4364.

Dated: August 25, 2012.

Roy A. Nash,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 2012–22797 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2010–0300; FRL–9715–1]

Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards; North Dakota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is in part approving and in part conditionally approving two State Implementation Plan (SIP) submissions made by the State of North Dakota. The SIP submissions demonstrate that North Dakota's SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. Section 110(a)(1) of the CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet the requirements of the ''infrastructure elements'' of section 110(a)(2). The State of North Dakota submitted revisions to their Infrastructure SIP for the 1997 ozone NAAQS, dated April 6, 2009, as well as a certification of the adequacy of their infrastructure SIP for the 1997 ozone NAAQS, dated November 23, 2009. This action is being taken under section 110 of the Clean Air Act.

DATES: *Effective Date:* This final rule is effective October 17, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2010–0300. 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 Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. 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 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kathy Ayala, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, 303–312–6142, *ayala.kathy@epa.gov.*

SUPPLEMENTARY INFORMATION:

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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The initials DAQ mean or refer to Division of Air Quality.

(iii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iv) The initials GHGs mean or refer to greenhouse gases.

(v) The initials NAAQS mean or refer to national ambient air quality standards.

(vi) The initials NDAC mean or refer to North Dakota Administrative Code.

(vii) The initials NDCC mean or refer to North Dakota Century Code.

(viii) The initials NO_X mean or refer to nitrogen oxides.

(ix) The initials NSR mean or refer to new source review.

(x) The initials $PM_{2.5}$ mean or refer to particulate matter with an aerodynamic diameter of less than 2.5 micrometers (fine particulate matter).

(xi) The initials ppm mean or refer to parts per million.

(xii) The initials PSD mean or refer to Prevention of Significant Deterioration.

(xiii) The initials SIP mean or refer to State Implementation Plan.

(xiv) The initials SSM mean or refer to start-up, shutdown, or malfunction.

I. Background for This Action

On July 18, 1997, EPA promulgated new NAAQS for ozone based on 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856). By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. Section 110(a)(2) provides basic requirements for SIPs, including emissions inventories, monitoring, and modeling, to assure attainment and maintenance of the standards. These requirements are set out in several ''infrastructure elements,'' listed in section 110(a)(2).

Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, and the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time a state develops and submits its SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions a state's existing SIP already contains. In the case of the 1997 ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS. In a guidance issued on October 2, 2007, EPA noted that, to the extent an existing SIP already meets the section 110(a)(2) requirements, states need only to certify that fact via a letter to EPA.[1] North Dakota submitted

[1] Memorandum from William T. Harnett, Director, Air Quality Policy Division, ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' (Oct. 2, 2007).

revisions to its SIP on April 6, 2009, which are being approved and are included in the state's infrastructure checklist and certification, dated November 23, 2009, that its infrastructure SIP requirements are met for the 1997 ozone NAAQS.

On April 16, 2012 EPA published a notice of proposed rulemaking (NPR) for the State of North Dakota. The NPR proposed approval of elements (A), (B), (C), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M) and conditional approval of element 110(a)(2)(E)(ii). In the NPR, we discussed our reasons for our proposed approval and conditional approval. We are completing our proposed action for the reasons given in the NPR. However, we find it appropriate to further explain our conditional approval for element 110(a)(2)(E)(ii).

In the NPR, we noted the link between element 110(a)(2)(E)(ii) and section 128 of the CAA. We then presented three considerations for implementing section 128 and applied these considerations to North Dakota's situation. We concluded that North Dakota, as a state without a board or body that approves permits or enforcement orders under the Act, was not subject to the requirements of section 128(a)(1), and was obliged to submit a SIP revision to meet the requirements of section 128(a)(2). We briefly described procedures that North Dakota has committed to submit as a SIP revision, procedures which were detailed in North Dakota's commitment letter in the docket, and we then briefly stated that, due to a requirement for recusal, the procedures were more stringent than the minimum requirements of 128(a)(2). As a result, we proposed conditional approval of North Dakota's infrastructure SIP for element 110(a)(2)(E)(ii) for the 1997 ozone NAAQS.

In this notice, EPA completes that conditional approval, and finds it appropriate to further explain how the elements of North Dakota's procedures satisfy the requirement for adequate disclosure of potential conflicts of interest. This explanation is not intended to imply that any other, different approaches would or would not meet the requirements of section 128(a)(2). Thus, EPA corrects our statements in the proposal to the extent they imply that North Dakota's procedures necessarily exceed the minimum requirements of section 128(a)(2), but we do not change the conclusion that the procedures meet these requirements.

Turning to our explanation, we first note that the set of persons to which the SIP revision will apply is adequate. As explained in our proposal, in a situation such as North Dakota's, in which there is no board or body that approves permits or enforcement orders under the Act, section 128(a)(2) then applies to the ''head of an executive agency with similar powers,'' that is, the head of an executive agency that approves permits or enforcement orders under the Act. As further explained in our proposal, this requirement should extend to any lower officer of an executive agency who is delegated authority by the head of the executive agency to approve permits or enforcement orders, or who is directly vested with this authority by statute. North Dakota has committed to, in its SIP revision, making the procedures applicable to any person in the State agency who approves permits or enforcement actions under North Dakota's implementation of the Act. This is sufficiently broad to include such lower officers.

Second, the North Dakota procedures address an adequately broad set of potential conflicts of interest. Under the procedures, a conflict of interest is defined as the conflict between the duties of the person subject to the procedure and the self-interest or other interests of the person. The procedures additionally state that persons subject to it must avoid any interest, influence, or relationship that might conflict or appear to conflict with the best interests of the state agency or the state, or that might affect the person's working judgment or loyalty. Because the procedures are not limited to the self-interest of the person but also include other interests, influences, and relationships, they extend beyond the minimum case where the person's own financial interest would create a conflict. In addition, because the procedures apply to interests, influences, and relationships that might appear to create a conflict or might affect the person's working judgment or loyalty, they are not dependent on a subjective standard as to whether a particular individual would actually have their working judgment or loyalty affected.

Third, the mechanics of the North Dakota procedures are adequate. The disclosure must be in writing and identify the potential conflict and its cause. The disclosure must be provided to a superior, and the person subject to the conflict must remove themselves from any negotiations, deliberations, or decisions involving the conflict. Thus, the conflict is adequately memorialized, an appropriate party is made aware of the conflict and a resolution of the conflict (e.g., recusal) is reached.

Finally, the purpose of the North Dakota procedures adequately relates to the purpose of section 128 as a whole. The overall purpose of section 128 appears to be that final decisions on permits or enforcement orders are not unduly influenced. However, as explained above, section 128(a)(1) does not apply in North Dakota's case. In such a case, it is reasonable for the state, as an alternative approach to meet the overall purpose of section 128 (and not the particular requirements of section 128(a)(1)), to require recusal in addition to disclosure. EPA therefore concludes that the SIP revision that North Dakota has committed to submit meets the requirements of section 128(a)(2) and that the North Dakota infrastructure SIP for the 1997 ozone NAAQS should be conditionally approved for section 110(a)(2)(E)(ii).

In this action, EPA also completes our proposed approval of portions of North Dakota's April 6, 2009 SIP submission. Specifically, EPA approves into the North Dakota SIP revisions sections 6.8, 6.11.3, and chapter 9, Air Pollution Control Rules of the State of North Dakota, and the addition of sections 1.14 and 7.7 to the Air Pollution Control Rules of the State of North Dakota.

II. Response to Comments

EPA did not receive comments regarding our proposed rule for action on North Dakota's SIP submittals.

III. Final Action

In this action, EPA is approving in full the following section 110(a)(2) infrastructure elements for North Dakota for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M).

In this action, EPA is conditionally approving section 110(a)(2)(E)(ii) for the 1997 ozone NAAQS and will fully approve this element if North Dakota takes the action detailed in the State's March 8, 2012 commitment letter, including submission of a SIP revision as described within the commitment letter, within one year after the publication date of this final action. If, however, North Dakota does not submit the SIP revisions specified in its commitment letter within one year after the publication date of this final action, EPA's conditional approval will automatically revert to disapproval of the infrastructure SIP for section 110(a)(2)(E)(ii) for the 1997 ozone NAAQS.

In this action, EPA also approves into the North Dakota SIP revisions to sections 6.8 (Annual Network Review), 6.11.3 (Air Quality Surveillance: Ozone), and chapter 9 (Resources), Air

Pollution Control Rules of the State of North Dakota, and the addition of sections 1.14 (Revisions to the Implementation Plan), and 7.7 (Air Quality Modeling) to the Air Pollution Control Rules of the State of North Dakota.

IV. Statutory and Executive Order Reviews

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).

This rule also 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 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 Clean Air Act. 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 Clean Air Act. 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 Clean Air Act. 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 Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 16, 2012. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: July 31, 2012.

James B. Martin,

Regional Administrator, Region 8.

PART 52 [AMENDED]

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

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

Subpart JJ—North Dakota

■ 2. Section 52.1820 in paragraph (e) is amended by:

■ a. Revising table entry ''(1)''; and

■ b. Adding to the table entries ''(26),'' ''(27),'' ''(28),'' ''(29),'' and ''(30),'' in numerical order.

The revisions and additions read as follows:

§ 52.1820 Identification of plan.

* * * * *

(e) * * *

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/adopted date	EPA approved date and citation [3]	Explanations
(1) Implementation Plan for the Control of Air Pollution for the State of North Dakota.	Statewide	Submitted: 1/24/72; Adopted: 1/24/72.	5/31/72, 37 FR 10842.	Excluding subsequent revisions, as follows: Chapters 1, 6, 7, 9, 11, and 12; Sections 1.14, 2.11, 3.7, 6.8, 6.10, 6.11, 6.13, 7.7, and 8.3; and Subsections 3.2.1, 5.2.1, 6.11.3, 7.8.1.A, 7.8.1.B, 7.8.1.C, and 8.3.1. Revisions to these non-regulatory provisions have subsequently been approved. See below.
Chapters: 1. Introduction. 2. Legal Authority. 3. Control Strategy. 4. Compliance Schedule. 5. Prevention of Air Pollution Emergency Episodes. 6. Air Quality Surveillance. 7. Review of New Sources and Modifications. 8. Source Surveillance. 9. Resources. 10. Intergovernmental Cooperation. 11. Rules and Regulations. With subsequent revisions to the chapters as follows:				
* * * * * * *				
(26) Revisions to SIP Chapter 6, Section 6.8, Annual Network Review.	Statewide	Submitted: 4/6/09; Adopted: 4/1/09.	9/17/12, [INSERT FR CITATION].	
(27) Revisions to SIP Chapter 6, Section 6.11.3, Air Quality Surveillance: Ozone.	Statewide	Submitted: 4/6/09; Adopted: 4/1/09.	9/17/12, [INSERT FR CITATION].	
(28) Revisions to SIP Chapter 9, Resources.	Statewide	Submitted: 4/6/09; Adopted: 4/1/09.	9/17/12, [INSERT FR CITATION].	
(29) Revisions to SIP Chapter 1, Section 1.14, Revisions to the Implementation Plan.	Statewide	Submitted: 4/6/09; Adopted: 4/1/09.	9/17/12, [INSERT FR CITATION].	
(30) Revisions to SIP Chapter 7, Section 7.7, Air Quality Modeling.	Statewide	Submitted: 4/6/09; Adopted: 4/1/09.	9/17/12, [INSERT FR CITATION].	

[3] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

■ 3. Section 52.1833 is added to read as follows:

§ 52.1833 Section 110(a)(2) infrastructure requirements.

On November 23, 2009, Tom Bachman, Senior Environmental Engineer, North Dakota Department of Health, submitted a completeness criteria checklist which provides the State of North Dakota's SIP provisions which meet the requirements of CAA Section 110(a)(1) and (2). The following elements are approved for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M). The following element is conditionally approved for the 1997 ozone NAAQS: (E)(ii).

[FR Doc. 2012–22771 Filed 9–14–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2012–0003; Internal Agency Docket No. FEMA–8245]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at *http://www.fema.gov/fema/csb.shtm*.

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region III				
Pennsylvania:				
Addison, Township of, Somerset County.	422508	January 18, 1985, Emerg; June 1, 1989, Reg; September 19, 2012, Susp.	Sept. 19, 2012.	Sept. 19, 2012.
Allegheny, Township of, Somerset County.	422509	August 4, 1983, Emerg; June 1, 1989, Reg; September 19, 2012, Susp.	......do*	Do.
Benson, Borough of, Somerset County..	420793	October 14, 1975, Emerg; May 17, 1990, Reg; September 19, 2012, Susp.	......do	Do.
Black, Township of, Somerset County.	422510	March 2, 1977, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	......do	Do.
Boswell, Borough of, Somerset County.	420794	March 22, 1977, Emerg; September 24, 1984, Reg; September 19, 2012, Susp.	......do	Do.
Brothersvalley, Township of, Somerset County.	422511	July 25, 1985, Emerg; August 19, 1985, Reg; September 19, 2012, Susp.	......do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Casselman, Borough of, Somerset County.	420795	March 9, 1977, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Central City, Borough of, Somerset County.	420796	August 29, 1975, Emerg; June 18, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Conemaugh, Township of, Somerset County.	422047	August 1, 1975, Emerg; June 4, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Confluence, Borough of, Somerset County.	422043	March 11, 1975, Emerg; September 6, 1989, Reg; September 19, 2012, Susp.	...... do	Do.
Elk Lick, Township of, Somerset County.	422048	March 8, 1977, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Fairhope, Township of, Somerset County.	422049	August 5, 1983, Emerg; August 19, 1985, Reg; September 19, 2012, Susp.	...... do	Do.
Garrett, Borough of, Somerset County.	420797	July 31, 1975, Emerg; June 4, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Greenville, Township of, Somerset County.	422512	October 27, 1981, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Hooversville, Borough of, Somerset County.	420798	August 5, 1975, Emerg; June 18, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Indian Lake, Borough of, Somerset County.	422513	October 12, 1976, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Jefferson, Township of, Somerset County.	422050	March 26, 1976, Emerg; August 19, 1985, Reg; September 19, 2012, Susp.	...... do	Do.
Jenner, Township of, Somerset County.	422051	February 18, 1976, Emerg; September 4, 1985, Reg; September 19, 2012, Susp.	...... do	Do.
Jennerstown, Borough of, Somerset County.	422514	March 1, 1977, Emerg; September 24, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Larimer, Township of, Somerset County.	422515	September 8, 1983, Emerg; April 1, 1988, Reg; September 19, 2012, Susp.	...... do	Do.
Lincoln, Township of, Somerset County.	422516	March 7, 1977, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Lower Turkeyfoot, Township of, Somerset County.	422517	May 4, 1977, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Meyersdale, Borough of, Somerset County.	422044	March 21, 1977, Emerg; June 17, 1986, Reg; September 19, 2012, Susp.	...... do	Do.
Middlecreek, Township of, Somerset County.	422518	April 25, 1979, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Milford, Township of, Somerset County.	422519	May 21, 1979, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
New Baltimore, Borough of, Somerset County.	420799	April 8, 1981, Emerg; September 24, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Northampton, Township of, Somerset County.	422520	February 10, 1976, Emerg; September 24, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Ogle, Township of, Somerset County.	422052	April 23, 1976, Emerg; May 17, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Paint, Borough of, Somerset County.	420800	August 27, 1975, Emerg; November 19, 1986, Reg; September 19, 2012, Susp.	...... do	Do.
Paint, Township of, Somerset County.	422521	February 13, 1976, Emerg; June 4, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Quemahoning, Township of, Somerset County.	422053	April 19, 1976, Emerg; August 15, 1989, Reg; September 19, 2012, Susp.	...... do	Do.
Rockwood, Borough of, Somerset County.	422045	February 17, 1977, Emerg; June 18, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Salisbury, Borough of, Somerset County.	420801	April 22, 1975, Emerg; September 24, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Shade, Township of, Somerset County.	422054	August 21, 1975, Emerg; February 6, 1991, Reg; September 19, 2012, Susp.	...... do	Do.
Shanksville, Borough of, Somerset County.	420802	March 2, 1977, Emerg; September 24, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Somerset, Borough of, Somerset County.	420803	September 10, 1971, Emerg; November 27, 1976, Reg; September 19, 2012, Susp.	...... do	Do.
Somerset, Township of, Somerset County.	422055	July 19, 1976, Emerg; May 17, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Southampton, Township of, Somerset County.	422523	March 1, 1977, Emerg; September 24, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Stonycreek, Township of, Somerset County.	422524	April 21, 1976, Emerg; August 19, 1985, Reg; September 19, 2012, Susp.	...... do	Do.
Summit, Township of, Somerset County.	422056	October 27, 1981, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.
Upper Turkeyfoot, Township of, Somerset County.	422525	April 25, 1979, Emerg; September 10, 1984, Reg; September 19, 2012, Susp.	...... do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Ursina, Borough of, Somerset County.	420804	August 21, 1975, Emerg; June 18, 1990, Reg; September 19, 2012, Susp.	...... do	Do.
Wellersburg, Borough of, Somerset County.	422526	April 19, 1984, Emerg; June 1, 1989, Reg; September 19, 2012, Susp.	...... do	Do.
Windber, Borough of, Somerset County.	422046	April 29, 1975, Emerg; October 17, 1986, Reg; September 19, 2012, Susp.	...... do	Do.
Region IV				
Kentucky:				
Burkesville, City of, Cumberland County.	210061	October 2, 1975, Emerg; July 3, 1986, Reg; September 19, 2012, Susp.	...... do	Do.
Grayson County, Unincorporated Areas.	210330	N/A, Emerg; September 15, 2001, Reg; September 19, 2012, Susp.	...... do	Do.
Leitchfield, City of, Grayson County.	210085	February 4, 2002, Emerg; N/A, Reg; September 19, 2012, Susp.	...... do	Do.
Mississippi:				
George County, Unincorporated Areas.	280223	May 2, 1975, Emerg; August 16, 1988, Reg; September 19, 2012, Susp.	...... do	Do.
Lucedale, City of, George County	280056	April 24, 1975, Emerg; April 15, 1986, Reg; September 19, 2012, Susp.	...... do	Do.
Region V				
Ohio:				
Malta, Village of, Morgan County	390421	April 22, 1975, Emerg; September 1, 1987, Reg; September 19, 2012, Susp.	...... do	Do.
McConnelsville, Village of, Morgan County.	390422	August 1, 1975, Emerg; July 1, 1987, Reg; September 19, 2012, Susp.	...... do	Do.
Stockport, Village of, Morgan County.	390423	May 30, 1975, Emerg; August 1, 1987, Reg; September 19, 2012, Susp.	...... do	Do.
Region VII				
Missouri:				
Argyle, Village of, Osage County	290491	May 13, 1974, Emerg; August 1, 1986, Reg; September 19, 2012, Susp.	...... do	Do.
Linn, City of, Osage County	290708	N/A, Emerg; April 28, 2006, Reg; September 19, 2012, Susp.	...... do	Do.
Region VIII				
Montana:				
East Helena, City of, Lewis and Clark County.	300039	May 23, 1975, Emerg; June 4, 1980, Reg; September 19, 2012, Susp.	...... do	Do.
Helena, City of, Lewis and Clark County.	300040	May 6, 1975, Emerg; April 15, 1981, Reg; September 19, 2012, Susp.	...... do	Do.
Lewis and Clark County, Unincorporated Areas.	300038	August 26, 1975, Emerg; April 1, 1981, Reg; September 19, 2012, Susp.	...... do	Do.

*...... do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: September 10, 2012.

David L. Miller,

Associate Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–22825 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[GC Docket No. 10–44; DA 12–1401]

Notice of Commission's Implementation of Procedure of Serving Parties in an Electronic Format

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission, via the Consumer and Governmental Affairs Bureau (CGB) provides notice of the implementation of a revised procedure for it to provide service of copies of orders, pleadings, and other documents to parties to a docketed proceeding when required by statute or regulation. Henceforth, that service will be made in an electronic format, rather than by mail.

DATES: Effective October 17, 2012.

FOR FURTHER INFORMATION CONTACT: Deborah Broderson, Consumer and Governmental Affairs Bureau at (202) 418–0652, or email: *Deborah.Broderson@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Public Notice, document DA 12–1401, released on August 24, 2012, *Consumer and Governmental Affairs Bureau Notice of Commission's Implementation of Procedure of Serving Parties in an Electronic Format.* The full text of DA

12–1401 will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. DA 12–1401 may also be purchased from the Commission's duplicating contractor, Best Copying and Printing, Inc. (BCPI), at Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI at its Web site, *www.bcpiweb.com,* or by calling 202–488–5300. DA 12–1401 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/document/commissions-implementation-serving-parties-electronic-format.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

By this Public Notice, CGB provided notice of the Commission's implementation of a revised procedure for it to provide service of copies of orders, pleadings, and other documents to parties to a docketed proceeding when required by statute or regulation. Henceforth, that service will be made in an electronic format, rather than by mail. This procedural change is made pursuant to § 1.47 of the Commission's Rules, as amended in 2011. On February 4, 2011, the Commission released *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization,* Report and Order, FCC 11–16, in CG Docket No. 11–44, published at 76 FR 24383, May 2, 2011, by which the Commission revised portions of its Part 1 practice and procedural rules and its Part 0 organizational rules to improve the efficiency of Commission decision-making and modernize the agency's processes in the digital age. Among other things, the Commission amended § 1.47 to allow the agency to serve parties to a proceeding in an electronic format (e.g., email or an Internet-based notification system such as an RSS feed). The amended rule also provides, in proceedings involving large numbers of parties, that the Commission may now satisfy its service obligation by issuing a public notice that identifies the documents required to be served and explains how parties can obtain copies of the documents. A note to the revised rule states that staff will decide the appropriate format for electronic notification in a particular proceeding, and that the Commission expects that service by public notice will be used only in proceedings with 20 or more parties. In DA 12–1401, CGB provides notice that, in docketed proceedings with fewer than 20 parties, the Commission will commence service of documents by RSS feed. Effective October 17, 2012, the Commission will discontinue mailing paper copies of documents that were previously served to parties in certain types of proceedings. Such parties should make the necessary arrangements so that they can obtain documents via RSS feed. Instructions on how to subscribe to an ECFS RSS feed may be found at: *http://fjallfoss.fcc.gov/ecfs/userManual/search/how_to_use_rss.jsp.*

Federal Communications Commission.

Kris Anne Monteith,

Acting Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2012–22756 Filed 9–14–12; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 77, No. 180

Monday, September 17, 2012

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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 985

[Doc. No. AMS–FV–12–0014; FV12–985–2 PR]

Marketing Order Regulating the Handling of Spearmint Oil Produced in the Far West; Change to Administrative Rules Regarding the Transfer and Storage of Excess Spearmint Oil

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on proposed revisions to the administrative rules prescribed under the marketing order regulating the handling of spearmint oil produced in the Far West. The marketing order is administered locally by the Spearmint Oil Administrative Committee (Committee). This rule would change the date by which a producer must transfer excess spearmint oil to another producer or deliver such oil to the Committee or its designees for storage from November 1 to December 1. This action would also change the date that the Committee must pool identified excess oil as reserve oil from November 1 to December 1. The proposed changes would be a relaxation of the handling regulations and are expected to benefit producers, handlers, and consumers.

DATES: Comments must be received by November 16, 2012.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov*. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Marketing Specialist, or Gary Olson, Regional Manager, Northwest Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (503) 326–2724, Fax: (503) 326–7440, or Email: *Barry.Broadbent@ams.usda.gov* or *GaryD.Olson@ams.usda.gov*.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Laurel.May@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Order No. 985 (7 CFR part 985), as amended, regulating the handling of spearmint oil produced in the Far West (Washington, Idaho, Oregon, and designated parts of Nevada and Utah), hereinafter referred to as the ‘‘order.’’ The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ‘‘Act.’’

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule invites comments on proposed revisions to the administrative rules prescribed under the order. This rule would change the date by which a producer must transfer excess spearmint oil to another producer or deliver such oil to the Committee or its designees for storage from November 1 to December 1. This rule would also change the date that the Committee must pool identified excess oil as reserve oil from November 1 to December 1. The proposed changes were unanimously recommended at a February 22, 2012, meeting of the full Committee.

Section 985.56(a) of the spearmint order specifies that before October 15, or such other date as the Committee, with the approval of the Secretary, may establish, a producer, following notification of the Committee, may transfer excess oil to another producer to fill a deficiency in that producer's annual allotment. In addition, § 985.56(b) specifies that before November 1, or such other date as the Committee, with the approval of the Secretary, may establish, excess oil, not used to fill another producer's deficiency, shall be delivered to the Committee or its designees for storage. Section 985.57(a) provides that on November 1, or such other date as the Committee, with the approval of the Secretary may establish, the Committee shall pool identified excess oil as reserve oil in such manner as to accurately account for its receipt, storage, and disposition.

In a rule published on October 30, 1980 (45 FR 71759), § 985.156 was added to the order's administrative rules and regulations, effectively changing the date by which the transfer of excess oil between producers to fill deficiencies must be completed from October 15 to November 1.

At the February 22, 2012 meeting, the Committee unanimously recommended changing the date by which all transfers of excess oil between producers to fill deficiencies must be completed from November 1 to December 1. In addition, the Committee recommended changing the date by which all excess oil, not used to fill another producer's deficiency, must be delivered to the Committee or its designees for storage from November 1 to December 1. Lastly, the Committee recommended changing the date that the Committee must pool identified excess oil as reserve oil from November 1 to December 1.

In its deliberations, the Committee commented that a number of factors have contributed to the need to establish later dates for the transfer, storage, and reserve pooling of excess oil. The largest factor driving the recommended change is the shift towards harvesting spearmint oil later in the year. Historically, the harvest of spearmint oil has concluded by the end of September. However, in recent years, many producers have extended the harvest of spearmint oil into the middle of October. This current trend towards harvesting later into the year has been facilitated by advances in the equipment, technology, and cultural practices employed by spearmint producers. While extending harvest further into October has benefited producers, it has also made the identification and transfer of excess oil prior to the current November 1 deadline increasingly difficult.

In addition, after harvest is complete, many producers now deliver their spearmint to a handler to remove excess water from the spearmint oil in order to derive a ''dewatered'' net quantity of oil produced. This dewatering process can take up to several weeks to complete, further tightening the timeframe that spearmint producers must operate under to meet the current volume regulation deadlines.

Lastly, many spearmint oil producers have diversified their farming operations and are typically involved in the harvest of other late bearing crops during the month of October. These producers may be preoccupied with their other farm obligations and may not have the time to review their spearmint production, ensure all paperwork is in order, make marketing decisions, and execute any transfers of excess oil prior to the current November 1 deadline.

The Committee staff must account for all of the production, transfer, sale, and reserve pooling of spearmint oil before an accurate determination of the statistics can be compiled for the marketing year. The Committee believes that extending the deadline by which producers must transfer or store their excess oil, and that the Committee must pool identified excess oil, from November 1 to December 1 would have minimal impact on the Committee staff's ability to perform their required functions in a timely manner.

The proposed changes are expected to benefit producers, handlers, and consumers of spearmint oil by ensuring that all spearmint oil eligible to enter the market under volume regulation is actually available to the market.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are 8 spearmint oil handlers subject to regulation under the order. In addition, there are approximately 32 producers of Scotch spearmint oil and approximately 88 producers of Native spearmint oil in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

Based on the SBA's definition of small entities, the Committee estimates that two of the eight handlers regulated by the order could be considered small entities. Most of the handlers are large corporations involved in the international trading of essential oils and the products of essential oils. In addition, the Committee estimates that 15 of the 32 Scotch spearmint oil producers and 26 of the 88 Native spearmint oil producers could be classified as small entities under the SBA definition. Thus, a majority of handlers and producers of Far West spearmint oil may not be classified as small entities.

The Far West spearmint oil industry is characterized by producers whose farming operations generally involve more than one commodity, and whose income from farming operations is not exclusively dependent on the production of spearmint oil. A typical spearmint oil-producing operation has enough acreage for rotation such that the total acreage required to produce the crop is about one-third spearmint and two-thirds rotational crops. Thus, the typical spearmint oil producer has to have considerably more acreage than is planted to spearmint during any given season. Crop rotation is an essential cultural practice in the production of spearmint oil for weed, insect, and disease control. To remain economically viable with the added costs associated with spearmint oil production, most spearmint oil-producing farms fall into the SBA category of large businesses.

Small spearmint oil producers generally are not as extensively diversified as larger ones and as such are more at risk to market fluctuations. Such small producers generally need to market their entire annual crop and do not have the luxury of having other crops to cushion seasons with poor spearmint oil returns. Conversely, large diversified producers have the potential to endure one or more seasons of poor spearmint oil markets because income from alternate crops could support the operation for a period of time. Being reasonably assured of a stable price and market provides small producing entities with the ability to maintain proper cash flow and to meet annual expenses. Thus, the market and price stability provided by the order potentially benefit the small producer more than such provisions benefit large producers.

This proposed rule would change the date by which transfers of excess spearmint oil between producers to fill deficiencies in annual allotments must be completed from November 1 to December 1. This rule would also change the date by which all excess oil not used to fill deficiencies must be transferred to the Committee for storage from November 1 to December 1. Lastly, this rule would extend the date that the Committee must pool identified excess oil as reserve oil from November 1 to December 1.

The Committee recommended extending the dates to give producers more time to assess the quantity of spearmint oil they produced relative to their annual allotment, to determine if there is a deficiency or an excess of such oil, and to make decisions regarding any transfers of oil. This action is expected to benefit producers, handlers, and consumers by ensuring that the market is adequately supplied with spearmint oil. The authority for this action is provided in §§ 985.56 and 985.57 of the order.

At the February 22, 2012, meeting, the Committee discussed the impact of the proposed changes on handlers and producers. The proposed action would be a relaxation of the current handling regulation, allowing an additional 30 days for industry participants to fully supply the market with the total amount of spearmint oil allotted under the volume regulation provisions of the order. The benefits of this rule are not expected to be disproportionately greater or less for small handlers or producers than for larger entities.

The Committee discussed alternatives to these proposed changes, including making no changes at all, changing the dates but keeping them within the month of November, and extending the dates further into December or into January. The Committee thought that maintaining the dates in the current regulations would not be responsive to the changing production practices of the industry. In addition, they felt that the dates should be extended at least 30 days for the change to be meaningful. However, the Committee believed that extending the dates any further than the proposed dates would affect the Committee's ability to establish accurate reports for the completed harvest season in a timely manner. The Committee members unanimously agreed that changing the dates for transferring, storing, and pooling excess oil from November 1 to December 1 addressed the industry's current needs without negatively impacting the operation of the Committee.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0178, Vegetable and Specialty Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would change the date by which excess oil must be transferred between producers to fill annual allotment deficiencies or delivered to the Committee or its designees for storage from November 1 to December 1. In addition, the rule would change the date the Committee must pool identified excess oil as reserve oil from November 1 to December 1. The rule would be a relaxation of the volume regulation provisions of the order. No changes in the reporting or recordkeeping requirements would be necessary as a result of this action. Accordingly, this proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large spearmint oil producers or handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Furthermore, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, the Committee's meeting was widely publicized throughout the spearmint oil industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the February 22, 2012, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *www.ams.usda.gov/MarketingOrdersSmallBusinessGuide*. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 60-day comment period is provided to allow interested persons to respond to this proposed rule. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 985

Marketing agreements, Oils and fats, Reporting and recordkeeping requirements, Spearmint oil.

For the reasons set forth in the preamble, 7 CFR part 985 is proposed to be amended as follows:

PART 985—MARKETING ORDER REGULATING THE HANDLING OF SPEARMINT OIL PRODUCED IN THE FAR WEST

1. The authority citation for 7 CFR part 985 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise § 985.156 to read as follows:

§ 985.156 Transfer of excess oil by producers.

(a) Pursuant to § 985.56(a), before December 1 of each marketing year, a producer, following notification of the Committee, may transfer excess oil to another producer to enable that producer to fill a deficiency in that producer's annual allotment.

(b) Pursuant to § 985.56(b), before December 1 of each marketing year, excess oil not used to fill another producer's deficiency shall be delivered to the Committee or its designees for storage.

3. Add § 985.157 to read as follows:

§ 985.157 Reserve pool requirements.

Pursuant to § 985.57(a), on December 1, the Committee shall pool identified excess oil as reserve oil in such manner as to accurately account for its receipt, storage, and disposition.

Dated: September 12, 2012.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2012–22834 Filed 9–14–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2012–0978; Notice No. 25–12–03–SC]

Special Conditions: Embraer S.A., Model EMB–550 Airplane; Electronic Flight Control System: Control Surface Awareness and Mode Annunciation

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Embraer S.A. Model EMB–550 airplane. This airplane will have a novel or unusual design feature(s) associated with the control surface awareness and mode annunciation of the electronic flight control system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send your comments on or before November 1, 2012.

ADDRESSES: Send comments identified by docket number FAA–2012–0978 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m. and 5 p.m., Monday through Friday, except federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/*, including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/*.

Docket: Background documents or comments received may be read at *http://www.regulations.gov/at* any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–2011; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive on or before the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On May 14, 2009, Embraer S.A. applied for a type certificate for their new Model EMB–550 airplane. The Model EMB–550 airplane is the first of a new family of jet airplanes designed for corporate flight, fractional, charter, and private owner operations. The aircraft has a conventional configuration with low wing and T-tail empennage. The primary structure is metal with composite empennage and control surfaces. The Model EMB–550 airplane is designed for 8 passengers, with a maximum of 12 passengers. It is equipped with two Honeywell HTF7500–E medium bypass ratio turbofan engines mounted on aft fuselage pylons. Each engine produces approximately 6,540 pounds of thrust for normal takeoff. The primary flight controls consist of hydraulically powered fly-by-wire elevators, aileron and rudder, controlled by the pilot or copilot sidestick.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Embraer S.A. must show that the Model EMB–550 airplane meets the applicable provisions of part 25, as amended by Amendments 25–1 through 25–127.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model EMB–550 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Model EMB–550 airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the "Noise Control Act of 1972."

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Model EMB–550 airplane will incorporate the following novel or unusual design features: The Embraer S.A. Model EMB–550 airplane will have a fly-by-wire electronic flight control system and no direct coupling from the flightdeck controller to the control surface. As a result, the pilot is not aware of the actual control surface position as envisioned when part 25 was written.

Discussion

This special condition proposes that the flightcrew receive a suitable flight control position annunciation when a flight condition exists in which nearly full surface authority (not crew-commanded) is being used. Suitability of such a display must take into account that some pilot-demanded maneuvers (e.g., rapid roll) are necessarily associated with intended full performance, which may saturate the surface. Therefore, simple alerting systems function in both intended and unexpected control-limiting situations. As a result, they must be properly balanced between providing necessary crew awareness and being a potential nuisance to the flightcrew. A monitoring system that compares airplane motion and surface deflection with the demand of the pilot sidestick controller could help reduce nuisance alerting.

This special condition also addresses flight control system mode annunciation. It proposes suitable mode annunciation be provided to the flightcrew for events that significantly change the operating mode of the system but do not merit the classic "failure warning."

This proposed special condition would establish a level of safety equivalent to that provided by a conventional flight control system and that contemplated in existing regulations.

Applicability

As discussed above, these special conditions are applicable to the Model EMB–550 airplane. Should Embraer S.A. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for Model EMB–550 airplanes.

1. Electronic Flight Control System: Control Surface Awareness and Mode Annunciation. In addition to the requirements of §§ 25.143, 25.671, and 25.672, the following requirements apply:

a. The system design must ensure that the flightcrew is made suitably aware whenever the primary control means nears the limit of control authority.

Note: The term ''suitably aware'' indicates annunciations provided to the flightcrew are appropriately balanced between nuisance and that necessary for crew awareness.

b. If the design of the flight control system has multiple modes of operation, a means must be provided to indicate to the crew any mode that significantly changes or degrades the normal handling or operational characteristics of the airplane.

Issued in Renton, Washington, on September 7, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–22777 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0820; Directorate Identifier 2010–NE–31–AD]

RIN 2120–AA64

Airworthiness Directives; Thielert Aircraft Engines GmbH Models TAE 125–01, TAE 125–02–99, and TAE 125–02–114 Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to all Thielert Aircraft Engines (TAE) GmbH Models TAE 125–01, TAE 125–02–99, and TAE 125–02–114 Reciprocating Engines. The existing AD currently requires installation of full-authority digital electronic control (FADEC) software version 2.91. Since we issued that AD, we have received reports of possible power loss on airplanes equipped with TAE 125 engines. This proposed AD would require removing all software mapping versions prior to 292, 301, or 302, applicable to the TAE engine model. We are proposing this AD to prevent engine power loss or in-flight shutdown, resulting in reduced control of or damage to the airplane.

DATES: We must receive comments on this proposed AD by November 16, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this AD, contact Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, phone: +49–37204–696–0; fax: +49–37204–696–55; email: *info@centurion-engines.com*. 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.

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

FOR FURTHER INFORMATION CONTACT: Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *alan.strom@faa.gov;* phone: 781–238–7143; fax: 781–238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2010–0820; Directorate Identifier 2010–NE–31–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On March 22, 2011 we issued AD 2011–07–09, amendment 39–16646 (76 FR 17757, March 31, 2011), for Thielert Aircraft Engines GmbH models TAE 125–01, TAE 125–02–99, and TAE 125–02–114 reciprocating engines installed in, but not limited to, Cessna 172 and (Reims-built) F172 series (European Aviation Safety Agency (EASA) STC No. EASA.A.S.01527); Piper PA–28 series (EASA STC No. EASA.A.S. 01632); APEX (Robin) DR 400 series (EASA STC No. A.S.01380); and Diamond Aircraft Industries Models DA 40, DA 42, and DA 42M NG airplanes. That AD requires installation of FADEC software version 2.91. That AD resulted from service experience that showed the FADEC channel B manifold air pressure sensor hose permeability was not always recognized as a fault by the FADEC. We issued that AD to prevent engine power loss or in-flight shutdown, resulting in reduced control of or damage to the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2011–07–09, we have received reports of possible power loss on airplanes equipped with TAE 125 engines. The preliminary investigation results have shown that an undetected engine overspeed, due to a slipping clutch, may have contributed to these occurrences, in combination with other circumstances.

Relevant Service Information

We reviewed TAE Service Bulletin TM TAE 000–0007, Revision 19, dated August 31, 2012. The service information describes procedures for updating the affected FADEC software.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would retain none of the requirements of AD 2011–07–09. This proposed AD would require removing all software mapping versions prior to 292, 301, or 302, applicable to the TAE engine model.

Costs of Compliance

We estimate that this proposed AD would affect about 112 engines installed on airplanes of U.S. registry. We also estimate that it would take about 0.5 work-hours per product to comply with this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD to U.S. operators to be $4,760.

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

(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.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2011–07–09, Amendment 39–16646 (76 FR 17757, March 31, 2011), and adding the following new AD:

Thielert Aircraft Engines GmbH: Docket No. FAA–2010–0820; Directorate Identifier 2010–NE–31–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by November 16, 2012.

(b) Affected ADs

This AD supersedes AD 2011–07–09, Amendment 39–16646.

(c) Applicability

This AD applies to Thielert Aircraft Engines GmbH models TAE 125–01, TAE 125–02–99, and TAE 125–02–114 reciprocating engines installed in, but not limited to, Cessna 172 and (Reims-built) F172 series (European Aviation Safety Agency (EASA) STC No. EASA.A.S.01527); Piper PA–28 series (EASA STC No. EASA.A.S. 01632); APEX (Robin) DR 400 series (EASA STC No. A.S.01380); and Diamond Aircraft Industries Models DA 40, DA 42, and DA 42M NG airplanes.

(d) Unsafe Condition

This AD was prompted by reports of possible power loss on airplanes equipped with TAE 125 engines. We are issuing this AD to prevent engine power loss or in-flight shutdown, resulting in reduced control of or damage to the airplane.

(e) Compliance

Unless already done, do the following. Within 55 flight hours or within 3 months of the effective date of the AD, or during the next scheduled maintenance, whichever occurs first, remove all full-authority digital electronic control (FADEC) software prior to versions 292, 301, and 302. Tables 1, 2, and 3 to paragraph (e) provide the software mapping and respective part numbers for software versions 292, 301, and 302, installed on the TAE 125–01, TAE 125–02–99, and TAE–125–02–114 engines, respectively.

TABLE 1 TO PARAGRAPH (E) FOR TAE 125–01 ENGINES

Software mapping	Part No.
T14V292CES	20–7610–55104R9
T28V292CES	20–7610–55105R7
T14V292PIP	40–7610–55106R9
T28V292PIP	40–7610–55107R7
T14V292APEX	60–7610–55106R9
T14V292DIA	50–7610–55105R9
R28V292DIA	50–7610–55107R5

TABLE 2 TO PARAGRAPH (E) FOR TAE 125–02–99 ENGINES

Software mapping	Part No.
O14V301CES	20–7610–E000110
O28V301CES	20–7610–E001110
O14V301PIP	40–7610–E000110
O28V301PIP	40–7610–E001110
O14V301APEX	60–7610–E000110
O14V301DA40	50–7610–E000110
O28V301DA42	52–7610–E000505

TABLE 3 TO PARAGRAPH (E) FOR TAE 125–02–114 ENGINES

Software mapping	Part No.
P14V302CES	20–7610–E002007
P28V302CES	20–7610–E003007
P28V302PIP	40–7610–E003007
P14V302APEX	60–7610–E002007
P14V302DA40	50–7610–E002007

(f) Alternative Methods of Compliance (AMOCs)

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

(g) Related Information

(1) For more information about this AD, contact Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803;

email: *alan.strom@faa.gov;* phone: 781–238–7143; fax: 781–238–7199.

(2) Refer to MCAI Airworthiness Directive No. 2012–0116, dated July 3, 2012, and Thielert Aircraft Engines Service Bulletin TM TAE 000–0007, Revision 19, dated August 31, 2012, for related information.

(3) For service information identified in this AD, contact Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, phone: +49–37204–696–0; fax: +49–37204–696–55; email: *info@centurion-engines.com.* 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.

Issued in Burlington, Massachusetts, on September 5, 2012.

Colleen M. D'Alessandro,

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

[FR Doc. 2012–22528 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 301

Regulations Under the Fur Products Labeling Act

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Federal Trade Commission proposes to amend its Regulations under the Fur Products Labeling Act to update its Fur Products Name Guide, provide more labeling flexibility, incorporate recently enacted Truth in Fur Labeling Act provisions, and eliminate unnecessary requirements. The Commission does not propose changing or providing alternatives to the required name on labels for *nyctereutes procyonoides* fur products. The Commission also does not propose changing the Rules' product coverage scope or continuing guaranty provisions.

DATES: Comments must be received on or before November 16, 2012.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form by following the instructions in the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted by using the following Web link: *https://ftcpublic.commentworks.com/ftc/furrulesreviewnprm* (and following the instructions on the web-based form). Comments filed in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex O), 600 Pennsylvania Avenue NW., Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Matthew Wilshire, (202) 326–2976, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 14, 2011, the Federal Trade Commission ("FTC" or "Commission") invited comment on its Rules and Regulations ("Fur Rules" or "Rules") under the Fur Products Labeling Act ("Fur Act" or "Act"), including its Fur Products Name Guide ("Name Guide").[1] After considering the comments and holding a public hearing, the Commission proposes updating the Name Guide, providing greater labeling flexibility, incorporating provisions of the recently enacted Truth in Fur Labeling Act ("TFLA"), and, on its own initiative, deleting unnecessary requirements.

The Commission declines to propose other amendments suggested by commenters. Although some supported changing the Name Guide's required name for *nyctereutes procyonoides,* the Commission proposes retaining "Asiatic Raccoon" as the only name for that species. As discussed below, the record shows that "Asiatic Raccoon" is the best name to identify the animal for consumers. Furthermore, alternative names suggested by commenters either risk misleading consumers or cannot be used to identify the animal.

This supplementary information section first provides background on the Fur Act and Rules, the Name Guide, TFLA, and this rulemaking. Next, it summarizes the comments. Finally, it analyzes those comments and discusses the proposed amendments.

II. Background

A. The Fur Act and Rules

The Fur Act prohibits misbranding and false advertising of fur products, and requires labeling of most fur products.[2] Pursuant to this Act, the Commission promulgated the Fur Rules. These Rules set forth disclosure requirements that assist consumers in making informed purchasing decisions.[3] Specifically, the Fur Act and Rules require fur manufacturers, dealers, and retailers to label products made entirely or partly of fur. These labels must disclose: (1) The animal's name as provided in the Name Guide; (2) the presence of any used, bleached, dyed, or otherwise artificially colored fur; (3) that the garment is composed of, among other things, paws, tails, bellies, sides, flanks, or waste fur, if that is the case; (4) the name or Registered Identification Number of the manufacturer or other party responsible for the garment; and (5) the product's country of origin.[4] In addition, manufacturers must include an item number or mark on the label for identification purposes.[5]

The Rules also include detailed labeling specifications. For example, the Rules specify an exact label size of 1.75 inches by 2.75 inches,[6] require disclosures on the label in a particular order,[7] and prohibit non-FTC information on the front of the label.[8]

Finally, the Fur Act requires the Rules to provide for separate and continuing guaranties.[9] These documents allow an entity to provide a guarantee to another entity that the fur products it manufactures or transfers are not mislabeled or falsely advertised or invoiced. Separate guaranties specifically designate particular fur products.[10] Continuing guaranties, which guarantors file with the Commission, apply to "any fur product or fur handled by a guarantor." [11] The Act provides that a guaranty recipient will not generally be liable for violations related to the guaranteed goods.[12]

B. The Name Guide

The Fur Act requires the Commission to maintain "a register setting forth the names of hair, fleece, and fur-bearing animals." [13] The Act further requires that these names "be the true English names for the animals in question, or in the absence of a true English name for an animal, the name by which such animal can be properly identified in the United States." [14] For example, the

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[1] 76 FR 13550 (Mar. 14, 2011). The Name Guide lists the English animal names that must appear on fur-product labels.

[2] 15 U.S.C. 69 *et seq.*

[3] 16 CFR part 301.

[4] 15 U.S.C. 69b(2); 16 CFR 301.2(a).

[5] 16 CFR 301.40.

[6] 16 CFR 301.27.

[7] 16 CFR 301.30.

[8] 16 CFR 301.29(a). By contrast, the Commission's Rules and Regulations ("Textile Rules") under the Textile Fiber Products Identification Act ("Textile Act"), which apply to clothing generally, do not have such restrictions.

[9] 15 U.S.C. 69h; 16 CFR 301.46; 301.47; 301.48; and 301.48a.

[10] 15 U.S.C. 69h(a)(1).

[11] 15 U.S.C. 69h(a)(2).

[12] 15 U.S.C. 69h(a).

[13] 15 U.S.C. 69e(a).

[14] *Id.*

Name Guide requires covered entities to label *mustela vison* as ''mink.'' [15]

The Commission first published the Name Guide in 1952. Under the Fur Act, the Commission can amend the Name Guide only ''with the assistance and cooperation of the Department of Agriculture and the Department of the Interior'' and ''after holding public hearings.'' [16] Prior to this rulemaking, the Commission had amended the Name Guide twice, most recently in 1967.[17]

C. TFLA

In 2010, Congress enacted TFLA,[18] which revoked one Fur Act exemption and replaced it with another. Specifically, TFLA deleted a Fur Act provision that authorized the Commission to exempt fur products of relatively low value from labeling requirements. Under that authority, the Fur Rules exempted products with a fur component valued at less than $150.[19] TFLA eliminated this *de minimis* exemption [20] and enacted a new, more limited exemption for furs sold directly by trappers and hunters to end-use customers in certain face-to-face transactions (''hunter/trapper exemption''). The new exemption provides:

> No provision of [the Fur Act] shall apply to a fur product—(1) the fur of which was obtained from an animal through trapping or hunting; and (2) when sold in a face to face transaction at a place such as a residence, craft fair, or other location used on a temporary or short term basis, by the person who trapped or hunted the animal, where the revenue from the sale of apparel or fur products is not the primary source of income of such person.[21]

In addition, TFLA required the Commission to initiate a review of the Name Guide.[22]

D. Procedural Background

In March 2011, as part of its comprehensive program to review all FTC rules and guides and in response to TFLA, the Commission opened a review of the Name Guide by seeking comment. As part of its regulatory review program,[23] the Commission also sought comment on the Fur Rules generally.[24] The Commission received 15 comments.[25]

The Commission also held a public hearing on December 6, 2011. The hearing was in roundtable format with an opportunity for audience participation. Four commenters participated in the roundtable: The Humane Society of the United States (''HSUS''); the Fur Information Council of America (''FICA''); the National Retail Federation (''NRF''); and Finnish Fur Sales (''Finnish Fur''). In addition, the hearing included representatives from the United States Department of Agriculture (''USDA''), the United States Geological Survey (''USGS''), and the Fish and Wildlife Service (''FWS'').[26]

III. The Record

Commenters disagreed about whether and how to amend the Name Guide, particularly the name for *nyctereutes procyonoides*. Several commenters also proposed eliminating unnecessary disclosure requirements and increasing labeling flexibility. In addition, HSUS urged the Commission to limit the use of continuing guaranties. Finally, two commenters suggested changes to the Fur Rules' product coverage.

A. The Name Guide

Commenters focused on whether the Commission should continue to require labeling *nyctereutes procyonoides* as ''Asiatic Raccoon'' or change the name to ''Raccoon Dog.'' Commenters also discussed whether the Name Guide should allow ''Finnraccoon'' as an alternate name for *nyctereutes procyonoides* that are raised in Finland, and suggested amendments regarding other species.

1. ''Raccoon Dog'' Versus ''Asiatic Raccoon''

All who addressed the subject agreed that *nyctereutes procyonoides'* taxonomic classification is in the canidae family, which includes foxes, wolves, and domestic dogs.[27] All commenters further agreed that raccoons are not closely related to *nyctereutes procyonoides.* Although both species are in the same order (carnivora), raccoons are in a different family (Procyonidae).[28] Despite agreeing about the animal's taxonomy, commenters sharply disagreed about whether the Name Guide should require entities to label it ''Asiatic Raccoon'' or ''Raccoon Dog.''

a. Support for ''Raccoon Dog''

HSUS recommended eliminating ''Asiatic Raccoon'' and replacing it with ''Raccoon Dog'' for three reasons. First, it asserted that ''Raccoon Dog'' is the Ascientifically accepted common name.'' [29] Specifically, HSUS noted that the Integrated Taxonomic Information System (''ITIS'') lists *nyctereutes procyonoides'* common name as ''Raccoon Dog.'' [30] At the hearing, HSUS explained that ITIS is ''a result of a partnership of federal government agencies formed to satisfy the need for scientifically credible taxonomic information.'' [31] HSUS described ITIS members, which include FWS, the Smithsonian Institute, and USGS, as ''neutral on the issue of how a particular industry, including the fur industry, identifies its products.'' [32] In addition, HSUS asserted that requiring ITIS's common names would assist consumers because the ITIS ''Web site contains an easily accessible database with reliable information on species names and their hierarchical classification.'' [33]

Second, HSUS asserted that ''Raccoon Dog'' has long been the ''most widely-accepted common name of the species.'' [34] As support, HSUS submitted a letter from biologist Lauren Nolfo-Clements attesting that scientists have used ''Raccoon Dog'' to describe *nyctereutes procyonoides* for ''well over a century.'' [35] In addition, HSUS cited references to the animal as ''Raccoon-Like Dog'' and ''Raccoon Dog'' in literature predating the Name Guide, including one encyclopedia claiming that the term ''Asiatic Raccoon'' was a ''guise'' to obscure the animal's relationship to dogs.[36] HSUS also pointed to recent uses of ''Raccoon Dog'' in an FWS press release and in an official publication.[37] HSUS did not, however, provide evidence that

[15] 16 CFR 301.0.

[16] 15 U.S.C. 69e(b).

[17] 32 FR 6023 (Apr. 15, 1967).

[18] Public Law 111–113.

[19] 16 CFR 301.39(a).

[20] Public Law 111–113, § 2.

[21] *Id.* at § 3.

[22] *Id.* at § 4.

[23] For further discussion of the program, *see www.ftc.gov/opa/2011/07/regreview.shtm*.

[24] 76 FR 13550.

[25] The comments, along with a transcript of the Name Guide hearing, are available at: *http://ftc.gov/os/comments/furlabeling/*. Citations to comments will identify the commenter name and comment page number containing the relevant discussion (*e.g.,* ''FICA at 8.''). Citations to one page comments will only state the commenter name. Citations to the hearing transcript will identify the relevant page and line (*e.g.,* ''Tr. at 9, ln. 2.'').

[26] USGS and FWS are agencies within the Department of the Interior.

[27] *See, e.g.,* attachment to HSUS comment at 31.

[28] *See* the Smithsonian's *Mammal Species of the World* entry for ''Raccoon,'' available at *http://www.vertebrates.si.edu/msw/mswcfapp/msw/taxon_browser.cfm?msw_id=12300.*

[29] HSUS at 7.

[30] *See* the ITIS Report for *nyctereutes procyonoides*, available at *http://www.itis.gov/servlet/SingleRpt/SingleRpt?search_topic=TSN&search_value=183821.*

[31] Tr. at 9, ln. 2–5.

[32] Tr. at 9, ln. 16–21.

[33] HSUS at 7.

[34] HSUS. at 8.

[35] HSUS at 13 (letter attachment).

[36] HSUS at 8–9.

[37] HSUS at 9.

consumers are more familiar with, or more likely to recognize, ''Raccoon Dog'' than ''Asiatic Raccoon.'' [38]

Finally, HSUS contended that ''Asiatic Raccoon'' is confusing and misleading, while ''Raccoon Dog'' is not. HSUS observed that ''the species is not a raccoon'' and ''is not just found in Asia, but * * * in numerous European countries.'' [39] Thus, HSUS asserted, ''Asiatic Raccoon'' could mislead consumers about the species of the animal that produced the fur and its geographic origin.[40] At the hearing, HSUS also asserted that ''Raccoon Dog,'' by contrast, would not mislead consumers because dogs are members of the canidae family, and therefore more closely related to *nyctereutes procyonoides* than raccoons.[41]

b. Support for ''Asiatic Raccoon''

Other commenters opposed replacing ''Asiatic Raccoon'' with ''Raccoon Dog.'' They argued that ITIS or other scientific sources should not determine an animal's name for labeling purposes, that ''Asiatic Raccoon'' better describes the animal, and that ''Raccoon Dog'' labels would mislead consumers and harm retail sales.

Several hearing participants, including government representatives, asserted that ITIS is not a common-name repository. For example, FICA described ITIS as ''a tool used internally within the government by scientists involved in wildlife regulatory issue[s] * * * [and] not intended to regulate the sale of fur in the retail marketplace.'' [42] Significantly, hearing participants from the government agreed that ITIS is not necessarily authoritative on common names. Specifically, Dr. Alfred Gardner from USGS, whom ITIS lists as an expert on *nyctereutes procyonoides'* taxonomy, explained that ''[t]he primary function of ITIS is to keep abreast of the changes in scientific names * * * [and] not * * * to establish common names.'' [43] Dr. Gardner further stated that the use of common names listed in scientific guides is ''not very consistent'' outside of the wildlife management field.[44] Ms. Sharon Lynn, Senior Wildlife Inspector for FWS, agreed that ITIS does not reflect a scientific consensus regarding species' common names.[45]

More generally, some commenters criticized HSUS's proposal to rely on ''scientific consensus'' rather than consumer perception.[46] Consistent with that view, a representative from Finnish Fur attested that, in his experience, consumers would not be familiar with ITIS.[47] NRF further observed, ''how a product is marketed ought to be a critical factor in deciding'' the animal's name because marketing often establishes commercial names for unfamiliar products.[48]

Indeed, two commenters noted that consumers have familiarity with ''Asiatic Raccoon'' through marketplace exposure. Specifically, FICA and Finnish Fur stated that, prior to TFLA's enactment, most *nyctereutes procyonoides* garments did not meet the now-defunct *de minimis* exemption and, therefore, would have been labeled as ''Asiatic Raccoon.'' [49] HSUS also acknowledged that ''Asiatic Raccoon'' appears on labels ''fairly often.'' [50]

Moreover, several commenters asserted that ''Asiatic Raccoon'' is superior to ''Raccoon Dog'' because it provides more information to consumers. For example, FICA stated that the term ''Raccoon'' accurately describes *nyctereutes procyonoides* because it has ''rings around its eyes, [so] it clearly looks like a raccoon.'' [51] In addition, Ms. Lynn of FWS noted that the word ''Asiatic'' is helpful, despite the existence of European *nyctereutes procyonoides,* because it ''gives you an idea where the animal originated naturally.'' [52] Ms. Lynn further explained that Asia is the species' ''native habitat'' and, therefore, ''the Asiatic name would be a neutral'' description.[53] Ms. Lynn observed that using ''Asiatic Raccoon'' to refer to European *nyctereutes procyonoides* is like the common practice of using ''African Lion'' to refer to lions raised in America.[54]

Furthermore, some commenters criticized ''Raccoon Dog'' as inaccurate, asserting that *nyctereutes procyonoides* is not closely related to domestic dog and does not exhibit dog-like behavior. For example, NRF noted that the animal is ''not a true-dog or dog-like canine within the genus Canis * * * Other canids, * * * such as wolves, coyotes, and jackals, are much more closely related to domestic dogs * * *'' [55] Moreover, according to FICA, ''[t]he Asiatic/Finnraccoon exhibits vastly different behaviors than the dog. For example, it hibernates, climbs trees, and it participates in social grooming * * * [It] cannot bark, and it does not wag its tail.'' [56] In support, FICA submitted a report from wildlife biologist Robert Byrne confirming those behavioral differences and noting other contrasts, including diet (omnivore versus carnivore) and gait (clumsy versus ''often very swift'').[57]

Finally, commenters warned that requiring ''Raccoon Dog'' on a label would mislead consumers into thinking that the species either was, or was closely related to, domestic dog, thereby harming *nyctereutes procyonoides* fur sales. FICA, citing news reports, suggested that the term ''has had a devastating impact * * * by causing consumers to believe mistakenly that the product is related to domestic dog.'' [58] NRF concurred, opining that using ''Raccoon Dog'' to describe the species creates ''a huge risk of misinformation.'' [59] As evidence, FICA and Finnish Fur reported that consumer exposure to the name ''Raccoon Dog'' has harmed sales. Specifically, major retailers Federated Department Stores and Lord & Taylor no longer sell the furs made from the animal because consumers mistake it for domestic dog.[60] Thus, they asserted requiring ''Raccoon Dog'' would essentially ''ban'' *nyctereutes procyonoides* fur ''because [it] will no longer exist in the marketplace * * *''.[61]

c. Alternatives to ''Raccoon Dog'' and ''Asiatic Raccoon''

NRF suggested ''Tanuki'' and ''Magnut'' as alternative names for *nyctereutes procyonoides.*[62] Dr. Gardner supported ''Tanuki'' because it ''doesn't carry any baggage.'' [63] HSUS, however, objected to both names because they are foreign words and, therefore, not true English names.[64] Furthermore, HSUS

[38] Tr. at 56, ln. 1–7.
[39] HSUS at 9.
[40] HSUS at 9.
[41] Tr. at 48, ln. 21–23.
[42] Tr. at 15, ln. 9–12.
[43] Tr. at 26, ln. 5–8.
[44] Tr. at 14, ln. 5–6.
[45] Tr. at 13, ln. 6–9.
[46] Tr. at 16, ln. 16–25, Tr. at 17, ln. 1–6.
[47] Tr. at 17, ln. 11–14.
[48] Tr. at 28, ln. 19–21. NRF gave the example of ''Kiwi'' fruit as an English name established by marketing. Tr. at 28, ln. 22–25.
[49] Tr. at 79, ln. 14–16.
[50] Tr. at 79, ln. 2.
[51] Tr. at 42, ln. 12–13.
[52] Tr. at 38, ln. 22–23.
[53] Tr. at 39, ln. 6, 11–12.
[54] Tr. at 39, ln. 15–19.
[55] NRF at 4. FICA similarly observed that ''[a]lthough the Asiatic Raccoon * * * is part of the family Canidae, like many other animals (*e.g.,* fox, wolves, coyotes), it is completely different from a domestic dog.'' FICA at 5.
[56] FICA at 5.
[57] FICA, Attachment 2 at 3–4.
[58] FICA at 6.
[59] Tr. at 36, ln. 7–10.
[60] Tr. at 60, ln. 1–7.
[61] Tr. at 59, ln. 21; Tr. at 43, ln. 19–21.
[62] NRF at 4. At the hearing, NRF clarified that it supported the current designation of ''Asiatic Raccoon'' and had proposed the alternatives only in the event that the Commission deleted ''Asiatic Raccoon.'' Tr. at 69, ln. 13–14.
[63] Tr. at 71, ln. 19–20.
[64] Tr. at 82, ln. 14–17.

represented that Internet searches for ''Tanuki'' and ''Magnut'' showed less usage than ''Asiatic Raccoon'' or ''Raccoon Dog.'' [65]

2. ''Finnraccoon''

FICA, Finnish Fur, and Finland's Ministries for Foreign Affairs and of Agriculture and Forestry urged the Commission to allow labeling *nyctereutes procyonoides* raised in Finland as ''Finnraccoon.'' These commenters did not assert that those animals differ in characteristics from *nyctereutes procyonoides* raised in Asia. Rather, they advocated adding the name because ''Finnraccoon'' would alert consumers that the animal had been raised under European regulations, which they described as stricter and more humane than in Asia. For example, the Finnish Ministries stated:

> [European regulation is] one of the strictest in the world. The EU is party to the European Convention for the protection of animals kept for farming purposes. The Convention aims to protect animals against any unnecessary suffering or injury.
>
> * * * * *
>
> As the animal welfare standards in place in Asian countries producing *Nyctereutes procyonoidos* are, unfortunately, not as high level as those in place in Finland/Europe, the situation is confusing also to the consumers; the term ''Asiatic raccoon'' implies misleadingly that the *Nyctereutes procyonoidos* fur originates from Asia, when in fact, [the] main part of the world trade originates from Finland.[66]

However, these commenters did not provide evidence that consumers were familiar with ''Finnraccoon'' or that ''Finnraccoon'' fur differs materially from other *nyctereutes procyonoides* fur.[67]

HSUS, by contrast, opposed the name, describing it as ''industry-coined.'' [68] It further pointed out that fur labels would disclose the country of origin in any event.[69]

3. Other Suggested Name Guide Amendments

Commenters also suggested several miscellaneous revisions to the Name Guide. First, HSUS recommended adding a large number of specific common names so that each fur-bearing species has its own common name. For example, HSUS suggested replacing ''chipmunk'' with specific names for 25 chipmunk species, such as ''California Chipmunk,'' ''Cliff Chipmunk,'' etc.[70] HSUS stated that the Commission should not use one name for multiple species because ''[d]ifferent animals experience different sorts of welfare problems in fur production'' and different conservation statuses.[71] In addition, FICA and HSUS suggested changing several Name Guide entries to reflect updated taxonomy and to correct errors.[72]

Second, FICA recommended removing names of animals prohibited for sale as furs, such as domestic dog and cat, because including them is ''confusing given their illegal status.'' [73] HSUS disagreed, pointing out that:

> One of the FTC's purposes here is enforcement * * * [Having the names listed] adds additional layers of enforcement. * * * And to have that additional ability to enforce is important. Quite honestly, I don't think a retailer should escape liability if the retailer is failing to label dog fur as dog when * * * domestic dog is not allowed to be sold in the United States.[74]

Commenter AAW agreed, noting that the Fur Rules help enforce the cat and dog fur prohibition ''by ensuring that all furs are properly identified and labeled.'' [75]

Finally, Deckers Outdoor Corporation (''Deckers'') suggested the Name Guide allow the term ''Sheepskin'' in lieu of ''Sheep'' and ''Lambskin'' in lieu of ''Lamb.'' Deckers asserted that the required names are confusing to consumers.[76] HSUS disagreed, however, noting the existence of serious problems in sheep-fur labeling prior to issuance of the Fur Rules and that sheepskin is not ''skin'' but rather fur.[77]

B. Requests for Increased Labeling Flexibility

Six commenters [78] criticized the Fur Rules' labeling provisions as overly prescriptive. Specifically, they argued that many labeling requirements provide no consumer benefits while imposing significant burdens. They further noted that TFLA's elimination of the *de minimis* exemption required labeling more fur products. As discussed below, these commenters recommended more limited disclosures and greater labeling flexibility.

1. Required Information

All commenters who addressed the subject urged the Commission to reduce the amount of required information. For example, Deckers stated that ''some of the required information * * * is not of interest to the consumer, and * * * may * * * obscure the information in which the consumer is really interested * * *''.[79] Deckers, therefore, urged the Commission to no longer require disclosure of whether fur is natural, pointed, dyed, bleached, or artificially colored, at least for sheepskins, because an altered sheepskin ''still looks like sheepskin.'' [80] Deckers also urged no longer requiring disclosure of ''sides'' or ''flanks.'' It asserted that ''the term 'side' is used in the industry to describe one half of an animal hide and is not a term used to describe a part of the animal'' and that ''a flank is considered the same as the belly, and thus its inclusion is redundant.'' [81]

Other commenters requested limited disclosures for items containing small amounts of fur. FICA requested that labels for products with only a ''small strip'' of fur disclose only ''fur'' and no other information because consumers would not want that additional information.[82] FICA did not, however, provide any evidence substantiating that assertion. FDRA similarly urged the Commission to revoke the requirement to disclose that the fur consists of paws and tails where the fur is limited to trim, which it suggested be defined as fifteen percent of the item or less.[83]

2. Label Specifications

Commenters also urged greater flexibility regarding the labels' size, the sequence and location of disclosures, and the requirements for attaching a single label to paired items like shoes. Several commenters criticized the requirement in § 301.27 that all labels measure 1.75 inches by 2.75 inches.[84] For example, Deckers noted that, ''[w]hile the label size currently mandated by the Rules may be appropriate for larger apparel items * * * they are impossible to affix to smaller items * * *. The Rules should either exempt smaller products from the size requirements, or simply mandate that the information be no smaller than

[65] Tr. at 82, ln. 20–24.

[66] Ministry for Foreign Affairs at 1; Ministry of Agriculture and Forestry at 1.

[67] Tr. at 87, ln. 4–7; Tr. at 95, ln. 2–3 (Finnish Fur representative conceding that ''from a scientific point of view, I don't know if there is a difference between Finnish and Asiatic'').

[68] Tr. at 90, ln. 19–20.

[69] Tr. at 91, ln. 20–24.

[70] HSUS at 56 (attachment).

[71] Tr. at 19, ln. 17–18; Tr. at 20, ln. 4–5.

[72] FICA at 7. For example, both commenters reported that the Name Guide provides the wrong scientific name for ocelot. FICA at 8; HSUS at 61.

[73] FICA at 8.

[74] Tr. at 117, ln. 12–21; Tr. at 118, ln. 2–8.

[75] AAW at 1. ''AAW'' did not otherwise identify him, her, or itself.

[76] Deckers 2–3.

[77] Tr. at 123, ln. 13–19; Tr. at 124, ln. 5–7.

[78] Deckers, FICA, NRF, the Footwear Distributors and Retailers of America (''FDRA''), McNeese Customs and Commerce (''McNeese''), and Stephen Zelman & Associates (''Zelman'').

[79] Deckers at 2.

[80] Deckers at 3.

[81] Deckers at 3.

[82] FICA at 10.

[83] FDRA comment (single page).

[84] 16 CFR 301.27.

information provided on other labels found on the product * * *''.[85] NRF agreed, explaining

These requirements are simply not appropriate for the range of smaller garments that are now subject to this law, and would increase costs to retailers and consumers. Specific requirements on label dimensions also limit a retailer's ability to make a label with a dimension that is suitable to the product, for example narrow belts and gloves * * *. Moreover, consumers are not likely to want large, permanent labels on these small products.[86]

To address the issue, NRF suggested requiring ''that the label be 'conspicuous, legible, and durable,' '' a standard that it described as ''well understood in the industry'' and consistent with labeling requirements in the Textile Act, Wool Act, and Care Labeling Rule.[87]

Commenters also criticized the Rules' strict requirements for the order and placement of information on the labels. Regarding § 301.30's requirement that disclosures must be in a specified order, Deckers argued:

The specific order should be determined by the manufacturer, and not by regulation. As all required information must be the same size type, it is unclear why the Rules need to mandate the order of information supplied. Many footwear manufactures [sic], including Deckers Outdoor Corporation, need the flexibility to properly design a label so that it fits a wide range of products.[88]

Commenters also favored lifting § 301.29's prohibition against disclosing on the front of a label any information other than FTC disclosures. Deckers noted that this prohibition may result in requiring multiple labels to comply with the Rules and state regulations.[89] NRF also requested more flexibility to decide what information appears on the fronts and backs of labels.[90]

Finally, several commenters recommended amending § 301.31, which requires that items sold in pairs, like shoes, must be ''firmly attached to each other'' until reaching the ultimate consumer or have a separate label attached to each item.[91] McNeese asserted that requiring firm attachment was ''inconsistent with the manner in which footwear is sold'': [92]

Footwear is sold to consumers in boxes, and only properly labeled samples are available for review prior to the consumer trying on a particular shoe/boot * * * Both the left and right shoe/boot is presented to the consumer at the point of sale.

McNeese submits that labeling only one shoe/boot with the required [Fur Act] information satisfies the purpose of the statute, which is to inform the consumer of the type of fur, method of treatment (if any), and country of harvest.[93]

Zelman likewise objected to the attachment requirement, asserting that it would ''hurt the trade.'' [94]

C. Proposal To Restrict Continuing Guaranties

As discussed above, entities generally are not liable under the Fur Act if they receive a document guaranteeing that all products manufactured or transferred by the guarantor are not misbranded or falsely advertised or invoiced.[95] One commenter, HSUS, expressed concern that these guaranty programs ''are not sufficient to ensure that consumers receive accurate information about the fur content of garments.'' [96] HSUS further asserted that ''[n]othing in the [Fur Act] prohibits the FTC from requiring that continuing guarantees [sic] specifically designate the fur products or furs guaranteed, as is required of separate guarantees [sic].'' [97] Therefore, HSUS recommended that the Commission require that ''all guarantees [sic] * * * specifically designate the type of fur contained in the fur products or furs guaranteed,'' which ''would ensure that retailers * * * know exactly where they need to go for the information they should rely on in generating new labels and advertisements.'' [98]

D. The Rules' Coverage

Two commenters recommended altering the scope of the Fur Rules' labeling requirements, which apply to ''wearing apparel.'' The Rules define ''wearing apparel'' as including ''[a]ny articles of clothing or covering for any part of the body.'' [99] FICA recommended amending the definition to exclude small items, such as shoes.[100] FICA argued that these items have an ''insignificant amount of fur'' and would be difficult to label because of their small size.[101] FICA further noted that excluding small objects would align the scope of the Fur Rules with the Textile Act,[102] which exempts handbags and shoes.[103] In contrast to FICA's request for narrower requirements, Deckers favored expanding the Rules' coverage to include faux-fur products. According to Deckers, doing so would ''ensure that the consumer knows whether [he or she] is purchasing real or fake fur prior to making the purchase.'' [104]

IV. Analysis

After considering the record, the Commission proposes the following amendments: Updating the Name Guide while retaining ''Asiatic Raccoon'' as *nyctereutes procyonoides'* only name; providing more labeling flexibility; conforming the Rules with TFLA; and eliminating unnecessary provisions. The Commission does not propose changing the Rules' scope or continuing guaranty provisions.

A. Name Guide

This section first discusses why the Commission is retaining the name ''Asiatic Racoon.'' It then explains why it will not add ''Finnraccoon'' to the Name Guide. Finally, it discusses proposed amendments to update the Name Guide.

1. The Commission Does Not Propose Replacing ''Asiatic Raccoon''

The Fur Act requires the Name Guide to prescribe ''the true English names for the animals in question, or in the absence of a true English name for an animal, the name by which such animal

[85] Deckers at 6.

[86] NRF at 2.

[87] NRF at 2. *See also* FICA at 10; FDRA comment; Zelman at 2–3. NRF and FDRA criticized the Rules for requiring sewn-in labels. NRF at 3; FDRA comment. In fact, as discussed below, the Rules do not require sewn-in labels. Nevertheless, the Commission proposes an amendment making this clear.

[88] Deckers at 6.

[89] Deckers at 6–7. *See also* FICA at 9; McNeese at 3 (urging the Commission to allow labels that will accommodate disclosures required by foreign governments).

[90] NRF at 2–3. FDRA recommended eliminating a requirement to disclose fur origin for items that already disclose the garment's country of origin on a different label. FDRA comment. Zelman likewise urged not requiring any information on a fur label that is otherwise provided on another conspicuous label. Zelman at 3.

[91] 16 CFR 301.31(b).

[92] McNeese at 3.

[93] McNeese at 4.

[94] Zelman at 4.

[95] 15 U.S.C. 69h(a).

[96] HSUS at 10.

[97] HSUS at 10.

[98] HSUS at 11.

[99] 16 CFR 301.1(b)(1).

[100] FICA at 9.

[101] FICA at 9.

[102] 15 U.S.C. 70 *et seq.*

[103] 15 U.S.C. 70j. FICA also cited the Textile Act's legislative history regarding its coverage. FICA at 9, n. 18.

[104] Deckers at 2. In addition to proposing amendments, some commenters submitted more general views. FICA requested a process for obtaining ''interpretations from the Commission'' regarding technical requirements and complying with overlapping state and federal regulations. FICA at 10. The Commission's rules already provide such a mechanism. *See* 16 CFR 1.1 through 1.4 (procedure for requesting advisory opinions). Deckers asked for clarification that the Rules do not apply to advertisements not linked to point of sale. Deckers at 7–8. Section 301.38(c) makes clear that the requirements do not apply to advertisements ''not intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of any specific fur products or furs.'' 16 CFR 301.38(c). Finally, several individual commenters voiced support for requiring fur disclosures generally. *See, e.g.,* Karol comment at 1.

can be properly identified in the United States.'' [105] In 1961, the Commission applied that standard and determined that ''Asiatic Raccoon'' was the appropriate name for *nyctereutes procyonoides.*[106] Here, the record confirms that ''Asiatic Raccoon'' continues to be appropriate for two reasons. First, it describes the animal in a way that consumers in the United States can properly identify it. Ms. Lynn from FWS explained that the word ''Asiatic'' ''gives you an idea where the animal originated naturally.'' [107] Critically, Ms. Lynn did not agree with HSUS that ''Asiatic'' is misleading. In fact, she described the term as ''neutral.'' [108] In addition, as FICA observed, *nyctereutes procyonoides* has a raccoon-like fur pattern around its eyes. Indeed, Dr. Nolfo-Clements' letter supporting HSUS's comment acknowledged that the animal ''superficially resembles the racoons * * * that are native to the Americas.'' [109]

Second, the record indicates that consumers likely have become familiar with the name ''Asiatic Raccoon'' through fur labels. Based on its own investigations, HSUS noted that ''Asiatic Raccoon'' appears on fur labels ''fairly often.'' [110] Consistent with that statement, FICA and Finnish Fur explained that products using *nyctereutes procyonoides* as trim usually did not meet the now-defunct *de minimis* exemption, and therefore would have been labeled as ''Asiatic Raccoon.'' [111] Because ''Asiatic Raccoon'' is the name that consumers have used to identify the animal since 1961, consumers likely understand this term. In addition, if the term confused or otherwise harmed consumers, evidence of such confusion should exist. The record, however, does not contain any such evidence.

Furthermore, HSUS's arguments against ''Asiatic Raccoon'' are not persuasive. The Commission does not agree that it should defer to ITIS in this instance. FWS and USGS representatives, including an ITIS-cited expert, agreed that ITIS is not intended as a source for common names.[112] Furthermore, scientific consensus is not the best measure of an animal's true English name or the name by which American consumers identify it. Scientists develop taxonomic schemes like ITIS for many purposes, but assisting with purchasing decisions is not one of them. The Commission likewise does not find dispositive the use of ''Racoon Dog'' in literature predating the Name Guide.[113] Rather, the more relevant consideration is consumers' current familiarity with the term, based on more than 50 years of use. Finally, the Commission does not find ''Asiatic Raccoon'' misleading, even though some of those animals are raised in Europe. As discussed above, ''Asiatic'' refers, accurately, to the animal's native habitat. For consumers interested in where the fur originated, the labels separately provide that information.

Moreover, other names suggested by commenters have significant problems. ''Raccoon Dog'' could significantly mislead consumers about the animal's relationship to domestic dog. Specifically, industry commenters reported that two major department stores had stopped carrying items with such fur because consumers confused it with domestic dog.[114] The suggested names ''Tanuki'' and ''Magnut'' are foreign words and are not names by which the animal can be identified in the United States as required by the Act. Although Dr. Gardner of the Smithsonian gave some support to ''Tanuki,'' HSUS reported that the term is not prevalent in the United States. Furthermore, there is no evidence establishing that consumers understand the term. No comments supported changing the name to ''Magnut.''

2. The Commission Does Not Propose Allowing ''Finnraccoon''

The current Name Guide specifies ''Asiatic Raccoon'' as the sole name for *nyctereutes procyonoides.* Two commenters suggested the Name Guide list ''Finnraccoon'' as an alternative to ''Asiatic Raccoon'' for Finnish-farmed *nyctereutes procyonoides.* They argued that ''Finnraccoon'' would help consumers differentiate between *nyctereutes procyonoides* raised according to stricter European regulatory standards and those raised in Asia. As discussed above, the Fur Act requires Name Guide names to be the animal's ''true English name'' or a name by which the animal can be identified in the United States. The record indicates that ''Finnraccoon'' satisfies neither criteria. Thus, the Commission declines to propose it as an alternative name.

Despite some use of the term in marketing, there is no evidence that consumers understand that ''Finnraccoon'' is *nyctereutes procyonoides* and that it is the same animal currently labeled as ''Asiatic Raccoon.'' In addition, the commenters' basis for the alternate name depends on purportedly superior European fur-farming practices, which can change and which the Commission cannot verify. In any event, the country of origin disclosure will alert consumers that the animal was raised in Europe. Accordingly, the Commission does not propose adding ''Finnraccoon'' to the Name Guide.[115]

3. Proposed Name Guide Updates

Commenters made several suggestions for revising other Name Guide entries. HSUS and FICA pointed to several entries that appeared to reference the wrong species or contained typographical errors. In addition, HSUS suggested that the Name Guide provide a different common name for each species of fur-bearing animal. Finally, FICA requested removal of prohibited species, and Deckers requested ''sheepskin'' as a new name.

In light of the record, the Commission proposes updating the Name Guide to correct typographical errors and species misidentification. The Commission has not updated the Name Guide since 1967, and the taxonomic classifications for some animals have changed. Accordingly, the Commission proposes several corrections, such as changing the scientific name for ''Ocelot'' from *felis pardalis* to *leopardus pardalis.* The following chart lists the amended Name

[105] 15 U.S.C. 69e(a).

[106] 26 FR 10446 (Nov. 4, 1961).

[107] Tr. at 38, ln. 22–23.

[108] Tr. at 39, ln. 6, 11–12.

[109] HSUS at 14 (attached letter of Dr. Lauren Nolfo-Clements).

[110] Tr. at 79, ln. 2.

[111] Tr. at 79, ln. 14–16.

[112] HSUS suggested that ITIS could serve as a consumer resource for information about the animal, but comments at the hearing indicated that consumers would not be familiar with ITIS. To the extent consumers would be inclined to research the term ''Asiatic Raccoon'' online, a google.com search performed on June 20, 2012, for example, shows that the first 17 results related to *nyctereutes procyonoides.*

[113] HSUS's repeated references to ''Asiatic Raccoon'' as a ''trade name'' appear to be based on speculation. Tr. at 63, ln. 13–16 (HSUS representative explaining the basis for the ''trade name'' assertion as ''[t]he fact that ['Asiatic Raccoon'] isn't listed anywhere reputable or scientific as being an accepted common name, [means that] I have to assume that some interest pushed it onto the list at some point'').

[114] As discussed in section III.A.1.b, *supra,* the record indicates that *nyctereutes procyonoides* differs significantly from domestic dog.

[115] As an alternative to amending the Name Guide, FICA proposed an additional regulation allowing the name ''Finnraccoon,'' as the Rules allow for certain types of lamb fur. FICA at 5. However, those regulations require the fur to have certain characteristics affecting its appearance as wearing apparel. *See, e.g.,* 16 CFR 301.9(a) (allowing term ''Mouton Lamb'' for fur that has been ''straightened, chemically treated, and thermally set to produce a moisture repellant finish''). There is no evidence that ''Finnraccoon'' fur significantly differs in characteristics from other Asiatic Raccoon fur.

Guide entries, with the new text in bold. Notably, the amended entries correct a misspelling of *nyctereutes procyonoides*.[116]

Name	Order	Family	Genus-species
Alpaca	Artiodactyla	Camelidae	Lama pacos.
Antelope	Ungulata	Bovidae	Hippotragus niger and Antilope cervicapra.
Bear, Polar	......do	......do	Ursus maritimus.
Calf	Artiodactyla	Bovidae	Bos taurus.
Cat, Leopard	......do	......do	Prionailurus bengalensis.
Cat, Lynx	......do	......do	Lynx rufus.
Cat, Margay	......do	......do	Leopardus wiedii.
Chipmunk	......do	Sciuridae	Tamias sp.
Civet	Carnivora	Viverridae	Viverra sp., Viverricula sp., Paradoxurus sp., and Paguma sp.
Desman	Soricomorpha	Talpidae	Desmana moschata and Galemys pyrenaicus.
Fox	......do	Canidae	Vulpes vulpes, Vulpes macrotis.
Fox, Blue	......do	......do	Vulpes lagopus.
Fox, White	Carnivora	Canidae	Vulpes lagopus.
Goat	Artiodactyla	Bovidae	Capra hircus.
Jaguar	......do	Felidae	Panthera onca.
Jaguarundi	......do	......do	Puma yagouaroundi.
Kangaroo	Diprotodontia	Macropodidae	Marcopus sp.
Kangaroo-rat	......do	Potoroidae	Bettongia sp.
Kid	Artiodactyla	Bovidae	Capra hircus.
Koala	Diprotodontia	Phascolarctidae	Phascolarctos cinereus.
Lamb	Artiodactyla	Bovidae	Ovis aries.
Leopard	Carnivora	Felidae	Panthera pardus.
Llama	Artiodactyla	Camelidae	Lama glama.
Marmot	Rodentia	Sciuridae	Marmota bobak.
Mole	Soricomorpha	Talpidae	Talpa sp.
Monkey	Primates	Cercopithecidae	Colobus polykomos.
Nutria	......do	Myocastoridae ..	Myocastor coypus.
Ocelot	Carnivora	Felidae	Leopardus pardalis
Opossum	Didelphimorphia	Didelphidae	Didelphis sp.
Opossum, Australian	Diprotodontia	Phalangeridae	Trichosurus vulpecula.
Opossum, Ringtail	......do	Pseudocheiridae	Pseudocheirus sp.
Opossum, South American	Didelphimorphia	Didelphidae	Lutreolina crassicaudata.
Otter	Carnivora	Mustelidae	Lontra canadensis, Pteronura brasiliensis, and Lutra lutra.
Panda	Carnivora	Ailuridae	Ailurus fulgens.
Pony	Perissodactyla	Equidae	Equus caballus.
Rabbit	Lagomorpha	Leporidae	Oryctolagus cuniculus.
Raccoon, Asiatic	......do	Canidae	Nyctereutes procyonoides.
Raccoon, Mexican	......do	Procyonidae	Nasua sp.
Reindeer	Artiodactyla	Cervidae	Rangifer tarandus.
Seal, Fur	Carnivora	Otariidae	Callorhinus ursinus.
Sheep	Artiodactyla	Bovidae	Ovis aries.
Skunk	Carnivora	Mephitidae	Mephitis mephitis, Mephitis macroura, Conepatus semistriatus and Conepatus sp.
Vicuna	Artiodactyla	Camelidae	Vicugna vicugna.
Viscacha	Rodentia	Chinchillidae	Lagidium sp.
Wallaby	Diprotodontia	Macropodidae	Wallabia sp., Petrogale sp., and Thylogale sp.
Weasel, Manchurian	Carnivora	Mustelidae	Mustela altaica and Mustela nivalis rixosa.
Wolf	......do	Canidae	Canis lupus.
Wolverine	......do	Mustelidae	Gulo gulo.
Wombat	Diprotodontia	Vombatidae	Vombatus sp.

The Commission does not propose separate names for each species because doing so would add significant burdens without providing any apparent consumer benefits. Requiring different names for each fur-bearing species, such as the 25 species of chipmunk suggested by HSUS, would require entities to create many additional labels for products. Against this burden, HSUS did not provide any evidence of ongoing consumer harm from the current practice of grouping similar animals under one common name. Although HSUS stated at the hearing that consumers might want to know about particular species because of varying levels of endangerment or treatment, it did not identify evidence that a significant number of consumers valued that information. Moreover, the record does not demonstrate that such information would influence consumers' purchasing decisions.

The Commission also declines to propose removing ''dog,'' ''cat,'' or other names of prohibited species because, as HSUS and AAW explained, leaving these names provides another means of enforcing the Rules as to those furs.

[116] Because commenters did not provide any evidence substantiating what they described as errors, the Commission proposes corrections only for errors it has independently verified with the assistance of FWS. In addition, the Commission declines to change the genus-species listing for ''dog'' from ''canis familiaris'' to ''canis lupus familiaris'' because doing so would conflict with the Dog and Cat Protection Act's definition of ''dog fur.'' *See* 19 U.S.C. 1308(a)(5) (defining ''dog fur'' as ''the pelt or skin of any animal of the species *Canis familiaris*'').

Specifically, retaining the names of prohibited species in the Name Guide helps to ensure that mislabeling and falsely advertising dog, cat, and other prohibited species remain Fur Rules violations.

Finally, the Commission does not propose amendments to allow ''sheepskin'' or ''lambskin,'' as requested by Deckers. The Fur Act limits Name Guide names to the common name of ''animals,'' not products,[117] and ''sheepskin'' and ''lambskin'' refer to products.

B. Labeling Amendments

Several commenters objected to the Rules' labeling requirements as unnecessarily complex and inconsistent with the Commission's textile labeling requirements. These commenters argued that such specifications impose significant costs on consumers and businesses without corresponding benefits to consumers. They also posited that the elimination of the *de minimis* exemption has substantially increased these costs. Thus, commenters made several suggestions for reducing the required information and labeling specifications. As explained below, the Commission agrees with most of these suggestions and, therefore, proposes several amendments to: (1) Reduce the amount of required information; and (2) provide more labeling flexibility.

1. Required Information

As discussed above, fur labels must disclose pointed, dyed, bleached, or artificially colored fur and fur consisting of, among other things, ''sides'' or ''flanks.'' [118] In light of the uncontroverted evidence that the ''sides'' and ''flanks'' disclosures either provide information already disclosed or do not provide consumers with meaningful information, the Commission proposes eliminating § 301.20(a)'s disclosure requirement.

The Commission declines, however, to further limit the required disclosures. The Commission cannot amend the Rules to eliminate disclosures of bleached, dyed, or artificially colored fur because the Fur Act requires them.[119] In addition, Deckers has not provided evidence establishing that disclosures of pointed fur fail to benefit consumers. Moreover, FICA and FDRA likewise failed to present any evidence showing consumers' lack of interest in the disclosures for items with small amounts of fur. In any event, the proposed amendments detailed below will provide additional flexibility. Furthermore, fur-trim product labels only need to disclose ''paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces, or waste fur'' if fur from those parts makes up at least ten percent of the product.[120]

2. Label Specifications

Commenters requested several changes to the Rules' labeling specifications, including elimination of requirements that the labels be a certain size; that disclosures be of a certain font size, in a set order, and limited to FTC-required information on the front; and that items sold in pairs must be physically attached to each other to have only one label. The Commission agrees with these comments. In its experience enforcing the Textile Rules, the Commission has found it effective to require that disclosures be ''clearly legible, conspicuous, and readily accessible to the prospective purchaser.''[121] Accordingly, the Commission proposes amendments to provide more flexibility regarding label size, text, and use for items sold in pairs or groups.

a. Deleting Label Size Requirements

The Rules currently require that labels measure 1.75 inches by 2.75 inches.[122] The Commission agrees that this size is impractical for smaller items, a consideration that carries greater significance now that TFLA has eliminated the *de minimis* exemptions. Furthermore, the Commission's textile labeling enforcement experience demonstrates that specifying exact label dimensions is unnecessary to inform consumers about wearing apparel, so long as the required disclosures are conspicuous. Therefore, the Commission proposes eliminating the size requirement. Consistent with the Textile Rules,[123] the proposed new § 301.27 would require labels to be ''conspicuous and of such durability as to remain attached to the product throughout any distribution, sale or resale, and until sold and delivered to the ultimate consumer.''

b. Deleting Label Text Requirements

Section 301.29 requires label text to be 12-point or ''pica'' font size. It also prohibits non-FTC information on the front of the label, while § 301.30 prescribes a specific order for disclosures. The Commission agrees that these requirements create substantial burdens, such as forcing marketers to use multiple labels to comply with FTC, state, and international fur regulations. Furthermore, the Commission finds that, based on its experience enforcing the Textile Rules, these requirements are unnecessary to disclose relevant information effectively. Accordingly, the Commission proposes:

- Replacing § 301.29(a)'s 12-point or ''pica'' type font-size requirement with a requirement to disclose information ''in such a manner as to be clearly legible, conspicuous, and readily accessible to the prospective purchaser'';
- Removing § 301.29(a)'s limits on information appearing on the front of the label, thereby allowing entities to include true and non-deceptive information on either side; and
- Deleting § 301.30, which specifies a particular order for FTC disclosures.

These proposed amendments should give marketers needed flexibility to convey effective disclosures without imposing unnecessary burdens.[124]

c. Revising Requirements for Labels for Items Sold in Pairs or Groups

Section 301.31 requires that items ''manufactured for use in pairs or groups'' be ''firmly attached to each other when marketed and delivered in the channels of trade and to the purchaser.'' [125] Commenters explained that this requirement interferes with marketing smaller items like shoes and gloves, which are typically sold in pairs. Furthermore, there is no apparent benefit, and likely some inconvenience, to consumers from requiring actual attachment of items through the point of sale. To address this issue, the Commission proposes eliminating the requirement and incorporating the Textile Rules' provision allowing a single label for items ''marketed or handled in pairs or ensembles,'' regardless of whether they are attached at the point-of-sale.[126] Thus, if the items are sold as pairs or ensembles and each

[117] 15 U.S.C. 69e(a).

[118] 16 CFR 301.19; 301.20.

[119] 15 U.S.C. 69b(2)(C).

[120] 16 CFR 301.20. FDRA also requested that the Commission not require a fur origin disclosure for shoes because the disclosure is, in most instances, redundant. FDRA comment. However, FDRA did not explain why such a disclosure is redundant, particularly considering that the Textile Act, which requires country of origin disclosure, does not apply to shoes. 15 U.S.C. 70j(a)(10).

[121] 16 CFR 303.16(b).

[122] 16 CFR 301.27. Commenters NRF and FDRA asserted that § 301.27 requires a sewn-in label. The Commission does not agree with this reading because, unlike a textile care label, that section requires only that the label remain affixed until it reaches the consumer. Nevertheless, the Commission's proposed revision to § 301.27 makes clear that labels need not be sewn-in.

[123] 16 CFR 303.15(a).

[124] Allowing different information to appear on fur labels should prevent the redundant disclosures noted by Deckers, FDRA, and Zelman.

[125] 16 CFR 301.31(b).

[126] 16 CFR 303.29(b).

item contains the same fur with the same country of origin, retailers can use a single label for all items.

C. Amendments Required by TFLA

TFLA's amendments require conforming changes to the Fur Rules. Accordingly, the Commission proposes replacing the *de minimis* exemption (§ 301.39), as well as all related provisions,[127] with TFLA's hunter/trapper exemption.

D. Proposed Amendments Eliminating Unnecessary Provisions

The Commission also proposes eliminating three sections to simplify the Rules. First, it proposes eliminating § 301.19(l)(1) through (7). These subsections provide a suggested, but not required, method for determining whether a fur has been treated with iron or copper and, therefore, requires a ''color altered'' or ''color added'' disclosure. The suggestion appears unnecessary because Section 301.19 requires that an entity coloring furs must disclose the treatment on an invoice.[128]

Second, the Commission proposes deleting § 301.28, which provides further guidance on attaching labels. Because the proposed new § 301.27 clarifies the method for attaching labels, § 301.28 is now redundant.

Third, § 301.40 requires entities to assign an ''item number or mark'' to furs and to disclose it on invoices and labels.[129] In the Commission's experience, it does not need this information to enforce the Fur Act and Rules. Furthermore, it does not provide any meaningful information to consumers. Therefore, the Commission proposes eliminating this provision and the internal references to it.

E. Retaining the Rules' Continuing Guaranty Provisions and Product Coverage

HSUS urged the Commission to require guarantors to designate specific fur products guaranteed, ''as is required of separate guarantees [sic].'' [130] HSUS's proposal, however, conflicts with the Fur Act. Specifically, the Act provides that continuing guaranties will apply ''to *any fur product* or fur handled by a guarantor.'' [131] The Act provides no limitation on the fur products covered by continuing guaranties. Thus, the Act requires the Commission's current provisions allowing a continuing guaranty to cover all fur products handled by the guarantor.

In addition, Deckers asked the Commission to expand the Rules' scope to cover fake fur products, while FICA requested narrowing it to exclude items like shoes and handbags. The Commission declines to do either. The Commission cannot expand the coverage to include faux fur because the Fur Act applies only to ''furs'' or ''fur products,'' which are defined as ''animal skin * * * with hair, fleece, or fur fibers attached thereto'' and ''wearing apparel'' made of or containing ''fur or used fur,'' respectively.[132] Faux fur is not such an item. Likewise, FICA's complaints do not justify reducing the Rules' coverage. As an initial matter, handbags are already excluded because the Fur Act's labeling provisions apply to wearing apparel, which the Rules define as ''clothing or covering for any part of the body.'' [133] In addition, the proposed amendments give ample flexibility to place smaller, more practical labels on small items. Thus, there is no need to reduce the Rules' scope and deny consumers useful information.[134]

V. Request for Comment

Interested parties are invited to submit comments online or on paper. For the Commission to consider your comment, we must receive it on or before November 16, 2012. Write ''Fur Rules Review, Matter No. P074201'' 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 personal information, such as anyone'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. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually-identifiable health information, such as medical records or other individually-identifiable health information. In addition, do not include any ''trade secret or any commercial or financial information which is * * * privileged or confidential'' as discussed 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 want 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).[135] 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. Accordingly, 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/furrulesreviewnprm* by following the instructions on the Web-based form. If this Notice appears at *http://www.regulations.gov,* you may also file a comment through that Web site.

If you file your comment on paper, write ''Fur Rules Review, Matter No. P074201'' 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 O), 600 Pennsylvania Avenue NW., Washington,

[127] Because TFLA eliminated the *de minimis* exemption, it also eliminated the provision that excepted dog and cat fur from that exemption (*i.e.,* a savings clause to require labeling of all dog and cat fur). Accordingly, the Commission proposes deleting the Rules' definitions of ''cat fur,'' ''dog fur,'' and ''dog or cat fur products,'' as well as the Rules' cat and dog fur exceptions in § 301.39(a), because those terms are used only in the *de minimis* exemption provision. As discussed above, the Name Guide will continue to list ''dog'' and ''cat'' as required names. Similarly, the Commission proposes several non-substantive amendments to ensure that references to other provisions and the Act are accurate and to correct typographical errors.

[128] 16 CFR 301.19(h).

[129] 16 CFR 301.40(a).

[130] HSUS at 10.

[131] 15 U.S.C. 69h(a)(2) (emphasis added).

[132] 15 U.S.C. 69(b) and (d).

[133] 16 CFR 301.1(b).

[134] FICA noted that textile labeling requirements do not apply to shoes and, therefore, the Textile Rules and the Fur Rules treat those items inconsistently. FICA at 9. However, the Textile Act specifically exempts shoes. 15 U.S.C. 70j(a)(10). The Fur Act, by contrast, does not contain a shoe exemption.

[135] 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).

DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://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 November 16, 2012. 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.shtm.*

VI. Paperwork Reduction Act

The proposed amendments do not constitute a ''collection of information'' under the Paperwork Reduction Act (44 U.S.C. 3501–3521). The labeling amendments provide greater flexibility and, as such, potentially reduce disclosure burdens. The changes to the Name Guide simply alter the required, but Government-supplied information on some labels.[136] Deleting the *de minimis* exemption will increase burden for some entities to the extent they will have to make disclosures regarding previously exempt products, but this has already been accounted for in the Commission's most recently approved clearance request and burden estimates for the Fur Rule.[137]

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act[138] requires an agency to provide an Initial Regulatory Flexibility Analysis with a proposed rule unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[139] As part of the Commission's recent PRA clearance request, the Commission estimated that 1,230 retailers, 90 manufacturers, and 1,200 importers are subject to the Rules.[140] The Commission further estimated that these entities incur a total recordkeeping burden of 51,870 hours and a total disclosure burden of 116,228 hours.[141] The entities subject to these burdens will be classified as small businesses if they satisfy the Small Business Administration's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (''NAICS'').[142] The relevant NAICS size standards, which are either minimum annual receipts or number of employees, are as follows:

NAICS industry title	Small business size standard
Fur-Bearing Animal and Rabbit Production	$750,000.
Fur and Leather Apparel Manufacturing	500 employees.
Men's Clothing Stores	$10,000,000.
Women's Clothing Stores	$25,000,000.
Department Stores	$30,000,000.

The Commission is unable to determine how many of the above-listed entities qualify as small businesses. Neither the record in this proceeding nor in the recent PRA clearance proceeding contains information regarding the size of entities subject to the Fur Rules. Moreover, the relevant NAICS categories include many entities that are not in the fur industry. Therefore, estimates of the percentage of small businesses in those categories would not necessarily reflect the percentage of small businesses subject to the Fur Rules in those categories. Accordingly, the Commission invites comments regarding the number of entities in each NAICS category that are subject to the Fur Rules, and revenue and employee data for those entities.

Even absent this data, however, the Commission does not expect that the proposed amendments will have a significant economic impact on small entities. As discussed above in Section VI, the amendments do not impose any new costs. The greater flexibility provided by the labeling amendments should reduce disclosure burdens, and the changes to the Name Guide simply alter the required information on some labels. Furthermore, businesses should not have to remove labels from existing fur products, which are mostly seasonal items, because they can continue to sell those products with old labels until the amendments' effective date.

This document serves as notice to the Small Business Administration of the agency's certification of no effect.

VIII. Communications by Outside Parties to the Commissioners or 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.[143]

List of Subjects in 16 CFR Part 301

Furs, Labeling, Trade practices.

For the reasons discussed in the preamble, the Federal Trade Commission is proposing to amend Title 16, Chapter I, Subchapter C, of the Code of Federal Regulations, part 301, as follows:

PART 301 [AMENDED]

1. The authority citation for part 301 continues to read:

Authority: 15 U.S.C. 69 *et seq.*

2. Revise § 301.0 to read as follows:

§ 301.0 Fur products name guide.

Name	Order	Family	Genus-species
Alpaca	Artiodactyla	Camelidae	Lama pacos.
Antelope	Ungulata	Bovidae	Hippotragus niger and Antilope cervicapra.
Badger	Carnivora	Mustelidae	Taxida sp. and Meles sp.
Bassarisk	......do	Procyonidae	Bassariscus astutus.

[136] According to OMB, ''[t]he public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public is not included'' within in the definition of a PRA ''collection of information.'' 5 CFR 1320.3(c)(2).

[137] OMB Control No. 3084–0099 (clearance granted April 3, 2012, through April 30, 2015).

[138] 5 U.S.C. 601–612.

[139] *See* 5 U.S.C. 603–605.

[140] 77 FR 10744, 10745 (Feb. 23, 2012).

[141] *Id.*

[142] The standards are available at *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

[143] *See* 16 CFR 1.26(b)(5).

Name	Order	Family	Genus-species
Bear	......do	Ursidae	Ursus sp.
Bear, Polar	......do	......do	Ursus maritimus.
Beaver	Rodentia	Castoridae	Castor canadensis.
Burunduk	......do	Sciuridae	Eutamias asiaticus.
Calf	Artiodactyla	Bovidae	Bos taurus.
Cat, Caracal	Carnivora	Felidae	Caracal caracal.
Cat, Domestic	......do	......do	Felis catus.
Cat, Leopard	......do	......do	Prionailurus bengalensis.
Cat, Lynx	......do	......do	Lynx rufus.
Cat, Manul	......do	......do	Felis manul.
Cat, Margay	......do	......do	Leopardus wiedii.
Cat, Spotted	......do	......do	Felis sp. (South America).
Cat, Wild	......do	......do	Felis catus and Felis lybica.
Cheetah	......do	......do	Acinonyx jubatus.
Chinchilla	Rodentia	Chinchillidae	Chinchilla chinchilla.
Chipmunk	......do	Sciuridae	Tamias sp.
Civet	Carnivora	Viverridae	Viverra sp., Viverricula sp., Paradoxurus sp., and Paguma sp.
Desman	Soricomorpha	Talpidae	Desmana moschata and Galemys pyrenaicus.
Dog	Carnivora	Canidae	Canis familiaris.
Ermine	......do	Mustelidae	Mustela erminea.
Fisher	......do	......do	Martes pennanti.
Fitch	......do	......do	Mustela putorius.
Fox	......do	Canidae	Vulpes vulpes, Vulpes macrotis.
Fox, Blue	......do	......do	Vulpes lagopus.
Fox, Grey	......do	......do	Urocyon cinereoargenteus and Urocyon littoralis.
Fox, Kit	......do	......do	Vulpes velox.
Fox, White	Carnivora	Canidae	Vulpes lagopus.
Genet	......do	Viverridae	Genetta genetta.
Goat	Artiodactyla	Bovidae	Capra hircus.
Guanaco, or its young, the Guanaquito.	......do	Camelidae	Lama guanicoe.
Hamster	Rodentia	Cricetidae	Cricetus cricetus.
Hare	......do	Leporidae	Lepus sp. and Lepus europaeus occidentalis.
Jackal	Carnivora	Canidae	Canis aureus and Canis adustus.
Jackal, Cape	......do	......do	Canis mesomelas.
Jaguar	......do	Felidae	Panthera onca.
Jaguarundi	......do	......do	Puma yagouaroundi.
Kangaroo	Diprotodontia	Macropodidae	Marcopus sp.
Kangaroo-rat	......do	Potoroidae	Bettongia sp.
Kid	Artiodactyla	Bovidae	Capra hircus.
Kinkajou	Carnivora	Procyonidae	Potos flavus.
Koala	Diprotodontia	Phascolarctidae ..	Phascolarctos cinereus.
Lamb	Artiodactyla	Bovidae	Ovis aries.
Leopard	Carnivora	Felidae	Panthera pardus.
Llama	Artiodactyla	Camelidae	Lama glama.
Marmot	Rodentia	Sciuridae	Marmota bobak.
Marten, American	Carnivora	Mustelidae	Martes americana and Martes caurina.
Marten, Baum	......do	......do	Martes martes.
Marten, Japanese	......do	......do	Martes melampus.
Marten, Stone	......do	......do	Martes foina.
Mink	......do	......do	Mustela vison and Mustela lutreola.
Mole	Soricomorpha	Talpidae	Talpa sp.
Monkey	Primates	Cercopithecidae	Colobus polykomos.
Muskrat	Rodentia	Muridae	Ondatra zibethicus.
Nutria	......do	Myocastoridae	Myocastor coypus.
Ocelot	Carnivora	Felidae	Leopardus pardalis.
Opossum	Didelphimorphia ..	Didelphidae	Didelphis sp.
Opossum, Australian	Diprotodontia	Phalangeridae	Trichosurus vulpecula.
Opossum, Ringtail	......do	Pseudocheiridae	Pseudocheirus sp.
Opossum, South American	Didelphimorphia ..	Didelphidae	Lutreolina crassicaudata.
Opossum, Water	......do	......do	Chironectes minimus.
Otter	Carnivora	Mustelidae	Lontra canadensis, Pteronura brasiliensis, and Lutra lutra.
Otter, Sea	......do	......do	Enhydra lutris.
Pahmi	......do	......do	Helictis moschata and Helictis personata.
Panda	Carnivora	Ailuridae	Ailurus fulgens.
Peschanik	Rodentia	Sciuridae	Citellus fulvus.
Pony	Perissodactyla	Equidae	Equus caballus.
Rabbit	Lagomorpha	Leporidae	Oryctolagus cuniculus.
Raccoon	Carnivora	Procyonidae	Procyon lotor and Procyon cancrivorus.
Raccoon, Asiatic	......do	Canidae	Nyctereutes procyonoides.
Raccoon, Mexican	......do	Procyonidae	Nasua sp.
Reindeer	Artiodactyla	Cervidae	Rangifer tarandus.

Name	Order	Family	Genus-species
Sable	Carnivora	Mustelidae	Martes zibellina.
Sable, American	......do	......do	Martes americana and Martes caurina.
Seal, Fur	Carnivora	Otariidae	Callorhinus ursinus.
Seal, Hair	......do	Phocidae	Phoca sp.
Seal, Roc	......do	Otariidae	Otaria flavescens.
Sheep	Artiodactyla	Bovidae	Ovis aries.
Skunk	Carnivora	Mephitidae	Mephitis mephitis, Mephitis macroura, Conepatus semistriatus and Conepatus sp.
Skunk, Spotted ..	......do	......do	Spilogale sp.
Squirrel	Rodentia	Sciuridae	Sciurus vulgaris.
Squirrel, Flying	......do	......do	Eupetaurus cinereus, Pteromys volans and Petaurista leucogenys.
Susilk	......do	......do	Citellus citellus, Citellus rufescens and Citellus suslica.
Vicuna	Artiodactyla	Camelidae	Vicugna vicugna.
Viscacha	Rodentia	Chinchillidae	Lagidium sp.
Wallaby	Diprotodontia	Macropodidae	Wallabia sp., Petrogale sp., and Thylogale sp.
Weasel	Carnivora	Mustelidae	Mustela frenata.
Weasel, Chinese	......do	......do	Mustela sibirica.
Weasel, Japanese	......do	......do	Mustela itatsi (also classified as Mustela sibirica itatsi).
Weasel, Manchurian	Carnivora	Mustelidae	Mustela altaica and Mustela nivalis rixosa.
Wolf	......do	Canidae	Canis lupus.
Wolverine	......do	Mustelidae	Gulo gulo.
Wombat	Diprotodontia	Vombatidae	Vombatus sp.
Woodchuck	Rodentia	Sciuridae	Marmota monax.

3. Amend § 301.1 by removing paragraphs (a)(6), (a)(7) and (a)(8) and by revising paragraph (a)(4) to read as follows:

§ 301.1 Terms defined.

(a) * * *

(4) The terms *Fur Products Name Guide* and *Name Guide* mean the register of names of hair, fleece, and fur-bearing animals issued and amended by the Commission pursuant to the provisions of section 7 of the act.

* * * * *

4. Amend § 301.2, by revising paragraphs (b) and (c) to read as follows:

§ 301.2 General requirements.

* * * * *

(b) Each and every fur, except those exempted under § 301.39 of this part, shall be invoiced in conformity with the requirements of the act and rules and regulations.

(c) Any advertising of fur products or furs, except those exempted under § 301.39 of this part, shall be in conformity with the requirements of the act and rules and regulations.

§ 301.19 [Amended]

5. Amend § 301.19 by removing paragraphs (l)(1) through (l)(7).

6. Revise § 301.20 paragraph (a) to read as follows:

§ 301.20 Fur products composed of pieces.

(a) Where fur products, or fur mats and plates, are composed in whole or in substantial part of paws, tails, bellies, gills, ears, throats, heads, scrap pieces, or waste fur, such fact shall be disclosed as a part of the required information in labeling, invoicing, and advertising. Where a fur product is made of the backs of skins, such fact may be set out in labels, invoices, and advertising.

* * * * *

7. Revise § 301.27 to read as follows:

§ 301.27 Labels and method of affixing.

At all times during the marketing of a fur product the required label shall be conspicuous and of such durability as to remain attached to the product throughout any distribution, sale, or resale, and until sold and delivered to the ultimate consumer.

§§ 301.28, 301.30, and 301.40 [Removed and reserved]

8. Remove and reserve §§ 301.28, 301.30, and 301.40.

9. Revise § 301.29 paragraph (a) to read as follows:

§ 301.29 Requirements in respect to disclosure on label.

(a) The required information shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the prospective purchaser, and all parts of the required information shall be set out in letters of equal size and conspicuousness. All of the required information with respect to the fur product shall be set out on one side of the label. The label may include any nonrequired information which is true and non-deceptive and which is not prohibited by the act and regulations, but in all cases the animal name used shall be that set out in the Name Guide.

* * * * *

10. Revise § 301.31 paragraph (b) to read as follows:

§ 301.31 Labeling of fur products consisting of two or more units.

* * * * *

(b) In the case of fur products that are marketed or handled in pairs or ensembles, only one label is required if all units in the pair or group are of the same fur and have the same country of origin. The information set out on the label must be applicable to each unit and supply the information required under the act and rules and regulations.

11. Amend § 301.35, by revising paragraph (b) to read as follows:

§ 301.35 Substitution of labels.

* * * * *

(b) The original label may be used as a substitute label provided the name or registered number of the person making the substitution is inserted thereon without interfering with or obscuring in any manner other required information. In connection with such substitution the name or registered number as well as any record numbers appearing on the original label may be removed.

* * * * *

12. Revise § 301.39 to read as follows:

§ 301.39 Exempted fur products.

The requirements of the act and regulations in this part do not apply to fur products that consist of fur obtained from an animal through trapping or hunting and that are sold in a face-to-face transaction at a place such as a residence, craft fair, or other location used on a temporary or short-term basis, by the person who trapped or hunted the animal, where the revenue from the sale of apparel or fur products is not the primary source of income of such person.

13. Amend § 301.41 by removing paragraph (a)(7) and by revising paragraph (a)(4) to read as follows:

§ 301.41 Maintenance of Records.

(a) * * *

(4) That the fur product is composed in whole or in substantial part of paws, tails, bellies, gills, ears, throats, heads, scrap pieces, or waste fur, when such is the fact;

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2012–22568 Filed 9–14–12; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 16, 801, 803, 806, 810, 814, 820, 821, 822, and 830

[Docket No. FDA–2011–N–0090]

RIN 0910–AG31

Agency Information Collection Activities; Proposed Collection; Unique Device Identification System; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending the comment period pertaining to information collection issues under the Paperwork Reduction Act of 1995 (the PRA) associated with the proposed rule, Unique Device Identification System, that appeared in the **Federal Register** of July 10, 2012 (77 FR 40736). The Agency is taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: Submit either electronic or written comments on the proposed collection of information by October 25, 2012.

ADDRESSES: Submit electronic comments on the collection of information to the Office of Regulatory Affairs, Office of Management and Budget (OMB) at FAX: 202–395–7285, or email comments to *OIRA_submissions@omb.eop.gov.* Please mark your comment to the FDA desk officer and reference this rule.

FOR FURTHER INFORMATION CONTACT: Jay Crowley, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–5995, email: *cdrhudi@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of July 10, 2012 (77 FR 40736), FDA published a notice of proposed rulemaking with a 60-day comment period concerning the proposed information collection. Comments on the proposed rulemaking will inform FDA's rulemaking to establish regulations for Unique Device Identification System.

The Agency has received requests for a 45-day extension of the comment period for the information collection. Each request conveyed concern that the current 60-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the information collection.

FDA has considered the requests and is extending the comment period for the information collection for 45 days, until October 25, 2012. The Agency believes that a 45-day extension allows adequate time for interested persons to submit comments without significantly delaying rulemaking on these important issues.

Dated: September 12, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–22821 Filed 9–14–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Chapter I

[Docket No. FDA–2012–N–0780]

Regulatory New Drug Review: Solutions for Study Data Exchange Standards; Notice of Meeting; Request for Comments; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Announcement of meeting; request for comments; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a document that appeared in the **Federal Register** of August 14, 2012 (77 FR 48491). The document announced a meeting entitled ''Regulatory New Drug Review: Solutions for Study Data Exchange Standards.'' The document was published with an incorrect email address. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Ron Fitzmartin, Office of Planning & Informatics, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1160, Silver Spring, MD 20993–0002, 301–796–5333, FAX: 301–847–8443, email: *CDERDataStandards@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In FR Doc. 2012–19748, appearing on page 48491 in the **Federal Register** of August 14, 2012, the following corrections are made:

1. On page 48491, in the first column, in the **FOR FURTHER INFORMATION CONTACT** section, the email address ''*CDERDataStandards@hhs.fda.gov*'' is corrected to read ''*CDERDataStandards@fda.hhs.gov.*''

2. On page 48491, in the second column, in the **SUPPLEMENTARY INFORMATION** section, under ''*Registration,*'' the email address ''*CDERDataStandards@hhs.fda.gov*'' is corrected to read ''*CDERDataStandards@fda.hhs.gov.*''

Dated: September 11, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–22793 Filed 9–14–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 10

[REG–138367–06]

RIN 1545–BF96

Regulations Governing Practice Before the Internal Revenue Service

AGENCY: Office of the Secretary, Treasury.

ACTION: Withdrawal of notice of proposed rulemaking; notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document proposes modifications of the regulations governing practice before the Internal Revenue Service (IRS). These proposed regulations affect individuals who practice before the IRS. These proposed regulations modify the standards governing written advice and update certain provisions as appropriate. This document also provides notice of a

public hearing on the proposed regulations and withdraws the notice of proposed rulemaking published on December 20, 2004, setting forth standards for State or local bond opinions.

DATES: Comments must be received by November 16, 2012. Outlines of topics to be discussed at the public hearing scheduled for December 7, 2012 at 10 a.m., in the Auditorium of the Internal Revenue Service building at 1111 Constitution Avenue NW., Washington, DC 20224, must be received by November 16, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–138367–06), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–138367–06), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–138367–06). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning issues for comment, Matthew D. Lucey at (202) 622–4940; concerning submissions of comments the public hearing, or to be placed on the building access list to attend the hearing, Oluwafunmilayo Taylor at (202) 622–7180; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate practice before the Treasury Department (Treasury). The Secretary has published regulations governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230).

Treasury and the IRS have consistently maintained that tax practitioners must meet minimum standards of conduct with respect to written tax advice, and those who do not should be subject to disciplinary action, including suspension or disbarment. In accordance with these principles, the regulations have been amended from time to time to address issues relating to tax opinions and written tax advice.

In February 1984, the regulations were amended to provide standards for providing opinions used in tax shelter offerings in accordance with American Bar Association Formal Opinion 346 (49 FR 6719). The 1984 amendments required a practitioner who renders a tax shelter opinion to exercise responsibility with respect to the accuracy of the relevant facts; apply the law to the particular facts of the tax shelter offering; ascertain that all material Federal tax issues have been considered; when possible, provide an opinion as to the likely outcome on the merits of each material tax issue; provide an evaluation of the extent to which the material tax benefits in the aggregate will be realized; and assure that the nature and extent of the tax shelter opinion is described correctly in the offering materials.

In January 2001, Treasury and the IRS proposed additional amendments regarding tax shelter opinions. See 66 FR 3276. The 2001 notice of proposed rulemaking addressed both general matters pertaining to practice before the IRS and matters pertaining specifically to tax shelter opinions, but the portion of these regulations regarding tax shelter opinions was not finalized. Rather, on December 30, 2003, Treasury and the IRS published in the **Federal Register** (68 FR 75186) (the 2003 proposed regulations) a second notice of proposed rulemaking to set forth best practices for tax advisors and to modify the standards for certain tax shelter opinions. Subsequently, Congress amended section 330 of title 31 to clarify that the Secretary may impose standards for written advice relating to a matter that is identified as having a potential for tax avoidance or evasion (American Jobs Creation Act of 2004, Public Law 108–357, 118 Stat. 1418).

In December 2004, Treasury and the IRS finalized the 2003 proposed regulations by publishing final regulations (TD 9165) in the **Federal Register** (69 FR 75839) setting forth best practices for tax advisors and providing standards for covered opinions and other written advice. Treasury and the IRS simultaneously issued a notice of proposed rulemaking (REG–159824–04) in the **Federal Register** (69 FR 75887) proposing standards for practice before the IRS relating to State or local bond opinions. In May 2005, Treasury and the IRS published revisions to the final regulations (TD 9201) in the **Federal Register** (70 FR 28824) to clarify the standards for covered opinions. In June 2005, Treasury and the IRS published Notice 2005–47 (2005–1 CB 1373), providing interim guidance and information concerning State or local bond opinions. While not a complete list of revisions to Circular 230, the preceding history demonstrates Treasury and the IRS' commitment to maintaining minimum standards for written advice that foster an ethical environment for practitioners and taxpayers.

As explained later in the Explanation of Provisions section of this preamble, these proposed regulations amend Circular 230 by eliminating the complex rules governing covered opinions in current § 10.35. In addition, these proposed regulations expand the requirements for written advice under § 10.37 and withdraw the proposed amendments to § 10.39 of the regulations governing requirements for State or local bond opinions. These proposed regulations also broaden the scope of the procedures to ensure compliance under § 10.36 by requiring that a practitioner with principal authority for overseeing a firm's Federal tax practice take reasonable steps to ensure the firm has adequate procedures in place for purposes of complying with Circular 230. These proposed regulations clarify that practitioners must exercise competence when engaged in practice before the IRS and that the prohibition on a practitioner endorsing or otherwise negotiating any check issued to a taxpayer in respect of a Federal tax liability applies to government payments made by any means, electronic or otherwise. These proposed regulations expand the categories of violations subject to the expedited proceedings in § 10.82 to include failures to comply with a practitioner's personal tax filing obligations that demonstrate a pattern of willful disreputable conduct. The proposed regulations also clarify the Office of Professional Responsibility's scope of responsibility.

Explanation of Provisions

Public awareness of the standards for written tax advice and the accountability of practitioners offering tax advice have increased since Treasury and the IRS published final regulations on covered opinions. This increased awareness and accountability is having a positive effect on our Federal tax system. Years of practical experience, however, have shown that the covered opinion rules in current § 10.35 have produced some unintended consequences and should be reconsidered.

Reconsideration of the covered opinion rules is appropriate in light of continued practitioner dissatisfaction due to the difficulty and cost of compliance with the rules. Practitioners have consistently voiced their concern over the current rules since their promulgation in 2004. See the docket for IRS REG–138367–06 at *www.regulations.gov.* Practitioners overwhelmingly conclude that the rules are overbroad, difficult to apply, and do not necessarily produce higher quality tax advice. Many practitioners have stated that the rules unduly interfere with their client relationships and are not an ethical standard that everyone, including clients, can comprehend easily. Some practitioners have also opined that these rules may reduce, rather than enhance, tax compliance due to the perception that a covered opinion takes more time to produce and is more expensive for the client than other tax advice. In this same regard, it has been suggested that the rules increase the likelihood that practitioners will provide oral advice to their clients when written advice is more appropriate because current § 10.35 does not govern oral advice.

Another concern that the government has heard from practitioners relates to the unrestrained use of disclaimers on nearly every practitioner communication regardless of whether the communication contains tax advice. Practitioners have stated that this practice discourages compliance with the ethical requirements because some practitioners have concluded that, if they include a disclaimer, they are free to disregard the standards in current § 10.35 regarding written tax advice. The disclaimers also lead to confusion for clients because clients often do not understand why the disclaimer is present and its consequences. In addition, practitioners have complained that the disclaimer's widespread overuse causes clients to ignore the disclaimers altogether, and may render their use in some circumstances irrelevant.

Although practitioners have informed us that they support sensible regulation of written tax advice, they have expressed little support for the rules in their current form and we have received numerous requests to revise the rules. After years of experience with these rules, the government and practitioners agree that the covered opinion rules are often burdensome and provide only minimal taxpayer protection. Overall, the benefit is insufficient to justify the additional costs associated with practitioner compliance with the covered opinion rules. After careful consideration, including consideration of the public's experience with and comments on these rules, Treasury and the IRS have concluded that the written advice standards should be revised.

The proposed regulations will streamline the existing rules for written tax advice by removing current § 10.35 and applying one standard for all written tax advice under proposed § 10.37. Proposed § 10.37 provides that the practitioner must base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance, and consider all relevant facts that the practitioner knows or should know. The proposed removal of § 10.35 will eliminate the requirement that practitioners fully describe the relevant facts (including the factual and legal assumptions relied upon) and the application of the law to the facts in the written advice itself, and the use of Circular 230 disclaimers in documents and transmissions, including emails.

Other provisions, §§ 10.31, 10.36, and 10.82, are also being updated at this time to reflect the current practice environment. In addition, a general competence standard is being proposed in new § 10.35. The proposed regulations also clarify that the Office of Professional Responsibility has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions.

The scope of these regulations is limited to practice before the IRS. These regulations do not alter or supplant other ethical standards applicable to practitioners.

1. Amendments Regarding Rules Governing Written Advice

A. Elimination of Covered Opinion Rules in § 10.35

Current §§ 10.35 and 10.37 provide comprehensive rules with respect to written tax advice. Specifically, current § 10.35 provides detailed rules for tax opinions that constitute ''covered opinions'' under Circular 230. Covered opinions include written advice concerning: (1) A listed transaction; (2) a transaction with the principal purpose of tax avoidance or evasion; or (3) a transaction with a significant purpose of tax avoidance or evasion, if the advice is a reliance opinion, marketed opinion, subject to conditions of confidentiality, or subject to a contractual protection.

The definitions of the various types of covered opinions under Circular 230 require considerable effort on behalf of practitioners to determine whether the advice rendered in a particular circumstance is subject to the covered opinion rules in current § 10.35. Because of the effort involved, many practitioners attempt to exempt the advice from the covered opinion rules by making a prominent disclosure or disclaimer stating that the opinion cannot be relied upon for penalty protection, as permitted by Circular 230.

Circular 230 also requires that practitioners comply with the extensive requirements set forth in § 10.35 when providing written advice that constitutes a covered opinion. Many of the standards in current § 10.35 track principles a competent practitioner uses when considering and rendering any advice, although these standards may be more rigid and cumbersome in application than generally applicable ethical standards. For example, current § 10.35 requires the practitioner to include in the written advice the relevant facts (including assumptions and representations), the application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts. This mechanical requirement of automatic inclusion of information will sometimes lead to awkward or unnecessary, highly technical discussions in the opinion that may hinder the practitioner's ability to provide quality tax advice. Further, the inclusion of this particular detail almost always burdens the practitioner and the client with significant increased costs, without necessarily increasing the quality of the tax advice that the client receives.

Significant progress has been made in combating abusive tax shelters and schemes, and preventing unscrupulous individuals from promoting those arrangements. In recent years, heightened awareness of the ethical standards governing tax advice contributed to this improved state and has benefited practitioners, taxpayers, and the government. At the same time, there is no direct evidence to suggest that the overly-technical and detailed requirements of current § 10.35 were responsible for, or particularly effective at, curtailing the behavior of individuals attempting to profit from promoting frivolous transactions or transactions without a reasonable basis.

For these reasons, the proposed regulations eliminate the covered opinion rules in § 10.35 and instead subject all written tax advice to streamlined standards under proposed § 10.37, as described later in this preamble. The proposed regulations also remove references to current § 10.35 in §§ 10.3, 10.22, and 10.52. The burden reduction that should result from the proposed regulations is consistent with the President's directive in Executive Order 13563 to remove or modify regulations that are outmoded, ineffective, insufficient, or too burdensome.

The elimination of the covered opinion rules in this notice of proposed rulemaking would, at a minimum, save tax practitioners $5,333,200. This burden reduction comes from the elimination of the provisions requiring practitioners to make certain disclosures in the covered opinion.

This number does not include a number of other significant savings to both tax practitioners and taxpayers relating to the cost of obtaining a covered opinion under the current rules that would occur as a result of the proposed regulations. Practitioners spend many hours each year determining whether they need to prepare a covered opinion for a client or if the advice falls into one of the exceptions. This requires significant time to, among other things, research and review the complicated covered opinion rules and discuss the issue with other practitioners in the firm to determine the right course of action. If the practitioner decides, after undertaking these activities, that a covered opinion is necessary, the practitioner must discuss the covered opinion rules with the client, including how the rules affect the scope of the work that the client has asked the practitioner to perform, because the client will incur significant extra costs to obtain the written advice the client requested. These significant extra costs can, in some cases, tip the scales against obtaining written advice.

B. Revision of Requirements for Written Advice

Treasury and the IRS continue to be aware of the risk associated with practitioners providing and marketing written tax opinions. Proposed § 10.37, therefore, replaces the covered opinion rules with basic principles to which all practitioners must adhere when rendering written advice. The proposed provisions also complement the best practices of § 10.33 and the due diligence requirements in § 10.22. Specifically, the proposed regulations revise § 10.37 to state affirmatively the standards to which a practitioner must adhere when providing written advice on a Federal tax matter. Proposed § 10.37 requires, among other things, that the practitioner base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance, and consider all relevant facts that the practitioner knows or should know. A practitioner must also use reasonable efforts to identify and ascertain the facts relevant to written advice on a Federal tax matter under the proposed regulations.

Consistent with current § 10.37, the proposed regulations provide that a practitioner must not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that an issue will not be raised on audit. Proposed § 10.37 eliminates the provision in the current regulations that prohibits a practitioner from taking into account the possibility that an issue will be resolved through settlement if raised when giving written advice evaluating a Federal tax matter. Treasury and IRS conclude that the current rule may unduly restrict the ability of a practitioner to provide comprehensive written advice because the existence or nonexistence of legitimate hazards that may make settlement more or less likely may be a material issue for which the practitioner has an obligation to inform the client.

Under proposed § 10.37(c)(2), the IRS will continue to apply a heightened standard of review to determine whether a practitioner has satisfied the written advice standards when the practitioner knows or has reason to know that the written advice will be used in promoting, marketing, or recommending an investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code.

Proposed § 10.37(b) also provides that a practitioner may rely on the advice of another practitioner only if the reliance on that advice is reasonable and in good faith considering the facts and circumstances. Specifically, proposed § 10.37(b) provides that reliance is not reasonable when the practitioner knows or should know that the opinion of the other practitioner should not be relied on, the other practitioner is not competent to provide the advice, or the other practitioner has a conflict of interest. These proposed reliance provisions incorporate reliance concepts from current §§ 10.22 and 10.35(d). Proposed § 10.37, unlike current § 10.35, does not require that the practitioner describe in the written advice the relevant facts (including assumptions and representations), the application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts. Rather, the scope of the engagement and the type and specificity of the advice sought by the client, in addition to all other appropriate facts and circumstances, are factors in determining the extent that the relevant facts, application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts must be set forth in the written advice. Also, under proposed § 10.37, unlike current § 10.35, the practitioner may consider these factors in determining the scope of the written advice. Further, the determination of whether a practitioner has failed to comply with the requirements of proposed § 10.37 will be based on all facts and circumstances, not on whether each requirement is addressed in the written advice.

As discussed earlier in this preamble, many practitioners currently use a Circular 230 disclaimer at the conclusion of every email or other writing as a measure to remove the advice from the covered opinion rules in § 10.35. In many instances, these disclaimers are frequently inserted without regard to whether the disclaimer is necessary or appropriate. These types of disclaimers are routinely inserted in any written transmission, including writings that do not contain any tax advice. The proposed removal of current § 10.35 eliminates the detailed provisions concerning covered opinions and disclosures in written opinions. Because proposed § 10.37 does not include the disclosure provisions in the current covered opinion rules, Treasury and the IRS expect that these amendments, if adopted, will eliminate the use of a Circular 230 disclaimer in email and other writings.

Overall, Treasury and the IRS have determined that the proposed regulations regarding written advice strike an appropriate balance between allowing practitioners flexibility in providing written advice and at the same time maintaining standards that require the practitioner to act ethically and competently. Treasury and the IRS are particularly interested in comments responding to whether the proposed rules achieve that appropriate balance.

C. Municipal Bond Opinions

The proposed regulations withdraw the proposed amendments to § 10.39 governing requirements for State or local bond opinions, and remove the definition of, and exclusion for, State or local bond opinions from the definition of covered opinions in § 10.35. The previously proposed amendments to § 10.39 are no longer necessary because these proposed regulations remove entirely the concept of covered opinions from Circular 230. Under these proposed regulations, practitioners rendering opinions concerning the tax treatment of municipal bonds are subject to the standards in § 10.37, the same professional standards that apply to all written tax advice.

2. Procedures To Ensure Compliance

Current § 10.36(a) provides requirements for procedures to ensure compliance with § 10.35. Because these proposed regulations remove current § 10.35, these regulations also remove current § 10.36(a). Treasury and the IRS, however, are proposing a new § 10.36 to ensure compliance with Circular 230 generally.

The procedures to ensure compliance have produced great successes in encouraging firms to self-regulate, without the excessive burden often associated with a rigid one-size-fits-all approach. Treasury and the IRS expanded § 10.36 in June 2011 to require firms to have procedures in place to ensure Circular 230 compliance with respect to a firm's tax return preparation practice. Under § 10.36 of these proposed regulations, the requirement for procedures to ensure compliance are expanded to include all provisions of Circular 230.

Firm responsibility is a critical factor in ensuring high quality advice and representation for taxpayers. Accordingly, Treasury and the IRS conclude that firm management with principal authority and responsibility for overseeing a firm's practice governed by Circular 230 should be responsible for establishing procedures to ensure compliance with all provisions of Circular 230, and not merely the provisions regarding tax advice and tax return preparation. For purposes of § 10.36, ''principal'' management will be interpreted in a manner consistent with its use in § 1.6694–2(a)(2) and Notice 2007–39.

3. General Standard of Competence

Proposed § 10.35 provides that a practitioner must exercise competence when engaged in practice before the IRS. Although a practitioner can be sanctioned for incompetent conduct under § 10.51, no provision of Circular 230 specifically requires a practitioner to exercise competence when engaged in practice before the IRS. Section 10.35 is revised, therefore, to clarify that a practitioner must possess the necessary competence when engaged in practice before the IRS. Proposed § 10.35 specifies that competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

4. Electronic Negotiation of Taxpayer Refunds

Proposed § 10.31 provides that a practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.

Treasury and the IRS are proposing to revise § 10.31 to clarify that the prohibition on practitioner negotiation of taxpayer refunds applies in the modern-day electronic environment in which the IRS and practitioners operate today. The proposed regulations also expand § 10.31 to apply to all individuals who practice before the IRS, not just those practitioners who are tax return preparers. Treasury and the IRS continue to encounter a small number of unscrupulous preparers and practitioners who attempt to manipulate the electronic refund process with the intent to defraud their clients and the IRS. The proposed regulations clarify that it constitutes disreputable conduct for a practitioner to direct the payment (or accept payment) of any monies issued to a client by the government in respect of a Federal tax liability to the practitioner or any firm or entity with which the practitioner is associated and that such conduct is subject to sanction.

5. Expedited Suspension Procedures

Section 10.82 of the current regulations authorizes the immediate suspension of a practitioner who has engaged in certain conduct. The proposed regulations extend the expedited disciplinary procedures to disciplinary proceedings against practitioners who have willfully failed to comply with their Federal tax filing obligations. Treasury and the IRS issued a notice of proposed rulemaking in 2006, which included provisions that proposed extension of the availability of the expedited suspension procedures to practitioners not compliant with tax filing and payment obligations. See 71 FR 6421. These provisions were not finalized in the attendant 2007 final regulations due to practitioners' concerns that the proposed rule would erode due process rights. See 72 FR 54540. Treasury and the IRS continue, however, to encounter practitioners who demonstrate they are unfit to practice by repeatedly failing to comply with their own tax obligations.

Accordingly, these proposed regulations permit prompt action against practitioners who have engaged in a pattern of willful disreputable conduct as demonstrated by non-compliance with their Federal tax obligations, but in a manner more narrowly tailored than the 2006 proposal. These proposed regulations only permit the use of expedited procedures in the limited circumstances when a noncompliant practitioner demonstrates a pattern of willful disreputable conduct by (1) failing to make an annual Federal tax return during four of five tax years immediately before the institution of an expedited suspension proceeding; or (2) failing to make a return required more frequently than annually during five of seven tax periods immediately before the institution of an expedited suspension proceeding. For purposes of proposed § 10.82, the phrase ''make a return'' has the same meaning as used in sections 6011 and 6012 of the Internal Revenue Code and § 10.51(a)(6) of this part. Additionally, the practitioner must be noncompliant with a tax filing obligation at the time the notice of suspension is served on the practitioner for the expedited procedures to apply.

Unlike the previously proposed regulations, these proposed regulations do not permit the use of expedited suspension proceedings against practitioners who have not paid their Federal tax obligations. This modification responds to commentators' concern that a practitioner's failure to pay can be precipitated by circumstances outside of the practitioner's control and that it may be inequitable to suspend a practitioner expeditiously in these situations. Treasury and the IRS conclude, however, that expedited suspension is appropriate for practitioners who have not complied with basic tax filing obligations for the immediately preceding four of five years for annual returns (or five of seven tax periods). Practitioners engaging in this repeated pattern of non-filing demonstrate a high level of disregard for the Federal tax system and a level of willfulness sufficient for practitioner sanction under Circular 230. Treasury and the IRS have determined that the proposed rule is appropriate because practitioners demonstrating this high level of disregard for the Federal tax system are unfit to represent others who are making a good faith attempt to comply with their own Federal tax obligations. Expedited action in these cases will likely prevent harm to these taxpayers and the Federal tax system.

Current § 10.82(f)(2) provides that a suspension under the expedited procedures is effective until the suspension is lifted by the IRS, an Administrative Law Judge, or the Secretary of the Treasury. Circular 230 does not otherwise provide guidance with respect to the length of suspension or the time period in which the practitioner is permitted to apply for reinstatement. Section 10.81, however, currently provides that a disbarred practitioner (or disqualified appraiser) may apply for reinstatement after five years following the practitioner's disbarment or disqualification.

Proposed § 10.81 makes these rules consistent and applies the same five-year time period for both disbarred and suspended practitioners.

Treasury and IRS are also proposing several non-substantive changes to the terms of § 10.82 that will help practitioners distinguish between the expedited suspension procedures of § 10.82 and otherwise generally applicable procedures for sanctions instituted under § 10.60. For example, to begin an expedited suspension under the proposed regulations, the IRS would issue a ''show cause order'' instead of a ''complaint'' and the practitioner would submit a ''response'' instead of an ''answer.'' The terms ''complaint'' and ''answer'' are currently used to describe the documents used in both expedited suspensions under § 10.82 and regular proceedings under § 10.60. These revisions do not generally change current expedited suspension procedures, or the contents of what must be included in the underlying documents, but are proposed to make § 10.82 easier to understand.

Proposed § 10.82(g) clarifies that practitioners subject to an expedited proceeding may demand a complaint under § 10.60, and that the demand must specifically reference the suspension action under § 10.82. Current § 10.82(g) provides that the IRS has 30 days to issue a complaint after receiving the practitioner's demand for a complaint. In some cases, extra time may be necessary to provide the practitioner and Administrative Law Judge with the most current information regarding the practitioner's fitness to practice before the IRS. Treasury and the IRS have determined that 45 days will provide the IRS with sufficient time to ensure the complaint complies with the requirements in § 10.62. Accordingly, proposed § 10.82(g) provides that the IRS has 45 days to issue a complaint after receiving a demand for a complaint from a practitioner suspended under the expedited procedures.

6. Scope of the Office of Professional Responsibility

IRS and Treasury propose revising current § 10.1 to clarify that the Office of Professional Responsibility has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions.

Effect on Other Documents

Notice 2005–47 (2005–1 CB 1373) will be obsolete beginning on the date that final regulations are published in the **Federal Register**.

Availability of IRS Documents

IRS notices cited in this preamble are made available by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Special Analyses

It has been determined that this proposed rule is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. The proposed rule affects practitioners who practice before the IRS. Persons authorized to practice before the IRS have long been required to comply with certain standards of conduct, and those who provide written tax advice currently must comply with specific rules for this advice. Because these proposed rules replace the rigid rules for written tax advice with more flexible rules and eliminate the necessity to provide disclaimers in certain written tax advice, these rules will reduce the burden imposed on small entities that issue written tax advice. Therefore, the updating amendments and requirements for written advice imposed by these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are timely submitted to the IRS as prescribed in this preamble under the **ADDRESSES** heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request.

The public hearing is scheduled for December 7, 2012, from 10 a.m., and will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit comments by November 16, 2012 and an outline of the topics to be discussed and the time to be devoted to each topic by November 16, 2012. A period of 10 minutes will be allocated to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Matthew D. Lucey of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 31 CFR Part 10

Accountants, Administrative practice and procedure, Lawyers, Reporting and recordkeeping requirements, Taxes.

Withdrawal of Notice of Proposed Rulemaking

Accordingly, under the authority of 31 CFR part 330, the notice of proposed rulemaking (REG–159824–04) that was published in the **Federal Register** on December 20, 2004 (69 FR 75887) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 31 CFR part 10 is proposed to be amended as follows:

PART 10—PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

Paragraph 1. The authority citation for 31 CFR part 10 continues to read as follows:

Authority: Sec. 3, 23 Stat. 258, secs. 2–12, 60 Stat. 237 et. seq.; 5 U.S.C. 301, 500, 551–559; 31 U.S.C. 321; 31 U.S.C. 330; Reorg. Plan No. 26 of 1950, 15 FR 4935, 64 Stat. 1280, 3 CFR, 1949–1953 Comp., p. 1017.

Par. 2. Section 10.1 is amended by revising paragraphs (a)(1) and (d) to read as follows:

§ 10.1 Offices.

(a) * * *

(1) The Office of Professional Responsibility, which shall generally have responsibility for matters related to practitioner conduct and shall have exclusive responsibility for discipline,

including disciplinary proceedings and sanctions; and

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

Par. 3. Section 10.3 is amended by revising paragraphs (a), (b), (g), and (j) to read as follows:

§ 10.3 Who may practice.

(a) *Attorneys.* Any attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that the attorney is currently qualified as an attorney and is authorized to represent the party or parties. Notwithstanding the preceding sentence, attorneys who are not currently under suspension or disbarment from practice before the Internal Revenue Service are not required to file a written declaration with the IRS before rendering written advice covered under § 10.37, but their rendering of this advice is practice before the Internal Revenue Service.

(b) *Certified public accountants.* Any certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that the certified public accountant is currently qualified as a certified public accountant and is authorized to represent the party or parties. Notwithstanding the preceding sentence, certified public accountants who are not currently under suspension or disbarment from practice before the Internal Revenue Service are not required to file a written declaration with the IRS before rendering written advice covered under § 10.37, but their rendering of this advice is practice before the Internal Revenue Service.

* * * * *

(g) *Others.* Any individual qualifying under § 10.5(e) or § 10.7 is eligible to practice before the Internal Revenue Service to the extent provided in those sections.

* * * * *

(j) *Effective/applicability date.* This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

Par. 4. Section 10.22 is amended by revising paragraphs (b) and (c) to read as follows:

§ 10.22 Diligence as to accuracy.

* * * * *

(b) *Reliance on others.* Except as provided in §§ 10.34 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

(c) *Effective/applicability date.* This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

Par. 5. Section 10.31 is revised to read as follows:

§ 10.31 Negotiation of taxpayer checks.

(a) A practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, in an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.

(b) *Effective/applicability date.* This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

§ 10.35 Competence.

(a) A practitioner must possess the necessary competence to engage in practice before the Internal Revenue. Competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

(b) *Effective/applicability date*. This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

Par. 7. Section 10.36 is revised to read as follows:

§ 10.36 Procedures to ensure compliance.

(a) Any practitioner who has (or practitioners who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with this part, as applicable. Any practitioner who has (or practitioners who have or share) this principal authority will be subject to discipline for failing to comply with the requirements of this paragraph (a) if—

(1) The practitioner through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with this part, as applicable, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable; or

(2) The practitioner knows or should know that one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, that does not comply with this part, as applicable, and the practitioner, through willfulness, recklessness, or gross incompetence fails to take prompt action to correct the noncompliance.

(b) *Effective/applicability date.* This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

Par. 8. Section 10.37 is revised to read as follows:

§ 10.37 Requirements for written advice.

(a) *Requirements.* (1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section.

(2) The practitioner must—

(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

(ii) Reasonably consider all relevant facts that the practitioner knows or should know;

(iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable; and

(v) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

(3) Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or should know that one or more representations or assumptions on which any representation is based are incorrect or incomplete.

(b) *Reliance on advice of others.* A practitioner may only rely on the advice of another practitioner if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when—

(1) The practitioner knows or should know that the opinion of the other practitioner should not be relied on;

(2) The practitioner knows or should know that the other practitioner is not competent or lacks the necessary qualifications to provide the advice; or

(3) The practitioner knows or should know that the other practitioner has a conflict of interest as described in this part.

(c) *Standard of review.* (1) In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonableness standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.

(2) In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of review because of the greater risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.

(d) *Effective/applicability date.* The rules of this section will apply to written advice that is rendered after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 9. Section 10.52 is revised to read as follows:

§ 10.52 Violations subject to sanction.

(a) A practitioner may be sanctioned under § 10.50 if the practitioner—

(1) Willfully violates any of the regulations (other than § 10.33) contained in this part; or

(2) Recklessly or through gross incompetence (within the meaning of § 10.51(a)(13)) violates §§ 10.34, 10.36, or 10.37.

(b) *Effective/applicability date.* This section is applicable to conduct occurring on or after the date final regulations are published in the **Federal Register**.

Par. 10. Section 10.81 is revised to read as follows:

§ 10.81 Petition for reinstatement.

(a) *In general.* A practitioner disbarred or suspended under § 10.60, or suspended under § 10.82, or a disqualified appraiser may petition for reinstatement before the Internal Revenue Service after the expiration of 5 years following such disbarment, suspension, or disqualification. Reinstatement will not be granted unless the Internal Revenue Service is satisfied that the petitioner is not likely to engage thereafter in conduct contrary to the regulations in this part, and that granting such reinstatement would not be contrary to the public interest.

(b) *Effective/applicability date.* This section is applicable beginning on the date final regulations are published in the **Federal Register**.

Par 11. Section 10.82 is amended by:

1. Revising paragraph (a) and the introductory text of paragraph (b).
2. Adding paragraph (b)(5).
3. Revising paragraphs (c), (d), (e), (f), (g), and (h).

The revisions and additions read as follows:

§ 10.82 Expedited suspension.

(a) *When applicable.* Whenever the Commissioner, or delegate, determines that a practitioner is described in paragraph (b) of this section, the expedited procedures described in this section may be used to suspend the practitioner from practice before the Internal Revenue Service.

(b) *To whom applicable.* This section applies to any practitioner who, within 5 years prior to the date that a show cause order under this section's expedited suspension procedures is served:

* * * * *

(5) Has demonstrated a pattern of willful disreputable conduct by—

(i) Failing to make an annual Federal tax return, in violation of the Federal tax laws, during 4 of the 5 tax years immediately preceding the institution of a proceeding under paragraph (c) of this section and remains noncompliant with any of the practitioner's Federal tax filing obligations at the time the notice of suspension is issued under paragraph (f) of this section; or

(ii) Failing to make a return required more frequently than annually, in violation of the Federal tax laws, during 5 of the 7 tax periods immediately preceding the institution of a proceeding under paragraph (c) of this section and remains noncompliant with any of the practitioner's Federal tax filing obligations at the time the notice of suspension is issued under paragraph (f) of this section.

(c) *Expedited suspension procedures.* A suspension under this section will be proposed by a show cause order that names the respondent, is signed by an authorized representative of the Internal Revenue Service under § 10.69(a)(1), and served according to the rules set forth in paragraph (a) of § 10.63. The show cause order must give a plain and concise description of the allegations that constitute the basis for the proposed suspension. The show cause order must notify the respondent—

(1) Of the place and due date for filing a response;

(2) That an expedited suspension decision by default may be rendered if the respondent fails to file a response as required;

(3) That the respondent may request a conference to address the merits of the show cause order and that any such request must be made in the response; and

(4) That the respondent may be suspended either immediately following the expiration of the period within which a response must be filed or, if a conference is requested, immediately following the conference.

(d) *Response.* The response to the show cause order described in this section must be filed no later than 30 calendar days following the date the show cause order is served, unless the time for filing is extended. The response must be filed in accordance with the rules set forth for answers to a complaint in § 10.64, except as otherwise provided in this section. The response must include a request for a conference, if a conference is desired. The respondent is entitled to the conference only if the request is made in a timely filed response.

(e) *Conference.* An authorized representative of the Internal Revenue Service will preside at a conference described in this section. The conference will be held at a place and time selected by the Internal Revenue Service, but no sooner than 14 calendar days after the date by which the response must be filed with the Internal Revenue Service, unless the respondent agrees to an earlier date. An authorized representative may represent the respondent at the conference.

(f) *Suspension*—(1) *In general.* The Commissioner, or delegate, may suspend the respondent from practice before the Internal Revenue Service by a written notice of expedited suspension immediately following:

(i) The expiration of the period within which a response to a show cause order must be filed if the respondent does not file a response as required by paragraph (d) of this section;

(ii) The conference described in paragraph (e) of this section if the Internal Revenue Service finds that the respondent is described in paragraph (b) of this section;

(iii) The respondent's failure to appear, either personally or through an authorized representative, at a conference scheduled by the Internal Revenue Service under paragraph (e) of this section.

(2) *Duration of suspension.* A suspension under this section will commence on the date that the written notice of expedited suspension is served on the practitioner, either personally or through an authorized representative. The suspension will remain effective until the earlier of:

(i) The date the Internal Revenue Service lifts the suspension after determining that the practitioner is no longer described in paragraph (b) of this section or for any other reason; or

(ii) The date the suspension is lifted by an Administrative Law Judge or the Secretary of the Treasury, or delegate deciding appeals, in a proceeding referred to in paragraph (g) of this section and instituted under § 10.60.

(g) *Practitioner request for § 10.60 proceeding.* If the Internal Revenue Service suspends a practitioner under the expedited suspension procedures described in this section, the practitioner may demand that the Internal Revenue Service institute a proceeding under § 10.60 and issue the complaint described in § 10.62. The request must be in writing, specifically reference the suspension action under § 10.82, and be made within 2 years from the date on which the practitioner's suspension commenced. The Internal Revenue Service must issue a complaint demanded under this paragraph (g) within 45 calendar days of receiving the demand.

(h) *Effective/applicability date.* This section is applicable beginning on the date that final regulations are published in the **Federal Register**.

Par. 12. Section 10.91 is revised to read as follows:

§ 10.91 Saving provision.

Any proceeding instituted under this part prior to the date that final regulations are published in the **Federal Register**, for which a final decision has not been reached or for which judicial review is still available is not affected by these revisions. Any proceeding under this part based on conduct engaged in prior to the date that final regulations are published in the **Federal Register**, which is instituted after that date, will apply subpart D and E of this part as revised, but the conduct engaged in prior to the effective date of these revisions will be judged by the regulations in effect at the time the conduct occurred.

Par. 13. Section 10.93 is revised to read as follows:

§ 10.93 Effective date.

Except as otherwise provided in each section and subject to § 10.91, Part 10 is applicable on the date that final regulations are published in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–22836 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0812]

RIN 1625–AA00

Safety Zone, Atlantic Intracoastal Waterway; Emerald Isle, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Coast Guard proposes to extend a temporary safety zone on the waters of the Atlantic Intracoastal Waterway at Emerald Isle, North Carolina. The safety zone is necessary to provide for the safety of mariners on navigable waters during maintenance of the NC 58 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 226, at Emerald Isle, North Carolina. The safety zone extension would temporarily restrict vessel movement within the designated area starting on December 12, 2012 through February 14, 2013.

DATES: Comments and related material must be received by the Coast Guard on or before October 2, 2012.

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

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

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email CWO4 Joseph M. Edge, U.S. Coast Guard Sector North Carolina; telephone 252–247–4525, email *Joseph.M.Edge@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

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

1. Submitting Comments

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

To submit your comment online, go to *http://www.regulations.gov,* type the docket number (USCG–2012–0812) in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2012–0432) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. 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.

3. Privacy Act

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

4. Public Meeting

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

B. Regulatory History and Information

This proposed rule would extend an existing safety zone in the Atlantic Intracoastal Waterway at Emerald Isle. The Coast Guard published a notice of proposed rulemaking for the existing safety zone on June 15, 2012 (USCG–2012–0432, 77 FR 35906), no comments were received and we published a final rule on July 30, 2012 (77 FR 44463).

C. Basis and Purpose

North Carolina Department of Transportation has contracted Marine Contracting Corporation of Virginia Beach, Virginia to perform bridge maintenance on the NC 58 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 226, at Emerald Isle, North Carolina. The contract provides for replacement of the fender system to commence on September 12, 2012 with a completion date of December 12, 2012. The contractor has been granted an extension by North Carolina Department of Transportation until February 14, 2013 to complete the bridge maintenance. The contractor will utilize a 140 foot deck barge with a 40 foot beam as a work platform and for equipment staging. The existing safety zone needs to be extended to provide a safety buffer for transiting vessels as bridge repairs present potential hazards to mariners and property due to reduction of horizontal clearance.

D. Discussion of Proposed Rule

The proposed temporary safety zone will encompass the waters directly under the NC 58 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 226, at Emerald Isle, North Carolina (34°40′28″ N, 077°03′56″ W). This initial zone is in effect from 8 a.m. September 12, 2012 through 8 p.m. December 12, 2012. The proposed extension will be in effect from 8 p.m. December 12, 2012 through 8 p.m. February 14, 2013. During this period the Coast Guard would require a one hour notification to the work supervisor at NC 58 Fixed Bridge, Atlantic Intracoastal Waterway crossing, mile 226, Emerald Isle, North Carolina. The notification requirement would apply during the maintenance period for vessels requiring a horizontal clearance of greater than 50 feet.

E. Regulatory Analyses

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

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. This rule does restrict traffic from transiting a portion of the Atlantic Intracoastal Waterway; it imposes a one hour notification to ensure the waterway is clear of impediment to allow passage to vessels requiring a horizontal clearance of greater than 50 feet.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which may be small entities: The owners or operators of commercial tug and barge companies, recreational and commercial fishing vessels intending to transit the specified portion of Atlantic Intracoastal Waterway from 8 p.m. December 12, 2012 through 8 p.m. February 14, 2013.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone will apply to this section of the Atlantic Intracoastal Waterway, vessel traffic will be able to request passage by providing a one hour advanced notification. Before the effective period, the Coast Guard will issue maritime advisories widely available to the users of the waterway. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves the establishment of a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add § 165.T05–0812 to read as follows:

§ 165.T05–0812 Safety Zone; Atlantic Intracoastal Waterway, Emerald Isle, NC.

(a) *Regulated Area.* The following area is a safety zone: This zone includes the waters directly under and 100 yards either side of the NC 58 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 226, at Emerald Isle, North Carolina (latitude 34°40′28″ N, longitude 077°03′56″ W).

(b) *Regulations.* The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary section, § 165.T05–0432. In addition the following regulations apply:

(1) All vessels requiring greater than 50 feet horizontal clearance to safely transit through the NC 58 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 226, at Emerald Isle, North Carolina must contact the work supervisor on VHF–FM marine band radio channels 13 and 16 one hour in advance of intended transit.

(2) All Coast Guard assets enforcing this safety zone can be contacted on VHF–FM marine band radio channels 13 and 16.

(3) The operator of any vessel within or in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign, and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign.

(c) *Definitions.*

(1) Captain of the Port North Carolina means the Commander, Coast Guard Sector North Carolina or any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port to act on his behalf.

(2) Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port North Carolina to assist in enforcing the safety zone described in paragraph (a) of this section.

(3) Work Supervisor means the contractors on site representative.

(d) *Enforcement.* The U.S. Coast Guard may be assisted by Federal, State and local agencies in the patrol and enforcement of the zone.

(e) *Enforcement period.* This section will be enforced from through 8 p.m. December 12, 2012 through 8 p.m. February 14, 2013 unless cancelled earlier by the Captain of the Port.

Dated: August 30, 2012.

A. Popiel,

Captain, U.S. Coast Guard, Captain of the Port, U.S. Coast Guard Sector North Carolina.

[FR Doc. 2012–22798 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1095]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; correction.

SUMMARY: On May 21, 2010, FEMA published in the **Federal Register** a proposed rule that contained an erroneous table. This notice provides corrections to that table, to be used in lieu of the information published at 75 FR 28511. The table provided here represents the flooding sources, location of referenced elevations, effective and modified elevations, and communities affected for Muhlenberg County, Kentucky and Incorporated Areas. Specifically, it addresses the following flooding sources: Brier Creek (backwater effects from Green River), Caney Creek, Caney Creek Tributary 27.1 (backwater effects from Caney Creek), Caney Creek Tributary 31 (backwater effects from Caney Creek), Canfield Branch (backwater effects from Green River), Cypress Creek (backwater effects from Green River), Cypress Creek Tributary 1 (backwater effects from Green River), Green River, Irwin Creek (backwater effects from Green River), Isaacs Creek (backwater effects from Green River), Jacobs Creek (backwater effects from Green River), Jacobs Creek Tributary 7 (backwater effects from Green River), Little Cypress Creek, Little Cypress Creek Tributary 16 (backwater effects from Little Cypress Creek), Little Cypress Creek Tributary 8 (backwater effects from Little Cypress Creek), Log Creek (backwater effects from Green River), Mud River (backwater effects from Green River), Muddy Fork (backwater effects from Green River), Nelson Creek (backwater effects from Green River), Opossum Run (backwater effects from Sandlick Creek), Plum Creek (backwater effects from Green River), Plum Creek Tributary 5 (backwater effects from Green River), Pond Creek (backwater effects from Green River), Pond Creek (backwater effects from Sandlick Creek), Pond Creek Tributary 29 (backwater effects from Green River), Pond Creek Tributary 30 (backwater effects from Green River), Pond River (backwater effects from Green River) and Sandlick Creek Tributary 2 (backwater effects from Sandlick Creek).

DATES: Comments are to be submitted on or before December 17, 2012.

ADDRESSES: You may submit comments, identified by Docket No. FEMA–B–1095, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064 or (email) *Luis.Rodriguez3@fema.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064 or (email) *Luis.Rodriguez3@fema.dhs.gov*.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) publishes proposed determinations of Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs for communities participating in the National Flood Insurance Program (NFIP), in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are minimum requirements. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Corrections

In the proposed rule published at 75 FR 28511, in the May 21, 2010, issue of the **Federal Register**, FEMA published a table under the authority of 44 CFR 67.4. The table, entitled ''Muhlenberg County, Kentucky, and Incorporated Areas'' addressed the following flooding sources: Brier Creek (backwater effects from Green River), Caney Creek, Caney Creek Tributary 27.1 (backwater effects from Caney Creek), Caney Creek Tributary 31 (backwater effects from Caney Creek), Canfield Branch (backwater effects from Green River), Cypress Creek (backwater effects from Green River), Cypress Creek Tributary 1 (backwater effects from Green River), Green River, Irwin Creek (backwater effects from Green River), Isaacs Creek (backwater effects from Green River), Jacobs Creek (backwater effects from Green River), Jacobs Creek Tributary 7 (backwater effects from Green River), Little Cypress Creek, Little Cypress Creek Tributary 16 (backwater effects from Little Cypress Creek), Little Cypress Creek Tributary 8 (backwater effects from Little Cypress Creek), Log Creek (backwater effects from Green River), Mud River (backwater effects from Green River), Muddy Fork (backwater effects from Green River), Nelson Creek (backwater effects from Green River), Opossum Run (backwater effects from Sandlick Creek), Plum Creek (backwater effects from Green River), Plum Creek Tributary 5 (backwater effects from Green River), Pond Creek (backwater effects from Green River), Pond Creek (backwater effects from Sandlick Creek), Pond Creek Tributary 29 (backwater effects from Green River), Pond Creek Tributary 30 (backwater effects from Green River), Pond River (backwater effects from Green River) and Sandlick Creek Tributary 2 (backwater effects from Sandlick Creek). That table contained inaccurate information as to the communities affected for the flooding source the Green River. In this notice, FEMA is publishing a table containing the accurate information, to address these prior errors. The information provided below should be used in lieu of that previously published.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Muhlenberg County, Kentucky, and Incorporated Areas				
Brier Creek (backwater effects from Green River).	From the confluence with Pond River to approximately 1,390 feet downstream of Phillips Town Road.	None	+389	Unincorporated Areas of Muhlenberg County.
Caney Creek	Approximately 0.5 mile upstream of North Main Street	None	+413	City of Greenville, Unincorporated Areas of Muhlenberg County.
	At the Caney Creek Tributary 27 confluence	None	+423	
Caney Creek Tributary 27.1 (backwater effects from Caney Creek).	From the Caney Creek confluence to approximately 0.7 mile upstream of the Caney Creek confluence.	None	+424	City of Greenville, Unincorporated Areas of Muhlenberg County.
Caney Creek Tributary 31 (backwater effects from Caney Creek).	From the Caney Creek confluence to approximately 0.6 mile upstream of the Caney Creek confluence.	None	+413	Unincorporated Areas of Muhlenberg County.
Canfield Branch (backwater effects from Green River).	From the Mud River confluence to approximately 340 feet upstream of Forest Oak Church Road.	None	+404	Unincorporated Areas of Muhlenberg County.
Cypress Creek (backwater effects from Green River).	From approximately 0.6 mile downstream of KY–175 to approximately 0.7 mile upstream of KY–81.	None	+393	Unincorporated Areas of Muhlenberg County.
Cypress Creek Tributary 1 (backwater effects from Green River).	From the Cypress Creek confluence to approximately 0.8 mile upstream of Coffman Schoolhouse Road.	None	+393	Unincorporated Areas of Muhlenberg County.
Green River	At the confluence with Mud River	+394	+393	City of South Carrollton, Unincorporated Areas of Muhlenberg County.
	Approximately 2.6 miles upstream of CSX Railroad	+403	+404	
Irwin Creek (backwater effects from Green River).	From the Isaacs Creek confluence to approximately 2,000 feet upstream of the Isaacs Creek confluence.	None	+389	Unincorporated Areas of Muhlenberg County.
Isaacs Creek (backwater effects from Green River).	From the Green River confluence to approximately 1,035 feet upstream of the Irwin Creek confluence.	None	+389	Unincorporated Areas of Muhlenberg County.
Jacobs Creek (backwater effects from Green River).	From the Green River confluence to approximately 2.0 miles upstream of Riverside Road.	None	+402	Unincorporated Areas of Muhlenberg County.
Jacobs Creek Tributary 7 (backwater effects from Green River).	From the Jacobs Creek confluence to approximately 370 feet upstream of Riverside Road.	None	+402	Unincorporated Areas of Muhlenberg County.
Little Cypress Creek	Approximately 190 feet upstream of West Whitmer Street	None	+405	Unincorporated Areas of Muhlenberg County, City of Central City.
	Just upstream of Front Street	None	+408	
Little Cypress Creek Tributary 16 (backwater effects from Little Cypress Creek).	From the Little Cypress Creek confluence to approximately 2,507 feet upstream of the Little Cypress Creek confluence.	None	+405	City of Central City, Unincorporated Areas of Muhlenberg County.
Little Cypress Creek Tributary 8 (backwater effects from Little Cypress Creek).	From the Little Cypress Creek confluence to approximately 1,100 feet upstream of the Little Cypress Creek confluence.	None	+422	Unincorporated Areas of Muhlenberg County.
Log Creek (backwater effects from Green River).	From the Pond River confluence to approximately 3,900 feet upstream of Millport Sacramento Road.	None	+389	Unincorporated Areas of Muhlenberg County.
Mud River (backwater effects from Green River).	From the Green River confluence to approximately 535 feet upstream of the Canfield Branch confluence.	None	+404	Unincorporated Areas of Muhlenberg County.
Muddy Fork (backwater effects from Green River).	From the Cypress Creek confluence to approximately 0.8 mile upstream of the Cypress Creek confluence.	None	+393	Unincorporated Areas of Muhlenberg County.
Nelson Creek (backwater effects from Green River).	From the Green River confluence to approximately 0.4 mile upstream of Green River Haul Road.	None	+398	Unincorporated Areas of Muhlenberg County.
Opossum Run (backwater effects from Sandlick Creek).	From the Sandlick Creek confluence to approximately 1,175 feet upstream of Opossum Lane.	None	+430	Unincorporated Areas of Muhlenberg County.
Plum Creek (backwater effects from Green River).	From the Pond Creek confluence to approximately 300 feet downstream of the Plum Creek Tributary 4 confluence.	None	+401	City of Drakesboro, Unincorporated Areas of Muhlenberg County.
Plum Creek Tributary 5 (backwater effects from Green River).	From the Plum Creek confluence to approximately 0.65 mile upstream of the Plum Creek confluence.	None	+401	Unincorporated Areas of Muhlenberg County.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Pond Creek (backwater effects from Green River).	From the Green River confluence to approximately 1,280 feet upstream of I–431.	None	+401	Unincorporated Areas of Muhlenberg County.
Pond Creek (backwater effects from Sandlick Creek).	From the Sandlick Creek confluence to just downstream of Johnson Road.	+422	+421	Unincorporated Areas of Muhlenberg County.
Pond Creek Tributary 29 (Backwater effects from Green River).	From the Pond Creek confluence to approximately 1,000 feet upstream of KY–2107.	None	+401	Unincorporated Areas of Muhlenberg County.
Pond Creek Tributary 30 (backwater effects from Green River).	From the Pond Creek confluence to approximately 1.4 miles upstream of the Pond Creek confluence.	None	+401	Unincorporated Areas of Muhlenberg County.
Pond River (backwater effects from Green River).	From the Green River confluence to approximately 1.0 mile upstream of KY–70.	None	+389	Unincorporated Areas of Muhlenberg County.
Sandlick Creek Tributary 2 (backwater effects from Sandlick Creek).	From the Sandlick Creek confluence to approximately 1,600 feet upstream of the Sandlick Creek confluence.	None	+449	Unincorporated Areas of Muhlenberg County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

City of Central City
Maps are available for inspection at City Hall, 214 North 1st Street, Central City, KY 42330.
City of Drakesboro
Maps are available for inspection at City Hall, 212 West Mose Rager Boulevard, Drakesboro, KY 42337.
City of Greenville
Maps are available for inspection at City Hall, 118 Court Street, Greenville, KY 42345.
City of South Carrollton
Maps are available for inspection at City Hall, 10515 U.S. Route 431, South Carrollton, KY 42374.

Unincorporated Areas of Muhlenberg County

Maps are available for inspection at the Muhlenberg County Judicial Building, 136 South Main Street, Greenville, KY 42345.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: August 23, 2012.

Sandra K. Knight,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–22897 Filed 9–14–12; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration (FMCSA)

49 CFR Part 395

[Docket No. FMCSA–2012–0183]

Hours of Service of Drivers of Commercial Motor Vehicles; Regulatory Guidance for Oil Field Exception

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of public listening session.

SUMMARY: FMCSA announces that it will hold its third and final public listening session to receive comments on the Agency's June 5, 2012, notice concerning regulatory guidance on the applicability of the oilfield operations exceptions in the hours-of-service regulations. In an August 6, 2012, **Federal Register** notice, the Agency extended the deadline for public comments from August 6 to October 5, 2012. As with the previous sessions, the Dallas listening session will be open to the public and webcast in its entirety.

DATES: This listening session will be held on September, 27, 2012, in Dallas, TX, at the Hyatt Regency DFW, 2334 North International Parkway, P.O. Box 619014, DFW Airport, Texas 75261, Telephone: (972) 453–1234, Fax: (972) 615–6826. The listening session will begin at 1:00 p.m., local time, and end at 5:30 p.m. local time, or earlier if all participants wishing to comment have expressed their views. Written comments to the docket must be received on or before October 5, 2012.

ADDRESSES: The September 27, 2012, listening session will be held at the

Hyatt Regency DFW, 2334 North International Parkway, P.O. Box 619014, DFW Airport, Texas 75261, Telephone: 972–453–1234, Fax: 972–615–6826.

Internet Address for Alternative Media Broadcasts During and Immediately After the Listening Session. FMCSA will post specific information on how to participate via the Internet and telephone on the FMCSA Web site at *www.fmcsa.dot.gov.*

You may submit comments identified by Federal Docket Management System Number FMCSA–2012–0183 by any of the following methods:

• *Web site: www.regulations.gov.* Follow the instructions for submitting comments on the Federal electronic docket site.

• *Fax:* 1–202–493–2251.

• *Mail:* Docket Management Facility; U.S. Department of Transportation, Room W–12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

• *Hand Delivery:* Ground Floor, Room W12–140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal Holidays.

All submissions must include the Agency name and docket number. For detailed instruction on submitting comments and additional information, see the ''Public Participation'' heading below. Note that all comments received will be posted without change to *www.regulations.gov*, including any personal information provided. Please see the ''Privacy Act'' heading below.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov* at any time or to Room W12–140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

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 the DOT's complete Privacy Act Statement in the **Federal Register** published on December 29, 2010 (75 FR 82133), or you may visit *www.regulations.gov.*

Public Participation: The *www.regulations.gov* Web site is generally available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of that Web site, and at DOT's *http://docketsinfo.dot.gov* Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

FOR FURTHER INFORMATION CONTACT: For the regulatory guidance issued on June 5, 2012, concerning oilfield hours-of-service exceptions: Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, phone (202) 366–4325, email *MCPSD@dot.gov.* For the listening sessions: Ms. Shannon Watson, Senior Advisor to the Associate Administrator for Policy, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, phone (202) 385–2395, email *shannon.watson@dot.gov.*

If you need sign language assistance to participate in a listening session, please contact Ms. Watson no later than 10 days prior to the listening session.

SUPPLEMENTARY INFORMATION:

Background

On June 5, 2012, FMCSA published a notice in the **Federal Register** concerning regulatory guidance about the ''oilfield operations'' exceptions in 49 CFR 395.1(d)(77 FR 33098). The regulatory guidance, effective June 5, 2012, was issued to ensure consistent understanding and application of the regulatory exceptions. Several groups or organizations have requested that the Agency extend the comment period and consider holding a listening session(s). On August 6, 2012, the FMCSA announced (1) an extension of the comment period for the submission of written comments in response to the June 5, 2012, notice, and (2) listening sessions on the regulatory guidance. The previous two listening sessions were held on August 17, 2012, in Denver, CO, and on August 21, 2012, in Pittsburgh, PA. This represents the third and final listening session on this issue.

Listening Session

The listening session is open to the public. Speakers are not required to preregister but should limit their remarks to 5 minutes. The public may submit material to the FMCSA staff at the session for inclusion in the docket, FMCSA–2012–0183.

Alternative Media Broadcasts During and Immediately After the Listening Session

FMCSA will provide webcast information for the listening session. Prior to the session, the Agency will post the Web address for the live webcast and instructions on how to participate at FMCSA's Web site, *www.fmcsa.dot.gov.* After the listening session, FMCSA will place a full transcript of the listening session in the docket referenced at the beginning of this notice.

Issued on: September 11, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–22880 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–EX–P

Notices

Federal Register

Vol. 77, No. 180

Monday, September 17, 2012

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

September 11, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques and other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC, *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Forest Service

Title: Understanding the Threats of Wildfire and Climate Change: Risk Mitigation Behaviors of Homeowners.

OMB Control Number: 0596–New.

Summary of Collection: The number of people living in wildland-urban interface areas that are threatened by wildfire has increased significantly over the past twenty to thirty years.

This, in turn has lead to increased risk to human and ecosystem health. In efforts to mitigate this risk the U.S. Forest Service (FS) uses techniques such as prescribed fire and selective thinning of vegetation to reduce fuel loads. Homeowners living in these areas also engage in activities, such as clearing brush from around their homes to mitigate risk. To understand homeowner behavior and their response to various sources of risk requires asking individuals living in high risk communities what they are doing and why they are doing it. A census of the homeowner population is the most effective statistically valid approach to expanding our understanding of these issues. The information collected from homeowners under this project will help forest service management meet the requirements of forest planning under the National Forest Management Act of 1976, the National Environmental Policy Act of 1969 for public input on federal decision making, and the National Fire Plan of 2001 that authorized social science research on wildfire and is funding this project.

Need and Use of the Information: Homeowners located in the wildland-urban interface in areas that were affected by wildfires, will be asked to complete a voluntary one time survey. Questions will help determine the link between homeowners' perceived risk to themselves and their property from wildfire and their behavior to mitigate that threat. Type of information collected will include (1) risk perceptions regarding wildfire, (2) risk reduction behaviors associated with wildfire, (3) sources of information regarding wildfires and wildfire risk reduction, (4) attitudes and knowledge of climate change and its impact on wildfire risks, and (5) socio-economic information. This study will help decision makers better understand the preferences of the homeowners in high risk areas to deal with threats that are posed from wildfire as these risks are enhanced due to the effects of climate change.

Description of Respondents: Individuals or households.

Number of Respondents: 400.

Frequency of Responses: Reporting: Other (one time).

Total Burden Hours: 130.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–22811 Filed 9–14–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed collection; Comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Business-Cooperative Service's (RBS) intention to request an extension for a currently approved information collection in support of the program for 7 CFR part 4279.

DATES: Comments on this notice must be received by November 16, 2012 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Brenda Griffin, Business and Industry Loan Processing Branch, Rural Business-Cooperative Service, U.S. Department of Agriculture, STOP 3224, 1400 Independence Avenue SW., Washington, DC 20250–3224, telephone (202) 720–6802, or by email to *brenda.griffin@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Guaranteed Loanmaking—Business and Industry Loans.

OMB Number: 0570–0018.

Expiration Date of Approval: 1/31/2013.

Type of Request: Extension of Paperwork Burden.

Abstract: The Business and Industry (B&I) Guaranteed Loan Program was legislated in 1972 under Section 310B of the Consolidated Farm and Rural Development Act, as amended. The purpose of the program is to improve, develop, or finance businesses, industries, and employment and improve the economic and environmental climate in rural communities. This purpose is achieved through bolstering the existing private credit structure through the guaranteeing of quality loans made by lending institutions, thereby providing lasting community benefits. The collected information is necessary to assist Agency loan officers and approval officials in determining program eligibility and program monitoring.

Estimate of Burden: Public reporting for this collection of information is estimated to average 30 minutes to 12 hours per response.

Respondents: Business or other for-profit; State, Local or Tribal; Lenders, accountants, attorneys.

Estimated Number of Respondents: 617.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 617.

Estimated Total Annual Burden on Respondents: 1,269.

Copies of this information collection can be obtained from Jeanne Jacobs, Regulations and Paperwork Management Branch, Support Services Division at (202) 692–0040.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of RBS, including whether the information will have practical utility; (b) the accuracy of RBS'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 Jeanne Jacobs, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave. SW., Washington, DC 20250.

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: September 7, 2012.

John C. Padalino,

Acting Administrator, Rural Business-Cooperative Service.

[FR Doc. 2012–22879 Filed 9–14–12; 8:45 am]

BILLING CODE 3410–XY–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: NMFS Observer Programs' Information that can be Gathered Only Through Questions.

OMB Control Number: 0648–0593.

Form Number(s): NA.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 13,295.

Average Hours Per Response: An observed trip is considered a response, and completion of all required forms per observer program averages 67 minutes, ranging from 15 minutes to 112 minutes.

Burden Hours: 26,782.

Needs and Uses: This request is for extension of a current information collection. The National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) deploys fishery observers on United States (U.S.) commercial fishing vessels and to fish processing plants in order to collect biological and economic data. NMFS has at least one observer program in each of its six Regions. These observer programs provide the most reliable and effective method for obtaining information that is critical for the conservation and management of living marine resources. Observer programs primarily obtain information through direct observations by employees or agents of NMFS; and such observations are not subject to the Paperwork Reduction Act (PRA). However, observer programs also collect the following information that requires clearance under the PRA: (1) Standardized questions of fishing vessel captains/crew or fish processing plant managers/staff, which include gear and performance questions, safety questions, and trip costs, crew size and other economic questions; (2) questions asked by observer program staff/contractors to plan observer deployments; (3) forms that are completed by observers and that fishing vessel captains are asked to review and sign; (4) questionnaires to evaluate observer performance; and (5) a form to certify that a fisherman is the permit holder when requesting observer data from the observer on the vessel. NMFS seeks to renew OMB PRA clearance for these information collections.

The information collected will be used to: (1) Monitor catch and bycatch in federally managed commercial fisheries; (2) understand the population status and trends of fish stocks and protected species, as well as the interactions between them; (3) determine the quantity and distribution of net benefits derived from living marine resources; (4) predict the biological, ecological, and economic impacts of existing management action and proposed management options; and (5) ensure that the observer programs can safely and efficiently collect the information required for the previous four uses. In particular, these biological and economic data collection programs contribute to legally mandated analyses required under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act, the Marine Mammal Protection Act (MMPA), the National Environmental Policy Act (NEPA), the Regulatory Flexibility Act (RFA), Executive Order 12866 (E.O. 12866), as well as a variety of state statutes. The confidentiality of the data will be protected as required by the MSA, Section 402(b).

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

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: September 11, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–22757 Filed 9–14–12; 8:45 am]

BILLING CODE 3510–22–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 of the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of Economic Analysis.

Title: Survey of Foreign Ocean Carriers' Expenses in the United States.

OMB Control Number: 0608–0012.

Form Number(s): BE–29.

Type of Request: Extension of a currently approved collection.

Burden Hours: 229.

Number of Respondents: 85 annually.

Average Hours Per Response: 3 hours for mandatory responses and 1 hour for other (non-mandatory) responses.

Needs and Uses: The data are needed to monitor U.S. international trade in transportation services, to analyze its impact on the U.S. economy and foreign economies, to compile and improve the U.S. economic accounts, to support U.S. commercial policy on transportation services, conduct trade promotion, and improve the ability of U.S. businesses to identify and evaluate market opportunities.

Affected Public: U.S. agents of foreign ocean carriers.

Frequency: Annually.

Respondent's Obligation: Mandatory.

Legal Authority: Title 22 U.S.C., Sections 3101–3108, as amended.

OMB Desk Officer: Paul Bugg, (202) 395–3093.

You may obtain copies of the above information collection proposal by writing or calling Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230, or via email at *jjessup@doc.gov.*

Send comments on the proposed information collection within 30 days of publication of this notice to Paul Bugg, OMB Desk Officer, via email at *pbugg@omb.eop.gov,* or by FAX at 202–395–7245.

Dated: September 11, 2012.

Glenna Mickelson,

Management Analyst, Office of Chief Information Officer.

[FR Doc. 2012–22803 Filed 9–14–12; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; National Security and Critical Technology Assessments of the U.S. Industrial Base

AGENCY: Bureau of Industry and Security, Commerce.

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 November 16, 2012.

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 Larry Hall, BIS ICB Liaison, (202) 482–4895, *Lawrence.Hall@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Department of Commerce, in coordination with the Department of Defense and other Federal agencies, conducts assessments of U.S. industrial base sectors deemed critical to U.S. national security. The information gathered is necessary to determine the health and competitiveness as well as the needs of these critical market segments in order to maintain a strong U.S. industrial base.

II. Method of Collection

Submitted electronically.

III. Data

OMB Control Number: 0694–0119.

Form Number(s): N/A.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit. organizations.

Estimated Number of Respondents: 26,350.

Estimated Time per Response: 8 to 14 hours.

Estimated Total Annual Burden Hours: 318,400.

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: September 12, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–22827 Filed 9–14–12; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–928]

Uncovered Innerspring Units from the People's Republic of China; Antidumping Duty Administrative Review; 2011–2012

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is conducting the administrative review of the antidumping duty order on uncovered innerspring units from the People's Republic of China (''PRC''). The period of review (''POR'') is February 1, 2011, through January 31, 2012. The review covers the following exporter of subject merchandise: Tai Wa Hong. We have preliminarily determined that Tai Wa Hong failed to cooperate to the best of its ability and are, therefore, applying adverse facts available (''AFA'') to Tai Wa Hong's PRC-origin merchandise.

FOR FURTHER INFORMATION CONTACT: Steven Hampton or Susan Pulongbarit, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0116 or (202) 482–4031, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise subject to the order is uncovered innerspring units composed of a series of individual metal springs joined together in sizes corresponding to the sizes of adult mattresses (*e.g.,* twin, twin long, full, full long, queen, California king and king) and units used in smaller constructions, such as crib and youth mattresses. The product is currently classified under subheading 9404.29.9010 and has also been classified under subheadings 9404.10.0000, 7326.20.0070, 7320.20.5010, or 7320.90.5010 of the Harmonized Tariff Schedule of the United States (''HTSUS''). The HTSUS subheadings are provided for convenience and customs purposes only; the written product description [1] of the scope of the order is dispositive.

Methodology

The Department has conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). In making these findings, we have relied, in part, on facts available and because one or more respondents did not act to the best of their ability to respond to the Department's requests for information, we have drawn an adverse inference in selecting from among the facts otherwise available.[2]

For a full description of the methodology underlying our conclusions, please see ''Decision Memorandum for Preliminary Results of 2011–2012 Antidumping Duty Administrative Review: Uncovered Innerspring Units from the People's Republic of China '' (''Preliminary Decision Memorandum'') from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with these results and hereby adopted by this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit (''CRU''), room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at http://www.trade.gov/ia/. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

As a result of this review, we preliminarily determine that a dumping margin of 234.51 percent exists for Tai Wa Hong for the period February 1, 2011, through January 31, 2012.

Disclosure and Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs not later than the later of 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[3] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[4] Case and rebuttal briefs should be filed using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS).[5]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, filed electronically via IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Standard Time within 30 days after the date of publication of this notice.[6] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries covered by this review.[7] The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. We will instruct CBP to assess duties at the *ad valorem* margin rate published above. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any assessment rate calculated in the final results of this review is above *de minimis.* The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable. Tai Wa Hong is a third country reseller and the Department will assess duties only on its PRC-origin merchandise.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) For Tai Wa Hong, the cash deposit rate will be that established in the final results of this review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate published for the most recently completed period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate

[1] Available in *Uncovered Innerspring Units from the People's Republic of China: Notice of Antidumping Duty Order,* 74 FR 7661 (February 19, 2009) (''Order'').

[2] *See* sections 776(a) and (b) of the Act.

[3] *See* 19 CFR 351.309(d).

[4] *See* 19 CFR 351.309(c)(2) and (d)(2).

[5] *See* 19 CFR 351.303.

[6] *See* 19 CFR 351.310(c).

[7] *See* 19 CFR 351.212(b)(1).

of 234.51 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: September 10, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–22864 Filed 9–14–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Social Capital Survey of Northeast Groundfish Fishery Permit Holders

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

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 November 16, 2012.

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 Patricia Pinto Da Silva at (508) 295.2370 or *patricia.pinto.da.silva@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a new information collection.

Quota allocations to groups of self-selecting permit holders (known as sector allocations) are increasingly being considered as a way to provide fishermen with greater control and flexibility in their fishing businesses while achieving efficiency gains. This new approach, which devolves substantial management responsibilities to groups of fishermen, represents a potential transformation in the relationship among permit holders as well as the relationship between permit holders and fisheries governance structures.

The NOAA National Marine Fisheries Service, Northeast Region expect that the success of sectors is likely to be shaped by the strength of the relationships between permit holders including their degree of trust and collaboration. We also expect that successful sectors will build norms and networks that enable collective action over time. The value of these relationships is commonly referred to in social and economic literature as social capital.

A baseline of existing social capital in the groundfish fishery in the Northeast Region was conducted in 2010 by the Gulf of Maine Research Institute. This survey, to be conducted twice over the next six years, will follow up on this earlier initiative and will enable researchers to measure the change in the types and strength of relationships between groundfish permit holders in the Northeast. This work will inform our understanding of how best to design collaborative management structures in support of sustainable fisheries in the region and nationally.

II. Method of Collection

Information will be collected via telephone interviews.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular (new information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 550.

Estimated Time Per Response: 2 hours.

Estimated Total Annual Burden Hours: 1,100.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

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: September 12, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–22820 Filed 9–14–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Indirect Cost Rates for the Damage Assessment, Remediation, and Restoration Program for Fiscal Year 2011

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Indirect Cost Rates for the Damage Assessment, Remediation, and Restoration Program for Fiscal Year 2011.

SUMMARY: The National Oceanic and Atmospheric Administration's (NOAA's) Damage Assessment, Remediation, and Restoration Program (DARRP) is announcing new indirect cost rates on the recovery of indirect costs for its component organizations involved in natural resource damage assessment and restoration activities for fiscal year (FY) 2011. The indirect cost rates for this fiscal year and date of

implementation are provided in this notice. More information on these rates and the DARRP policy can be found at the DARRP web site at: *http://www.darrp.noaa.gov/library/12_b.html*

FOR FURTHER INFORMATION CONTACT: For further information, contact LaTonya Burgess at 301–713–4248, ext. 211, by fax at 301–713–4389, or email at *LaTonya.Burgess@noaa.gov.*

SUPPLEMENTARY INFORMATION: The mission of the DARRP is to restore natural resource injuries caused by releases of hazardous substances or oil under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601 *et seq.*), the Oil Pollution Act of 1990 (OPA) (33 U.S.C. 2701 *et seq.*), and support restoration of physical injuries to National Marine Sanctuary resources under the National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1431 *et seq.*). The DARRP consists of three component organizations: The Office of Response and Restoration (ORR) within the National Ocean Service; the Restoration Center within the National Marine Fisheries Service; and the Office of the General Counsel for Natural Resources (GCNR). The DARRP conducts Natural Resource

Damage Assessments (NRDAs) as a basis for recovering damages from responsible parties, and uses the funds recovered to restore injured natural resources.

Consistent with Federal accounting requirements, the DARRP is required to account for and report the full costs of its programs and activities. Further, the DARRP is authorized by law to recover reasonable costs of damage assessment and restoration activities under CERCLA, OPA, and the NMSA. Within the constraints of these legal provisions and their regulatory applications, the DARRP has the discretion to develop indirect cost rates for its component organizations and formulate policies on the recovery of indirect cost rates subject to its requirements.

The DARRP's Indirect Cost Effort

In December 1998, the DARRP hired the public accounting firm Rubino & McGeehin, Chartered (R&M) to: Evaluate the DARRP cost accounting system and allocation practices; recommend the appropriate indirect cost allocation methodology; and determine the indirect cost rates for the three organizations that comprise the DARRP. A **Federal Register** notice on R&M's effort, their assessment of the DARRP's cost accounting system and practice, and their determination regarding the most appropriate indirect cost methodology and rates for FYs 1993 through 1999 was published on December 7, 2000 (65 FR 76611). The notice and report by R&M can also be found on the DARRP Web site at: *http://www.darrp.noaa.gov/library/12_b.html.*

R&M continued its assessment of DARRP's indirect cost rate system and structure for FYs 2000 and 2001. A second federal notice specifying the DARRP indirect rates for FYs 2000 and 2001 was published on December 2, 2002 (67 FR 71537).

In October 2002, DARRP hired the accounting firm of Cotton and Company LLP (Cotton) to review and certify DARRP costs incurred on cases for purposes of cost recovery and to develop indirect rates for FY 2002 and subsequent years. As in the prior years, Cotton concluded that the cost accounting system and allocation practices of the DARRP component organizations are consistent with Federal accounting requirements. Consistent with R&M's previous analyses, Cotton also determined that the most appropriate indirect allocation method continues to be the Direct Labor Cost Base for all three DARRP component organizations. The Direct Labor Cost Base is computed by allocating total indirect cost over the sum of direct labor dollars, plus the application of NOAA's leave surcharge and benefits rates to direct labor. Direct labor costs for contractors from I.M. Systems Group (IMSG) were included in the direct labor base because Cotton determined that these costs have the same relationship to the indirect cost pool as NOAA direct labor costs. IMSG provided on-site support to the DARRP in the areas of injury assessment, natural resource economics, restoration planning and implementation, and policy analysis. IMSG continues to provide on-site support to the DARRP. Starting in FY 2010, contractors from Genwest provide on-site support for cost documentation. A third federal notice specifying the DARRP indirect rates for FY 2002 was published on October 6, 2003 (68 FR 57672), a fourth notice for the FY 2003 indirect cost rates appeared on May 20, 2005 (70 FR 29280), and a fifth notice for the FY 2004 indirect cost rates was published on March 16, 2006 (71 FR 13356). The notice for the FY 2005 indirect cost rates was published on February 9, 2007 (72 FR 6221). The notice for the FY 2006 rates was published on June 3, 2008 (73 FR 31679). The notice for the FY 2007 and FY 2008 rates was published on November 16, 2009 (74 FR 58948). Finally, the notice for the FY 2009 and FY 2010 rates was published on October 20, 2011 (76 FR 65182). Cotton's reports on these indirect rates can also be found on the DARRP Web site at: *http://www.darrp.noaa.gov/library/12_b.html*

Cotton reaffirmed that the Direct Labor Cost Base is the most appropriate indirect allocation method for the development of the FY 2011 indirect cost rates.

The DARRP's Indirect Cost Rates and Policies

The DARRP will apply the indirect cost rates for FY 2011 as recommended by Cotton for each of the DARRP component organizations as provided in the following table:

DARRP component organization	FY2011 Indirect rate (percent)
Office of Response and Restoration (ORR)	113.03
Restoration Center (RC)	49.34
General Counsel for Natural Resources (GCNR)	20.97

These rates are based on the Direct Labor Cost Base allocation methodology.

The FY 2011 rates will be applied to all damage assessment and restoration case costs incurred between October 1, 2010 and September 30, 2011. DARRP will use the FY 2011 indirect cost rates for future fiscal years, beginning with FY 2012, until subsequent year-specific rates can be developed.

For cases that have settled and for cost claims paid prior to the effective date of the fiscal year in question, the DARRP will not re-open any resolved matters for the purpose of applying the revised rates in this policy for these fiscal years. For cases not settled and cost claims not paid prior to the effective date of the fiscal year in question, costs will be recalculated using the revised rates in this policy for these fiscal years. Where a responsible party has agreed to pay costs using previous year's indirect rates, but has not yet made the payment because the settlement documents are not finalized, the costs will not be recalculated.

The DARRP indirect cost rate policies and procedures published in the **Federal Register** on December 7, 2000 (65 FR 76611), on December 2, 2002 (67 FR 71537), October 6, 2003 (68 FR 57672), May 20, 2005 (70 FR 29280), March 16, 2006 (71 FR 13356), February 9, 2007 (72 FR 6221), June 3, 2008 (73 FR 31679), November 16, 2009 (74 FR 58948), and October 20, 2011 (76 FR65182) remain in effect except as updated by this notice.

Dated: September 7, 2012.

David Westerholm,

Director, Office of Response and Restoration.

[FR Doc. 2012–22826 Filed 9–14–12; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC237

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Groundfish Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Thursday, October 4, 2012 at 9 a.m.

ADDRESSES: The meeting will be held at the Holiday Inn, One Newbury Street, Peabody, MA 01960; telephone: (978) 535–4600; fax: (978) 535–8238.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Groundfish Advisory Panel (GAP) will meet to discuss development of Framework Adjustment 48 to the Northeast Multispecies Fishery Management Plan. The panel will: Discuss possible adjustments to management measures for sectors. The focus of this discussion will be on possible changes to the sector monitoring program, but may also consider other sector management issues. The GAP will also discuss dockside, at-sea and electronic monitoring options; discuss possible changes to the treatment of Annual Catch Limits and Accountability Measures and discuss measures that may increase access to year-round closed areas and other measures that may be intended to mitigate the effects of anticipate low catch quotas. Other business may also be discussed. GAP recommendations will be provided to the Groundfish Oversight Committee at a future meeting. Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 12, 2012.

William D. Chappell,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–22847 Filed 9–14–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID; DoD–2012–OS–0113]

Privacy Act of 1974; System of Records

AGENCY: Defense Intelligence Agency, DoD.

ACTION: Notice to alter a System of Records.

SUMMARY: The Defense Intelligence Agency is proposing to alter a system to its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on October 18, 2012 unless comments are received which result in a contrary determination. Comments will be accepted on or before October 17, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive; East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Theresa Lowery at Defense Intelligence Agency, DAN 1–C, 600 MacDill Blvd., Washington, DC 20340–0001 or by phone at (202) 231–1193.

SUPPLEMENTARY INFORMATION: The Defense Intelligence Agency system of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**. The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on June 18, 2012, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: September 11, 2012.

Aaron Siegel,

Alternate OSD **Federal Register** *Liaison Officer, Department of Defense.*

LDIA 0209

Litigation and Disposition Documentation (June 5, 2006, 71 FR 32323).

CHANGES:

* * * * *

SYSTEM NAME:

Delete entry and replace with ''Litigation Case Files''.

SYSTEM LOCATION:

Delete entry and replace with ''Defense Intelligence Agency, 200 MacDill Blvd., Washington, DC 20340–0001.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Federal employees, military service members, contractors and their affiliates and persons not associated with the Federal Government who are litigants or claimants; to include their representatives.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Individuals name, Social Security Number (SSN), work location, personal contact information such as name, telephone number, home address, and email address. Place, and date of birth, financial data, citizenship, security clearance records, and employment records. Records include case files documenting the nature, course, and outcome of litigation involving the agency. These types of documents may include court pleadings and orders, opinions, depositions, transcripts, affidavits, exhibits, and documents related to discovery and evidence.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete and replace with ''28 U.S.C. 1346(b); Federal Tort Claims Act, and E.O. 9397 (SSN), as amended.''

PURPOSE(S):

Delete entry and replace with ''The system will manage files pertaining to litigation concerning agency civilian, military and contractor personnel as well as persons not associated with the Federal Government who are litigants or claimants.

Information is used to meet regulatory requirements and to support various legal-related activities associated with the Defense Intelligence Agency, the Department of Justice, the Office of Personnel Management and the Military Services or adjudicative agencies of the U.S. Government as may be necessary or required in the disposition of an individual case.''

* * * * *

STORAGE:

Delete entry and replace with ''Paper and electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''By last name.''

SAFEGUARDS:

Delete entry and replace with ''Records are stored in office buildings protected by guards, controlled screenings, use of visitor registers, electronic access, and/or locks. Access to records is limited to individuals who are properly screened, and cleared on a need-to-know basis in the performance of their duties. Passwords and User IDs are used to control access to the system data, and procedures are in place to deter and detect browsing and unauthorized access. Physical and electronic access are limited to persons responsible for servicing and authorized to use the system.''

RETENTION AND DISPOSAL:

Delete and replace with ''Inactive Litigation: Judicially contested Freedom of Information Act (FOIA) and Privacy Act files transfer to the Washington National Records Center (WNRC) and destroy 10 years after the date of transfer. All other inactive ligation case files: Permanent; disposition pending approval by the National Archives and Records Administration.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Executive Assistant, Office of the General Counsel, Defense Intelligence Agency, 200 Mac Dill Blvd., Washington, DC 20340–0001.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the DIA Freedom of Information Act Office (DAN–1A), Defense Intelligence Agency, 200 MacDill Blvd., Washington, DC 20340–0001.

Request should contain the individual's full name, current address, and telephone number.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system of records, should address written inquiries to the DIA Freedom of Information Act Office, Defense Intelligence Agency (DAN–1A), 200 MacDill Blvd., Washington, DC 20340–0001.

Request should contain the individual's full name, current address, and telephone number.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''DIA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DIA Instruction 5400.001 ''Defense Intelligence Agency Privacy Program'';or may be obtained from the system manage.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Agency and other government officials, corporations, individuals and public records.''

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Delete entry and replace with ''Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a (j)(2), may be exempt pursuant to 5 U.S.C 552 (k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or which he would otherwise be eligible, as a result of maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. This exemption provides limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

Exempt materials from other systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this case record, the Defense Intelligence Agency hereby claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary systems of records, which they are a part.

An exemption rule for this system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2) and (3) (c) and (e) and it published at 32 CFR part 319.''

[FR Doc. 2012–22743 Filed 9–14–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0114]

Privacy Act of 1974; System of Records

AGENCY: Defense Intelligence Agency, DoD.

ACTION: Notice to Add a System of Records.

SUMMARY: The Defense Intelligence Agency is proposing the add a system to its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on October 18, 2012 unless comments are received which result in a contrary determination. Comments will be accepted on or before October 17, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive; East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Theresa Lowery at Defense Intelligence Agency, DAN 1–C, 600 MacDill Blvd., Washington, DC 20340–0001 or by phone at (202) 231–1193.

SUPPLEMENTARY INFORMATION: The Defense Intelligence Agency system of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**. The proposed system report, as required by 5 U.S.C. 552a of the Privacy Act of 1974, as amended, was submitted on April 26, 2012, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals, ''dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: September 11, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

LDIA 12–0002

SYSTEM NAME:

Privacy and Civil Liberties Case Management Records.

SYSTEM LOCATION:

Defense Intelligence Agency, 200 MacDill Blvd., Washington DC 20340–0001.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Civilian employees, contractors and military assignees who are the subject of an inquiry based on improper handling, release or transmission of Personally Identifiable Information, who report a breach of PII and who request guidance on the collection of PII. Civilian employees, contractor, military assignees, and members of the public who submit allegations of civil liberties violations by the Defense Intelligence Agency.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), work and home telephone number, address, military service, and case number. Copies of documents containing PII generated due to transmission, inquiry, or allegation. Complaints, comments, notes, memoranda, and correspondence relating to inquires, or allegations.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Public Law 458, Intelligence Reform and Terrorism Protection Act of 2004; Public Law 110–53, Implementing Recommendations of the 911 Commission Act of 2007; E.O. 12333–2008, Governing the Conduct of United States Activities; 5 U.S.C. 552a, Privacy Act of 1974 as amended, DoD 5400.11–R, Department of Defense Privacy Program; DIA 5400.001, Defense Intelligence Agency Privacy and Civil Liberties Program and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To receive, log and track the processing of Privacy Act violations, inquiries, and allegations of violations of civil liberties.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD ''Blanket Routine Uses'' set forth at the beginning of the Defense Intelligence Agency's compilation of systems records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and Electronic Storage Media.

RETRIEVABILITY:

By last name.

SAFEGUARDS:

Records are stored in office buildings protected by guards, controlled screenings, use of visitor registers, electronic access, and/or locks. Access to records is limited to individuals who are properly screened and cleared on a need-to-know basis in the performance of their duties. Passwords and User IDs are used to control access to the system data, and procedures are in place to deter and detect browsing and unauthorized access. Physical and electronic access are limited to persons responsible for servicing and authorized to use the system.

RETENTION AND DISPOSAL:

Documents containing PII generated due to transmission or inquiry; follow the disposition instructions approved for the official file copy or destroy 6 years after the erroneous release. Documents that do not contain PII generated due to transmission or inquiry; TEMPORARY; destroy 5 years after the erroneous release. Privacy Act Control Files and Civil Liberties Control Files maintained for purposes in responding to requests, TEMPORARY; destroy 5 years after final action by the agency or final adjudication by courts, whichever is later. Paper Files are shredded or burned, electronic files are deleted from the database.

SYSTEM MANAGER(S) AND ADDRESS:

Privacy Act Compliance Officer, Defense Intelligence Agency, 200 MacDill Blvd. Washington DC 20340–5100.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the DIA Freedom of Information Act Office (DAN–1A), Defense Intelligence Agency, 200 MacDill Blvd., Washington DC 20340–5100.

Request should contain the individual's full name, current address and telephone number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves, contained in this system of records, should address written inquiries to the DIA Freedom of Information Act Office, Defense Intelligence Agency (DAN–1A), 200 MacDill Blvd., Washington DC 20340–5100.

Request should contain the individual's full name, current address, and telephone number.

CONTESTING RECORD PROCEDURES:

DIA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DIA Instruction 5400.001 ''Defense Intelligence Agency Privacy Program''; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individuals, Privacy Compliance Staff Members, and other agency officials.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C 552a(j)(2), may be exempt pursuant to 5 U.S.C 552(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or which he would otherwise be eligible, as a result of maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. Note: When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

Investigatory material complied solely for determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent, such material would reveal the identity of a confidential source.

An exemption rule for this system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2) and (3) c) and (e) and it published at 32 CFR part 319.

[FR Doc. 2012–22765 Filed 9–14–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review; Institute of Education Sciences; Teaching and Learning International Survey (TALIS) 2013 Main Study

SUMMARY: TALIS is an international survey of the teaching workforce, teaching as a profession, and the learning environments of schools. Data are collected through questionnaires from individual teachers and their school principals in lower secondary schools (grades 7, 8 and 9) in the United States.

DATES: Interested persons are invited to submit comments on or before October 17, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Washington, DC 20202–4537. Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04931. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Teaching and Learning International Survey (TALIS) 2013 Main Study.

OMB Control Number: 1850–0888.

Type of Review: Reinstatement .

Total Estimated Number of Annual Responses: 3,542.

Total Estimated Number of Annual Burden Hours: 3,341 .

Abstract: TALIS' main objective is to help countries review current policy and develop informed education policy by providing accurate and relevant international indicators on teachers and teaching. TALIS offers an opportunity for teachers and school principals to provide their perspectives on the state of education in their own countries. Both teacher and principal questionnaires include questions about teacher and principal background and characteristics; teacher and principal professional development; school leadership; teacher appraisal and feedback; teachers' instructional beliefs and pedagogical practices; school climate; student characteristics as perceived by the teacher; teacher efficacy; and teacher and principal job satisfaction. TALIS is sponsored by the Organization for Economic Cooperation and Development and managed in the United States by the National Center for Education Statistics. This submission requests the Office of Management and Budget's clearance for the spring 2013 main study data collection.

Dated: September 12, 2012.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–22898 Filed 9–14–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Board for Education Sciences; Meeting

AGENCY: Institute of Education Sciences, Department of Education.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the National Board for Education Sciences. The notice also describes the functions of the Committee. Notice of this meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend the meeting.

DATES: October 5, 2012.

Time: 8:30 a.m. to 4:30 p.m. Eastern Standard Time.

ADDRESSES: 80 F Street NW., Room 100, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Monica Herk, Executive Director, National Board for Education Sciences, 555 New Jersey Ave. NW., Room 602 K, Washington, DC 20208; phone:(202)

208–3491; fax:(202) 219–1466; email: *Monica.Herk@ed.gov.*

SUPPLEMENTARY INFORMATION: The National Board for Education Sciences is authorized by Section 116 of the Education Sciences Reform Act of 2002(ESRA), *20 U.S.C 9516.* The Board advises the Director of the Institute of Education Sciences (IES) on, among other things, the establishment of activities to be supported by the Institute, on the funding for applications for grants, contracts, and cooperative agreements for research after the completion of peer review, and reviews and evaluates the work of the Institute.

On October 5, 2012, starting at 8:30 a.m., the Board will approve the agenda and hear remarks from the NBES Chair, Bridget Long. John Easton, Director of IES, will swear in two newly appointed Board members. John Easton and the Commissioners of the national centers will then give an overview of recent developments at IES.

From 9:45 to 10:15 a.m., Board members will follow-up on their discussion of the IES peer review process by listening to and discussing an update by Anne Ricciuti, IES Deputy Director for Science. A break will take place from 10:15 to 10:30 a.m.

From 10:30 a.m. to 12:00 noon, the Board will consider how to increase the supply and demand of information about educational research. Following opening presentations by Ruth Neild, Commissioner of the National Center for Education Evaluation and by Steve Fleishman, Deputy Executive Officer of Education Northwest, Board members will engage in roundtable discussion of the issues raised. The meeting will break for lunch from 12:00 noon to 1:00 p.m.

The Board meeting will resume from 1:00 to 2:30 p.m. for members to discuss the topic, ''Design-Based Implementation Research''. After opening remarks by Barbara Means, Director of the Center for Technology in Learning at SRI International, and Thomas Smith, Director of the National Center for Scaling Up Effective Schools, the Board will engage in roundtable discussion of the topic.

From 2:30 to 3:00 p.m., John Easton, IES Director, will describe a new research program that IES will be launching.

An afternoon break will occur from 3:00 to 3:15 p.m.

From 3:15 to 3:45 p.m., the Board will listen to and discuss a briefing by Sue Betka, IES Deputy Director for Administration and Policy, on IES's budgetary outlook.

Between 3:45 and 4:15 p.m., the Board will discuss the leadership of the Board for the coming year.

At 4:15 p.m., there will be closing remarks and a consideration of next steps from the IES Director and NBES Chair, with adjournment scheduled for 4:30 p.m.

There will not be an opportunity for public comment. However, members of the public are encouraged to submit written comments related to NBES to Monica Herk (see contact information above). A final agenda is available from Monica Herk (see contact information above) and is posted on the Board Web site *http://ies.ed.gov/director/board/agendas/index.asp.* Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistance listening devices, or materials in alternative format) should notify Monica Herk no later than September 21. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Records are kept of all Board proceedings and are available for public inspection at 555 New Jersey Ave. NW., Room 602 K, Washington, DC, 20208, from the hours of 9 a.m. to 5 p.m., Eastern Standard Time Monday through Friday. *Electronic Access to This Document:* You may 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/fed-register/index.html.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–866–512–1800; or in the Washington, DC, area at (202) 512–0000.

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: *www.gpoaccess.gov/nara/index.html.*

John Q. Easton,

Director, Institute of Education Sciences.

[FR Doc. 2012–22861 Filed 9–14–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Proposed Agency Information Collection

AGENCY: U.S. Energy Information Administration (EIA), U.S. Department of Energy.

ACTION: Agency Information Collection Activities: Proposed Collection; Notice and Request for Comments.

SUMMARY: The EIA invites public comment on the comprehensive evaluation of an existing data collection, the Financial Reporting System, EIA–28, which EIA is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper evaluation of this form, 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 that will occur as a result of this evaluation, 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 respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before November 16, 2012. If you anticipate difficulty in submitting comments within that period, contact the person listed in **ADDRESSES** as soon as possible.

ADDRESSES: Written comments may be sent to Neal Davis, Energy Information Administration, 1000 Independence Ave, SW., Washington DC 20585 or by fax at 202–586–4420 or by email at *neal.davis@eia.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Neal Davis, Energy Information Administration, 1000 Independence Ave. SW., Washington DC 20585, *neal.davis@eia.gov*.

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.1905–0149:* Existing;

(2) *Information Collection Request Title:* Evaluation of the Financial Reporting System, Form EIA–28;

(3) *Type of Request:* Comprehensive Evaluation of an Existing Data Collection;

(4) *Purpose:* The U.S. Energy Information Administration (EIA) is planning to request a three year approval from the Office of Management and Budget (OMB) to conduct a comprehensive evaluation of an existing data collection, the Financial Reporting System, EIA–28. This is not a request to collect data using the existing data collection. It is a request to collect data in order to evaluate an existing data collection. This includes investigating what data are being collected on the form, how these data are understood by respondents, and how useful the data being collected are to stakeholders. The goal of this evaluation is to collect enough data about the existing data collection to successfully inform the future redesign of the EIA–28. This authority would allow EIA to conduct field testing, pilot surveys, respondent debriefings, cognitive interviews, usability interviews, and focus groups in support of this evaluation. Through the use of these methods, EIA will improve the quality of data being collected, reduce or minimize respondent burden, increase agency efficiency, and improve responsiveness to the public. Note that the use of any or all of these methods is dependent upon the availability of resources and all methods are voluntary.

The methods proposed for coverage by this evaluation are the following:

Field Testing. Field testing surveys conducted under this evaluation will generally be methodological studies of 100 cases or less. A field test is used to clarify particular issues, rather than to replicate all components of a methodological design. Accordingly, field tests will not employ statistically representative samples.

Pilot Surveys. Pilot surveys conducted under this evaluation will generally be methodological studies of 100 cases or less. The pilot surveys will replicate all components of the methodological design, sampling procedures (where possible) and questionnaires of the full scale survey. Accordingly, pilot tests will employ statistically representative samples.

Respondent Debriefings. Respondent debriefings conducted under this evaluation will generally be methodological studies of 100 cases or less. Respondent debriefings are usually conducted post data collection and are used to determine potential issues with data quality and to determine a more accurate respondent burden measure. Respondent debriefings can employ either statistically or non-statistically representative samples. When employing statistically representative samples, respondent debriefings allow EIA to improve its understanding of variance for the items in the EIA–28.

Cognitive Interviews. Cognitive interviews conducted under this evaluation will generally number 50 or less. Cognitive interviews are used to identify problems of ambiguity or misunderstanding, or other difficulties respondents have answering questions, and reduce measurement error in a survey. Cognitive interviews will not employ statistically representative samples

Usability Interviews. Usability interviews conducted under this evaluation will generally number 50 or less. Usability interviews are used to make sure that electronic questionnaires, Web sites and other associated materials are user-friendly, allowing respondents to easily and intuitively navigate the electronic item and find the information that they seek. Usability interviews will not employ statistically representative samples.

Focus Groups. Focus groups conducted under this evaluation will generally number 25 or less. Focus groups are used to identify and explore issues with populations of interest, e.g., from a specific group of stakeholders. Focus groups will not employ statistically representative samples.

(5) *Annual Estimated Number of Respondents:* 300;

(6) *Annual Estimated Number of Total Responses:* 300;

(7) *Annual Estimated Number of Burden Hours:* 450;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* 0. EIA estimates that there are no additional costs to respondents associated with the surveys other than the costs associated with the burden hours.

Statutory Authority: Public Law 93–275 (Federal Energy Administration Act of 1974), 5(a), 5(b), and 13(a).

Issued in Washington, DC on September 11, 2012.

Stephanie Brown,

Director, Office of Survey Development and Statistical Integration, Energy Information Administration.

[FR Doc. 2012–22833 Filed 9–14–12; 8:45 am]

BILLING CODE 6450–01–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: CP12–514–000.
Applicants: Texas Eastern Transmission, LP.
Description: Application of Texas Eastern Transmission, LP for authorization to abandon service and waiver of tariff provision.
Filed Date: 9/5/12.
Accession Number: 20120905–5126.
Comments Due: 5 p.m. ET 9/20/12.

Docket Numbers: CP12–515–000.
Applicants: Texas Eastern Transmission, LP.
Description: Texas Eastern Transmission, LP application for authorization to abandon service.
Filed Date: 9/6/12.
Accession Number: 20120906–5023.
Comments Due: 5 p.m. ET 9/20/12.

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 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: RP12–901–001.
Applicants: CenterPoint Energy—Mississippi River T.
Description: Compliance Filing_Discount Type Adjustments for Negotiated Rate Agreements to be effective 9/1/2012.
Filed Date: 9/10/12.
Accession Number: 20120910–5120.
Comments Due: 5 p.m. ET 9/24/12.

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 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 September 11, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary

[FR Doc. 2012–22814 Filed 9–14–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–2601–000]

Rayonier Performance Fibers, 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 Rayonier Performance Fibers, 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 October 1, 2012.

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: September 11, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–22813 Filed 9–14–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–2590–000]

DR Power, 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 DR Power, 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 October 1, 2012.

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: September 11, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–22816 Filed 9–14–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–2542–000]

Prairie Rose Wind, 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 Prairie Rose Wind, 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 October 1, 2012.

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: September 11, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–22815 Filed 9–14–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–2600–000]

American Illuminating Company, 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 American Illuminating Company, 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 October 1, 2012.

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: September 11, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–22817 Filed 9–14–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

Good Neighbor Environmental Board; Notification of Public Advisory Committee Teleconference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of Public Advisory Committee Teleconference.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Good Neighbor Environmental Board (GNEB) will hold a public teleconference on October 2, 2012 from 3:30 p.m. to 5:00 p.m. Eastern Standard Time.

The meeting is open to the public. For further information regarding the teleconference and background materials, please contact Mark Joyce at the number listed below.

Background: GNEB is a federal advisory committee chartered under the Federal Advisory Committee Act, Public Law 92463. GNEB provides advice and recommendations to the President and Congress on environmental and infrastructure issues along the U.S. border with Mexico. Purpose of Meeting: The purpose of this teleconference is to discuss and approve the Good Neighbor Environmental Board's Fifteenth Report, which focuses on water infrastructure issues in the U.S.-Mexico border region.

SUPPLEMENTARY INFORMATION: If you wish to make oral comments or submit written comments to the Board, please contact Mark Joyce at least five days prior to the meeting.

General Information: Additional information concerning the GNEB can be found on its Web site at *www.epa.gov/ofacmo/gneb.*

Meeting Access: For information on access or services for individuals with disabilities, please contact Mark Joyce at (202) 564–2130 or email at *joyce.mark@epa.gov.* To request accommodation of a disability, please contact Mark Joyce at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

Dated: September 11, 2012.

Mark Joyce,

Acting Designated Federal Officer.

[FR Doc. 2012–22835 Filed 9–14–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[9727–7]

National Pollutant Discharge Elimination System (NPDES): Draft General Permit for Point Source Discharges From New and Replacement Surface Discharging Wastewater Treatment Systems to Waters of the United States, Including to Conveyances to Waters of the United States, Including Interstate Waters That Flow Across or Form Part of the Boundary of Illinois and in All Areas of the State of Illinois

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of draft general permit, open house, public hearing, and public comment period.

SUMMARY: EPA, Region 5 today is proposing an NPDES draft general permit for point source discharges of less than 1500 gallons per day from new and replacement surface discharging wastewater treatment systems to Waters of the United States, including to conveyances to Waters of the United States, including interstate waters that flow across or form part of the boundary of Illinois and in all areas of the State of Illinois. Once finalized, this permit will be available to eligible surface discharging system owners or operators who submit an administratively complete notice of intent to be covered by the general permit, including the technological and economic feasibility analyses. The permit will require compliance with certain effluent limitations and inspection, monitoring and reporting requirements. The Agency is asking the public for comments on the draft general permit. The permit and supporting documentation are available at: *www.epa.gov/region5/water/npdestek/surfacedischarge/.*

DATES: Today's action is effective on September 17, 2012. Comments on the draft general permit must be provided at the public hearing, or postmarked or delivered by electronic mail, on or before November 15, 2012.

ADDRESSES: Submit your comments by one of the following methods.

1. In person at the public hearing.
2. *Email: il_psd_comments@epa.gov.*
3. *Mail to:* Mark Ackerman, U.S. Environmental Protection Agency, Region 5, NPDES Programs Branch—WN–16J, 77 West Jackson Boulevard, Chicago, Illinois 60604–3590.

Open house and public hearing: EPA will hold an open house and a public hearing on the draft general permit at the University of Illinois at Springfield. The open house will be held in Public Affairs Center (PAC) Conference Room G, 2200 Ernest Hemingway Drive, in Springfield, IL 62703–5407, from 3:00 p.m. to 5:00 p.m., on November 1, 2012. EPA representatives will answer questions at the open house. The public hearing is for submitting oral and written comments and will be held in Brookens Auditorium, 2200 Ernest Hemingway Drive, in Springfield, IL 62703–5407, from 7:00 p.m. to 9:00 p.m., on November 1, 2012. If you wish to make an oral comment, sign in begins at 6:00 p.m. Speakers will appear in the order in which they sign in. A written transcript of the hearing will be made available to the public following the hearing.

SUPPLEMENTARY INFORMATION: To see the draft general permit and related documents, go to *www.epa.gov/region5/water/npdestek/surfacedischarge/* or visit the EPA's Chicago regional office to view the full administrative record. To schedule an appointment at the Chicago office, or if you need special accommodations to attend the open house or public hearing, contact Mark Ackerman at 312–353–4145.

Authority: 33 U.S.C. 1251 *et seq.*

Dated: September 6, 2012.

Anthony Carrollo,

Deputy Director, Water Division, EPA Region 5.

[FR Doc. 2012–22759 Filed 9–14–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following information collection pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13. 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 control number.

FOR FURTHER INFORMATION CONTACT: Ghassan Khalek, Federal Communications Commission, 445 12th Street, SW., Washington DC, 20554, (202) 418–02771 or via the Internet at: *ghassan.khalek@fcc.gov.*

OMB Control Number: 3060–0228.

OMB Approval Date: August 28, 2012.

OMB Expiration Date: August 31, 2015.

Title: Section 80.59—Compulsory ship inspections and Ship Inspection Certificates.

Form Number: FCC Forms 806, 824, 827 and 829.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions and state, local or tribal government.

Number of Respondents and Responses: 1,310 respondents; 1,310 responses.

Estimated Time per Response: 0.84 hours (5 minutes) up to 4 hours per response.

Frequency of Response: On occasion, annual and every five year reporting requirements, recordkeeping requirement, and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 4, 303, 309, 332 and 362 of the Communications Act of 1934, as amended.

Total Annual Burden: 5,445 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: None.

Needs and Uses: The requirement contained in this rule section is necessary to implement the provisions of section 362(b) of the Communications Act of 1934, as amend, which require the Commission to inspect the radio installation of large cargo ships and certain passenger ships at least once a year to ensure that the radio installation is in compliance with the requirements of the Communications Act, and permits the Commission to waive the required annual inspection of certain oceangoing ships for up to 30 days beyond the expiration date of a vessel's radio safety certificate, upon finding that the public interest would be served. The information is used by the Engineer in Charge of FCC Field Offices to determine the eligibility of a vessel for a waiver of the required annual radio station inspection.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2012–22906 Filed 9–14–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Federal Advisory Committee Act; Advisory Committee on Diversity for Communications in the Digital Age

AGENCY: Federal Communications Commission.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC) Advisory Committee on Diversity for Communications in the Digital Age (''Diversity Committee''). The Committee's mission is to provide recommendations to the Commission regarding policies and practices that will further enhance diversity in the telecommunications and related industries. In particular, the Committee will focus primarily on lowering barrier to entry for historically disadvantaged men and women, exploring ways in which to ensure universal access to and adoption of broadband, and creating an environment that enables employment of a diverse workforce within the telecommunications and related industries. The Committee will be charged with gathering the data and information necessary to formulate meaningful recommendations for these objectives.

DATES: October 3, 2012 at 2:00 p.m.

ADDRESSES: Federal Communications Commission, Room TW–C305 (Commission Meeting Room), 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Barbara Kreisman, 202–418–1605 *Barbara.Kreisman@FCC.gov.*

SUPPLEMENTARY INFORMATION: At this meeting the current committee structure and other organizational matters will be discussed. The goals and approaches of the advisory group will be discussed, including the substantive direction further recommendations should consider. Committee reports may be submitted.

Members of the general public may attend the meeting. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. The public may submit written comments before the meeting to: Barbara Kreisman, the FCC's Designated Federal Officer for the Diversity Committee by email: *Barbara.Kreisman@fcc.gov* or U.S. Postal Service Mail (Barbara Kreisman, Federal Communications Commission, Room 2–A665, 445 12th Street SW., Washington, DC 20554).

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). Such requests should include a detailed description of the accommodation needed. In addition, please include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Additional information regarding the Diversity Committee can be found at *www.fcc.gov/DiversityFAC.*

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 2012–22752 Filed 9–14–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 12–25; DA 12–1446]

Mobility Fund Phase I Auction; Release of Files with Recalculated Road Miles for Auction 901; Mock Auction Rescheduled for September 21, 2012

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Wireless Telecommunications and Wireline Competition Bureaus announce updated data files of census blocks eligible for the Mobility Fund Phase I support to be offered in Auction 901, which is to be held on September 27, 2012, and the change of the mock auction date from September 25, 2012 to September 21, 2012.

DATES: The mock auction is rescheduled for September 21, 2012. Auction 901 is scheduled to be held on September 27, 2012.

FOR FURTHER INFORMATION CONTACT: Wireless Telecommunications Bureau, Auctions and Spectrum Access Division: Lisa Stover at (717) 338–2868.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 901 Updated Data Files and Mock Auction Date Change Public Notice* released on September 7, 2012. The *Auction 901 Updated Data Files and Mock Auction Date Change Public Notice* and its associated attachment as well as related Commission documents may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, fax 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, for example, DA 12–1446. The *Auction 901 Updated Data Files and Mock Auction Date Change Public Notice* and related documents also are available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/901/* or by using the search function for AU Docket No. 12–25 on the Commission's Electronic Comment Filing System (ECFS) web page at *http://www.fcc.gov/cgb/ecfs/.*

1. In the *Auction 901 Procedures Public Notice,* 77 FR 32092, May 31, 2012, the Bureaus identified census blocks eligible for the Mobility Fund Phase I support to be offered in Auction 901. The Bureaus also released files containing detailed information about these census blocks in a number of data formats, and a file with information about the more than 14,000 biddable geographic areas for Auction 901. These biddable items include: (1) The census tract-level aggregations of eligible census blocks, (2) separate aggregations of Tribal blocks and non-Tribal blocks for tracts that contain some eligible blocks that are in a Tribal land and other eligible blocks that are not in a Tribal land, and (3) individual eligible census blocks in Alaska. The Bureaus now announce the availability of updated versions of these files, which are available via the link for ''Attachment A Files'' at *http://wireless.fcc.gov/auctions/901/.* An updated summary of the eligible census blocks is attached to the *Auction 901 Updated Data Files and Mock Auction Date Change Public Notice.*

2. These files do not change the set of eligible census blocks or biddable items. The only changes made are to the road miles listed for certain of the eligible census blocks and their associated biddable items. Comparing the recalculated road miles released today to the previously-released data, the Bureaus note that: (1) More than 80% of the biddable items have either no change in road miles or a change of less than 1 mile; and (2) Fewer than 200 of the more than 14,000 biddable items have changes of at least 1 road mile and more than 25% of the previous total road miles.

3. The Bureaus recently became aware of some anomalies in the calculated

road miles for certain of the eligible census blocks, and as a result the Bureaus have reviewed their procedures for calculating road miles. The Bureaus' review indicates that the previously-posted files overstated the eligible road miles in certain cases. Newly-calculated files are available on the Auction 901 Web site (*http://wireless.fcc.gov/auctions/901/*) via the link for ''Attachment A Files.''

4. Based on the Bureaus' review, they have determined that the overstatement resulted from an error in processing the relevant census data files relating to road miles. By way of background, as stated in the *Auction 901 Comment Public Notice,* 77 FR 7152, February 10, 2012, in calculating the number of road miles associated with each eligible census block, the Bureaus used the sum of linear road miles within the block plus half of the sum of linear road miles that form a border with an adjacent block. The Bureaus included half of the sum of the border roads so these linear miles are not double counted and are appropriately attributed to each eligible block. In order to make this calculation, they considered data in census TIGER files that defines census block borders, other geographic borders, and linear features such as roads. Due to an error in joining these data files, the Bureaus' previous files overstated the calculation of road miles within certain census blocks.

5. The Bureaus' review also indicated that, based on the different ways in which various software treats fractions, the Bureaus could improve the consistency of their data by standardizing their rounding procedures. So the Bureaus now round all road mile numbers to hundredths of miles (two decimal places). As a result, the road mile figures in some cases may be slightly different than the previously-released data due to the new rounding procedures.

6. The Bureaus also reschedule the upcoming mock auction for Auction 901. The mock auction, initially scheduled for September 25, 2012, will instead take place on September 21, 2012. The mock auction will enable qualified bidders to become familiar with the FCC Auction System and to practice submitting bids. Auction 901 will proceed as scheduled on

Thursday, September 27, 2012. Consistent with its usual practice, the Commission intends to announce qualified bidders and distribute registration materials by overnight mail approximately ten days before the auction. All other previously-announced auction procedures and requirements remain the same.

Federal Communications Commission.

Gary D. Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 2012–22907 Filed 9–14–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 12–1433]

Open Internet Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Commission announces the next meeting date, time, and agenda of the Open Internet Advisory Committee (Committee). The Committee was established to track and evaluate the effects of the Commission's Open Internet rules, and to provide any recommendations it deems appropriate to the Commission regarding policies and practices related to preserving the open Internet. The Committee will observe market developments regarding the freedom and openness of the Internet and will focus in particular on issues addressed in the Commission's Open Internet rules, such as transparency, reasonable network management practices, differences in treatment of fixed and mobile broadband services, specialized services, and technical standards.

DATES: The next meeting of the Committee will take place on Tuesday, October 9, 2012, 10:00 a.m. to 12:00 p.m., at Milstein West A at the Wasserstein Hall/Caspersen Student Center, Harvard Law School, 1585 Massachusetts Avenue, Cambridge, MA 02138.

FOR FURTHER INFORMATION CONTACT: Daniel Kirschner, Office of General Counsel, (202) 418–1735, or email *Daniel.Kirschner@fcc.gov;* or Deborah Broderson, Consumer and Governmental Affairs Bureau, (202) 418–0652, or email at *Deborah.Broderson@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document DA 12–1433, released August 31, 2012, announcing the agenda, date and time of the Committee's next meeting.

At its October 9, 2012 meeting, it is expected that the Committee will consider issues related to the subject areas of its four working groups—Mobile Broadband, Economic Impacts of Open Internet Frameworks, Specialized Services, and Transparency—as well as other open Internet related issues. A limited amount of time will be available on the agenda for comments from the public. Alternatively, members of the public may send written comments to: Daniel Kirschner, Designated Federal Officer of the Committee, or Deborah Broderson, Deputy Designated Federal Officer, at the address provided above.

The meeting is open to the public and the site is fully accessible to people using wheelchairs or other mobility aids. Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please include your contact information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill. The meeting of the Committee will also be broadcast live with open captioning over the Internet at *http://cyber.law.harvard.edu/events/2012/10.oiac.*

Federal Communications Commission.

Kris Anne Monteith,

Acting Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2012–22755 Filed 9–14–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Radio Broadcasting Services; AM or FM Proposals To Change The Community of License.

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The following applicants filed AM or FM proposals to change the community of license: ALEXANDRA COMMUNICATIONS, INC., Station KRKZ–FM, Facility ID 189499, BPH–20120725AHL, From NETARTS, OR, To CHINOOK, WA; ALEXANDRA COMMUNICATIONS, INC., Station KTIL, Facility ID 50554, BMP–20120725AHO, From TILLAMOOK, OR, To NETARTS, OR; BIRACH BROADCASTING CORPORATION, Station NEW, Facility ID 136069, BMP–20120813ABI, From TERRE HAUTE, IN, To PEOTONE, IN; BRAHMIN BROADCASTING CORPORATION, Station KPAD, Facility ID 166006,

BMPH–20111230ABO, From RAWLINS, WY, To WHEATLAND, WY; CITICASTERS LICENSES, INC., Station WOGB, Facility ID 89, BPH–20120720ACQ, From KAUKAUNA, WI, To REEDSVILLE, WI; CLEAR CHANNEL BROADCASTING LICENSES, INC., Station WQNS, Facility ID 41008, BPH–20120807ACK, From WAYNESVILLE, NC, To WOODFIN, NC; CORPORATION FOR NATIVE BROADCASTING, Station KXSW, Facility ID 171940, BPED–20120717AAL, From SISSETON, SD, To AGENCY VILLAGE, SD; CRAIN MEDIA GROUP, LLC, Station KEAZ, Facility ID 48748, BPH–20120716ADV, From HEBER SPRINGS, AR, To KENSETT, AR; DAIJ MEDIA, LLC, Station KJOZ, Facility ID 20625, BP–20120731AAA, From CONROE, TX, To FRIENDSWOOD, TX; ENTERTAINMENT MEDIA TRUST, DENNIS J.WATKINS, TRUSTEE, Station KQQZ, Facility ID 5281, BMP–20120628AAL, From FAIRVIEW HEIGHTS, IL, To DESOTO, MO; GOOD TIDINGS TRUST, INC., Station WAYR, Facility ID 24625, BP–20120724ABN, From ORANGE PARK, FL, To FLEMING ISLAND, FL; IHR EDUCATIONAL BROADCASTING, Station NEW, Facility ID 160745, BMP–20120821AAF, From MERRILL, OR, To ALTAMONT, OR; JER LICENSES, LLC, Station NEW, Facility ID 190382, BNPH–20120529ALR, From GUNNISON, CO, To DOTSERO, CO; KIERTRON, INC., Station KBRT, Facility ID 34588, BMP–20120809AAQ, From AVALON, CA, To COSTA MESA, CA; MALVERN ENTERTAINMENT CORPORATION, Station KHAN, Facility ID 164210, BPH–20120716ADT, From KENSETT, AR, To MAGNESS, AR; SYNERGY BROADCAST NORTH DAKOTA, LLC, Station KLTQ, Facility ID 164305, BPH–20120727AHW, From NEW ENGLAND, ND, To BEULAH, ND; SYNERGY BROADCAST NORTH DAKOTA, LLC, Station KQLZ, Facility ID 166059, BPH–20120727AID, From BEULAH, ND, To NEW ENGLAND, ND; THE OPP BROADCASTING CO., INC., Station WAMI–FM, Facility ID 66211, BPH–20120612ACO, From FORT DEPOSIT, AL, To OPP, AL; TRI STATE RADIO, LLC, Station KYLZ, Facility ID 170181, BPH–20120807ACF, From PAROWAN, UT, To ENOCH, UT.

DATES: The agency must receive comments on or before November 16, 2012.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Tung Bui, 202–418–2700.

SUPPLEMENTARY INFORMATION: The full text of these applications is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street SW., Washington, DC 20554 or electronically via the Media Bureau's Consolidated Data Base System, *http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm.* A copy of this application may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC, 20554, telephone 1–800–378–3160 or *www.BCPIWEB.com.*

Federal Communications Commission.

James D. Bradshaw,

Deputy Chief, Audio Division, Media Bureau.

[FR Doc. 2012–22753 Filed 9–14–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: September 10, 2012.

Federal Deposit Insurance Corporation.

Pamela Johnson,

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In Alphabetical Order]

FDIC Ref. no.	Bank name	City	State	Date closed
10457	First Commercial Bank	Bloomington	MN	9/7/2012

[FR Doc. 2012–22724 Filed 9–14–12; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notice

AGENCY: Federal Election Commission.

DATE & TIME: *Thursday, September 20, 2012 At 10 a.m.*

PLACE: 999 E Street NW., Washington, DC (Ninth Floor)

STATUS: This Meeting Will Be Open To The Public.

ITEMS TO BE DISCUSSED:

Correction and Approval of the Minutes for the Meeting of August 23, 2012

Draft Advisory Opinion 2012–25: American Future Fund, American Future Fund Political Action, Mr. David McIntosh and David McIntosh for Indiana

Draft Advisory Opinion 2012–31: AT&T Inc.

Audit Division Recommendation Memorandum on Righmarch.com PAC, Inc. (A09–25)

Audit Division Recommendation Memorandum on the Minnesota Democratic-Farmer-Labor Party (A09–08)

Candidate and Committee Viewer Demonstration

Management and Administrative Matters

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shelley E. Garr,

Deputy Secretary of the Commission.

[FR Doc. 2012–22979 Filed 9–13–12; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 2, 2012.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. *James Richard Smail and J.R. Smail, Inc.,* both of Orrville, Ohio; to acquire voting shares of National Bancshares Corporation, and thereby indirectly acquire voting shares of First National Bank, both in Orrville, Ohio.

Board of Governors of the Federal Reserve System, September 12, 2012.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

[FR Doc. 2012–22801 Filed 9–14–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 12, 2012.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *Educational Services of America, Inc., and EdBancorp, Inc.,* both in Knoxville, Tennessee; to merge with SouthEast Bancshares, Inc., and thereby indirectly acquire SouthEast Bank & Trust, both in Athens, Tennessee.

Board of Governors of the Federal Reserve System, September 12, 2012.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

[FR Doc. 2012–22800 Filed 9–14–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: HHS–OS–17339–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

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 an Information Collection Request (ICR), described below, to the Office of Management and Budget. The ICR is for extending the use of the approved information collection assigned OMB control number 0990–0302 which expires on November 31, 2012. 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. OS especially 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.

Deadline: Comments on the ICR must be received within 60 days of the issuance of this notice.

ADDRESSES: Submit your comments, including the document identifier HHS–OS–17339–60D, to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

Copies of the supporting statement and any related forms for the ICR may also be requested through the above email or telephone number.

Information Collection Request Title: Medical Reserve Corps Unit Profile and Reports

Abstract: Medical Reserve Corps (MRC) units are currently located in almost 1,000 communities across the United States, and represent a resource of more than 205,000 volunteers. In order to continue supporting the MRC units in communities across the United States, and to continue planning for future emergencies that are national in scope, detailed information about the MRC units, including unit demographics, contact information (regular and emergency), volunteer numbers, and information about activities is needed by the Division of Civilian Volunteer Medical Reserve Corps (DCVMRC) within the Office of the Secretary/Office of the Assistant Secretary for Health/Office of the Surgeon General. MRC Unit Leaders are asked to update this information on the MRC Web site at least quarterly, and to participate in a Technical Assistance Assessment at least annually. The MRC unit data collected has not changed. This OMB extension request is for 3 years.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
MRC Unit Leader	1,000	6	1.0	6,000

Keith A. Tucker,

Information Collection Clearance Officer, Department of Health and Human Services.

[FR Doc. 2012–22824 Filed 9–14–12; 8:45 am]

BILLING CODE 4150–47–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Chronic Fatigue Syndrome Advisory Committee

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the Chronic Fatigue Syndrome Advisory Committee (CFSAC) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will be held on Wednesday, October 3, 2012 and Thursday, October 4, 2012 from 9 a.m. until 5 p.m.

ADDRESSES: Department of Health and Human Services; Hubert H. Humphrey Building; 200 Independence Avenue SW., Room 800, Washington, DC 20201. For a map and directions to the Hubert H. Humphrey building, please visit *http://www.hhs.gov/about/hhhmap.html.*

FOR FURTHER INFORMATION CONTACT: Nancy C. Lee, M.D., Designated Federal Officer, Chronic Fatigue Syndrome Advisory Committee, Department of Health and Human Services, 200 Independence Avenue SW., Room 712E, Washington, DC 20201. Any questions about meeting registration or public comment sign-up should be directed to *CFSACOctober2012@seamoncorporation.com.* Please direct other inquiries to *cfsac@hhs.gov.*

SUPPLEMENTARY INFORMATION: CFSAC was established on September 5, 2002 to advise, consult with, and make recommendations to the Secretary through the Assistant Secretary for Health, on a broad range of topics including: (1) The current state of knowledge and research on the epidemiology, etiologies, biomarkers, treatment, and risk factors relating to chronic fatigue syndrome (CFS), to identify potential opportunities in these areas; (2) the impact and implications of current and proposed diagnosis and treatment methods for CFS; (3) development and implementation of programs to inform the public, health care professionals, and the biomedical research communities about CFS; and (4) strategies to improve the quality of life for CFS patients.

The agenda for this meeting is being developed and will be posted on the CFSAC Web site, *http://www.hhs.gov/advcomcfs* when finalized. The meeting will be live-video streamed at *www.HHS.gov/Live* and archived through the CFSAC Web site: *www.hhs.gov/advocomcfs.* Listening-only audio via telephone will be available on both days. Call-in information will be posted on the CFSAC Web site.

Individuals who plan to attend should register at the following link by September 28, 2012: *http://www.blsmeetings.net/CFSACOctober2012.* Attendance by visitors who are not U.S. citizens is welcome, but prior approval is required by sending a request to *CFSACOctober2012@seamoncorporation.com.* Members of the media will also need to register. All attendees will be required to show government-issued picture identification (state or federal) for entry into the federal building. Attendees will receive a wrist band that must be worn the entire time. Security requires all non-federal employees to be escorted the entire time they are in the building. Upon leaving the building for any reason individuals will be required to follow the security steps mentioned above and receive a new wrist band.

Members of the public will have the opportunity to provide public comments at the meeting or via telephone. International calls cannot be accommodated. A separate sign-up process for requesting time for public comment must be completed by September 24, 2012 at the following link: *http://www.blsmeetings.net/CFSACPublicCommentOctober2012.* It is requested that individuals wishing to provide public comment submit a copy of their testimony (5 pages or less) in advance. It is preferred that individuals email their testimony (in MS WORD format, single spaced, using a 12 point font) to *CFSACOctober2012@seamoncorporation.com* by Monday, September 24, 2012. Testimony may also be mailed to the following address: Chronic Fatigue Syndrome Advisory Committee, Department of Health and Human Services, 200 Independence Avenue SW. Room 712E, Washington, DC, 20201. Mailed testimony must be received no later than Monday, September 24, 2012. Note: PDF files, hand-written notes and photographs will not be accepted. Requests for public comment and written testimony will not be accepted through the CFSAC mailbox. Also, the CFSAC mailbox will not respond to questions about specific public comment requests.

All public comment becomes part of the public record, available for viewing and posted on the CFSAC Web site. All testimony and printed material submitted for the meeting are part of the official meeting record and will be uploaded to the CFSAC Web site and made available for public inspection. Testimony and materials submitted should not include sensitive personal information, such as social security number, birthdates, driver's license number, state identification or foreign country equivalent, passport number, financial account number, or credit or debit card number. Sensitive health information, or non-public corporate or trade association information, such as trade secrets or other proprietary information should be excluded from any materials submitted. If you wish to remain anonymous the document must specify this.

We will confirm your time for public comment via email by September 28, 2012. Each speaker will be limited to five minutes per speaker; no exceptions will be made. We will give priority to individuals who have not provided public comment within the previous year.

Persons who wish to distribute printed materials to CFSAC members should submit one copy to Designated Federal Officer at *cfsac@hhs.gov,* prior to Friday, September 28, 2012. Submissions are limited to five typewritten pages.

Dated: September 4, 2012

Nancy C. Lee,

Designated Federal Officer, Chronic Fatigue Syndrome Advisory Committee.

[FR Doc. 2012–22874 Filed 9–14–12; 8:45 am]

BILLING CODE 4150–42–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10445, CMS–10164, CMS–10143 and CMS–838]

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:* New collection; *Title:* Medicare Advantage Quality Bonus Payment Demonstration; *Use:* In response to the provision of the Affordable Care Act, beginning in 2012, quality bonus payments (QBPs) are given to all plans earning four or five stars in Medicare's Star Rating program. As an extension of this legislation, CMS launched the Medicare Advantage Quality Bonus Payment Demonstration, which accelerates the phase-in of QBPs by extending bonus payments to three-star plans and eliminating the cap on blended county benchmarks that would otherwise limit QBPs. Through this demonstration, CMS seeks to understand how incentive payments impact plan quality across a broader spectrum of plans.

The data collection effort will be conducted in the form of a survey of Medicare Advantage Organizations (MAOs) and up to 10 case studies with MAOs in order to supplement what can be learned from the analyses of administrative and financial data for MAOs, and from an environmental and literature scan. The data collected is needed to evaluate the QBP demonstration to better understand what impact the demonstration has had on MAO operations and their efforts to improve quality. The data collection instrument is a survey questionnaire designed to capture information on how MAOs perceive the demonstration and are planning for or implementing changes in quality initiatives and to identify factors that help or hinder the capacity to achieve quality improvement and that influence the decision calculus to make changes. Specifically, the information is expected to provide a detailed picture to CMS of the kinds of quality initiatives utilized by MAOs and some preliminary information on how they assess the effectiveness of these programs. The survey is designed to provide an overall picture of the QBP that can be used for national comparisons across plans as part of the larger evaluation of the QBP demonstration.

The case studies will be conducted as a series of open-ended discussions with MAO staff that will be guided by a discussion protocol. The case studies will supplement the information gathered from the survey and data analysis, providing valuable context and details about successful quality improvement activities. The case studies are particularly well suited to exploring the detailed characteristics of the plans' quality improvement activities, emphasizing the decision-making and thought processes underlying the structure and direction of their efforts and capturing the contextual factors that impact the nature, structure, and scope of the programs. *Form Number:* CMS–10445 (OCN: 0938–New); *Frequency:* Annual; *Affected Public:* Private Sector—Business or other for-profits; *Number of Respondents:* 730; *Total Annual Responses:* 1,280; *Total Annual Hours:* 683. (For policy questions regarding this collection contact Gerald Riley at 410–786–6699. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Reinstatement with a change of a previously approved collection; *Title:* Medicare Electronic Data Interchange (EDI) Registration and Electronic Data Interchange (EDI) Enrollment Form; *Use:* The purpose of this collection to obtain information that will be subsequently used during transaction exchange for identification of Medicare providers/suppliers and authorization of requested Electronic Data Interface (EDI) functions. The EDI Enrollment and the Medicare Registration Forms are completed by Medicare providers/suppliers and submitted to Medicare contractors. Authorization is needed for providers and suppliers to send and receive HIPAA standard transactions directly (or through a designated 3rd party) to and from Medicare contractors. Medicare contractors would use the information for initial set-up and maintenance of the access privileges. The use of the standard form provides an efficient uniform means by which Medicare captures information necessary to drive Medicare EDI security and EDI access privileges. All EDI providers will complete and sign the EDI Enrollment Form along with the Medicare EDI Registration Form. They will also reconfirm their access privileges annually.

The information collected will be uploaded into Medicare contractor computer systems. Medicare contractors will store this information in a database accessed at the time of provider connection to the Medicare Data Contractor Network (MDCN). When authentication is successful and connectivity is established, transactions may be exchanged. The information will be stored in a computer data base and used to authenticate the user on day-to-day electronic commerce, support the submitter and password administration function, and validate access relationships between providers/suppliers and their designated EDI submitter/receiver on a per transaction basis. *Form Number:* CMS–10164 (OCN: 0938–0983); *Frequency:* Once; *Affected Public:* Private Sector—Business or other for-profits, Not for-profit institutions; *Number of Respondents:*

240,000; *Total Annual Responses:* 240,000; *Total Annual Hours:* 80,000. (For policy questions regarding this collection contact Claudette Sikora at 410–786–5618. For all other issues call 410–786–1326.)

3. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection. *Title of Information Collection:* Monthly State File of Medicaid/Medicare Dual Eligible Enrollees. *Use:* The monthly data file is provided to CMS by states on dually eligible Medicaid and Medicare beneficiaries, listing the individuals on the Medicaid eligibility file, their Medicare status and other information needed to establish subsidy level, such as income and institutional status. The file will be used to count the exact number of individuals who should be included in the phased-down state contribution calculation that month. CMS will be able to merge the data with other data files and establish Part D enrollment for those individuals on the file. The file may be used by CMS partners to obtain accurate counts of duals on a current basis. *Form Number:* CMS–10143 (OCN 0938–0958). *Frequency:* Monthly. *Affected Public:* State, Local, or Tribal Governments. *Number of Respondents:* 51. *Total Annual Responses:* 612. *Total Annual Hours:* 6,120. (For policy questions regarding this collection contact Goldy Austen at 410–786–6450. For all other issues call 410–786–1326.)

4. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection. *Title of Information Collection:* Medicare Credit Balance Reporting Requirements and Supporting Regulations in 42 CFR 405.371, 405.378 and 413.20; *Use:* Section 1815(a) of the Act authorizes the Secretary to request information from providers which is necessary to properly administer the Medicare program. Quarterly credit balance reporting is needed to monitor and control the identification and timely collection of improper payments. The information obtained from Medicare credit balance reports will be used by the contractors to identify and recover outstanding Medicare credit balances and by federal enforcement agencies to protect federal funds. The information will also be used to identify the causes of credit balances and to take corrective action. *Form Number:* CMS–838 (OCN: 0938–0600); *Frequency:* Yearly; *Affected Public:* Private sector—Business or other for-profits; *Number of Respondents:* 45,838; *Total Annual Responses:* 183,352; *Total Annual Hours:* 550,056. (For policy questions regarding this collection contact Milton Jacobson at 410–786–7553. 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 *November 16, 2012:*

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: September 11, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–22726 Filed 9–14–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Administration on Intellectual and Developmental Disabilities (AIDD); Notice of Meeting

AGENCY: President's Committee for People with Intellectual Disabilities (PCPID), HHS.

ACTION: Notice of Meeting.

DATES: Tuesday, October 16, 2012, from 8:30 a.m. to 3:15 p.m. (EST); and Wednesday, October 17, 2012, from 8:30 a.m. to 4:30 p.m. (EST). The meeting will be open to the public.

ADDRESSES: The meeting will be held in Conference Room 800 of the Hubert H. Humphrey Building, U.S. Department of Health and Human Services, 200 Independence Avenue SW., Washington, DC 20201. Individuals who would like to participate via conference call may do so by dialing 888–730–9135, pass code: 6725139. Individuals whose full participation in the meeting will require special accommodations (e.g., sign language interpreting services, assistive listening devices, materials in alternative format such as large print or Braille) should notify MJ Karimi, PCPID Program Analyst, via email at *MJ.Karimie@acf.hhs.gov,* or via telephone at 202–619–3165, no later than Monday, October 08, 2012. PCPID will attempt to meet requests for accommodations made after that date, but cannot guarantee ability to grant requests received after this deadline. All meeting sites are barrier free, consistent with the Americans with Disabilities Act (ADA), and the Federal Advisory Committee Act (FACA).

Agenda: Committee members will discuss preparation of the PCPID 2012 Report to the President, including its content and format, and related data collection and analysis required to complete the writing of the Report.

Additional Information: For further information, please contact Laverdia Taylor Roach, Senior Advisor, President's Committee for People with Intellectual Disabilities, 200 Independence Avenue SW., Room 637D, Washington, DC 20201. Telephone: 202–205–5970. Fax: 202–260–3053. Email: *Laverdia.Roach@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: PCPID acts in an advisory capacity to the

President and the Secretary of Health and Human Services, through the Administration on Intellectual and Developmental Disabilities, on a broad range of topics relating to programs, services and supports for persons with intellectual disabilities. The PCPID Executive Order stipulates that the Committee shall: (1) Provide such advice concerning intellectual disabilities as the President or the Secretary of Health and Human Services may request; and (2) provide advice to the President concerning the following for people with intellectual disabilities: (A) Expansion of educational opportunities; (B) promotion of homeownership; (C) assurance of workplace integration; (D) improvement of transportation options; (E) expansion of full access to community living; and (F) increasing access to assistive and universally designed technologies.

Dated: September 6, 2012.

Sharon Lewis,

Commissioner, Administration on Intellectual and Developmental Disabilities.

[FR Doc. 2012–22830 Filed 9–14–12; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0020]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Experimental Study of Consumer Response to Health Claims and Disclaimers About the Relationship Between Selenium and Risk of Various Cancers

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by October 17, 2012.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910—New and title ''Experimental Study of Consumer Response to Health Claims and Disclaimers About the Relationship Between Selenium and Risk of Various Cancers.'' Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400T, Rockville, MD 20850, *domini.bean@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Experimental Study of Consumer Response to Health Claims and Disclaimers About the Relationship Between Selenium and Risk of Various Cancers—(OMB Control Number 0910—New)

I. Background

FDA regulates the labeling of food products under the Federal Food, Drug, and Cosmetic Act, as amended by the Nutrition Labeling and Education Act of 1990 (NLEA). NLEA regulations establish general requirements for voluntary health claims in food labeling; health claims are labeling statements that characterize the relationship between a food substance and a disease or health-related condition (21 CFR 101.14(a)(1)). Under the petition process for new health claims (21 CFR 101.70), the petitioner must submit the scientific evidence supporting a proposed health claim to FDA for review. If FDA determines that there is significant scientific agreement (SSA) among experts that the proposed health claim is supported by the totality of publicly available evidence, FDA issues a regulation authorizing the claim (21 CFR 101.14(c) and (d)). Health claims must be ''complete, truthful, and not misleading'' (21 CFR 101.14(d)(2)(iii)) and must ''enable the public to comprehend the information provided and to understand the relative significance of such information in the context of a total daily diet'' (21 CFR 101.14(d)(2)(v)).

In a court challenge to FDA's decision not to authorize four dietary supplement health claims that failed to meet the SSA standard, the U.S. Court of Appeals for the DC Circuit held that the First Amendment does not permit FDA to prohibit health claims that the Agency determines to be potentially misleading unless the Agency also reasonably determines that a disclaimer would not eliminate the potential deception (*Pearson* v. *Shalala,* 164 F.3d 650 (DC Cir. 1999)). Because the court also held that a health claim is not inherently misleading simply because the evidence supporting it does not reach the SSA level, the decision effectively requires FDA to permit health claims that are backed by credible scientific evidence unless the Agency can demonstrate that the claim would mislead consumers. In response to the court's decision, FDA issued guidance on an interim review process for health claims that do not meet the SSA standard for the issuance of a regulation authorizing the claim (Ref. 1). These claims, referred to as ''qualified health claims'' (QHCs), include a disclaimer or other qualifying language to distinguish them from claims that meet the SSA standard and to prevent consumers from being misled about the level of scientific evidence supporting the claim (Ref. 2). When FDA reviews a QHC petition and determines that the proposed claim is supported by credible evidence and that it can be qualified to prevent consumers from being misled, the Agency issues a letter stating its intent to exercise enforcement discretion for the use of the QHC in food labeling.

In 2003, FDA issued a letter of enforcement discretion for two QHCs for dietary supplements containing selenium (Ref. 3):

Claim 1: ''Selenium may reduce the risk of certain cancers. Some scientific evidence suggests that consumption of selenium may reduce the risk of certain forms of cancer. However, FDA has determined that this evidence is limited and not conclusive.''

Claim 2: ''Selenium may produce anticarcinogenic effects in the body. Some scientific evidence suggests that consumption of selenium may produce anticarcinogenic effects in the body. However, FDA has determined that this evidence is limited and not conclusive.''

In 2007, FDA published a notice in the **Federal Register** (72 FR 72738; December 21, 2007) (the 2007 notice) announcing the Agency's intent to reevaluate these two QHCs, among other health claims. One of the other health claims being reevaluated is the authorized health claim for dietary fat and cancer risk in § 101.73 (21 CFR 101.73). The model health claims in § 101.73(e) use language similar to the ''certain cancers'' language used in Claim 1 for selenium, as they state that low-fat diets may reduce the risk of ''some cancers'' or ''some types of cancers.'' The 2007 notice explained that, during FDA's reevaluation of the scientific evidence underlying these claims, the Agency also planned to consider whether the claims should be revised to replace generic references to ''certain cancers'' (or similar language) with the names of specific cancers (e.g., prostate cancer, breast cancer) because each type of cancer is a separate disease with different causes and risk factors (72 FR at 72740).

In 2008, FDA received a petition requesting enforcement discretion for two additional QHCs similar to the ones for which FDA had issued a letter of enforcement discretion in 2003. The basic claim in the first sentence of each proposed QHC was the same as the claim in the first sentence of the corresponding 2003 QHC (''selenium may reduce the risk of certain cancers'' and ''selenium may produce anticarcinogenic effects in the body,'' respectively), but the 2008 petition requested enforcement discretion for the use of the following disclaimer with each claim: ''Scientific evidence supporting this claim is convincing but not yet conclusive.'' The 2008 petition also requested enforcement discretion for a number of other QHCs about selenium and reduced risk of specific cancers. In 2009, FDA issued a response to the 2008 petition in which the Agency stated its intent to exercise enforcement discretion for QHCs about selenium and reduced risk of prostate, thyroid, and bladder cancers (Ref. 4). The Agency declined to exercise enforcement discretion for QHCs about selenium and several other site-specific cancers because there was no credible evidence that selenium reduces the risk of those cancers. The Agency also declined to exercise enforcement discretion for the two QHCs that were similar to the 2003 ''certain cancers'' and ''anticarcinogenic effects'' QHCs because it concluded that the proposed claims were misleading and could not be cured with a disclaimer.

Several of the petitioners filed suit in the U.S. District Court for the District of Columbia, challenging FDA's 2009 petition response under the First Amendment. On cross-motions for summary judgment, the court ruled for the plaintiffs on the ''certain cancers'' and ''anticarcinogenic effects'' claims, as well as three of the site-specific cancer claims (*Alliance for Natural Health* v. *Sebelius,* 714 F. Supp. 2d 48 (D.D.C. 2010)). With respect to the ''certain cancers'' and ''anticarcinogenic effects'' QHCs, the court found that FDA had failed to show with empirical evidence that the claims were misleading and could not be corrected with disclaimers. The court also concluded that the Agency's scientific decisions regarding three QHCs for site-specific cancers were not supported by the record and remanded the case to FDA for reconsideration of those claims, along with the ''certain cancers'' and ''anticarcinogenic effects'' QHCs. FDA and the plaintiffs then reached a settlement whereby FDA agreed to exercise enforcement discretion for QHCs for selenium and reduced risk of bladder, prostate, colon, rectal, and thyroid cancers (Ref. 5). In lieu of the ''certain cancers'' and ''anticarcinogenic effects'' QHCs, plaintiffs agreed to accept a QHC that listed all five site-specific cancers.

II. Purpose and Methodology of Proposed Study

The objective of FDA's proposed study is to collect quantitative data to examine consumer interpretations of two dietary supplement labeling claims, ''selenium may reduce the risk of certain cancers'' and ''selenium may produce anticarcinogenic effects in the body,'' with and without various disclaimers. Previous studies conducted by FDA and others have examined consumer understanding of hypothetical QHCs and QHCs that are the subject of a letter of enforcement discretion. The primary goal of the previous studies was to evaluate ways to communicate the strength of scientific evidence supporting a claim (Refs. 6 to 9). None of these studies, however, has investigated whether labeling claims using phrases such as ''certain cancers'' and ''anticarcinogenic effects'' may mislead consumers into having unjustified perceptions about the effects of a dietary supplement or food and how such misperceptions may affect behavioral intentions. The Agency therefore proposes to use selenium QHCs in this case study to examine consumer reactions to health claims using those phrases, with and without various disclaimers.

Specifically, the study plans to examine: (1) Whether one or both of the selenium claims quoted in this document would lead consumers to have the impression that selenium reduces the risk of all forms of cancer (''cancer in general''); (2) whether one or both of these claims would lead consumers to have the impression that selenium reduces the risk of a cancer for which there is no credible evidence of risk reduction, and, if so, whether a disclaimer specifying the names of the cancers for which there is such evidence (bladder, prostate, colon, rectal, and thyroid cancers) can communicate to consumers that the claimed risk reduction effect is only for the named cancers; (3) whether the ''anticarcinogenic effects'' claim would lead consumers to believe that selenium not only reduces the risk of cancer, but also treats or completely prevents cancer; (4) whether various disclaimer options for the two claims would correct potential consumer misperceptions about the nature of the relationship between selenium and various cancers or the scope of the claims; and (5) whether either of the claims leads consumers to have other erroneous perceptions, such as that all cancers are alike.

The proposed study will use a Web-based survey to collect information from approximately 1,200 adults, including 800 men who are 55 years or older and 400 women who are 50 years or older, who belong to online consumer panels maintained by a contractor. Data provided by the nationally representative Health Information National Trends Survey (HINTS; Ref. 10) suggest that individuals in the age groups proposed for this study have a higher overall prevalence of cancer in general, and a higher prevalence of most of the specific cancers that are the subject of an existing QHC for selenium (see list in I. Background section), but do not systematically differ from individuals in other age groups with respect to their patterns of cancer-related perceptions. By targeting participants in this age range and with these characteristics, the study is expected to maximize efficient use of the limited resources allocated to the project by yielding a greater amount of information pertinent to people who are more likely to take a selenium supplement. To that end, the study will aim for increased representation of potential selenium users by targeting a sample that includes at least 400 participants who have taken a selenium supplement at least once. Because the rate of selenium use in the general population is estimated to be low overall, but somewhat higher among men than women (Refs. 11 and 12), the sample will consist of a greater proportion of men. In addition, the screening process for the online consumer panel will limit female participants to those who report being married, and women enrolled in the study will be asked to provide information about their spouses' use of selenium in addition to their own.

On a computer screen, participants will view a label image and answer questions about their perceptions and behavioral intentions in response to the label they view. Each participant will be randomly assigned to an experimental condition in which he or she will view one of the following: (a) A selenium product label containing no claim; (b) a selenium product label containing the claim that ''selenium may reduce the risk of certain cancers''; (c) a selenium product label containing the claim that ''selenium may produce anticarcinogenic effects in the body''; (d) a selenium product label containing one of the claims from (b) or (c) plus a selected disclaimer statement. To help understand the data, the study will also collect information on each participant's background, including, but not limited to, health status, race/ethnicity, education, and income.

The proposed study is part of FDA's continuing effort to enable consumers to make informed dietary choices and eat healthful diets. Results of this case study will be used to further the Agency's understanding of how consumers may interpret ''certain cancers'' and ''anticarcinogenic effects,'' phrases that appear in a number of health claims that are authorized by regulation, as well as in some QHCs for which the Agency has issued a letter of enforcement discretion. Results of the study will not be used to develop population estimates.

In the **Federal Register** of January 27, 2012 (77 FR 4329), FDA published a 60-day notice requesting public comment on the proposed collection of information. The Agency received one comment that dealt with topics outside the scope of the proposed collection of information described in the 60-day notice. Therefore, the comment is not addressed here.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	No. of respondents	No. of responses per respondent	Total annual responses	Average burden per response	Total hours
Cognitive interview screener	350	1	350	0.083 (5 minutes)	29
Cognitive interview	9	1	9	1 hour	9
Pretest invitation	1,700	1	1,700	0.033 (2 minutes)	56
Pretest	60	1	60	0.167 (10 minutes)	10
Survey invitation	45,000	1	45,000	0.033 (2 minutes)	1,485
Survey	1,200	1	1,200	0.167 (10 minutes)	200
Total					1,789

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

This burden estimate is 94 hours lower than the estimate published in the 60-day notice and includes 23 more hours for the cognitive interview screener, 48 more hours for the pretest invitation, and 165 fewer hours for the survey invitation. These estimates were adjusted to better reflect the anticipated effort required to recruit, conduct cognitive interviews, pretest, and survey participants with the desired characteristics. FDA's burden estimate is based on prior experience with research that is similar to this proposed study.

III. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday, and are available electronically at *http://www.regulations.gov.* (FDA has verified the Web site addresses, but we are not responsible for any subsequent changes to the Web sites after this document publishes in the *Federal Register*.)

1. U.S. Food and Drug Administration, ''Guidance for Industry: Interim Procedures for Qualified Health Claims in the Labeling of Conventional Human Foods and Human Dietary Supplements,'' 2003, available at *http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm053832.htm.*
2. U.S. Food and Drug Administration, ''Guidance for Industry: Evidence-Based Review System for the Scientific Evaluation of Health Claims,'' 2009, available at *http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm073332.htm.*
3. U.S. Food and Drug Administration, ''Selenium and Certain Cancers (Qualified Health Claim: Final Decision Letter) (Docket No. 02P–0457),'' 2003, available at *http://www.fda.gov/Food/LabelingNutrition/LabelClaims/QualifiedHealthClaims/ucm072780.htm.*
4. U.S. Food and Drug Administration, ''Selenium and a Reduced Risk of Site-Specific Cancers (FDA–2008–Q–04323),'' 2009, available at *http://www.fda.gov/Food/LabelingNutrition/LabelClaims/QualifiedHealthClaims/ucm168527.htm.*
5. U.S. Food and Drug Administration, ''Settlement Reached for Qualified Health Claims Relating Selenium to Reduced Risk of Prostate, Colon, Rectal, Bladder, and Thyroid Cancers,'' 2011, available at *http://www.fda.gov/Food/LabelingNutrition/LabelClaims/QualifiedHealthClaims/ucm256940.htm.*
6. Derby, B.M. and A.S. Levy, ''Effects of Strength of Science Disclaimers on the Communication Impacts of Health Claims,'' 2005, available at *http://www.fda.gov/OHRMS/dockets/dockets/03N0496/03N-0496-rpt0001.pdf.*
7. Choinière, C. and L. Verrill, ''Experimental Study of Qualified Health Claims: Consumer Inferences About Monounsaturated Fatty Acids From Olive Oil, EPA and DHA Omega-3 Fatty Acids, and Green Tea,'' 2009, available at *http://www.fda.gov/Food/LabelingNutrition/LabelClaims/QualifiedHealthClaims/ucm207549.htm.*
8. Hooker, N.H. and R. Teratanavat, ''Dissecting Qualified Health Claims: Evidence From Experimental Studies,'' *Critical Reviews in Food Science and Nutrition,* vol. 48, pp. 160–176, 2008.
9. Kapsak, W.R., D. Schmidt, N.M. Childs, et al., ''Consumer Perceptions of Graded, Graphic and Text Label Presentations for Qualified Health Claims,'' *Critical Reviews in Food Science and Nutrition,* vol. 48, pp. 248–256, 2008.
10. National Cancer Institute, ''Health Information National Trends Survey,'' 2007, available at *http://hints.cancer.gov/.*
11. Bailey, R.L., J.J. Gahche, C.V. Lentino, et al., ''Dietary Supplement Use in the United States, 2003–2006,'' *Journal of Nutrition,* vol. 141, pp. 261–266, 2011.
12. Radimer, K., B. Bindewald, J. Hughes, et al., ''Dietary Supplement Use by US Adults: Data From the National Health and Nutrition Examination Survey, 1999–2000,'' *American Journal of Epidemiology,* vol. 160, pp. 339–349, 2004.

Dated: September 7, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–22795 Filed 9–14–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0881]

Draft Guidance for Industry on Self-Identification of Generic Drug Facilities, Sites, and Organizations; Availability; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of Monday, August 27, 2012 (77 FR 51811). The document announced a draft guidance for industry entitled ''Self-Identification of Generic Drug Facilities, Sites, and Organizations.'' The document was published with an incorrect docket

number. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Joyce Strong, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 32, Rm. 3208, Silver Spring, MD 20993–0002, 301–796–9148.

SUPPLEMENTARY INFORMATION: In FR Doc. 2012–20946, appearing on page 51811 in the **Federal Register** of Monday, August 27, 2012, the following correction is made:

1. On page 51811, in the third column, the docket number is corrected to read ''FDA–2012–D–0881''.

Dated: August 30, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–22784 Filed 9–14–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on December 4, 2012, from 8 a.m. to 5:30 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Minh Doan, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, email: *ODAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), to find out further information regarding FDA advisory committee information. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: The subcommittee will receive a presentation on pediatric provisions mandated by the Food and Drug Administration Safety and Innovation Act. This will be an awareness presentation and there will not be a formal Committee discussion or recommendation. In addition, information will be presented regarding pediatric development plans for four products that are in development for an adult oncology indication. The subcommittee will consider and discuss issues relating to the development of each product for pediatric use and provide guidance to facilitate the formulation of written requests for pediatric studies, if appropriate. The four products under consideration are: (1) Trametinib, application submitted by GlaxoSmithKline, LLC; (2) TH–302, application submitted by Threshold Pharmaceuticals, Inc.; (3) volasertib (BI 6727), application submitted by Boehringer Ingelheim Pharmaceuticals, Inc.; and (4) blinatumomab (MT 103), application submitted by Amgen Inc.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before November 19, 2012. Oral presentations from the public will be scheduled between approximately 9:15 a.m. to 9:30 a.m., 11:15 a.m. to 11:30 a.m., 2:05 p.m. to 2:20 p.m., and 4:10 p.m. to 4:25 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before November 8, 2012. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by November 9, 2012.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA 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 Minh Doan at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: September 11, 2012.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2012–22794 Filed 9–14–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1984.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the agency; (b) the accuracy of the agency's estimate of the burden 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.

Proposed Project: Workforce Recruitment in Health Resources and Services Administration (HRSA)—Funded Health Centers (OMB No. 0915–0353)—[Extension]

This semi-annual survey is designed to collect information from HRSA-funded health centers regarding their current workforce and recent hiring efforts. The purpose of this data collection instrument is to provide data on baseline and hiring uptake data of health center workforce recruitment, and recommendations on whether additional training or technical assistance might be needed to support health centers in their hiring efforts. As authorized by statute, HRSA provides technical assistance to health centers to assist them in meeting the Health Center Program requirements and in providing required primary health services that are dependent on a high quality and effective workforce.

Ensuring that the primary care workforce is able to meet the demands of increasing patient volume is critical to the future success of health centers in serving the nation's underserved and vulnerable populations. As health centers seek to fill open positions, one growing pool of qualified candidates increasingly being recruited is returning veterans, many of which have trained as health care providers and/or administrators during their time in the service. The information collected in this survey will help assess how health centers have filled vacancies, whether the availability of veterans to join the health center workforce is impacting their hiring efforts, and what additional efforts might improve health center recruitment.

The annual estimate of burden is as follows:

Instrument	Number of respondents	Responses per respondent	Total responses	Hours per response *	Total burden hours
Health Center Workforce Survey	1,200	2	2,400	1.0	2,400
Total	1,200	2	2,400	1.0	2,400

*__Note:__ This estimate includes the time for the grantee to read the survey instructions, collect the data and information requested, and to complete the online survey.

Email comments to *paperwork@hrsa.gov,* or mail the HRSA Reports Clearance Officer, Room 10–29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: September 10, 2012.

Bahar Niakan,

Director, Division of Policy and Information Coordination.

[FR Doc. 2012–22709 Filed 9–14–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Part C Early Intervention Services Grant Under the Ryan White HIV/AIDS Program

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice of One-Time Non-Competitive Replacement Award, Part C Funds for the Vanderbilt University Medical Center, Nashville, Tennessee. The grant award amount is $706,990.

SUMMARY: HRSA will be awarding to Vanderbilt University Medical Center, Nashville, Tennessee, a one-time non-competitive replacement grant for Part C funds to support comprehensive primary care services for persons living with HIV/AIDS, including primary adult HIV medical care, adult psychiatric and mental health therapy, nurse medical case management focused on treatment adherence, and referrals to specialty medical care. These funds will help to avoid a disruption of HIV clinical care to clients in Nashville, Tennessee, and the surrounding counties.

SUPPLEMENTARY INFORMATION:

Grantee of record: Comprehensive Care Center, Nashville, Tennessee.

Intended recipient of the award: Vanderbilt University Medical Center, Nashville, Tennessee.

Amount of the award: $706,990 to ensure ongoing clinical services to the target population.

Authority: Section 2651 of the Public Health Service Act, 42 U.S.C. 300ff–51.

CFDA Number: 93.918.

Project period: July 1, 2012, to June 30, 2013, and the period of support for this award is from July 1, 2012, to June 30, 2013.

Justification for the Exception to Competition: Critical funding for HIV medical care and treatment services to clients in the city of Nashville and its surrounding counties will be continued through a one-time non-competitive replacement funding award to the Vanderbilt University Medical Center. Over the last 2 years, the Vanderbilt University Medical Center managed the Ryan White HIV/AIDS Program through a contractual agreement with the Comprehensive Care Center (CCC), while leasing Vanderbilt University Medical Center employees to CCC under an employee leasing agreement. CCC does not have the infrastructure to continue providing quality HIV care without the Vanderbilt University Medical Center's assistance. This is a one-time replacement funding award. CCC, which previously serviced this population, notified HRSA that it could not continue providing services, as of June 30, 2012. Vanderbilt University Medical Center, a private nonprofit hospital, is the best qualified entity for this one-time grant, as it has the infrastructure to ensure comprehensive services are provided, including adult HIV medical care, adult psychiatric and mental health therapy, nurse medical case management focused on treatment adherence, and referrals to specialty medical care. This one-time grant award will help retain the targeted population in care, with the least amount of disruption while the service area is re-competed.

This one-time replacement funding award will cover the time period from July 1, 2012, through June 30, 2013. This service area will be included in the upcoming competition for the Part C HIV Early Intervention Services for project periods starting July 1, 2013.

FOR FURTHER INFORMATION CONTACT: Dora Ober, by email at *dober@hrsa.gov*, or by phone at (301) 443–0759.

Dated: September 11, 2012.

Mary K. Wakefield,

Administrator.

[FR Doc. 2012–22742 Filed 9–14–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health 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: Scientific and Technical Review Board on Biomedical and Behavioral Research Facilities.

Date: October 16–17, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington, DC/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Barbara J. Nelson, Ph.D., Scientific Review Officer, Office of Grants Management & Scientific Review, National Center for Advancing Translational, Sciences NCATS, National Institutes of Health, 6701 Democracy Blvd., Room 1080, 1 Dem. Plaza, Bethesda, MD 20892–4874, 301–435–0806, *nelsonbj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: September 11, 2012.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–22766 Filed 9–14–12; 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 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 of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel.

Date: October 3, 2012.

Time: 1:00 p.m. to 3:00 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: XIAODU GUO, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 761, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Informed Consent Ancillary Studies.

Date: October 15, 2012.

Time: 1:00 p.m. to 2:00 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: Elena Sanovich, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 750, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, 301–594–8886, *sanoviche@mail.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: September 11, 2012.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–22767 Filed 9–14–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed 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: Center for Scientific Review Special Emphasis Panel; Population Sciences and Epidemiology R15.

Date: October 1, 2012.

Time: 3:00 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Fungai Chanetsa, MPH, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3135, MSC 7770, Bethesda, MD 20892, 301–408–9436, *fungai.chanetsa@nih.hhs.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer Biology-1.

Date: October 10, 2012.

Time: 4:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Angela Y Ng, MBA, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804, Bethesda, MD 20892, 301–435–1715, *nga@csr.nih.gov.*

*Name of Committee:*Center for Scientific Review Special Emphasis Panel; Collaborative Applications: Collaborative Clinical and Services Studies.

Date: October 12, 2012.

Time: 12:00 p.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20036.

Contact Person: Serena Chu, Ph.D., Scientific Review Officer, BBBP IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, 301–500–5829, *sechu@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Bioinformatics in Surgical Sciences, Biomedical Imaging and Bioengineering.

Date: October 15, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Guo Feng Xu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5122, MSC 7854, Bethesda, MD 20892, 301–237–9870, *xuguofen@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group; Atherosclerosis and Inflammation of the Cardiovascular System Study Section.

Date: October 15–16, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites O'Hare, Chicago, 5500 North River Road, Rosemont, IL 60018.

Contact Person: Anshumali Chaudhari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4124, MSC 7802, Bethesda, MD 20892, (301) 435–1210, *chaudhaa@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: Mouse Meiosis.

Date: October 15, 2012.

Time: 3:30 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael M. Sveda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, 301–435–3565, *svedam@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Pregnancy and Neonatology Study Section.

Date: October 16–17, 2012.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael Knecht, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892, (301) 435–1046, *knechtm@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Gene and Drug Delivery Systems Study Section.

Date: October 16–17, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Handlery Union Square Hotel, 351 Geary Street, San Francisco, CA 94102.

Contact Person: Amy L Rubinstein, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5152, MSC 7844, Bethesda, MD 20892, 301–408–9754, *rubinsteinal@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Cardiovascular and Sleep Epidemiology Study Section.

Date: October 16, 2012.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW, Washington, DC 20036.

Contact Person: Julia Krushkal, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, 301–435–1782, *krushkalj@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function E Study Section.

Date: October 17, 2012.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue NW, Washington, DC 20036.

Contact Person: Nitsa Rosenzweig, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4152, MSC 7760, Bethesda, MD 20892, (301) 435–1747, *rosenzweign@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 11, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–22770 Filed 9–14–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; 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 Dental and Craniofacial Research Special Emphasis Panel; Review of R34 Clinical Trial or Biomarker Clinical Evaluation Study Planning Grants.

Date: October 9, 2012.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy

Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Victor Henriquez, Ph.D., Scientific Review Officer, DEA/SRB/NIDCR, 6701 Democracy Blvd., Room 668, Bethesda, MD 20892–4878, 301–451–2405, *henriquv@nidcr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: September 11, 2012.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–22768 Filed 9–14–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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 Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI Resource-Related Research Project for Gene Targeted Rat Models.

Date: October 10, 2012.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Melissa E Nagelin, Ph.D. Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Rm. 7202, Bethesda, MD 20892, 301–435–0297, *nagelinmh2@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Mentoring Program to Promote Diversity in Health Research.

Date: October 11, 2012.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, Conf. Room 10, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Stephanie L Constant, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892, 301–443–8784, *constantsl@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 11, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–22769 Filed 9–14–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Treatment Episode Data Set (TEDS)—New

The Treatment Episode Data Set (TEDS) is a compilation of client-level substance abuse treatment admission and discharge data submitted by States on clients treated in facilities that receive State funds. TEDS is related to SAMHSA's Drug and Alcohol Services Information System (DASIS) (now the Behavioral Health Services Information System (BHSIS)), and was previously approved as part of the DASIS data collection (OMB No. 0930–0106). SAMHSA is now requesting OMB approval for TEDS separately from the other DASIS/BHSIS activities.

The BHSIS data collections involve primarily facility-level data systems, including the Inventory of Behavioral Health Services (I–BHS), which is an inventory of substance abuse and mental health treatment facilities, the National Survey of Substance Abuse Treatment Services (N–SSATS), and the National Mental Health Services Survey (NMHSS, OMB No. 0930–0119). The N–SSATS and NMHSS are census surveys of treatment facilities. In contrast, TEDS is a client-level data system that collects admission and discharge records from state substance abuse agencies. Therefore, SAMHSA is requesting OMB approval for the TEDS client-level data collection separately from the BHSIS facility-related activities.

TEDS data are collected to obtain information on the number of admissions and discharges at publicly-funded substance abuse treatment facilities and on the characteristics of clients receiving services at those facilities. TEDS also monitors trends in the demographic and substance use characteristics of treatment admissions. In addition, several of the data elements used to calculate performance measures for the Substance Abuse Prevention and Treatment (SAPT) Block Grant are collected in TEDS.

This request for OMB approval includes a request to continue the collection of TEDS client-level admissions and discharge data. Most states collect the TEDS data elements from their treatment providers for their own administrative purposes and are able to submit a crossed-walked extract of their data to TEDS. No significant changes are expected in the TEDS collection (other than recording the TEDS burden hours separately from the DASIS/BHSIS burden hours.)

Estimated annual burden for the TEDS activities is shown below:

Type of respondent and activity	Number of respondents	Responses per respondent	Hours per response	Total burden hours
STATES:				
TEDS Admission Data	52	4	6.25	1,300
TEDS Discharge Data	52	4	8.25	1,716
TEDS Crosswalks	5	1	10	50
Total	52			3,066

Written comments and recommendations concerning the proposed information collection should be sent by October 17, 2012 to the SAMHSA Desk Officer at the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure timely receipt of comments, and to avoid potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov.* Although commenters are encouraged to send their comments via email, commenters may also fax their comments to: 202–395–7285. Commenters may also mail them to: Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Room 10102, Washington, DC 20503.

Summer King,

Statistician.

[FR Doc. 2012–22822 Filed 9–14–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4080–DR; Docket ID FEMA–2012–0002]

Louisiana; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–4080–DR), dated August 29, 2012, and related determinations.

DATES: *Effective Date:* September 5, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 29, 2012.

Tangipahoa Parish for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22888 Filed 9–14–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4071–DR; Docket ID FEMA–2012–0002]

West Virginia; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of West Virginia (FEMA–4071–DR), dated July 23, 2012, and related determinations.

DATES: *Effective Date:* August 31, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of West Virginia is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 23, 2012.

Berkeley and Taylor Counties for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22886 Filed 9–14–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4080–DR; Docket ID FEMA–2012–0002]

Louisiana; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–4080–DR), dated August 29, 2012, and related determinations.

DATES: *Effective Date:* September 4, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 29, 2012.

St. Charles Parish for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant;

97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22885 Filed 9–14–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4081–DR; Docket ID FEMA–2011–0001]

Mississippi; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4081–DR), dated August 29, 2012, and related determinations.

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

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Mississippi is hereby amended to include the Individual Assistance program for the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 29, 2012.

Hancock, Harrison, Jackson, and Pearl River Counties for Individual Assistance (already designated for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22873 Filed 9–14–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4080–DR; Docket ID FEMA–2012–0002]

Louisiana; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for State of Louisiana (FEMA–4080–DR), dated August 29, 2012, and related determinations.

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

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael J. Hall, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gerard M. Stolar as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22869 Filed 9–14–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4080–DR; Docket ID FEMA–2012–0002]

Louisiana; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–4080–DR), dated August 29, 2012, and related determinations.

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

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 29, 2012.

Ascension, Lafourche, Livingston, and Orleans Parishes for Individual Assistance (already designated for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator,

Federal Emergency Management Agency.

[FR Doc. 2012–22867 Filed 9–14–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4080–DR; Docket ID FEMA–2011–0001]

Louisiana; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–4080–DR), dated August 29, 2012, and related determinations.

DATES: *Effective Date:* August 31, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the Individual Assistance program for the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 29, 2012.

Jefferson, Plaquemines, St. Bernard, St. John the Baptist, and St. Tammany Parishes for Individual Assistance (already designated for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22810 Filed 9–14–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2008–0010]

Board of Visitors for the National Fire Academy

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Committee Management; Notice of Open Federal Advisory Committee Meeting.

SUMMARY: The Board of Visitors for the National Fire Academy (Board) will meet on October 5 and 6, 2012. The meeting will be open to the public.

DATES: The meeting will take place Friday, October 5, 2012, from 8:30 a.m. to 5:00 p.m. EST and Saturday, October 6, 2012, from 9:00 a.m. to 1:30 p.m. EST. Please note that the meeting may close early if the Board has completed its business.

ADDRESSES: The meeting will be held at the National Emergency Training Center, Building H, Room 300, Emmitsburg, Maryland. Members of the public who wish to obtain details on how to gain access to the facility and directions may contact Ruth MacPhail as listed in the **FOR FURTHER INFORMATION CONTACT** section by close of business September 27, 2012. A picture identification is needed for access. Members of the public may also participate by teleconference and may contact Ruth MacPhail to obtain the call-in number and access code. For information on services for individuals with disabilities or to request special assistance, contact Ruth MacPhail as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the Board as listed in the **SUPPLEMENTARY INFORMATION** section. Comments must be submitted in writing no later than September 27, 2012, and must be identified by docket ID FEMA–2008–0010 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail/Hand Delivery:* Ruth MacPhail, 16825 South Seton Avenue, Emmitsburg, Maryland 21727.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket ID for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the Board, go to *http://www.regulations.gov*.

Public comments will be requested prior to deliberation of each agenda item. Speakers will be afforded 5 minutes to make comments. Contact Ruth MacPhail to register as a speaker.

FOR FURTHER INFORMATION CONTACT: Ruth MacPhail, 16825 South Seton Avenue, Emmitsburg, Maryland 21727, telephone (301) 447–1117, fax (301) 447–1173, and email *ruth.macphail@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463).

Purpose of the Board

The purpose of the Board is to review annually the programs of the National Fire Academy (Academy) and advise the Administrator of the Federal Emergency Management Agency (FEMA), through the United States Fire Administrator, regarding the operation of the Academy and any improvements therein that the Board deems appropriate. The Board makes interim advisories to the Administrator of FEMA, through the United States Fire Administrator, whenever there is an indicated urgency to do so in fulfilling its duties. In carrying out its responsibilities, the Board examines Academy programs to determine whether these programs further the basic missions which are approved by the Administrator of FEMA, examines the physical plant of the Academy to determine the adequacy of the Academy's facilities, and examines the funding levels for Academy programs. The Board submits an annual report through the United States Fire Administrator to the Administrator of FEMA, in writing. The report provides detailed comments and recommendations regarding the operation of the Academy.

Agenda

On the first day of the meeting, the Board will select a Chairperson and Vice Chairperson for fiscal year (FY) 2013, and will review and approve the minutes of the July 26, 2012 meeting.

The Board will attend Annual Ethics Training provided by FEMA's Office of Chief Counsel. The Board will discuss deferred maintenance and capital improvements on the National Emergency Training Center (NETC) campus, to include FY 2013 Budget Planning. The Board will review Academy program activities including mediated instructor-led Online Course Pilot update, new National Fire Academy (NFA) Online courses, Executive Fire Officer Program Prerequisites/Accreditation update, curriculum assessment status report, anticipated FY 2013 curriculum developments, and changes in the State training system.

The Board will also review the status of the Fire and Emergency Services Higher Education (FESHE) Institutional Recognition and Certificate Program and the progress of Training Resources And Data Exchange (TRADE)/FESHE Adobe Connect electronic meetings, the future of the Degrees at a Distance Program (DDP) and how changes in the DDP Program will further the NFA goal of standardizing fire science and emergency services undergraduate degree programs.

The public will have an opportunity to comment on these issues prior to deliberation and final action by the Board. After deliberation, the Board will recommend actions to the Superintendent of the National Fire Academy and the Administrator of FEMA.

On the second day of the meeting, the Board will engage in an annual report working session. There will be no public comment period on the second day.

Dated: September 11, 2012.

Denis G. Onieal,

Superintendent, National Fire Academy, United States Fire Administration, Federal Emergency Management Agency.

[FR Doc. 2012–22808 Filed 9–14–12; 8:45 am]

BILLING CODE 9111–45–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5603–N–64]

Notice of Submission of Proposed Information Collection to OMB Housing Counseling Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Nonprofit Housing Counseling organizations submit information to HUD through Grants.gov when applying for grant funds to provide housing counseling assistance to eligible homebuyers to find and purchase affordable housing; Housing Counseling organizations also assist eligible homeowners to avoid foreclosures; The Housing Counseling organizations also use grant funds to assist renters to avoid evictions; help the homeless find temporary or permanent shelter; report fair housing and discrimination. HUD uses the information collected to evaluate applicants competitively and then select qualified organizations to receive funding that supplement their housing counseling program. Post-award collection, such as quarterly reports, will allow HUD to evaluate grantees' performance. This collection of information includes renewal of various HUD forms, including the HUD–9900 which is the Housing Counseling Approval Application, and form HUD–9902, Housing Counseling Agency Activity Report. Additionally, it covers the collection of client level activities, client financial leverage data, and agency profile information.

DATES: *Comments Due Date:* October 17, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0261) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov* fax: 202–395–5806.

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.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Housing Counseling Program.

OMB Approval Number: 2502–0261.

Form Numbers: SF–424, SF–424Supp, SF–424CB, SF–LLL, HUD–27300, HUD–2880,

HUD–2990, HUD–2991, HUD–2994, HUD–96010, HUD–9902 .

Description of the Need for the Information and Its Proposed Use

Nonprofit Housing Counseling organizations submit information to HUD through Grants.gov when applying for grant funds to provide housing counseling assistance to eligible homebuyers to find and purchase affordable housing; Housing Counseling organizations also assist eligible homeowners to avoid foreclosures; The Housing Counseling organizations also use grant funds to assist renters to avoid evictions; help the homeless find temporary or permanent shelter; report fair housing and discrimination. HUD uses the information collected to evaluate applicants competitively and then select qualified organizations to receive funding that supplement their housing counseling program. Post-award collection, such as quarterly reports, will allow HUD to evaluate grantees' performance. This collection of information includes renewal of various HUD forms, including the HUD–9900 which is the Housing Counseling Approval Application, and form HUD–9902, Housing Counseling Agency Activity Report. Additionally, it covers the collection of client level activities, client financial leverage data, and agency profile information.

	Number of respondents	Annual responses	×	Hours per response	Burden hours
Reporting Burden	12,402	3.305		0.907	37,213

Total Estimated Burden Hours: 37,213.

Status: Extension without change of currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: September 12, 2012.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2012–22902 Filed 9–14–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5603–N–63]

Notice of Submission of Proposed Information Collection to OMB; Loan Guarantees for Indian Housing

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The information is required by section 184 of the Housing and Community Development Act of 1994, as amended by section 701 of the Native American Housing Assistance and Self-Determination Act of 1996 and implementing regulations at 24 CFR part 1005. HUD has the authority to guarantee loans for the construction, acquisition, rehabilitation or refinance of 1- to 4-family homes to be owned by Native Americans in restricted Indian lands or service areas. Mortgage lenders approved by HUD provide borrower and lender information to HUD for guarantee of the loan. If the information was not provided then HUD would be unable to guarantee loans and as a result lenders would be unable to provide financing to Native Americans.

DATES: *Comments Due Date:* October 17, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0200) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov* fax: 202–395–5806.

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.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Loan Guarantees for Indian Housing.

OMB Approval Number: 2577–0200.

Form Numbers: IRA/FNMA Universal forms, Fannie Mae Form 1003A, Fannie Mae Form 1006, Fannie Mae Form 1005.

Description of the Need for the Information and Its Proposed Use

The information is required by section 184 of the Housing and Community Development Act of 1994, as amended by section 701 of the Native American Housing Assistance and Self-Determination Act of 1996 and implementing regulations at 24 CFR part 1005. HUD has the authority to guarantee loans for the construction, acquisition, rehabilitation or refinance of 1- to 4-family homes to be owned by Native Americans in restricted Indian lands or service areas. Mortgage lenders approved by HUD provide borrower and lender information to HUD for guarantee of the loan. If the information was not provided then HUD would be unable to guarantee loans and as a result lenders would be unable to provide financing to Native Americans.

	Number of respondents	Annual responses	×	Hours per response	Burden hours
Reporting Burden	3,000	19.366		0.358	20,805

Total Estimated Burden Hours: 20,805.

Status: Reinstatement with change of previously approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: September 11, 2012.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2012–22904 Filed 9–14–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5607–N–30]

Notice of Proposed Information Collection: Comment Request; Application for the Transfer of Physical Assets

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* November 16, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Harry Messner, Office of Asset Management, Policy and Participation Standards Division, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 402–2626 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Application for the Transfer of Physical Assets.

OMB Control Number, if applicable: 2502–0275.

Description of the need for the information and proposed use: This information will be used to ensure that HUD multifamily housing properties are not placed in physical, financial, or managerial jeopardy during a transfer of physical assets.

Agency form numbers, if applicable: HUD–92266.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 24,437. The number of respondents is 14,445, the number of responses is 289, the frequency of response is on occasion, and the burden hour per response is 90.33.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: September 11, 2012.

Laura M. Marin,

Acting General Deputy Assistant Secretary for Housing-Acting General Deputy Federal Housing Commissioner.

[FR Doc. 2012–22859 Filed 9–14–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5608–N–03]

Notice of Proposed Information Collection: Collection of Information From HUD Lead Hazard Control Grantees Regarding Their Use of Healthy Homes Supplemental Funding

AGENCY: HUD Office of Healthy Homes and Lead Hazard Control.

ACTION: Notice.

SUMMARY: The proposed information collection requirement concerning a survey of selected lead hazard control grantees funded by HUD that have also received Healthy Homes Supplemental funds will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments due date:* November 16, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Ashley L. Mack, Reports Liaison Officer, Office of Healthy Homes and Lead Hazard Control, Department of Housing and Urban Development, 451 7th Street SW., Room 8236, Washington, DC 20410; *ashley.l.mack@hud.gov*.

FOR FURTHER INFORMATION CONTACT: Peter J. Ashley, Department of Housing and Urban Development, 451 7th Street SW., Room 8236, Washington, DC 20410, telephone number (202) 402–7595 (this is not a toll-free number) for copies of the proposed survey and other available documents. Hearing- or speech-challenged individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. This Notice also lists the following information:

Title of Proposal: Collection of Information from HUD Lead Hazard

Control Grantees Regarding Their Use of Healthy Homes Supplemental Funding.

OMB Control Number: To be assigned.

Need for the Information and Proposed Use: HUD is interested in collecting information on the use of supplemental Healthy Homes Program funds by HUD Lead Hazard Control (LHC) Program grantees. LHC applicants have been eligible to receive supplemental funding to support modest ''healthy homes'' interventions in target housing starting in FY 2009. The Healthy Homes Program funds can be used by the grantees to mitigate priority health and safety hazards that cannot be addressed using Lead Hazard Control Program grant funds. Individual grantees were eligible to receive the following amounts of supplemental funds in the four fiscal years that the supplemental funds have been offered: $75,000 per grantee in FY 2009; $100,000 in FY 2010; $150,000 in FY 2011, and $200,000 in FY 2012. In FY 2011 and FY 2012, grantees were required to use the Healthy Homes Rating System (HHRS) to identify the residential hazards to be addressed. Approximately 80 grantees have received the healthy homes supplement during the period in which the funds have been offered.

Grantees will be asked the following:

a. How the LHC grantees have been using the healthy homes supplemental funds, and their experience using the HHRS assessment tool.

b. To identify effective healthy homes practices that can be summarized and made available to other programs through the development of case studies, etc.

Agency Form Numbers: None.

Members of Affected Public: HUD Office of Healthy Homes and Lead Hazard Control's Lead-Based Paint Hazard Control grantees, and the grantees' contractors, where applicable.

Total Burden Estimate:

Requirement	Number of respondents	Hours per respondent	Total hours	Cost per hour	Labor cost	Startup cost	O&M Cost	Total cost
Complete questionnaire ...	80	12	960	$32.75	$31,440	$0	$0	$31,440
Total	80	....	960	....	31,440	0	0	31,440

Status of the Proposed Information Collection: New request.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: September 12, 2012.

Jon L. Gant,

Director, HUD Office of Healthy Homes and Lead Hazard Control.

[FR Doc. 2012–22856 Filed 9–14–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5608–N–02]

Notice of Proposed Information Collection: Requirements for Notification of Lead-Based Paint Hazards in Federally-Owned Residential Properties and Housing Receiving Federal Assistance

AGENCY: HUD, Office of Healthy Homes and Lead Hazard Control.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* November 16, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Ashley L. Mack, Reports Liaison Officer, Office of Healthy Homes and Lead Hazard Control, Department of Housing and Urban Development, 451 7th Street SW., Room 8236, Washington, DC 20410; *ashley.l.mack@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Warren Friedman, Senior Advisor, Office of Healthy Homes and Lead Hazard Control, Office of Departmental and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email *Warren.Friedman@HUD.gov,* telephone 202–402–7574; Fax 202–755–1000 (this is not a toll-free number) for other available information.

If you are a hearing- or speech-impaired person, you may reach the above telephone numbers through TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Requirements for Notification of Lead-Based Paint Hazards in Federally-Owned Residential Properties and Housing Receiving Federal Assistance.

OMB Control Number, if Applicable: 2539–0009.

Description of the Need for the Information and Proposed Use: Requirements for notification of lead-based paint hazard in federally-owned residential properties and housing receiving Federal assistance, as codified in 24 CFR 35.

Agency Form Numbers, if Applicable: None.

Members of Affected Public: Business or other for-profit, not-for-profit institutions, State, local or tribal government.

Estimation of the Total Number of Hours Needed to Prepare the Information Collection including Number of Respondents, Frequency of Response, and Hours of Response: An estimation of the total numbers of hours needed to prepare the Information collection is 167,744, number of respondents is 63,637, frequency of response is ''on occasion,'' and the hours per response is 2.6 hours.

Status of the Proposed Information Collection: Extension of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: September 10, 2012.

Jon L. Gant,

Director, Office of Healthy Homes and Lead Hazard Control.

[FR Doc. 2012–22855 Filed 9–14–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2012–N221; 40120–1112–0000–F2]

Receipt of Applications for Endangered Species Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless a Federal permit is issued that allows such activities. The ESA requires that we invite public comment before issuing these permits.

DATES: We must receive written data or comments on the applications at the address given below, by *October 17, 2012.*

ADDRESSES: Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345 (Attn: Cameron Shaw, Permit Coordinator).

FOR FURTHER INFORMATION CONTACT: Cameron Shaw, telephone 904/731–3191; facsimile 904/731–3045.

SUPPLEMENTARY INFORMATION: The public is invited to comment on the following applications for permits to conduct certain activities with endangered and threatened species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and our regulations in the Code of Federal Regulations (CFR) at 50 CFR 17. This notice is provided under section 10(c) of the Act.

If you wish to comment, you may submit comments by mail or hand-delivery to the Fish and Wildlife Service's Regional Office (see **ADDRESSES** section) or via electronic mail (email) to *permitsR4ES@fws.gov.* Please include your name and return address in your email message. If you do not receive a confirmation from the Fish and Wildlife Service that we have received your email message, contact us directly at the telephone number listed above (see **FOR FURTHER INFORMATION CONTACT** section).

Before including your address, telephone number, email address, or other personal identifying information in your comments, 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 comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit Application Number: TE–79580A

Applicant: Jason Butler, Lexington, Kentucky

Applicant requests authorization to conduct presence/absence surveys for the Cumberland darter (*Etheostoma susanae*), Blackside dace (*Chrosomus cumberlandensis*), and Kentucky arrow darter (*Etheostoma spilotum*) in the Cumberland and Kentucky River drainages in Kentucky.

Permit Application Number: TE–130300

Applicant: Paul Johnson, Alabama Aquatic Biodiversity Center, Marion, Alabama

Applicant requests renewed authorization to collect, transport, house, translocate, and euthanize 54 freshwater mussel species, 9 snail species, and 8 fish species within Alabama.

Permit Application Number: TE–80377A

Applicant: Michael Zavislak, Columbia, South Carolina

Applicant requests authorization to conduct presence/absence surveys for Carolina heelsplitter (*Lasmigona decorata*) in South Carolina.

Permit Application Number: TE–80381A

Applicant: U.S. Army, Fort Campbell, Fort Campbell, Kentucky

Applicant requests authorization to conduct scientific studies and surveys on Indiana bats (*Myotis sodalis)* and gray bats (*Myotis grisescens).* These surveys will be conducted on Fort Campbell, in Tennessee and Kentucky.

Permit Application Number: TE–81756A

Applicant: Jason Robinson, Lexington, Kentucky

Applicant requests reauthorization to conduct scientific studies and surveys on the following species:

Indiana bat *Myotis sodalis*
Gray bat *Myotis grisescens*
Virginia big-eared bat *Corynorhinus townsendii virginianus*

These surveys will be conducted in Kentucky, North Carolina, Tennessee, Virginia, West Virginia, Ohio, Illinois and Indiana.

Dated: September 6, 2012.

Mark J. Musaus,

Acting Regional Director.

[FR Doc. 2012–22812 Filed 9–14–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2012–N116; 12560–0000–10137 S3]

Bandon Marsh, Nestucca Bay, and Siletz Bay National Wildlife Refuges, Coos, Tillamook, and Lincoln Counties, OR; Comprehensive Conservation Plans and Environmental Assessments

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft comprehensive conservation plans and environmental assessments (Draft CCP/EAs) for three Oregon refuges—Bandon Marsh, Nestucca Bay, and Siletz Bay National Wildlife Refuges (NWRs)—for public review and comment. Each refuge's Draft CCP/EA describes our proposal for managing that refuge for the 15 years following approval of the final CCP.

DATES: To ensure consideration, please send your written comments by October 22, 2012.

ADDRESSES: You may submit comments or requests for copies or more information by any of the following methods. You may request printed copies or a CD–ROM of the documents.

Email: oregoncoastCCP@fws.gov. Include ''Bandon Marsh, Nestucca Bay, and Siletz Bay draft CCP and EA'' in the subject line of the message.

Fax: Attn: Project Leader, 541–867–4551.

U.S. Mail: Oregon Coast National Wildlife Refuge Complex, 2127 SE Marine Science Drive, Newport, OR 97365.

In-Person Drop-off, Viewing, or Pickup: Call 541–867–4550 to make an appointment (necessary for viewing/pickup only) during regular business hours at the above address. For more information on locations for viewing or obtaining documents, see ''Public Availability of Documents'' under **SUPPLEMENTARY INFORMATION.**

Web site: http://www.fws.gov/oregoncoast/ccp_nes_slz_bdm.htm.

FOR FURTHER INFORMATION CONTACT: Roy W. Lowe, Project Leader, Oregon Coast National Wildlife Refuge Complex, 2127 SE Marine Science Drive, Newport, OR 97365; phone (541) 867–4550 and fax (541) 867–4551.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for Bandon Marsh, Nestucca Bay, and Siletz Bay National Wildlife Refuges in Coos, Tillamook, and Lincoln Counties, Oregon, respectively. We started this process through a notice in the **Federal Register** (75 FR 73121; November 29, 2010).

Bandon Marsh, Nestucca Bay, and Siletz Bay National Wildlife Refuges

Bandon Marsh NWR was established in 1983, with the acquisition of 289 acres of salt marsh, mudflats, and tidal sloughs. The Bandon Marsh Unit is located near the mouth of the Coquille River, with approximately 25 percent of the Unit within the city limits of Bandon, Oregon. The 582-acre Ni-les'tun Unit, established in 2000, is located on the east side of Highway 101 on the north bank of the Coquille River. A tidal marsh restoration project, completed in summer 2011 at the Ni-les'tun Unit, restored 418 acres of historic tidal wetlands within the lower Coquille River estuary. The total land base of Bandon Marsh NWR is 889 acres.

The purpose for establishing Bandon Marsh NWR was ''for the preservation and enhancement of the highly significant wildlife habitat of the area known as Bandon Marsh, in the estuary of the Coquille River * * * for the protection of migratory waterfowl, numerous species of shorebirds, and fish, including Chinook and silver salmon, and to provide opportunity for wildlife-oriented recreation and nature study on the marsh * * *'' (95 Stat. 1709, dated Dec 29, 1981). The Ni-les'tun Unit was added to Bandon Marsh NWR in order to (1) Protect and restore intertidal marsh, freshwater marsh, and riparian areas to provide a diversity of habitats for migratory birds, including waterfowl, shorebirds, wading birds, and songbirds; (2) restore intertidal marsh habitat for anadromous fish such as the threatened coho salmon, chinook, chum salmon, steelhead, and cutthroat trout; (3) protect and restore habitat for species listed under the Endangered Species Act as threatened or endangered; and (4) provide wildlife-dependent public use opportunities compatible with refuge purposes.

Nestucca Bay NWR is located near Pacific City and Neskowin in Tillamook County, Oregon. The refuge was established in 1991 with the acquisition of a 370-acre dairy farm, and has since expanded to 1,010 acres. The primary need for establishing Nestucca Bay NWR was to protect high-quality coastal habitats for dusky Canada geese and threatened Aleutian Canada geese (delisted in 2001); other endangered and threatened species; and a variety of other migratory waterfowl, shorebirds, raptors, songbirds, anadromous fish, and other wildlife while preserving part of Oregon's biodiversity. In 2001, the refuge was expanded to include the Neskowin Marsh Unit (228 acres acquired), located about 2.5 miles south of the Nestucca Bay Refuge Unit near the community of Neskowin, Oregon. The Neskowin Marsh Unit incorporates unique freshwater wetland and bog habitats and wildlife resources not found within the initial refuge boundary.

Siletz Bay NWR is located near Lincoln City on the central coast of Oregon. The refuge was established in 1991 with a donation of 40 acres of tidally muted salt marsh. The approved acquisition refuge boundary totals 1,936 acres and encompasses the northern tip of the Siletz spit, vegetated and unvegetated tidelands of the bay, a portion of the diked former tidelands of the Siletz River floodplain, and forested headlands near the mouth of Schooner Creek and Drift Creek. Approximately 1,060 acres within the authorized boundary are State-owned tidelands. Currently, refuge lands total 568 acres. The primary need for establishing this refuge was to protect coastal wetland habitats and upland buffers for a variety of waterfowl, shorebirds, marine mammals, endangered species, raptors, songbirds, fish, and other wildlife. The refuge serves to protect the remaining coastal wetlands and uplands adjacent to Siletz Bay from rapidly encroaching development, and management emphasis has been to enhance and restore wetland and upland habitats for a variety of estuarine-dependent fish and wildlife species.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd-668ee (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, 111 Stat. 1254, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, the National Environmental Policy Act (NEPA), legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify compatible wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update each CCP at least every 15 years in accordance with the Refuge Administration Act. Implementing a CCP is subject to the availability of funding and any additional compliance requirements.

Public Outreach

We began public outreach by publishing a notice of intent in the **Federal Register** (75 FR 73121; November 29, 2010) announcing our intent to complete a CCP and EA for each of the refuges and inviting public comments. In November 2010, we distributed Planning Update 1 to our mailing list and public outlets. On November 29 and 30 and December 2, 2010, we held public scoping meetings in Lincoln City, Pacific City, and Bandon, Oregon, respectively, to meet with the public and identify issues for evaluation. The meetings were announced through local media outlets, on the refuges' Web sites, and in Planning Update 1. Some scoping comments we received were about broad or long-range issues, while others suggested very specific or detailed strategies that could be used to achieve biological or public use objectives. Most of the comments suggested changes or additions to the refuges' public use programs; some examples were adding new areas where wildlife observation and photography could be allowed, establishing waterfowl hunting and fishing programs where none exist, expanding interpretation and environmental education programs, or partnering with local and State agencies and community groups that share common goals for the refuges' natural resources.

We reviewed and evaluated the potential issues, management concerns, and opportunities that we, our partners, and the public identified during scoping. We used this information to define the significant issues to be addressed in the CCP/EA for each refuge. Preliminary draft alternatives were then developed to address these issues and meet the goals and objectives of each refuge. In November 2011, we distributed Planning Update 2, which included a summary of the scoping comments we received, a summary of our preliminary draft alternatives, a planning schedule, notice of three public open house meetings, and information on how and where to comment. On November 9, 10, and 16, 2011, we held public open house meetings in Lincoln City, Pacific City, and Bandon, Oregon, respectively, to meet with the public and solicit comments on our preliminary draft alternatives. Comments we received have been considered and evaluated, with many incorporated into the various alternatives addressed in each draft CCP/EA.

To better address issues raised regarding our Bandon Marsh NWR boundary expansion study, we decided in February 2012 to conduct our Land Protection Planning (LPP) process separately from the CCP. Separating the LPP process from the CCP process will allow us to more readily meet our CCP completion schedule, and focus more attention on evaluating potential environmental, recreational, and socio-economic benefits and impacts of our LPP alternatives, and respond to public concerns.

Alternatives We Are Considering for Each Draft CCP/EA

During the public scoping process with which we started work on these draft CCPs, we, other governmental partners, Tribes, and the public raised several issues. Our draft CCPs address these issues. A full description of each alternative is in the EA for each refuge. To address these issues, we developed and evaluated the following alternatives, briefly summarized below:

Bandon Marsh NWR

Alternative A: No Action

Under Alternative A, the refuge would continue with current management, which focuses on protecting and maintaining habitats in their current condition. Existing invasive species control and monitoring programs would continue. Public use would remain limited to wildlife observation and photography, interpretation and environmental education, hunting, and fishing allowed on the Bandon Marsh Unit. The only public uses on the Ni-les'tun Unit would be wildlife observation, photography, and interpretation from the observation deck and associated gravel trail, with no public entry into the remainder of the unit. Existing structures would be maintained and the refuge would continue to seek funding to replace or rehabilitate the Smith Tract structures.

Alternative B: Enhanced Active Habitat Management and Restoration

This alternative would continue the activities in Alternative A; however, Alternative B would expand the level of active habitat management and restoration. Approximately 29 acres of grasslands (former pastures) and 11 acres of forested wetlands would be restored. Monitoring programs would be expanded. Wildlife observation and photography would continue 7 days per week on the Bandon Marsh Unit, and would be allowed daily during the non-waterfowl hunting season on a portion of the Ni-les'tun Unit. The waterfowl hunting program, which currently allows hunting on 256 acres of Bandon Marsh Unit 7 days per week, would expand to also allow hunting on 300 acres of the Ni-les'tun Unit 7 days per week. With regard to facilities and structures, the Service would focus on participation in partner- and community-based visitor information projects.

Alternative C: Enhanced Active Habitat Management and Restoration and Visitor Services (Preferred Alternative)

All additional active habitat management, monitoring, and restoration activities included in Alternative B are also included in this alternative. A portion of the Ni-les'tun Unit would be open to wildlife observation and photography daily during the non-waterfowl hunting season. In addition to the existing waterfowl hunting program on the Bandon Marsh Unit, hunting would be allowed on 300 acres of the Ni-les'tun Unit 3 days per week. Fishing for cutthroat trout would be permitted in Redd, No Name, and Fahys Creeks south of North Bank Lane, in accordance with state regulations but with an additional refuge regulation of artificial lures or flies only. The start of the season would coincide with the Oregon Department of Fish and Wildlife's season for trout fishing; however, the season on the refuge would end on September 30 to avoid conflicts with the waterfowl hunting season. Additional trails and parking lots would be constructed. Some administrative and visitor facilities would be replaced. Off-refuge, the Service would participate in partner- and community eco-tourism or natural resource-based visitor centers.

Nestucca Bay NWR

Alternative A: No Action

Under Alternative A, the refuge would continue with current management, which focuses on protecting and maintaining habitats in their current condition and taking advantage of opportunities to restore or enhance some habitats. Existing invasive species control and monitoring programs would continue. The 346 acres of lowland pastures would continue to be managed by cooperative farmers, and the upland grasslands would be occasionally mowed and silaged, with small areas enhanced with native prairie and Oregon silverspot butterfly habitat plant species when possible. Public use would remain limited to the wildlife observation, photography, interpretation, and minimal environmental education programs offered at Cannery Hill. A trail and observation deck would also be constructed. Existing structures would remain in place and the refuge would continue to seek funding to replace the deteriorating volunteer residence with a bunkhouse through the standard funding process.

Alternative B: Enhanced Active Habitat Management and Monitoring

This alternative would continue many of the activities in Alternative A, but would also include more active habitat management and monitoring activities. The tsunami evacuation route through Neskowin Marsh would remain open and, following a hydrological study, redesigned to improve hydrology and accessibility. Some lowland pastures would be restored to tidal marsh habitat and the remainder would continue to be managed for wintering goose forage through cooperative farming agreements. Approximately 25 acres of former coastal prairie on Cannery Hill would be fully restored, and some active forest management techniques would be employed along with invasive species management. Public use changes include the construction of new trails and an observation deck, allowing seasonal public access on a portion of the Little Nestucca Restoration area, and allowing public access on Brooten Marsh. A waterfowl hunting program would be established on 108 acres at Brooten Marsh, 33 acres at the mouth of the Little Nestucca River, and 82 acres at the Little Nestucca Restoration area. The Service would seek funding to build a refuge office with a visitor lobby under this alternative, as well as replacing the existing volunteer residence with a bunkhouse.

Alternative C (Preferred Alternative): Enhanced Active Habitat Management and Monitoring and Visitor Services

All lowland pastures would continue to be managed for wintering goose habitat through cooperative farming agreements. A hydrological study would be conducted and used to guide the future modification of the tsunami evacuation route through Neskowin Marsh to improve hydrology and accessibility. The Neskowin Marsh Unit would be proposed for designation as a Research Natural Area. The 25-acre full restoration of former coastal prairie on Cannery Hill would be focused on specific life-history parameters needed by the threatened Oregon silverspot butterfly, with the goal of introducing a nonessential experimental population once habitat parameters specified in the Oregon Silverspot Butterfly Recovery Plan are reached. An additional 14 acres of upland grassland would also be restored to coastal prairie. New trails and an observation deck would be constructed on Cannery Hill. The Little Nestucca Restoration area would gain a trail as well as graveled parking lots. Brooten Marsh would be opened to access for wildlife observation and photography year round. A waterfowl hunting program would be established on Brooten Marsh (108 acres) and the mouth of the Little Nestucca River (33 acres), and clamming access would be allowed through Brooten Marsh. To accommodate increasing visitation to the refuge, the current refuge volunteer residence would be replaced with a bunkhouse and small administrative office. The Service would also remodel the north bay of the maintenance shop to accommodate two offices: one for maintenance staff and a second for the refuge Friends Group.

Siletz Bay NWR

Alternative A: No Action

Under Alternative A, the refuge would continue with current management, which focuses on protecting and maintaining habitats in their current condition and contributing to restoration and enhancement of some habitats. Existing invasive species control and monitoring programs would continue. The Service would continue to work with private landowners and partners to acquire lands within the approved refuge boundary with the intention of restoring full tidal action to those properties. Partnerships would also continue to be cultivated for the restoration of tidal marsh on privately-owned and state-owned lands. Public use would remain limited to the interpreter-led, seasonal paddle trips through Millport Slough and the Siletz River.

Alternative B: Enhanced Active Habitat Management

Under Alternative B, more active habitat management activities would occur, such as inventory and management for late-successional forest and closer coordination with the Oregon Division of State Lands to monitor and treat invasive species. If feasible, tidal marsh restoration would occur at Siletz Keys and Alder Island, and on any additional diked lands acquired. Monitoring programs would be expanded. Proposed new public use opportunities include opening Alder Island to public access with development of a loop trail, viewing platform, parking lot, and boat launch. Unrestricted walking would also be allowed on lands south of Millport Slough. Walk-in bank fishing would be allowed from Alder Island and lands south of Millport Slough. A waterfowl hunting program would be established on 80 acres of refuge lands west of Highway 101 7 days per week, as well as on 225 acres of refuge lands north and south of Millport Slough and east of Highway 101 3 days per week.

Alternative C: Alternative B: Enhanced Active Habitat Management and Visitor Services (Preferred Alternative)

All additional habitat monitoring and management activities included in Alternative B are also included in this alternative. Interpreter-led seasonal paddle trips would continue and potentially expand with the development of the boat launch near Alder Island. A loop trail, viewing platform, and parking lot would be developed at Alder Island. Access to clamming would be allowed through Snag Alley and walk-in bank fishing would be allowed from Alder Island only. A waterfowl hunting program would be allowed daily in season on 80 acres of refuge lands west of Highway 101 and 3 days per week on 97 acres of refuge lands south of Millport Slough and east of Highway 101. A small gravel parking lot and kiosk would be developed to support the Millport Slough waterfowl hunting access.

Public Availability of Documents

In addition to any methods in **ADDRESSES**, you can view or obtain documents by calling the refuge complex at 541–867–4550 or visiting our Web site at *http://www.fws.gov/oregoncoast/ccp_nes_slz_bdm.htm.* Printed copies will be available for review at the following libraries:

- Bandon Public Library, 1204 11th St. SW., Bandon, OR 97411
- Coquille Public Library, 105 N. Birch St., Coquille, OR 97423
- Newport Public Library, 35 NW Nye St., Newport, OR 97365
- Driftwood Public Library, 801 SW Hwy 101 #201, Lincoln City, OR 97367
- Pacific City Public Library, 6200 Camp Street, Pacific City, OR 97135
- Tillamook County Library, 1716 3rd St., Tillamook, OR 97141

Submitting Comments/Issues for Comment

Public comments are requested, considered, and incorporated throughout the planning process. Comments on each Draft CCP/EA will be analyzed by the Service and addressed in the final planning documents. See **ADDRESSES** for how to submit comments.

Public Availability of Comments

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: June 1, 2012.

Robyn Thorson,

Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2012–22960 Filed 9–14–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[USGS–GX12LR000F60100]

Agency Information Collection Activities: Comment Request for the Mine, Development, and Mineral Exploration Supplement (1 Form)

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of an extension of a currently approved information collection (1028–0060).

SUMMARY: We (the USGS) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. This collection consists of 1 form. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This collection is scheduled to expire on March 31, 2013.

DATES: To ensure that your comments on this IC are considered, we must receive them on or before November 16, 2012.

ADDRESSES: Please submit a copy of your comments to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive, Mail Stop 807, Reston, VA 20192 (mail); 703–648–7199 (fax); or *smbaloch@usgs.gov* (email). Reference Information Collection 1028–0060 in the subject line.

FOR FURTHER INFORMATION CONTACT: Shonta E. Osborne at 703–648–7960 (telephone); *sosborne@usgs.gov* (email); or by mail at U.S. Geological Survey, 985 National Center, 12201 Sunrise Valley Drive, Reston, VA 20192.

SUPPLEMENTARY INFORMATION:

I. Abstract

Respondents will use this form to supply the USGS with domestic production, exploration, and mine development data for nonfuel mineral commodities. This information will be published as an Annual Report for use by Government agencies, industry, academia, and the general public.

II. Data

OMB Control Number: 1028–0060.

Form Number: 9–4000–A.

Title: Mine, Development, and Mineral Exploration Supplement.

Type of Request: Extension of a currently approved collection.

Affected Public: Private sector: U.S. nonfuel minerals producers and exploration operations; Public sector: State and local governments.

Respondent Obligation: Voluntary.

Frequency of Collection: Annually.

Estimated Number of Annual Responses: 887.

Annual Burden Hours: 665 hours. We expect to receive 887 annual responses. We estimate an average of 45 minutes per response.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have not identified any ''non-hour cost'' burdens associated with this collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, et seq.) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number and current expiration date.

III. Request for Comments

Comments: We are soliciting comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) how to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology. Please note that the comments submitted in response to this notice are a matter of public record. 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 we will be able to do so.

Dated: September 6, 2012.

John H. DeYoung, Jr.,

Director, National Minerals Information Center.

[FR Doc. 2012–22744 Filed 9–14–12; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR957000–L63100000–HD0000: HAG12–0299]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management Oregon/Washington State Office, Portland, Oregon, 30 days from the date of this publication.

Willamette Meridian

Oregon

T. 5 S., 14 E., accepted August 21, 2012
T. 26 S., R. 2 W., accepted August 21, 2012
T. 27 S., R. 11 W., accepted August 21, 2012
T. 39 S., R. 3 E., accepted September 7, 2012
T. 19 S., R. 5 W., accepted September 7, 2012
T. 19 S., R. 2 W., accepted September 7, 2012
T. 25 S., R. 2 W., accepted September 7, 2012
T. 28 S., R. 2 W., accepted September 7, 2012

ADDRESSES: A copy of the plats may be obtained from the Land Office at the Bureau of Land Management, Oregon/Washington State Office, 333 SW. 1st Avenue, Portland, Oregon 97204, upon required payment. A person or party who wishes to protest against a survey must file a notice that they wish to protest (at the above address) with the Oregon/Washington State Director, Bureau of Land Management, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Kyle Hensley, (503) 808–6124, Branch of Geographic Sciences, Bureau of Land Management, 333 SW. 1st Avenue, Portland, Oregon 97204. 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 above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: 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.

Timothy J. Moore,

Acting, Chief, Cadastral Surveyor of Oregon/Washington.

[FR Doc. 2012–22809 Filed 9–14–12; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–11059; 2200–1100–665]

Notice of Inventory Completion: U.S. Department of Defense, Army, Fort Sill Museum, Lawton, OK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Defense, Army, Fort Sill Museum, with the U.S. Army Corps of Engineers, St. Louis District, has completed an inventory of human remains and associated funerary objects in consultation with the appropriate Indian tribe, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and a present-day Indian tribe. Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects may contact the Fort Sill Museum. Repatriation of the human remains and associated funerary objects to the Indian tribe stated below occurred on April 12, 2004.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains and associated funerary objects should contact the Fort Sill Museum at the address below by October 17, 2012.

ADDRESSES: Scott A. Neel, Ph.D., Director, Fort Sill National Historic Landmark and Museum, U.S. Army Fires Center of Excellence, Fort Sill, OK 73503, telephone (580) 442–6570.

SUPPLEMENTARY INFORMATION: Notice is hereby given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the Fort Sill Museum. The human remains and associated funerary objects were removed from Comanche County, OK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains and funerary objects was made by professional staff from the Fort Sill Museum and the U.S. Army Corps of Engineers, St. Louis District, in consultation with representatives of the Comanche Nation, Oklahoma.

History and Description of the Remains

In November 1969, human remains representing, at minimum, one individual were removed from the Jared site (34CM221) in Comanche County, OK. The burial was excavated by staff from the Museum of the Great Plains, OK, and representatives of Fort Sill. Following the excavation, Dr. Clyde Snow, Chief of the Physical Anthropology Section at the Federal Aviation Administration's Civil Areomedical Institute in Oklahoma City, examined the skeletal remains, and determined the remains to be one female, age 25–35 years. No known individuals were identified. The human remains and funerary objects were stored at the Fort Sill Museum. The 1,581 associated funerary objects are 1 horse trapping, 3 metal rings, 2 metal rivets, 17 metal nails, 53 metal bracelets, 1 metal pail, 1,500 glass beads, 1 bone bead, 2 fragments of animal bone, and 1 leather/cloth fragment.

Based on examination, the burial dates to between 1869 and 1890. The skeleton was determined to be Native American based on skeletal morphology, diagnostic metric traits, burial context, and artifact associations. The burial was located in the bed of a ravine and covered with large flat stones. The archaeological evidence, including the burial context and funerary associations, support a cultural affiliation to the Comanche tribe. The size, design, and decoration of bracelets, rivets, and buttons found with this burial are similar to those found in burials of known Comanche origin. Additionally, ethnographic and historic reports include the use of ravine burials in that area by the Comanche, while also reporting that the Kiowa did not use such burial places.

The Comanche were a Shoshonean group originally residing along the upper Yellowstone and Platte Rivers. Around the beginning of the eighteenth century, they began to migrate onto the Southern Plains, between the Apache to the west and the Pawnee and Wichita to the east. After 1750, the geographic area of present day Fort Sill was increasingly controlled by the Comanche and the Kiowa. In 1834, a major U.S. expedition into the Southern Plains, the Dragoon Expedition, made contact with Comanche villages located in the vicinity of Medicine Bluff and Medicine Creek, near the present-day site of Fort Sill. In 1867, a land cession gave the Kiowa and Comanche a reservation in Oklahoma that included the area near Fort Sill. Fort Sill was established in 1869, with the Kiowa Comanche Indian Agency outside the gate of the Fort. Fort Sill was expanded in 1897 with 27,000 acres of land from the Kiowa Comanche reservation, in order to accommodate incoming Apache prisoners. Finally, the reservation land was open to allotments in 1901, with 160 acres of land allotted to each Native American inhabitant. The Comanche chose the lands in the south near Fort Sill, with the Kiowa choosing settlements in the north. Archaeological, anthropological, historical, and geographical lines of evidence support a cultural affiliation with the Comanche tribe.

Determinations Made by the U.S. Department of Defense, Army, Fort Sill Museum

Officials of the Fort Sill Museum have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 1,581 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Comanche Nation.

Additional Requestors and Disposition

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Scott A. Neel, Director, Fort Sill National Historic Landmark and Museum, U.S. Army Fires Center of Excellence, Fort Sill, OK 73503, telephone (580) 442–6570, before

October 17, 2012. On April 12, 2004, the human remains and associated funerary objects from the Jared site (34CM221) were repatriated to the Comanche Nation.

The Fort Sill Museum is responsible for notifying the Comanche Nation, Oklahoma, that this notice has been published.

Dated: August 10, 2012.

Melanie O'Brien,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–22747 Filed 9–14–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–11058; 2200–1100–665]

Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Arapaho and Roosevelt National Forest and Pawnee National Grasslands, Fort Collins, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture (USDA), Forest Service, Arapaho and Roosevelt National Forest and the Pawnee National Grassland (ARP) has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes, and has determined that there is no cultural affiliation between the remains and any present-day Indian tribe. Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains may contact the ARP. Disposition of the human remains and associated funerary objects to the Indian tribes described below may occur if no additional requestors come forward.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains should contact the ARP at the address below by October 17, 2012.

ADDRESSES: Sue Struthers, Arapaho and Roosevelt National Forest and Pawnee National Grasslands, 2150 Centre Avenue, Building E, Fort Collins, CO 80526, telephone (970) 295–6622.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects located at the University of Colorado Museum, Boulder, Colorado, and under the control of the USDA, Forest Service, ARP. The human remains and associated funerary objects described below were removed from Larimer County, CO.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

On May 16th and 17th, 2007, an initial assessment of the human remains was made by the ARP professional staff and the University of Colorado Natural History Museum, Boulder, CO, professional staff in consultation with representatives of the following tribes: Arapaho Tribe of the Wind River Reservation, Wyoming; Cheyenne and Arapaho Tribes, Oklahoma (foremerly the Cheyenne-Arapaho Tribes of Oklahoma); Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Tribe of Montana; Fort Sill Apache Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Pawnee Nation of Oklahoma; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Ute Indian Tribe of Uintah & Ouray Reservation, Utah; and the Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah. A second consultation meeting was held May 2nd and 3rd, 2012, with representatives of the Arapaho Tribe of theWind River Reservation, Wyoming; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; and the Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado.

History and Description of the Remains

In August of 1963, human remains representing, at minimum, one individual were removed from the Gordon Creek burial site (5LR99), in Larimer County, CO. The remains were discovered during the course of a watershed improvement project in the Gordon Creek drainage eroding out of a stream bank on a tributary of Gordon Creek within the Arapaho and Roosevelt National Forest. Excavation was conducted by the Department of Anthropology, University of Colorado, with the approval of the USDA, Forest Service. After the excavation concluded, the human remains and the associated funerary objects were sent to the University of Colorado Natural History Museum. No known individuals were identified. The 24 associated funerary objects are 1 stone tool core; 1 stone biface perform tool; 1 stone perform tool; 2 stone biface tool fragments; 7 stone tool flakes; 1 sample of ochre (hematite); 2 animal bones (large mammal hyoid bones with cut marks on the ends); 4 elk incisor teeth; 1 burnt animal bone; 1 soil sample from burial pit; 1 soil sample labeled "attempted C14 sample"; 1 carbonized sap specimen; and 1 lot of residue from C14 testing.

Although the human remains were fragmentary, some of the skeleton and associated artifacts were removed from a slump below the burial pit and some of the skeleton was in situ, all of the skeletal remains were stained with a thick coat of red ocher. The remains were interred in a flexed position, in an intentionally formed burial pit. Subsequent analysis determined that the remains are those of a 25–30 year old American Indian (paleoindian) female and that the burial dates to approximately 9,000 year B.P. The Gordon Creek burial site is located on lands adjudicated by the Indian Claims Commission as the aboriginal lands of the Northern Cheyenne, Cheyenne and Arapaho, and Northern Arapaho tribes.

Determinations Made by the Arapaho and Roosevelt National Forest and Pawnee National Grasslands

Officials of the Arapaho and Roosevelt National Forest and Pawnee Grasslands have determined that:

- Based on archaeological evidence the human remains are Native American.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian tribe.
- According to final judgments of the Indian Claims Commission, the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Arapaho Tribe of theWind River Reservation, Wyoming; Cheyenne and Arapaho Tribes, Oklahoma (formerly the Cheyenne-Arapaho Tribes of Oklahoma); and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one

(1) individual of Native American ancestry.

- Pursuant to 25 U.S.C. 3001(3)(A), the 24 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary objects is to the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana.

Additional Requestors and Disposition

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains or any other Indian tribe that believes it satisfies the criteria in 43 CFR 10.11(c)(1) should contact Sue Struthers, Arapaho and Roosevelt National Forest and Pawnee National Grasslands, 2150 Centre Avenue, Building E, Fort Collins, CO 80526, telephone (970) 295–6622, before October 17, 2012. Disposition of the human remains to Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana, may proceed after that date if no additional requestors come forward.

The Arapaho and Roosevelt National Forest and Pawnee National Grasslands is responsible for notifying the Arapaho Tribe of the Wind River Reservation, Wyoming; Cheyenne and Arapaho Tribes, Oklahoma (foremerly the Cheyenne-Arapaho Tribes of Oklahoma); Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Tribe of Montana; Fort Sill Apache Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Pawnee Nation of Oklahoma; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Ute Indian Tribe of Uintah & Ouray Reservation, Utah; and the Ute Mountain Tribe of the Ute Mountain Reservation, Dolorado, New Mexico & Utah that this notice has been published.

Dated: August 9, 2012.

Melanie O'Brien,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–22751 Filed 9–14–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–11180; 2200–3200–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before August 25, 2012. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by October 2, 2012. 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: August 29, 2012.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

FLORIDA

Hillsborough County

Rogers Park and Golf Course—Willie Black Side, 7801 N. 30th St., Tampa, 12000838

Leon County

Sollner—Wall House, 2235 Chaires Cross Rd., Tallahassee, 12000839

GEORGIA

Fulton County

Sardis Methodist Church and Cemetery, 3725 Powers Ferry Rd., Atlanta, 12000840

ILLINOIS

Cook County

Auburn Gresham Bungalow Historic District, (Chicago Bungalows MPS) Roughly bounded by S. Paulina, 78th, & 75th Sts., & S. Winchester Ave., Chicago, 12000841

KANSAS

Barton County

Manweiler—Maupin Chevrolet, (Roadside Kansas MPS) 271 S. Main St., Hoisington, 12000842

Brown County

Bethany Brethren Church, 121 1st St., Hamlin, 12000843

Douglas County

French, Charles & Elizabeth Haskell, House, 1300 Haskell Ave., Lawrence, 12000844

MARYLAND

Howard County

Howard Lodge, 12301 Howard Lodge Rd., Sykesville, 12000845

MINNESOTA

Hennepin County

Lincoln Bank Building, 730 Hennepin Ave., Minneapolis, 12000846

MISSOURI

Jackson County

Seven Oaks School, (Kansas City, Missouri School District Pre-1970 MPS) 3711 Jackson Ave., Kansas City, 12000847

SOUTH CAROLINA

Hampton County

Lawtonville Baptist Church, 194 E. 4th St., Estill, 12000848

Palmetto Theatre, 109 Lee Ave., Hampton, 12000849

Richland County

Efird's Department Store, 1601 Main St., Columbia, 12000850

UTAH

Duchesne County

42Dc1620, (Nine Mile Canyon, Utah MPS) Address Restricted, Price, 12000837

VIRGINIA

Richmond Independent city

Forest Hill Historic District, Roughly bounded by Riverside Dr., Forest Hill Park, Reedy Cr., Bassett Ave., Southcliff Rd., Cedar Ln., Richmond (Independent City), 12000851

WISCONSIN

Brown County

Christ Episcopal Church Complex, 425 Cherry St., Green Bay, 12000852

A request for removal has been made for the following resource:

INDIANA

St. Joseph County

Northern Indiana Gas and Electric Company Building, 221 N. Michigan, South Bend, 85001225

[FR Doc. 2012–22763 Filed 9–14–12; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Docket No. 2912]

Certain Reduced Folate; Nutraceutical Products and L-Methylfolate Raw Ingredients Used Therein; 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 Reduced Folate Nutraceutical Products and L-methylfolate Raw Ingredients Used Therein, DN 2912; 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 South Alabama Medical Science Foundation; Merck & Cie, and Pamlab LLC on September 10, 2012. 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 reduced folate nutraceutical products and L-methylfolate raw ingredients used therein. The complaint names as respondents Gnosis SpA of Italy; Gnosis Bioresearch SA of Switzerland; Gnosis USA Inc. of PA; and Macoven Pharmaceuticals LLC of TX.

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. 2912'') 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: September 11, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–22758 Filed 9–14–12; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–12–026]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: September 19, 2012 at 1 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes
3. Ratification List
4. Vote in Inv. No. 731–TA–1104 (Review) (Polyester Staple Fiber from China). The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before September 28, 2012.

5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: September 12, 2012.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2012–22958 Filed 9–13–12; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–31]

Cleveland J. Enmon, Jr., M.D.; Decision and Order

On April 26, 2012, Administrative Law Judge Gail A. Randall (ALJ) issued the attached recommended decision. Neither party filed exceptions to the decision.

Having reviewed the entire record in this matter, I have decided to adopt the ALJ's recommended rulings, findings of fact,[1] conclusions of law, and recommended order. Accordingly, I will order that Respondent's registration be revoked and that his pending application to renew and modify his registration be denied.

[1] The ALJ made several factual findings based on the statements made to a Special Agent by two employees of the Brunswick Wellness Center (BWC) during the execution of a search warrant, as well as statements made during interviews the Special Agent conducted of several patients of Respondent's subsequent clinic. *See* ALJ Slip Op. at 7 (statements of BWC employees that clinic lacked basic medical equipment and attracted patients from out-of state who did not appear to be in pain), *id.* at 9–10 (statement of Ocean Care patient that he obtained controlled substances from Respondent in order to sell them on the street and that Respondent did not perform a physical examination and increased prescription upon request). While the ALJ found the Special Agent's testimony credible, as do I, the ALJ did not apply the factors for assessing the reliability of the underlying hearsay statements as set forth in the case law of either the Eleventh or DC Circuits. *See Basco* v. *Machin,* 514 F.3d 1177, 1182 (11th Cir. 2008); *J.A.M. Builders* v. *Herman,* 233 F.3d 1350, 1354 (11th Cir. 2000); *Hoska* v. *United States Dep't of the Army,* 677 F.2d 131, 138 (DC Cir. 1982). However, I conclude that this does not constitute prejudicial error because the ALJ's legal conclusions are amply supported by substantial evidence, including the uncontroverted testimony of the Government's Expert, and the ALJ did not cite these statements as support for her conclusion that Respondent repeatedly prescribed controlled substances without a legitimate medical purpose and outside the course of professional practice in violation of both federal and state law. *See* ALJ Slip. Op. at 38–44 (citing 21 CFR 1306.04(a) and Ga. Code Ann. 16–13–41(f)).

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration No. BE9655284, issued to Cleveland J. Enmon, Jr., M.D., be, and it hereby is, revoked. I further order that the pending application of Cleveland J. Enmon, Jr., M.D., to renew and modify his registration, be, and it hereby is, denied. This Order is effective immediately.[2]

Dated: August 31, 2012.

Michele M. Leonhart,

Administrator.

Brian Bayly, Esq., for the Government

Cleveland J. Enmon, Jr., M.D., for the Respondent

[2] For the same reasons that I concluded that Respondent's conduct posed an imminent danger to public health and safety and warranted the Immediate Suspension of his registration, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

Gail A. Randall, Administrative Law Judge.

I. PROCEDURAL BACKGROUND

The Administrator of the Drug Enforcement Administration (''DEA'' or ''Government''), issued an Order to Show Cause and Immediate Suspension of Registration (''Order'') dated January 10, 2012, immediately suspending the DEA Certificate of Registration, No. BE9655284, of Cleveland J. Enmon, Jr., M.D. (''Respondent''), pursuant to 21 U.S.C. 824(d), and proposing to revoke his DEA Certificate of Registration as a practitioner, pursuant to 21 U.S.C. 824(a)(4), and to deny any pending applications for renewal of such registration, pursuant to 21 U.S.C. 823(f), because the continued registration of the Respondent would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). [Administrative Law Judge Exhibit (''ALJ Exh.'') 1 at 1].

The Order stated that Respondent is registered with the DEA as a practitioner with authority to handle controlled substances in Schedules II–V, and that his registration expired by its terms on August 31, 2011. [*Id.*]. The Order further stated that although Respondent submitted a timely renewal application, which would have allowed him to lawfully handle controlled substances under 5 U.S.C. 558(c) (2006), his current practice location is not at his DEA registered address because he abandoned that location. Therefore, he is not permitted to issue controlled substances from his current practice location. [*Id.*].

The Order alleged that Respondent issued controlled substances prescriptions from locations in Brunswick, Georgia and Jesup, Georgia, without obtaining permission from the Government to change his DEA registered address to either of these locations. [*Id.* at 2].

Next, the Order alleged that Respondent had prescribed oxycodone and hydrocodone to at least nineteen patients with no or insufficient medical history, with no relevant physical examinations, without diagnosing any medical conditions warranting such medications and without monitoring the patients to determine if the patients were diverting the controlled substances. [*Id.*]. The Order also asserted that Respondent had prescribed alprazolam to eighteen of these patients with no diagnosis or other justification except for checking a boilerplate form marked ''anxiety'' in the patient file. [*Id.*]

Lastly, the Order alleged that Respondent prescribed two hundred and thirty dosage units of oxycodone to patient, M.B.S. based on a diagnosis with no documentation. [*Id.*]. The Order alleged that this patient was admitted to a local hospital emergency room and that the hospital subsequently determined that the patient was opiate dependent and needed detoxification treatment. [*Id.*]. Further, the Order alleged that on October 11, 2011, the Respondent prescribed the same patient sixty dosage units of alprazolam without documenting any findings of anxiety symptoms in the patient's file. [*Id.*].

The Administrator then gave the Respondent the opportunity to show cause as to why his registration should not be revoked on the basis of those allegations. [*Id.* at 3].

On February 3, 2012, Respondent filed a request for a hearing in the above-captioned matter. [ALJ Exh. 3].

On March 1, 2012, a Protective Order was issued to protect patient names and medical files used in this proceeding. [ALJ Exh. 6].

The hearing was conducted on March 6–7, 2012, in Beaufort, South Carolina. [ALJ Exh. 5]. At the hearing, counsel for the DEA called three witnesses to testify and introduced documentary evidence. [Transcript (''Tr.'') Volume I–II]. The Respondent called one witness to testify and testified on behalf of himself. [*Id.*].

After the hearing, the Government submitted Proposed Findings of Fact, Conclusions of Law and Argument (''Govt. Brief''). The Respondent did not submit a post-hearing brief.

II. ISSUE

The issue in this proceeding is whether or not the record as a whole establishes by a preponderance of the evidence that the Drug Enforcement Administration should revoke the DEA Certificate of Registration Number BE9655284 of Cleveland J. Enmon, Jr., M.D., as a practitioner, pursuant to 21 U.S.C. 824(a) (2006), and deny any pending applications for renewal or modification of such registration, pursuant to 21 U.S.C. 823(f), because his continued registration would be inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f). [Tr. 5; ALJ Exh. 4].

III. FINDINGS OF FACT

A. Dr. Enmon's Registration History

The Agency first issued a certificate of registration as a practitioner to Dr. Enmon on March 9, 2006. [Govt. Exh. 3 at 4]. On September 4, 2008, Dr. Enmon requested to change his DEA registered address from King/Drew Medical Center in Los Angeles, California to Cleveland Health Care in Atlanta, Georgia. [*Id.;* Tr. 179]. The DEA approved Respondent's request for an address change that same day. [Govt. Exh. 3 at 3].

Dr. Enmon ceased practicing at Cleveland Health Care in approximately 2009. [Tr. 177]. On August 31, 2011, Dr. Enmon requested to change his DEA registered address from Cleveland Health Care in Atlanta, Georgia, to Ocean Care Clinic in Jesup, Georgia. [Govt. Exh. 3 at 1; Tr. 175–176]. The DEA did not approve Dr. Enmon's address change request. [Tr. 176]. Therefore, Dr. Enmon's DEA registered address remains at Cleveland Health Care in Atlanta, Georgia. [Tr. 175; Govt. Exh. 3].

DEA Diversion Investigator Charles Sikes testified at the hearing. I find his testimony credible and consistent with the documentary evidence in the record. He testified that the DEA does not automatically grant address change requests. [Tr. 176]. Instead, the DEA treats an address change request as a new application for registration. [*Id.*]. He further testified that registrants must request a change of address if they leave their current registered location. [Tr. 205]. He also testified that Dr. Enmon was not entitled to the practitioner exemption under 21 C.F.R. 1301.12(b)(3) (2011) because he had ceased practicing at his original registered location in Atlanta, Georgia. [Tr. 204–205].

B. Dr. Enmon

Dr. Enmon received an undergraduate degree from Morehouse College and then attended medical school at the Morehouse School of Medicine. [Tr. 330]. After graduating from medical school, Respondent began a residency program in emergency medicine, at the Martin Luther King Jr./Drew Medical Center in Los Angeles, California. [*Id.*]. Following his residency training, Respondent practiced emergency medicine in Los Angeles, California before moving to Atlanta, Georgia. [Tr. 331].

C. Brunswick Wellness Center

Dr. Enmon began working at Brunswick Wellness Center in Brunswick, Georgia (''BWC'') on approximately May 2, 2011. [Tr. 308, 183]. Respondent testified about his employment at BWC. I find this portion of his testimony credible and consistent with the evidence in the record. A staffing company recruited Dr. Enmon to work at BWC. [Tr. 334, 182]. Upon his arrival at BWC, Dr. Enmon testified that the clinic did not appear to be a normal doctor's office. [Tr. 334]. There, Dr. Enmon met with BWC's office manager, a woman who, according to Dr. Enmon's testimony, appeared to be under the influence of controlled substances. [*Id.,* 343].

Dr. Enmon further testified that he was ''not comfortable'' with several elements of BWC's operation. [Tr. 339]. Specifically, Respondent claimed that BWC's management directed him to treat out-of-state patients and patients under twenty-five years old, even though he initially refused to treat these kinds of patients. [*Id.*]. According to Dr. Enmon, he realized that continued employment at BWC placed him ''at risk'' and in fact spurred him to open his own chronic pain management clinic. [Tr. 340, 343]. While Dr. Enmon testified at length about his concerns about BWC's operation, he also testified that ''a lot'' of Brunswick's patients were in fact ''legitimate'' pain patients. [Tr. 335].

D. Search Warrant Served on Brunswick Wellness Center on July 14, 2011

On July 12, 2011, a federal search and seizure warrant was issued against Brunswick Wellness Center. [Govt. Exh. 8; Tr. 16–17]. A team of local and federal law enforcement agents executed the warrant on July 14, 2011 at 10:00 a.m. [Tr. 181]. DI Sikes was a member of the law enforcement team that executed the warrant. [*Id.*].

DI Sikes interviewed Dr. Enmon during the execution of the search warrant. [Tr. 181]. At the time of the search warrant's execution, Dr. Enmon was the only physician employed by BWC. [Tr. 183]. Dr. Enmon admitted to DI Sikes that while he had no specialized training in pain management, he was practicing as a pain management doctor at BWC. [Tr. 182]. Respondent further stated that he practiced non-interventionist pain management, which he explained as concentrating in medication management for chronic pain patients. [Tr. 184]. Dr. Enmon also admitted to prescribing oxycodone and hydromorphone products to BWC patients for pain management. [*Id.*].

Dr. Enmon informed DI Sikes that he saw between thirty-five and forty patients a day at BWC, although he also disclosed that his patient load was starting to increase due to the closure by law enforcement of several neighboring pain clinics. [Tr. 185]. Dr. Enmon charged his patients three hundred and fifty dollars per visit. [*Id.*]. BWC did not accept insurance or other forms of payments besides cash. [*Id.*].

DEA Special Agent Michael Marbert also participated in the execution of the search warrant on BWC. [Tr. 213–214]. I find his testimony credible and consistent with the documentary evidence in the record. He interviewed two employees of BWC, a security guard, and a phlebotomist. [Tr. 215]. The phlebotomist told SA Marbert that BWC lacked basic medical equipment, like a defibrillator, tongue depressors, and thermometers. [Tr. 218]. The security guard reported that BWC attracted patients from Tennessee and Kentucky and that many of the patients did not appear to show any signs of being in pain. [Tr. 219]. Following the execution of the search warrant, BWC's business license was revoked and it ceased to operate after July 14, 2011. [Tr. 187].

E. Ocean Care Clinic

Following the closure of BWC, Dr. Enmon opened his own pain management clinic, Ocean Care, in Jesup, Georgia on August 15, 2011. [Tr. 187–188]. Ocean Care was located at 129 South Macon Street in Jesup, Georgia, about thirty-eight miles from BWC. [*Id.*]. Respondent was the sole owner of Ocean Care. [Tr. 188].

Linda Henderson, Ocean Care's office manager testified at the hearing. [Tr. 265]. Ms. Henderson was a patient of Dr. Enmon while he worked at BWC. [Tr. 266]. She testified that Dr. Enmon help to wean her off pain medication that previous doctors at BWC had prescribed for her. [*Id.*]. I do not find her testimony credible on this point in light of Ms. Henderson's testimony on cross-examination regarding the specific prescriptions that Dr. Enmon issued to her while at BWC and Ms. Henderson's ScriptSure records. [Tr. 313–316; Govt. Exh. 33].

Ms. Henderson also testified about the operation of Ocean Care. [Tr. 271]. I find this portion of her testimony credible and consistent with the evidence in the record. She testified that Ocean Care did not treat out of state patients. [Tr. 272–273]. Ocean Care also required that patients be at least twenty-five years old and possess a Georgia state ID. [Tr. 273, 276]. Ms. Henderson further testified that Ocean Care denied treatment to approximately thirty to sixty patients every day. [Tr. 274]. Ocean Care had patients come in for pill counts. [Tr. 278–279, 288]. Ocean Care also did not advertise and relied solely on word of mouth to attract new patients. [Tr. 292]. During Ocean Care's operation from August to December 2011, Dr. Enmon treated over nine hundred patients. [Tr. 324]. Some of these Ocean Care patients also received treatment from Dr. Enmon while he was employed at BWC. [Tr. 325].

DI Sikes further testified about a complaint he received from a local hospital regarding one of Dr. Enmon's Ocean Care patients. [Tr. 371]. This patient, M.B.S., presented complaints of abdominal pain but the admitting physician at the hospital determined that she was in fact suffering from opiate-induced constipation. [Tr. 371–372; Govt. Exh. 7 at 3]. Concerned about Respondent's treatment of M.B.S., a patient whom the admitting physician diagnosed as opiate dependent, the admitting physician had M.B.S.'s treatment records faxed to the DEA and asked DI Sikes to investigate Dr. Enmon. [Tr. 373, 376–77, 380–381; Govt. Exh. 7].

F. Search Warrant Served on Ocean Care Clinic on October 6, 2011

On October 5, 2011, a federal search and seizure warrant was issued against Ocean Care. [Govt. Exh. 9]. A team of local and federal law enforcement agents executed the warrant on October 6, 2011. [Tr. 188]. DI Sikes was a member of the law enforcement team that executed the warrant. [*Id.*]. Six employees and Respondent were present at Ocean Care during the execution of the warrant. [Tr. 189].

DI Sikes interviewed Dr. Enmon during the execution of the search warrant at Ocean Care. [*Id.*]. Dr. Enmon told DI Sikes that he was the sole owner of Ocean Care and had opened the clinic on August 15, 2011. [Tr. 189–190]. Respondent informed DI Sikes that Ocean Care required potential patients to produce a Georgia ID, be at least twenty-five years old, and have a MRI or CT scan record prior to receiving treatment at the clinic. [Tr. 191].

Dr. Enmon also told DI Sikes that he saw between twenty and forty patients a day and that Ocean Care drew patients from a number of surrounding pain clinics including the shuttered Brunswick Wellness Center. [Tr. 191–192]. Patients paid two hundred and seventy-five dollars per visit and Ocean Care only accepted payment in cash or money orders. [Tr. 194]. Respondent further stated that Ocean Care possessed medical equipment ranging from a scale and stethoscope to a blood pressure cuff but lacked gloves, Band-Aids, a defibrillator, first aid kit, tongue depressors, cotton balls, gauze and a thermometer. [Tr. 193–194].

With regard to his prescribing practices, Respondent admitted to issuing prescriptions to Ocean Care patients for fifteen and thirty milligram dosage units of Roxicodone, a schedule II controlled substance, and for two milligram dosage units of Xanax, a schedule IV controlled substance. [Tr. 192]. Respondent typically issued prescriptions for between one hundred and twenty to one hundred and fifty dosage units of thirty milligram Roxicodone and between thirty and ninety dosage units for fifteen milligram Roxicodone. [Tr. 192–193]. Respondent also typically issued prescriptions for thirty dosage units of two milligram Xanax. [Tr. 193].

Following the execution of the search warrant, SA Marbert conducted interviews with several Ocean Care patients. [Tr. 236–237]. One patient told SA Marbert that he obtained controlled substances prescriptions from Dr. Enmon in order to sell them on the street. [Tr. 240]. The patient further reported that Dr. Enmon did not perform a physical examination prior to writing the prescriptions and was able to have the dosage units of his prescriptions increased upon request. [*Id.*].

G. DEA's December 8, 2011 Letter to Dr. Enmon

On December 8, 2011, Dr. Enmon called DI Sikes and inquired about the status of his renewal for his DEA certificate of registration. [Tr. 196–197]. DI Sikes informed Dr. Enmon that he could no longer handle controlled substances because he was working from an unregistered location. [Tr. 197]. DI Sikes also asked to meet with Dr. Enmon to provide him with a letter from the DEA's Chief Counsel's Office regarding the status of his registration. [Tr. 199].

On December 9, 2011, Dr. Enmon was personally served with this letter at the DEA office in Savannah, Georgia. [Tr. 199; Govt. Exh. 4]. This letter instructed Dr. Enmon that he was without the necessary authority to handle controlled substances at his practice location, the Ocean Care Clinic because the DEA had not approved the address change request he had submitted on August 31, 2011.[1] [Govt. Exh. 4]. After receiving this letter, Dr. Enmon closed the Ocean Care Clinic and ceased issuing prescriptions for controlled substances from this location. [Tr. 202, 301].

H. Patient Files

On October 6, 2011, DI Sikes, using a federal search warrant, obtained over nine hundred patient treatment files from the Ocean Care Clinic.[2] [Tr. 19–22; Govt. Exh. 9]. A random sampling of these patient files were provided to the Government's expert medical witness, Dr. Eugene Kennedy. [Tr. 21, 23–24]. Dr. Kennedy reviewed forty patient files from the Ocean Care Clinic. [Tr. 155–156]. A total of nineteen of these patient files were admitted into the record in this proceeding. [Govt. Exh. 12–30].

Dr. Kennedy testified at the hearing concerning these nineteen patient files and his medical report. [Tr. 27; Govt. Exh. 6]. I qualified Dr. Kennedy as an expert medical witness in ''the use of controlled substances for pain management and the use of benzodiazepines.'' [Tr. 59]. Correspondingly, I find his testimony credible and consistent with the documentary evidence in the record.

Dr. Kennedy, a board certified family practitioner, is licensed to practice medicine in Georgia. [Tr. 31–33; Govt. Exh. 31]. While Dr. Kennedy is not board certified in pain management, he is a credentialed member of the American Academy of Pain Medicine. [Tr. 59; Govt. Exh. 31]. He has taken the required courses and test to qualify for this credential. [Tr. 32–33]. He has a private practice where he treats chronic pain patients, and for about seventy-five percent of his patients, he issues controlled substance prescriptions in order to manage their pain treatment. [Tr. 34–35, 39]. Dr. Kennedy sees fourteen to fifteen patients a day. [Tr. 39]. According to Dr. Kennedy, a patient load of forty patients a day qualifies as a heavy patient load. [Tr. 39].

Prior to treating a chronic pain patient, Dr. Kennedy requires the patient or referring physician to provide the patient's past medical records. [Tr. 40]. Dr. Kennedy only sees such patients on a referral basis. [*Id.*]. He requires ''a very solidly established medical history—usually surgical history—that would support'' the medical necessity for treating a patient with long-term narcotics. [*Id.*]. Dr. Kennedy testified that a physical examination is a necessary requirement in order to properly treat a chronic pain patient. [Tr. 41]. Dr. Kennedy will first explore nonpharmacologic options with the patient before considering prescribing medication. [Tr. 42]. Dr. Kennedy next will look to non-narcotic medications, and after exploring these options, will begin treating the patient incrementally with narcotic medications. [Tr. 43]. Dr. Kennedy credibly testified that he ''would have to have substantial support from previous treating physicians before I would put someone on chronic narcotics.'' [*Id.*]. Dr. Kennedy further credibly testified that every patient in his practice has a urine drug screen before they get their first prescription, and that urine drug screens are done randomly thereafter to ensure the patient is taking the controlled substances as prescribed. [Tr. 44].

Xanax is a brand name for alprazolam, a schedule IV controlled substance. [Tr. 45; Govt. Exh. 11]. It is chemically classified as a benzodiazepine and is commonly prescribed as an anti-anxiety drug. [Tr. 45–46; Govt. Exh. 11]. Dr. Kennedy credibly testified that before prescribing Xanax to a patient, he would need ''substantial documentation as to what their symptomatology is, how long it has lasted, how it is affecting their life, and why it's necessary for me to treat them with scheduled medications.'' [Tr. 68–69]. Specifically, he noted that the patient's file should contain a ''specific anxiety diagnosis'' with a detailed description of their current symptoms, past medical treatment, and their social history. [Tr. 123].

Klonopin is a brand name for clonazepam, which is another Schedule IV controlled substance. [Tr. 46; Govt. Exh. 10]. It is also a benzodiazepine, and is commonly prescribed for use as a muscle relaxant. [Tr. 46–47]. Dr. Kennedy credibly explained, ''I would want to establish that the patient has either failed or has not done well on any of the plethora of non-scheduled non-controlled muscle relaxants and anti-spasmodics that are available'' before issuing a prescription for Klonopin. [Tr. 47].

1. D.B.

D.B., a patient at Respondent's Ocean Care Clinic, was diagnosed with neck and low back pain. [Tr. 62; Govt. Exh. 12]. His patient file contains an MRI report, but Dr. Kennedy found that ''the report alone does not support prescribing narcotic medication.'' [Tr. 62; Govt. Exh. 6 at 2]. Dr. Kennedy stated that the Respondent would need a supporting physical examination because the MRI findings were not severe enough to support prescribing narcotics. [Tr. 62–63; Govt. Exh. 6 at 2]. Further, Dr. Kennedy found that there was nothing in D.B.'s patient file that justified the amount and strength of narcotics that were prescribed to D.B. [Tr. 63–64; Govt. Exh. 12]. Although D.B. indicated that he had long-term pain, there were no previous medical treatment records in D.B.'s chart, despite the listing of a previous prescribing physician. [Tr. 64–65; Govt. Exh. 12 at 19, 21]. Although D.B. reported that his ''left fingertips stay numb,'' Dr. Kennedy could not find anything that would support such a symptom in D.B.'s medical chart. [Tr. 65; Govt. Exh. 12 at 21].

Given what little medical examination that was provided, Dr. Kennedy found that, ''with full range of motion'' and ''normal neurologic exam,'' the Respondent had failed to find a basis to ''support prescribing a large number of scheduled medications'' for D.B. [Tr. 66; Govt. Exh. 12 at 2]. Yet the Respondent prescribed one hundred and twenty dosage units of 30 milligram Roxicodone, sixty dosage units of 15 milligram Roxicodone, sixty dosage units of 2 milligram Xanax and sixty dosage units of 350 milligram Soma to D.B. [Govt. Exh. 12 at 3–7]. Instead of issuing these prescriptions, Dr. Kennedy opined that the Respondent should have tried ''all medical reliefs that are available before embarking on a course of large dosages of narcotics, to include non-scheduled medications and lifestyle changes, diet, exercise, heat applications, physical therapy, [and] possibly injections.'' [Tr. 67]. Attempting to pursue these other options would be the standard of care. [Tr. 67].

Dr. Kennedy further found that the patient's file lacked the degree of information needed to support the prescribing of Xanax.

[1] The Respondent never filed an application to change his DEA registration from Atlanta to the Brunswick Wellness Center. [Tr. 180–181].

[2] The patient files and testimony about those files are protected by a Protective Order in this proceeding. [ALJ Exh. 6].

[Tr. 68–69; Govt. Exh. 12 at 27; Govt. Exh. 6 at 1–3]. Dr. Kennedy credibly testified that he would expect to see ''questions and responses that are significant enough to support assigning a patient a psychiatric diagnosis and prescribing controlled medications'' prior to issuing a prescription for Xanax [Tr. 171]. Further, the file contained no mention of any actual plan of treatment. [Govt. Exh. 6 at 2]. Overall, Dr. Kennedy found that the ''treatment of this patient falls below the standard of care.''[3] [Govt. Exh. 6 at 2–3].

2. T.C.

T.C.'s patient file contained a thoracic MRI report, which was essentially normal. [Tr. 69; Govt. Exh. 13 at 8]. Dr. Kennedy described the accompanying lumbar impressions as ''very minor,'' and in Dr. Kennedy's opinion, these lumbar impressions did not ''rise to the level of starting the patient on large dose narcotics.'' [Tr. 69–70]. In addition, T.C.'s patient chart indicated that there was no past medical history, no past surgical history, and no family medical history. [Tr. 72–73; Govt. Exh. 13 at 1]. Dr. Kennedy found that this lack of self-reported medical history ''does not support prescribing scheduled medications.'' [Tr. 73]. Further, there is no mention of anxiety in the file, and thus, the prescribing of Xanax is not justified by this medical record. [Tr. 73]. In sum, Dr. Kennedy found that there was ''no documentation to support pain that rises to the level of requiring the agents prescribed.'' [Govt. Exh. 6 at 4].

As for prescribing, Dr. Kennedy found that the Respondent ''inappropriately initially prescribed schedule II opiates and other scheduled medications in the absence of an appropriate supporting history and physical examination. The rationale for prescribing narcotics was never mentioned.'' [Govt. Exh. 6 at 5]. In addition, Dr. Kennedy found that the record fails to document ''any treatment modalities attempted in the past or anticipated for the future.'' [*Id.*]. The chart also fails to reflect any plan of treatment. [*Id.*]. Further, a ''coherent rationale for the treatment of this patient is absent entirely.'' [*Id.*]. Dr. Kennedy likewise found that a pertinent physical examination was never performed. In conclusion, Dr. Kennedy credibly opined that the ''treatment of this patient falls below the standard of care in almost every regard.'' [*Id.*]. He further noted that on the single, initial encounter, ''this patient was provided with prescriptions that resulted in a combined total of 290 pills. In my opinion, this patient's management is unacceptable, and falls below any reasonable standards of care.'' [*Id.*].

3. J.D.

J.D.'s patient file contained a MRI report for the patient's cervical and thoracic spine. [Tr. 74; Govt. Exh. 14 at 19–20]. Although the patient reported having scoliosis as a teenager, the MRI report does not support this claim. [Tr. 75; Govt. Exh. 14 at 19–20]. Dr. Kennedy opined that the findings in the MRI report were ''minimal'' and ''do not support large doses of narcotic medication.'' [Tr. 75; Govt. Exh. 6 at 8]. And although the patient noted two prior treating physicians, the patient file does not contain any previous medical records or any indication that these previous medical records were requested by Ocean Care. Dr. Kennedy opined that such records should have been requested. [Tr. 75–76]. J.D. also reported that she had previously been prescribed Lorcet.[4] [Govt. Exh. 14 at 8]. However, the Respondent prescribed Roxicodone, a schedule II controlled substance to J.D. [Govt. Exh. 14 at 17]. Dr. Kennedy opined that there were no notations in the patient file that would support increasing the strength of the opiate prescribed to J.D. [Tr. 76]. Rather, Dr. Kennedy noted that more ''conservative, non-scheduled treatments would have been appropriate for this patient.'' [*Id.*]. Also, the patient file failed to indicate any reason for prescribing Xanax other than a check-mark beside the word ''anxiety'' on the physical examination form. [Govt. Exh. 6 at 8]. Lastly, no treatment plan is reflected in this file. [Govt. Exh. 14].

Dr. Kennedy credibly opined that a ''coherent rationale for the treatment of this patient is absent entirely.'' [Govt. Exh. 6 at 8]. Further, he noted that the ''unsupported coadministration of oxycodone, Xanax and Soma could represent a significant risk to the patient. It should be noted that on the single, initial encounter, this patient was provided with prescriptions that resulted in a combined total of 330 pills. In my opinion, this patient's management is unacceptable, and falls below a reasonable standard of care.'' [Govt. Exh. 6 at 9].

4. L.D.

L.D.'s patient file contains a blank physical examination sheet, indicating that no physical exam was performed. [Tr. 80; Govt. Exh. 15 at 3–4]. The patient self-reported that he had never been prescribed pain medication in the past. [Tr. 81; Govt. Exh. 15 at 19]. Dr. Kennedy opined that the prescriptions written to L.D. were not supported by the physical examination. [Tr. 81; Govt. Exh. 6 at 10–11]. The patient file likewise failed to provide a medical justification for the Xanax prescription that Respondent issued to L.D. [Tr. 82]. Dr. Kennedy also noted that there was ''no mention of any treatment modalities attempted in the past or anticipated for the future. There is no documentation in the chart that indicates any actual plan of treatment or supports any rationale for prescribing controlled medication.'' [Govt. Exh. 6 at 10–11].

Overall, Dr. Kennedy concluded that the treatment of this patient fell ''below an acceptable standard of care.'' [*Id.*] Specifically, Dr. Kennedy found that ''nowhere in the medical record is there any evidence that even a cursory physical examination was ever performed'' and that ''this patient was provided with prescriptions that resulted in a combined total of 300 pills, and this was repeated on the subsequent encounter. In my opinion, this patient's management is entirely unacceptable, and falls below every reasonable standard of care.'' [Govt. Exh. 6 at 11–12].

5. A.J.

A.J.'s patient file listed a previous treating family physician, but the Ocean Care file does not contain any previous medical records from this physician. [Tr. 82; Govt. Exh. 16]. A.J. self-reported receiving prior prescriptions for oxycodone and Xanax. [Tr. 84; Govt. Exh. 16 at 8, 20]. Yet the patient file failed to provide any other medical history that would verify this information. [Tr. 84]. This patient file also contained a blank follow-up physical examination form with only the patient's blood pressure and heart rate recorded. [Tr. 84; Govt. Exh. 16 at 1]. Dr. Kennedy credibly testified that he would expect to see the complete vital signs for each patient visit to Dr. Enmon's clinic. [Tr. 84–85].

Although A.J. reported experiencing a pain level of nine and ten, the maximum indications available on the form, there is no medical information in the patient record that would support this report of such high levels of pain. [Tr. 85–86; Govt. Exh. 6 at 13]. A.J. also reported that her pain location was ''everywhere.'' [Govt. Exh. 16 at 28]. Dr. Kennedy found that a patient with that reported level of pain and that location of pain ''would have credibility problems,'' because such reports would be unbelievable. [Tr. 86]. Likewise, A.J.'s patient file does not contain any information concerning a complaint or diagnosis of anxiety, but Respondent nevertheless issued her a prescription for Xanax. [Tr. 86; Govt. Exh. 16]. Dr. Kennedy concluded that this prescription for Xanax was not issued for a legitimate medical purpose in the course of professional practice. [Tr. 86–87; Govt. Exh. 6 at 14].

Dr. Kennedy also found that there was no mention of any treatment modalities ''attempted in the past or anticipated for the future. There is no documentation in the chart that indicates any actual plan of treatment or supports any rationale for prescribing controlled medication.'' [Govt. Exh. 6 at 14]. He also opined that the ''treatment of this patient falls below an acceptable standard of care.'' [*Id.* at 14–15]. On A.J.'s first visit to Ocean Care, Respondent provided her with prescriptions for scheduled medications that ''resulted in a combined total of 240 pills, and this was repeated on the subsequent encounter.'' [*Id.*]. Overall, Dr. Kennedy found that ''this patient's management [was] unacceptable, and [it fell] below a reasonable standard of care.'' [Govt. Exh. 6 at 15].

6. B.B.

BB's patient file contained a physical examination form that is blank except for a check marked notation that B.B. ''appears in pain.'' [Govt. Exh. 17 at 11]. There are no other physical examination entries. [*Id.*]. The patient file contained an MRI report, but Dr. Kennedy credibly opined that the lack of a detailed physical examination coupled with the inconclusive MRI report, fails to medically support the prescribing of Roxicodone in the amounts and strengths that the Respondent prescribed to B.B. [Tr.

[3] Dr. Kennedy credibly testified that his assessment of the patient files in this matter was based on the Georgia standard of care. [Tr. 165].

[4] Lorcet is the brand name for combination hydrocodone and Tylenol, a schedule III controlled substance. [Tr. 76].

88; Govt. Exh. 17 at 2–5; Govt. Exh. 6 at 16–17]. Additionally, the patient's MRI report identified a referring physician, and Dr. Kennedy opined that Dr. Enmon should have acquired the patient's previous medical records. [Tr. 89–90; Govt. Exh. 6 at 16]. No previous medical records were present in the patient's Ocean Care file. [Tr. 90; Govt. Exh. 17]. Dr. Kennedy further noted that B.B.'s patient file did not contain any entries that would support the prescribing of Xanax to this patient. [Tr. 90–91; Govt. Exh. 17 at 26; Govt. Exh. 6 at 17].

Dr. Kennedy also noted that there was ''no mention of any treatment modalities attempted in the past or anticipated for the future.'' [Govt. Exh. 6 at 17]. B.B.'s patient file also did not contain a treatment plan. [*Id.*]. However, the patient was provided with prescriptions for a combined total of three hundred and ninety pills. [*Id.*]. In Dr. Kennedy's expert medical opinion, ''this patient's management [was] unacceptable, and [fell] below a reasonable standard of care, and may represent a significant danger to the patient's safety.'' [*Id.*].

7. J.B.

J.B.'s patient file contained a follow-up examination form, which was blank except for a notation of J.B.'s pulse and blood pressure. [Govt. Exh. 18 at 1]. Dr. Kennedy found this significant, for he credibly testified: ''There is no way of knowing what the patient's follow-up complaint status was. There's no way to tell what the physician intended. There is certainly no support for ongoing narcotics medication.'' [Tr. 92; Govt. Exh. 6 at 20].

Dr. Kennedy also found that J.B.'s patient file did not contain adequate entries to justify a diagnosis of chronic anxiety. [Tr. 94]. Therefore, he found that Xanax was not appropriate to prescribe based upon the entries in this patient file. [Tr. 94; Govt. Exh. 6 at 20]. Further, the patient file does not contain information that justified the prescribing of scheduled narcotics. [Tr. 95]. To this point, Dr. Kennedy explained that the patient file failed to note any treatment modalities attempted in the past or anticipated for the future. [Govt. Exh. 6 at 20]. He also pointed out that Respondent's treatment plan for J.B. was not recorded in the patient file. [*Id.*]. Overall, Dr. Kennedy found that ''this patient's management [was] unacceptable, and [fell] below a reasonable standard of care, and may represent a significant danger to the patient's safety.'' [Govt. Exh. 6 at 20–21].

8. A.A.

Dr. Kennedy found that Respondent's treatment of this patient ''achieve[d] an acceptable standard of care, although barely.'' [Tr. 96; Govt. Exh. 6 at 23]. Specifically, Dr. Kennedy noted that the Respondent's initial management of A.A. with opiates was acceptable, and ''giving both the patient and the [Respondent] the benefit of a doubt, minimally achieves a reasonable standard of care.'' [Govt. Exh. 6 at 24]. A.A.'s patient file demonstrated that she had a history of multi-level spine surgeries, and the MRI report supported her account. [Tr. 96]. Entries in the physical examination of surgical scarring and tenderness, and uncomfortable range of motion were also consistent with a history of these types of surgeries. [Tr. 96; Govt. Exh. 19 at 1–2].

But Dr. Kennedy testified that A.A.'s patient file did not support the prescribing of Xanax to this patient. [Tr. 97; Govt. Exh. 6 at 23]. He further noted that the patient file failed to reflect any other treatment modalities in the past or anticipated for the future. [Govt. Exh. 6 at 23]. Lastly, he found that the patient file did not contain a treatment plan for A.A. [*Id.*].

9. N.A.

This patient reported experiencing chronic pain resulting from an acute injury. [Tr. 98; Govt. Exh. 20 at 14, 16]. Yet N.A.'s MRI report does not support a history of traumatic injury. [Tr. 98–99; Govt. Exh. 20 at 9, 11]. N.A.'s patient file contained a history and physical examination form, but the physical examination portion of the form is largely blank except for notations of the patient's height, weight, blood pressure and pulse measurements. [Tr. 100; Govt. Exh. 20 at 1]. N.A. reported seeing a prior treating physician, but N.A.'s prior medical records were not present in the Ocean Care patient file for N.A. [Tr. 99; Govt. Exh. 20].

Given the largely blank physical examination form and the unremarkable MRI report, Dr. Kennedy concluded that there was no documented support in the patient file to justify prescribing Roxicodone to N.A. [Tr. 98, 100; Govt. Exh. 6 at 25]. Specifically, he found that the Respondent issued prescriptions for a total of two hundred and ninety scheduled pills even though the ''rationale for prescribing narcotics was never mentioned'' in the patient file. [Govt. Exh. 6 at 26]. Additionally, there was no mention of any past or future treatment modalities, and N.A.'s patient file also did not contain a treatment plan. [*Id.*].

N.A. self-reported symptoms of anxiety and panic attacks. [Govt. Exh. 20 at 25]. Yet her patient file provided no other diagnostic information or medical history relating to these claimed symptoms. [Govt. Exh. 20]. Dr. Kennedy found that, under these circumstances, the Xanax prescription issued to N.A. was not for a legitimate medical reason in the usual course of practice. [Tr. 101–102]. Dr. Kennedy concluded that N.A.'s ''management [was] unacceptable, [fell] below a reasonable standard of care, and may represent a significant danger to the patient's safety.'' [Govt. Exh. 6 at 26–27].

10. S.A.

S.A.'s patient file contained a completed release of information form for the patient's prior treating physician. [Govt. Exh. 21 at 1]. But S.A.'s patient file does not contain any prior medical records from this physician. [Tr. 103; Govt. Exh. 21]. Dr. Kennedy testified that he would expect to see prior medical records before prescribing oxycodone at the levels this patient was prescribed. [Tr. 103]. Furthermore S.A.'s history and physical examination form, except for vital signs and a notation that the sensory exam was normal, is blank. [Tr. 103–104; Govt. Exh. 21 at 31]. Given the lack of S.A.'s prior medical records and the incomplete physical examination form, Dr. Kennedy concluded that the controlled substances prescriptions issued by Dr. Enmon to this patient were not for a legitimate medical purpose. [Tr. 104; Govt. Exh. 6 at 29].

S.A.'s patient file also contains a prescription record that shows her previous treating physician wrote S.A. a prescription for Methylin, a schedule II controlled substance and amphetamine. [Govt. Exh. 21 at 15]. Dr. Enmon issued S.A. a prescription for Xanax but Dr. Kennedy explained that he would have explored whether S.A.'s anxiety was caused by the Methylin. [Tr. 105]. Yet the patient file did not demonstrate such an inquiry or any other information to justify the Xanax prescription. [Tr. 105]. Furthermore, Dr. Kennedy noted that the patient file failed to note any past or future treatment modalities, or an actual plan of treatment for S.A. [Govt. Exh. 6 at 29]. However, over two visits to Ocean Care, this patient was prescribed five hundred and twenty scheduled pills. Dr. Kennedy's overall opinion was that ''this patient's management [was] unacceptable, [fell] below a reasonable standard of care, and may represent a significant danger to the patient's safety.'' [Govt. Exh. 6 at 30].

11. M.G.

M.G. self-reported that he was taking ''Roxy'' and ''Loreys,'' which are slang names for Roxicodone and Lorcet. [Govt. Exh. 22 at 20; Tr. 106]. Dr. Kennedy testified that a patient's use of street names for pain medications would concern him. [Tr. 106]. Dr. Kennedy also noted that although M.G. identified a prior treating physician, M.G.'s patient file did not contain any prior medical records. [Govt. Exh. 22 at 19, 21].

Dr. Enmon's physical examination of M.G. produced ''essentially normal'' findings, although Respondent noted some mild tenderness in the patient's cervical spine. [Govt. Exh. 22 at 2; Tr. 107]. Although the patient file contained a cervical MRI report, Dr. Kennedy credibly testified that this data alone would not justify the issuance of the strengths and amounts of oxycodone prescribed by the Respondent. [Tr. 108–109; Govt. Exh. 22 at 11]. Nor would the results of M.G.'s physical examination justify the level of narcotics the Respondent prescribed for this patient. [Tr. 107–108; Govt. Exh. 22 at 2; Govt. Exh. 6 at 31–32]. Additionally, although the patient self-reported experiencing anxiety and panic attack symptoms, again Dr. Kennedy found no medical justification for issuing M.G. a Xanax prescription. [Tr. 108; Govt. Exh. 22 at 29; Govt. Exh. 6 at 32]. In summary, Dr. Kennedy surmised that ''this patient's management [was] unacceptable, [fell] below a reasonable standard of care, and may represent a significant danger to the patient's safety.'' [Govt. Exh. 6 at 33].

12. J.G.

Respondent's physical examination of J.G. produced ''essentially normal'' findings although Dr. Enmon noted that the patient appeared to be in pain along with some moderate paraspinal tenderness. [Tr. 109; Govt. Exh. 23 at 2]. Dr. Kennedy testified that J.G.'s physical exam and MRI report do not medically justify the prescription Respondent issued to J.G. for oxycodone. [Tr. 109–110; Govt. Exh. 6 at 34–35].

Additionally, J.G.'s patient file documented no past medical history or surgical history for this patient. [Tr. 109; Govt. Exh. 23 at 1]. Although the patient listed receiving treatment from another pain clinic, J.G.'s patient file does not contain any records from that clinic. [Govt. Exh. 23 at 15–16; Tr. 110]. Dr. Kennedy testified that Respondent should have acquired these prior records before prescribing the quantity of oxycodone issued to this patient. [Tr. 110–111]. Furthermore, Dr. Kennedy found that J.G.'s patient file failed to contain any mention of past or future treatment modalities or a treatment plan. [Govt. Exh. 6 at 35].

J.G. denied experiencing any anxiety or panic attack symptoms, but Respondent nevertheless issued J.G. a prescription for Xanax. [Tr. 111; Govt. Exh. 23 at 24]. Dr. Kennedy credibly testified that this prescription was ''not medically legitimate.'' [Tr. 111]. J.G.'s patient file provided no justification for the Xanax prescription. [Tr. 111; Govt. Exh. 23; Govt. Exh. 6 at 35]. In conclusion, Dr. Kennedy found that ''this patient's management [was] unacceptable, [fell] below a reasonable standard of care, and may represent a significant danger to the patient's safety.'' [Govt. Exh. 6 at 35–36].

13. T.G.

T.G. reported lower back pain stemming from a car accident in which she was ejected from the vehicle. [Govt. Exh. 24 at 4–5]. Despite this serious car accident and T.G.'s listing of a prior treating physician, T.G.'s patient file did not contain any prior medical records. [Govt. Exh. 24 at 6; Tr. 112]. Dr. Kennedy also found that the MRI report and physical examination findings for T.G. did not support the medications prescribed by Respondent. [Tr. 112; Govt. Exh. 6 at 37]. Specifically, he opined that T.G. should have been treated with ''non-scheduled modalities, even non-pharmacologic modalities initially prior to advancing to providing 300 narcotics pills.'' [Tr. 112]. In addition, Dr. Kennedy found that T.G.'s patient file failed to note any past or anticipated treatment modalities, or provide any actual treatment plan for the patient. [Govt. Exh. 6 at 38]. Lastly, Dr. Kennedy credibly testified that there was no information in the patient file that would justify the Xanax prescription issued to T.G. by the Respondent. [Tr. 114; Govt. Exh. 6 at 38]. T.G. did not report experiencing any anxiety symptoms. [Govt. Exh. 24 at 14; Tr. 114]. In Dr. Kennedy's expert medical opinion, ''this patient's management [was] unacceptable, [fell] below a reasonable standard of care, and may represent a significant danger to the patient's safety.'' [Govt. Exh. 6 at 38–39].

14. A.J.

A.J. lacerated his left thumb while uninstalling a countertop. [Govt. Exh. 25 at 5]. Prior to seeking treatment at Ocean Care, A.J. had been treated at a hospital emergency room and an urgent care clinic where he had been prescribed Lorcet, a schedule III controlled substance. [Tr. 115; Govt. Exh. 25 at 5–7]. Respondent issued A.J. a prescription for ninety dosage units of thirty milligram Roxicodone and sixty dosage units of two milligram Xanax. [Govt. Exh. 25 at 20–21, 24]. Dr. Kennedy found that the Roxicodone was ''inappropriately prescribed'' to A.J. because Dr. Enmon did not document or justify increasing the amounts and strength of scheduled medications necessary to treat A.J.'s pain symptoms. [Tr. 116; Govt. Exh. 6 at 41]. To that point, Dr. Kennedy noted that while A.J. self-reported pain in the arm, back and neck, in addition to the thumb pain, there was no documentation in the patient file that supported these claims. [Tr. 117; Govt. Exh. 25 at 6]. Nor did Dr. Enmon document any examination of A.J.'s reported pain symptoms outside of examining his left thumb. [Govt. Exh. 6 at 41]. A.J. also reported that ''almost anything'' causes or increases his pain level. [Govt. Exh. 25 at 11]. Dr. Kennedy highlighted that such a nonspecific complaint would cause him to question the patient's credibility. [Tr. 119].

Dr. Kennedy also found the prescription for Xanax was medically illegitimate. [Tr. 118; Govt. Exh. 6 at 41]. While A.J. reported experiencing anxiety symptoms, his patient file did not contain any further information that would support these assertions. [Tr. 118; Govt. Exh. 25 at 23]. Although A.J. reported that he was prescribed Xanax for pain, Xanax is not a drug that is indicated for the treatment of pain. [Tr. 119; Govt. Exh. 11].

Lastly, despite the indications that A.J. had recently received treatment from both a hospital emergency room and an urgent care clinic, his Ocean Care patient file did not contain any prior medical records. [Govt. Exh. 25; Tr. 115]. Nor did his patient file contain any mention of past or anticipated treatment modalities, and there is no documentation in the file ''that indicates a rationale for prescribing ongoing controlled medication.'' [Govt. Exh. 6 at 41]. Thus, Dr. Kennedy concluded that Respondent's treatment of this patient fell below an acceptable standard of care. [Govt. Exh. 6 at 42].

15. L.M.

L.M.'s patient file contained a history and physical examination form, but the physical examination portion of the form is almost entirely blank except for notations of the patient's height, weight, blood pressure and pulse measurements. [Tr. 120; Govt. Exh. 26 at 2]. L.M. self-reported taking several controlled substances, including oxycodone, Soma, Adderall, and Xanax, but Dr. Kennedy found that his patient file failed to provide sufficient information concerning L.M.'s need for these medications. [Tr. 121; Govt. Exh. 26 at 12]. In fact, L.M. reported that he was not currently under the care of a physician. [Govt. Exh. 26 at 18]. Dr. Kennedy further noted that L.M.'s prior medical records were not present in his Ocean Care patient file. [Tr. 121; Govt. Exh. 26].

L.M. reported experiencing anxiety symptoms. [Govt. Exh. 26 at 24]. L.M. also reported taking Adderall, an amphetamine and Schedule II controlled substance. [Tr. 122; Govt. Exh. 26 at 12]. Dr. Kennedy testified that while L.M.'s Adderall use could have produced his anxiety symptoms, Respondent ignored this possibility and instead issued a Xanax prescription to L.M. [Tr. 122–123; Govt. Exh. 26 at 24]. Dr. Kennedy testified that prior to issuing a prescription for Xanax, he would expect that the patient's file contain an anxiety diagnosis based on specific and detailed documentation of the patient's symptoms, psychosocial situation, and prior medical treatment. [Tr. 123].

Furthermore, Dr. Kennedy explained that while prescriptions for a total of three hundred and twenty scheduled pills and sixty dosage units of Soma were provided to L.M., the ''rationale for prescribing narcotics was never mentioned. There is nothing in the chart that even minimally supports the initial prescription of Xanax.'' [Govt. Exh. 6 at 44]. Likewise, L.M.'s patient file failed to reflect any past or anticipated treatment modalities, or provide a treatment plan for the patient. [*Id.*]. Dr. Kennedy concluded that Respondent's treatment of L.M. fell ''below an acceptable standard of care.'' [*Id.*].

16. S.M.

S.M.'s patient file contained a history and physical examination form, but the physical examination portion of the form is blank except for notations of the patient's height, weight, blood pressure and pulse measurements. [Govt. Exh. 27 at 24; Govt. Exh. 6 at 46]. Dr. Kennedy also testified that S.M.'s MRI report showed that the patient had only a ''mild disc bulge and mild bilateral foraminal stenosis,'' findings which do not ''connote any neurological impingement.'' [Tr. 125; Govt. Exh. 27 at 19]. Thus, Dr. Kennedy concluded that S.M.'s physical examination and MRI report do not justify the Roxicodone or Xanax prescriptions that Respondent issued to this patient. [Tr. 124–25; Govt. Exh. 27 at 19; Govt. Exh. 6 at 47]. As Dr. Kennedy noted, there was no documented physical examination in S.M.'s patient file to support any of his treatment. [Tr. 126–27].

Nor did S.M.'s patient file contain any prior medical records, despite the MRI report, which identified S.M.'s referring physician. [Tr. 125; Govt. Exh. 27 at 19]. The patient file also failed to record any treatment modalities or an actual plan of treatment for S.M. [Govt. Exh. 6 at 47]. Consequently, Dr. Kennedy concluded that ''[t]he documentation present in the chart is inadequate to support prescriptions for scheduled agents.'' [*Id.*]. Furthermore, S.M. reported alcohol consumption and a previous DUI arrest. [Govt. Exh. 27 at 8]. Dr. Kennedy credibly testified that when a patient reports a history with addictive substances, he ''would be mindful…when prescribing controlled medications'' to that patient. [Tr. 127]. Lastly, Dr. Kennedy found insufficient justification in the patient file to support the prescribing of Xanax to S.M. [Tr. 128; Govt. Exh. 6 at 47]. In conclusion, Dr. Kennedy found that Respondent's treatment of S.M. fell ''below an acceptable standard of care.'' [Govt. Exh. 6 at 47–48].

17. K.M.

K.M.'s patient file contained a history and physical examination form, but the physical examination portion of the form is blank except for notations of the patient's height, weight, blood pressure and pulse measurements and a checkmark indicating the patient demonstrated normal posture. [Tr. 130; Govt. Exh. 28 at 25; Govt. Exh. 6 at 49].

Dr. Kennedy also testified that findings from K.M.'s MRI report were ''fairly minimal.'' [Tr. 130; Govt. Exh. 28 at 20]. Thus, in Dr. Kennedy's expert medical opinion, the patient's physical examination and MRI report do not medically justify the prescriptions for oxycodone, Lorcet and Xanax issued by Respondent to K.M. [Tr. 130; Govt. Exh. 6 at 50]. Additionally, Dr. Kennedy testified that K.M.'s report of high pain level is not credible in light of her MRI report and physical examination. [Tr. 131–32; Govt. Exh. 28 at 5]. Nor did K.M.'s patient file provide any medical justification for Respondent issuing a Xanax prescription. [Tr. 132–33; Govt. Exh. 6 at 50].

The patient file also lacked any previous medical records other than the MRI report despite the identification of a previous treating clinic. [Tr. 132; Govt. Exh. 28 at 8]. Dr. Kennedy noted that, if K.M. was being treated for chronic pain condition ''that rises to the level of requiring narcotics'' he would expect ''there to be past medical records present in the chart.'' [Tr. 132]. In addition, the patient file failed to list any treatment modalities, either past or anticipated future modalities. [Govt. Exh. 6 at 50; Govt. Exh. 28]. Nor did the patient file illustrate a treatment plan for K.M. [*Id.*]. Lastly, Dr. Kennedy credibly opined that the ''documentation present in the chart is inadequate to support prescriptions for scheduled agents'' and that ''[a] coherent rationale for the treatment of this patient is completely absent.'' [Govt. Exh. 6 at 50]. Thus, Dr. Kennedy concluded that Respondent's treatment of this patient fell below an acceptable standard of care. [Govt. Exh. 50–51].

18. E.L.

E.L. presented complaints of back and shoulder pain stemming from a workplace related injury. [Govt. Exh. 29 at 5–9, 29]. After reviewing the physical examination and the MRI report, Dr. Kennedy credibly opined that those reports do not justify the quantity or strength of opiates prescribed by the Respondent to this patient. [Tr. 134–135; Govt. Exh. 29 at 19–20, 29–31]. Specifically Dr. Kennedy noted that E.L.'s MRI report was ''normal at all levels'' and did not document any ''nerve impingement.'' [Tr. 135; Govt. Exh. 29 at 19–20]. Thus, Dr. Kennedy found that ''the physical examination alone [did not] support the diagnosis of a pain condition that rises to the level of immediately pursuing schedule II narcotic management.'' [Govt. Exh. 6 at 53]. Yet the Respondent, over the course of two visits with this patient, prescribed three hundred and sixty scheduled pills and one hundred and fifty dosage units of Soma. [*Id.*] Dr. Enmon did not document his ''rationale for prescribing narcotics'' to E.L. [*Id.*]. Likewise, Dr. Kennedy found that E.L.'s patient file lacked any justification for the initial prescription of Soma. [*Id.*]. Similarly, on E.L.'s follow-up visit, both the oxycodone and the Lorcet were increased in quantity ''without explanation'' by Respondent [*Id.*].

E.L. reported receiving hydrocodone and Roxicodone from prior treating physician. [Govt. Exh. 29 at 5]. Yet his patient file does not contain any prior medical records. [Govt. Exh. 29; Tr. 133]. Nor does E.L.'s patient file reflect any past or anticipated future treatment modalities, or a treatment plan. [Govt. Exh. 6 at 53–54]. In Dr. Kennedy's expert medical opinion, he found that Respondent's treatment of E.L. fell ''below an acceptable standard of care.'' [*Id.*].

19. E.V.

EV presented complaints of neck and lower back pain. [Govt. Exh. 30 at 3–9]. Respondent issued E.V. a prescription for one hundred and twenty dosage units of thirty milligram Roxicodone, sixty dosage units of fifteen milligram Roxicodone, and ninety dosage units of two milligram Xanax. [Govt. Exh. 30 at 24–25]. But Dr. Kennedy testified that E.V.'s patient file contained a lumbar MRI report, which was not consistent with the pain levels reported by E.V. [Tr. 136; Govt. Exh. 30 at 19–20; Govt. Exh. 6 at 55–56]. Similarly, Dr. Kennedy testified that the findings on E.V.'s physical examination did not medically justify the Roxicodone and Xanax prescriptions issued to E.V. [Tr. 136–37; Govt. Exh. 30 at 25, 27; Govt. Exh. 6 at 55]. E.V. also did not report experiencing any anxiety symptoms, but Respondent issued her a prescription for Xanax. [Govt. Exh. 30 at 14]. Thus, Dr. Kennedy found ''nothing in the chart that even minimally supports the prescription of Xanax.'' [Govt. Exh. 6 at 56]. Similar to the other files, Dr. Kennedy noted this patient file failed to reflect any treatment modalities or a treatment plan. [*Id.*]. Nor did this file contain any previous medical records for E.V. [Govt. Exh. 30]. Lastly, Dr. Kennedy found that ''this patient's management [was] unacceptable and [fell] below a reasonable standard of care.'' [Govt. Exh. 6 at 57].

I. Dr. Kennedy's Findings

In conclusion, Dr. Kennedy identified one patient out of the nineteen patient files he examined where Respondent's treatment met the standard of care. [Tr. 60; Govt. Exh. 6 at 23–24].

Dr. Kennedy found that the Respondent failed to maintain appropriate patient records that supported his prescribing of controlled substances. [Tr. 54–55; *see* G.A. Comp. R. & Regs. 360–3-.02(7) (2012)]. To this point, Dr. Kennedy testified that a patient's medical records are needed prior to treatment because the doctor issuing the prescription ''needs to know what medications, what treatment modalities have been used in the past, either successfully or unsuccessfully, to guide [the treating physician's] treatment in the future.'' [Tr. 141]. Dr. Kennedy also concluded, after his review of the patient files, that Dr. Enmon failed to use ''such means as history, physical examination, laboratory, or radiographic studies, when applicable, to diagnose a medical problem'' because in many of the nineteen patient files there was a ''lack of appropriate physical examination or substantial supporting documentation that would support large doses of narcotic medication.'' [Tr. 55; Govt. Exh. 32 at 3; *see* G.A. Comp. R. & Regs. 360–3-.02(14) (2012)].

Similarly, Dr. Kennedy concluded that Respondent also failed to document that he had taken precautions regarding ''adverse reactions, habituation, and the establishment of chemical dependency'' in the patients for whom he prescribed large quantities of controlled substances. [Tr. 56; Govt. Exh. 32 at 3; *see* G.A. Comp. R. & Regs. 360–3-.02(15) (2012)]. Lastly, Dr. Kennedy found that the Respondent failed ''to maintain patient records documenting the course of the patient's medical evaluation, treatment, and response,'' because there were numerous patient files containing charts ''with entirely blank physical examinations combined with entirely blank follow-up visits.'' [Tr. 56; Govt. Exh. 32 at 3; *see* G.A. Comp. R. & Regs. 360–3-.02(16) (2012)]. To this point, Dr. Kennedy credibly testified that physicians are trained to document every physical examination conducted on a patient. [Tr. 164]. If a doctor fails to document a physical examination in the patient's file, Dr. Kennedy explained that there is a ''presumption [that] [the] physical examination did not occur.'' [*Id.*].

Consequently, Dr. Kennedy found that the Respondent did not issue prescriptions for controlled substances to these patients for a legitimate medical purpose in the usual course of professional practice. [Tr. 60; *see* 21 C.F.R. 1306.04(a) (2011)]. Instead, Dr. Kennedy concluded that Respondent's prescribing created ''a great degree of concern about diversion, abuse, [and] overdosage.'' [Tr. 61]. In judging the legitimacy of Respondent's prescriptions, Dr. Kennedy explained that a prescription would have to be valid based upon the history, studies and physical examination of the patient by the treating physician. [Tr. 160]. In addition, Dr. Kennedy credibly explained that MRI reports, alone, do not provide the medical justification for issuing controlled substances, because ''sometimes MRI's have equivocal findings, or findings that don't rise to the level of prescribing controlled medication on their own, and they have to be combined with a physical examination before a patient is started down this road.'' [Tr. 140]. Dr. Kennedy also credibly testified that pain patients warrant a higher level of scrutiny because they ''are taking chronic addictive medications that are used recreationally.'' [Tr. 164]. But he noted that there were ''a fairly large number of cases'' where Dr. Enmon's patients, on their initial visit, ''would be issued prescriptions for in excess of 300-unit doses of narcotic medications'' even though their ''charts had radiographic studies but no medical histories.'' [Tr. 60–61].

Specifically with regard to the Xanax prescriptions, Dr. Kennedy found that Respondent prescribed a varying number of dosage units of two milligram Xanax to all but one of the nineteen patients. [Govt. Exh. 5; Tr. 137–138]. Two milligrams is one of the highest strengths for that medication. [Tr. 138]. Dr. Kennedy opined that he would not prescribe the highest dosage unit of Xanax as a starting level for that medication. [*Id.*]. In Dr. Kennedy's expert medical opinion, combining Xanax and other controlled substances can also have an additive effect upon a patient. [Tr. 141–42]. Dr. Kennedy explained that such combined effects are ''a matter of concern and need to be discussed with the patient.'' [Tr. 142].

Dr. Kennedy also noted that the Respondent routinely prescribed thirty-milligram dosage units of Roxicodone along with fifteen-milligram dosage units of Roxicodone to his patients. [Govt. Exh. 5]. Dr. Kennedy explained that such prescribing is appropriate for a patient who reports experiencing breakthrough pain or ''pain not responding to the initial dosage.'' [Tr. 139–140]. Yet in his review of the Respondent's medical files, Dr. Kennedy found no indication that there was any documented need for such breakthrough pain medication. [Tr. 140].

IV. STATEMENT OF LAW AND DISCUSSION

A. Position of the Parties

1. Government's Position

The Government asserts that the appropriate remedy in this matter is revocation of the Respondent's registration. [Govt. Brief at 38]. Specifically in addressing the Section 823(f) public interest factors, the Government argues that three of five factors support the revocation of Respondent's registration. [Govt. Brief at 30]. First, the Government cites factors two and four and argues that the Respondent's experience in dispensing controlled substances and his noncompliance with the applicable law relating to controlled substances weighs in favor of revocation. [Govt. Brief at 30–31]. Lastly, the Government cites factor five and argues that Respondent's lack of remorse and his inability to claim any persuasive mitigating factors for his conduct also supports the revocation of his registration. [Govt. Brief at 31].

The Government makes several arguments under factors two and four. First, citing the Xanax prescriptions, which Respondent issued to eighteen of the nineteen patients in the record, the Government argues that Respondent issued these prescriptions without a legitimate medical purpose and outside the usual scope of professional practice in violation of 21 C.F.R. 1306.04(a) (2011). [Govt. Brief at 31]. Specifically the Government noted that nine patient files revealed no complaints of anxiety symptoms yet all nine of these patients received Xanax prescriptions from Respondent. [*Id.*]. While the other nine patients reported anxiety symptoms, the Government noted that their complaints only consisted of checking or circling an entry on a boilerplate form, which the Government argued was insufficient to justify prescribing the strongest possible dosage of Xanax. [Govt. Brief at 32]. To this point, the Government highlighted Dr. Kennedy's expert testimony that these Xanax prescriptions were not medically justified. [*Id.*].

Next, the Government argues that Respondent's issuance of oxycodone and hydrocodone prescriptions to all nineteen patients also violated 21 C.F.R. 1306.04(a) (2011) and correspondingly various Georgia administrative regulations. [Govt. Brief at 30, 32–34]. First, the Government claims that none of the nineteen patient files contained any past medical records in violation of Georgia administrative regulations. [Govt. Brief at 31, 33]. Next, the Government asserts that Respondent failed to adequately document physical examinations for these patients, another violation of Georgia administrative regulations. [*Id.*].

Similarly, the Government contends that neither the physical examinations of the patients nor their MRI reports provided sufficient justification for Respondent's treatment of these patients with large dosages of heavy strength narcotics. [*Id.*]. In addition, the Government argues that Dr. Enmon inappropriately issued multiple prescriptions for controlled substances to treat breakthrough pain, despite the patient files containing no indication that the patients needed such treatment. [Govt. Brief at 34]. Furthermore, the Government claims, and Dr. Kennedy agrees, that Respondent issued prescriptions for high strength controlled substances without attempting any other treatment modalities. [*Id.*].

Lastly, the Government argues that Respondent violated federal law by issuing controlled substances prescriptions from two unregistered locations, namely the Brunswick Wellness Center and the Ocean Care Clinic. [*Id.*]. The Government notes that Respondent issued controlled substances prescriptions from Ocean Care even though the DEA had not approved his change of address request for this location. [*Id.*]. Moreover, the Government asserts that Respondent wrote prescriptions for controlled substances during his employment at BWC, but never submitted an address change request to the DEA for this location. [*Id.*].

Lastly, under factor five, the Government argues that Respondent has not accepted responsibility or shown any remorse for his alleged unlawful conduct. [Govt. Brief at 31]. Nor, the Government contends, has Respondent presented any persuasive mitigating evidence that supports his continued registration. [Govt. Brief at 35–37]. In conclusion, the Government argues that Dr. Enmon's continued registration with the DEA would be inconsistent with the public interest and that his registration should be revoked. [Govt. Brief at 38].

2. Respondent's Position

Respondent did not file a post-hearing brief.

B. Statement of Law and Analysis

Pursuant to 21 U.S.C. 824(a)(4) (2006),[5] the Administrator may revoke a DEA Certificate of Registration if she determines that such registration would be inconsistent with the public interest as determined pursuant to 21 U.S.C 823(f). In determining the public interest, the following factors are considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f) (2006).

These factors are to be considered in the disjunctive; the Administrator may rely on any one or a combination of factors and may give each factor the weight she deems appropriate in determining whether a registration should be revoked. *See Robert A. Leslie, M.D.,* 68 Fed. Reg. 15,227, 15,230 (DEA 2003). Moreover, the Administrator is ''not required to make findings as to all of the factors.'' *Hoxie v. DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall v. DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

The Government bears the burden of proving that the requirements for revocation are satisfied. 21 C.F.R. 1301.44(e) (2011). Once the Government has met its burden of proof, the burden of proof shifts to the Respondent to show why his continued registration would be consistent with the public's interest. *See Medicine Shoppe—Jonesborough,* 73 Fed. Reg. 364, 380 (DEA 2008). To this point, the Agency has repeatedly held that the ''registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe—Jonesborough,* 73 Fed. Reg. at 387; *see also Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23,848, 23,853 (DEA 2007). In short, after the Government makes its *prima facie* case, the Respondent must prove by a preponderance of the evidence that he can be entrusted with the authority that a registration provides by demonstrating that he accepts responsibility for his misconduct and that the misconduct will not re-occur.

1. Factor One: Recommendation of Appropriate State Licensing Board.

Although the recommendation of the applicable state medical board is probative to this factor, the Agency possesses ''a separate oversight responsibility with respect to the handling of controlled substances'' and therefore must make an ''independent determination as to whether the granting of [a registration] would be in the public interest.'' *Mortimer B. Levin, D.O.,* 55 Fed. Reg. 8,209, 8,210 (DEA 1990); *see also Jayam Krishna-Iyer,* M.D., 74 Fed. Reg. 459, 461 (DEA 2009). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 Fed. Reg. 6,580, 6,590 (DEA 2007), *aff'd, Chein v. DEA,* 533 F.3d 828 (DC Cir. 2008). So while not dispositive, state board recommendations are relevant on the issue of revoking or maintaining a DEA registration. *See Gregory D. Owens, D.D.S.,* 74 Fed. Reg. 36,751, 36,755 (DEA 2009); *Martha Hernandez, M.D.,* 62 Fed. Reg. 61,145, 61,147 (DEA 1997).

In this case, the Georgia Composite Medical Board (''Georgia Medical Board'' or ''the Board'') has not taken any action against Respondent's medical license or made any recommendations related to this case. Nor has the Board made any recommendation concerning Dr. Enmon's licensure. Nevertheless, the Agency has consistently held that a practitioner's possession of state authority, while a prerequisite to maintenance of a registration, is not dispositive of the public interest

[5] The Administrator has the authority to make such a determination pursuant to 28 C.F.R. 0.100(b) (2011).

determination. *Mark De La Lama, P.A.,* 76 Fed. Reg. 20,011, 20,018 (DEA 2011). Therefore, I find that this factor does not weigh in favor or against the revocation of Respondent's DEA certificate of registration.

2. Factors Two and Four: Registrant's Experience With Controlled Substances And Compliance With Applicable State, Federal, Or Local Laws Relating To Controlled Substances

Agency regulations provide that a prescription is lawful only if it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 C.F.R. 1306.04(a) (2011). This regulation places the ''responsibility for the proper prescribing * * * of controlled substances'' on the ''prescribing practitioner,'' in this case, Dr. Enmon. *Id.* As the Supreme Court has explained, ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales v. Oregon,* 546 U.S. 243, 274 (2006). Likewise, Georgia law contains a similar requirement for controlled substances prescriptions. Ga. Code Ann. 16–13–41(f)(2–3) (2012) (mandating that practitioners must ''act[] in the usual course of [] professional practice'' and only issue controlled substances prescriptions for a ''legitimate medical purpose''); *see also Strong v. State,* 272 SE.2d 281 (Ga. 1980).

Under the Controlled Substances Act (''CSA'' or ''the Act''), it is fundamental that a practitioner establish and maintain a good faith doctor-patient relationship in order to act ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *Laurence T. McKinney,* 73 Fed. Reg. 43,260, 43,265 n. 22 (DEA 2008). The CSA, however, generally looks to state law to determine whether a doctor and patient have established a good faith doctor-patient relationship. *Kamir Garces-Mejias, M.D.,* 72 Fed. Reg. 54,931, 54,935 (DEA 2007).

The Georgia Medical Board has determined that in Georgia it constitutes ''unprofessional conduct'' for a physician to ''fail[] to maintain appropriate patient records whenever Schedule II, III, IV or V controlled substances are prescribed.'' G.A. Comp. R. & Regs. 360–3-.02(7) (2012). Appropriate patient records are defined as containing: ''the patient's name and address; the date, drug name, drug quantity, and patient's diagnosis necessitating the Schedule II, III, IV, or V controlled substances prescription; and records concerning the patient's history.'' G.A. Comp. R. & Regs. 360–3-.02(7)(a–c) (2012). It is also ''unprofessional conduct'' for a Georgia physician to ''fail[] to maintain patient records documenting the course of the patient's medical evaluation, treatment, and response.'' G.A. Comp. R. & Regs. 360–3-.02(16) (2012). Records which must be maintained include ''history and physical, progress notes…and laboratory reports.'' G.A. Comp. R. & Regs. 360–3-.02(16)(a) (2012).

Additionally under Georgia administrative rules, ''unprofessional conduct'' further includes:

Failing to use such means as history, physical examination, laboratory, or radiographic studies, when applicable, to diagnose a medical problem; and

Failing to use medications and other modalities based on generally accepted and approved indications, with proper precautions to avoid adverse physical reactions, habituation, or addiction in the treatment of patients.

G.A. COMP. R. & REGS. 360–3-.02(14–15) (2012).

a. Recordkeeping Violations

In this case, Respondent concedes that the nineteen patient files from his Ocean Care Clinic fail to record when physical examinations were conducted and the specific results of those examinations in support of his diagnoses. While Respondent testified that he performed a physical examination on all Ocean Care patients, he also testified that the charts introduced at the hearing revealed that ''an [physical] exam [was] not documented.'' [Tr. 343; Govt. Exh. 12–30]. By not documenting a patient's physical examination in his charts, Respondent violated Georgia law which mandates that physicians maintain patient records, which specifically include the results of a history and physical examination. G.A. Comp. R. & Regs. 360–3-.02(16) (2012). Despite Respondent's self-serving testimony that the busy nature of his practice somehow excused him from complying with this regulation, I find that Respondent, by failing to document physical examinations, violated Georgia law. [Tr. 345].

Furthermore, Respondent does not dispute that the nineteen patient files from his Ocean Care Clinic were incomplete and lacking in the required patient history records in violation of Georgia regulations. [Govt. Exh. 12–30; Tr. 357–358]. Instead Respondent testified that many of his patients came from clinics that had been shut down and that Ocean Care could not obtain their records. [Tr. 357]. But Respondent admitted that he did not document any efforts to obtain these past medical records. [Tr. 358]. An examination of the nineteen patient files reveals that while Dr. Enmon wrote controlled substances prescriptions to all nineteen patients, their Ocean Care patient file lacked any of their past medical records, or even documentation of efforts to obtain these records. [Govt. Exh. 12–30]. Therefore, I find that Respondent violated Georgia law by issuing controlled substance prescriptions to these nineteen patients without obtaining their past medical records. G.A. Comp. R. & Regs. 360–3-.02(7) (2012).

Related to these findings, I note that Dr. Kennedy concluded, after his review of the patient files, that Dr. Enmon failed to use ''such means as history, physical examination, laboratory, or radiographic studies, when applicable, to diagnose a medical problem'' because in almost all of the nineteen patient files there was a ''lack of appropriate physical examination or substantial supporting documentation that would support large doses of narcotic medication.'' [Tr. 55; Govt. Exh. 6]. Therefore, in light of the Respondent's failure to document physical examinations or obtain any patient records beyond an MRI report, I find that Respondent violated Georgia law by failing to utilize these means to properly diagnose his patients. G.A. Comp. R. & Regs. 360–3-.02(14) (2012).

b. Respondent's Prescribing Practices

Respondent issued Xanax prescriptions to all but one of the patients whose files were introduced into the record. [Govt. Exh. 5; Govt. Exh. 12–30]. Xanax is clinically indicated for the treatment of anxiety and panic disorders. [Tr. 45–46; Govt. Exh. 11]. But nine of these patient files revealed no self-reports or complaints of anxiety or panic attack symptoyms. [Govt. Exh. 13, 15–18, 23–24, 27, 30]. Dr. Kennedy, an expert in the use of such medication, concluded that these Xanax prescriptions lacked any legitimate medical purpose. [Tr. 59, 60; Govt. Exh. 6 at 5, 11, 14, 17, 20, 35, 38, 47, 56]. In light of Dr. Kennedy's uncontroverted expert testimony that these Xanax prescriptions were issued outside the usual scope of professional practice and without a legitimate medical purpose, I consequently find that that Respondent's issuance of these nine prescriptions violated the prescription requirement of both federal and state law. 21 C.F.R. 1306.04(a) (2011); **GA. CODE ANN**. 16–13–41(f) (2012).

Respondent also issued Xanax prescriptions to the other nine patients, however, these patients did report experiencing anxiety and panic attack symptoyms. [Govt. Exh. 12, 14, 19–22, 25–26, 28]. But Dr. Kennedy credibly testified that prior to treating a patient with Xanax, the patient's file should contain ''substantial documentation'' that would support the assignment of a psychiatric diagnosis to the patient. [Tr. 123, 171]. As the Government rightly notes though, these patient files failed to contain any information justifying these prescriptions except for a boilerplate form filled out by the patient. [Govt. Brief at 32; Govt. Exh. 12, 14, 19–22, 25–26, 28]. Dr. Kennedy also questioned Respondent's initial choice of Xanax as a frontline anxiety treatment and the corresponding high dosage unit of Xanax which he prescribed to these patients. [Tr. 171–172]. He credibly concluded that these Xanax prescriptions could not be medically justified. [Tr. 60; Govt. Exh. 6 at 2, 8, 23, 26, 29, 32, 41, 44, 50]. Respondent did not challenge Dr. Kennedy's expert medical conclusion regarding these prescriptions. Accordingly, I find that Respondent issued these Xanax prescriptions for other than a legitimate medical purpose in violation of both federal and state law. 21 C.F.R. 1306.04(a) (2011); **GA. CODE ANN**. 16–13–41(f) (2012).

Respondent further prescribed oxycodone or hydrocodone to all of the nineteen patients whose files were introduced into the record. [Govt. Exh. 5; Govt. Exh. 12–30]. While Dr. Kennedy testified that chronic pain patients warrant a higher level of scrutiny because they ''are taking chronic addictive medications that are used recreationally,'' he noted that there were ''a fairly large number of cases'' where Dr. Enmon's patients, on their initial visit, ''would be issued prescriptions for in excess of 300-unit doses of narcotic medications.'' [Tr. 60–61, 164]. Even though Respondent's patients typically reported experiencing high levels of pain, Dr. Kennedy concluded that their MRI reports and physical examination findings did not support Respondent's prescription of narcotic pain medications. [Tr. 60, 140–141; Govt. Exh. 12–30; Govt. Exh. 6]. Specifically he testified that ''the numbers and strengths of the narcotic medications that were prescribed were not valid for legitimate medical practice.'' [Tr. 160].

Thus, Dr. Kennedy, who was qualified as expert in the use of controlled substances for pain management, concluded that there was only one patient out of the nineteen where Respondent's issuance of oxycodone or hydrocodone prescriptions met the standard of care. [Tr. 59–60, 141; Govt. Exh. 6]. Dr. Enmon failed to introduce any evidence or make any argument that his treatment of these patients with narcotic pain medication was consistent with the Georgia standard of care or the federal and state prescription requirement. Nor did he challenge Dr. Kennedy's expert medical opinion regarding his treatment of these patients with large numbers of high dosage units of oxycodone and Xanax. Therefore I find that Respondent issued prescriptions for oxycodone and Xanax to these patients in violation of the prescription requirement of both federal and state law. 21 C.F.R. 1306.04(a) (2011); **GA. CODE ANN**. 16–13–41(f) (2012)

Dr. Kennedy also highlighted two patients' files where Respondent issued prescriptions for oxycodone, Xanax, and Soma. [Govt. Exh. 6 at 2–3, 9]. In Dr. Kennedy's expert opinion, ''the unsupported coadministration of oxycodone, Xanax, and Soma'' to these patients ''could represent a significant risk.'' [*Id.*]. Specifically he testified that ''benzodiazepines and the opiates do have an addictive effect'' and that ''the combined effects of these medications is a matter of concern and needs to be discussed with the patient.'' [Tr. 141–142]. Despite the potentially dangerous addictive effect of combining these scheduled medications, Dr. Kennedy did not find any evidence in the patient files that Dr. Enmon took ''any precautions…about adverse reactions, habituation, [or] the establishment of chemical dependency'' for these patients. [Tr. 56; Govt. Exh. 12, 14]. Nor did Dr. Enmon provide any relevant testimony or proffer any evidence to rebut Dr. Kennedy's expert medical conclusion on this point. Therefore I find that Respondent violated Georgia law by issuing controlled substance prescriptions to these two patients without ''proper precautions to avoid..habituation or addiction in the treatment of patients.'' **G.A. COMP. R. & REGS.** 360–3-.02(15) (2012).

Lastly, while the Government introduced evidence concerning another of Respondent's patients, M.B.S., I find that the Government has failed to prove, by a preponderance of the evidence, that Respondent's treatment of M.B.S. violated the Georgia standard of care. The Government did not introduce any expert medical testimony concerning Respondent's treatment of this patient. *C.f. Jack A. Danton, D.O.,* 76 Fed. Reg. 60,900, 60,901 (DEA 2011). The only evidence in the record pertaining to this patient is DI Sikes' testimony regarding the complaint he received from a physician at a local hospital and the patient's medical records which the hospital faxed to the DEA. [Tr. 371–381; Govt. Exh. 7]. Despite the serious allegations regarding Respondent's treatment of M.B.S. contained in Government Exhibit 7, I note the hearsay nature of this complaint and consequently decline to give it substantial weight in this matter. Furthermore, I find that Respondent properly documented his physical examination of M.B.S., in sharp contrast to the other patient records introduced in this proceeding. [Govt. Exh. 7 at 5–6]. Thus, I conclude that the Government has failed to prove that Dr. Enmon's treatment of M.B.S. violated the applicable Georiga standard of care.

c. Prescribing From An Unregistered Location

The CSA and DEA regulations also require registrants to obtain separate registrations for each principal place of business or professional practice where controlled substances are manufactured, distributed, or dispensed. 21 U.S.C. 822(e) (2006); 21 C.F.R. 1301.12(a) (2011). The Agency, however, has provided a limited exemption for practioners from this requirement. 21 C.F.R. 1301.12(b)(3) (2011). Specifically, a practitioner who is already registered at a location in one state is not required to obtain a separate registration for another office located in that same state if the practioner only prescribes controlled substances from that second office and also does not maintain any supplies of controlled substances at that second office. *Id.* Agency regulations, however, also specify that a registrant's certificate of registration ''shall terminate'' if the registrant ''discontinues business or professional practice'' 21 C.F.R. 1301.52(a) (2011).

In addition, any registrant may apply to modify his registration in order to, among other things, change his address, by submitting a request to the Agency. 21 C.F.R. 1301.51 (2011). The regulation further provides that ''the request for modification shall be handled in the same manner as an application for registration.'' *Id.; see also Wedgewood Vill. Pharm., Inc. v. Ashcroft,* 293 F. Supp. 2d 462, 469 (D.N.J. 2003) (''There is no provision at any other place in either the CSA itself, or in DEA's regulations, that indicates or even suggests that the approval of a modification to a registration by the DEA is anything other than permissive.''). Therefore, while the address change request is pending with the DEA, the registrant is not authorized to handle controlled substances at the new location until the DEA approves the modification. *See* 21 C.F.R. 1301.13(a) (2011) (''No person required to be registered shall engage in any activity for which registration is required until the application for registration is granted and a Certificate of Registration is issued by the Administrator to such person.''); *Richard A. Herbert, M.D.,* 76 Fed. Reg. 53,942, 53,959 (DEA 2011).

Here the Government argues that Respondent violated federal law by issuing prescriptions for controlled substances from two unregistered locations, the Brunswick Wellness Center and the Ocean Care Clinic. [Govt. Brief at 31, 34]. The Government does note that Dr. Enmon ceased issuing prescriptions from Ocean Care after he received notification from the DEA that he was not allowed to handle controlled substances at that location. [Govt. Brief at 34].

I find, by a preponderance of the evidence, that Respondent issued controlled substances prescriptions while working at BWC from approximately May 2011 to July 2011. [Tr. 180, 184, 333–335, 363–365; Govt. Exh. 33]. I also find that Dr. Enmon did not seek or obtain a certificate of registration from the DEA which would have authorized him to practice at this location. [Govt. Exh. 3; Tr. 180–181]. In addition, I find that Respondent's registered address in Atlanta does not trigger the exemption in 21 C.F.R. 1301.12(b)(3) (2011), because Dr. Enmon had ceased practicing at his original registered address in approximately 2009. [Tr. 177, 204–205; *see also* 21 C.F.R. 1301.52(a) (2011)]. Thus because Dr. Enmon was neither authorized by the DEA to prescribe at BWC, nor entitled to the relevant exemption for practitioners, I find that he violated federal law by issuing controlled substance prescriptions from BWC. 21 U.S.C. 822(e) (2006); 21 C.F.R. 1301.12(a) (2011).

Similarly, I find, by a preponderance of the evidence, that Respondent issued prescriptions for controlled substances while he operated the Ocean Care Clinic from approximately August 2011 to December 2011. [Tr. 188, 192–193; Govt. Exh. 12–30]. While Respondent requested to change his DEA registered address to Ocean Care on August 31, 2011, I find that the DEA did not approve Dr. Enmon's address change request. [Govt. Exh. 3; Tr. 175–176]. While Dr. Enmon's address change request was pending with the DEA, he lacked the necessary authority to issue prescriptions for controlled substances from Ocean Care. 21 C.F.R. 1301.13(a) (2011); *Herbert,* 76 Fed. Reg. at 53,959 (''Unlike a renewal application, which, when timely filed, remains in effect past the registration expiration date while the DEA makes a final determination on the application, a request for a modification is treated as a new application; a registrant, therefore, is not authorized to dispense or prescribe controlled substances at his new location pending approval of a modification request to change a DEA registered address.''). Consequently, I find that Respondent violated federal law by issuing controlled substance prescriptions from Ocean Care without a DEA registration. 21 U.S.C. 822(e) (2006); 21 C.F.R. 1301.12(a) (2011).

In summary, I find that Respondent violated Georgia law by failing to adequately document physical examinations in his patient files and by prescribing controlled substances to patients without attempting to obtain their past medical records. Next, I find that Respondent was at the very least, reckless or grossly negligent in issuing narcotic and benzodiazepine prescriptions for other than a legitimate medical purpose in violation of both federal and state law. Lastly, I find that Respondent violated federal law by issuing prescriptions for controlled substances from two unregistered locations. The scope and severity of Dr. Enmon's illicit conduct weighs strongly in favor of a finding that Respondent's continued registration would be inconsistent with the public interest. Accordingly under factors two and four, I find that the grounds do exist for revoking the Respondent's DEA Certificate of Registration.

3. Factor Three: Applicant's Conviction Record Relating to Controlled Substances

The record contains no evidence that the Respondent has been convicted of an offense related to the manufacture, distribution or dispensing of controlled substances. While this factor may support the continuation of Respondent's registration, the Agency has held that this factor is not dispositive to the public interest determination. *Morris W. Cochran, M.D.,* 77 Fed. Reg. 17,505, 17,517 (DEA 2012).

4. Factor Five: Other Factors Affecting the Public Interest

After the Government ''has proved that a registrant has committed acts inconsistent with the public interest, a registrant must 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' '' *Medicine Shoppe—Jonesborough,* 73 Fed. Reg. 364, 387 (DEA 2008) (*quoting Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23,848, 23,853 (DEA 2007). ''Moreover, because 'past performance is the best predictor of future performance,' *Alra Labs., Inc. v. DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe—Jonesborough,* 73 Fed. Reg. at 387; *see also Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23, 848, 23,853 (DEA 2007); *John H. Kennedy, M.D.,* 71 Fed. Reg. 35,705, 35,709 (DEA 2006); *Prince George Daniels, D.D.S.,* 60 Fed. Reg. 62,884, 62,887 (DEA 1995). *See also Hoxie v. DEA,* 419 F.3d 477, 483 (6th Cir. 2005) (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

Here, I find that Respondent has neither admitted responsibility for his actions nor shown any remorse for his unlawful conduct. Respondent testified at the hearing and denied violating any federal or state law while practicing at Ocean Care. [Tr. 341]. Instead, Respondent testified that he was the victim of a conspiracy which involved both local and federal law enforcement, whose objective, according to Dr. Enmon, was closing Respondent's pain clinic in order to benefit a competing pain clinic. [Tr. 342–43]. In light of the ample evidence in the record showing Respondent's numerous violations of both federal and state law, I do not find Dr. Enmon's allegations of a conspiracy to be credible.

In addition, Respondent has failed to demonstrate any remedial measures he has undertaken to prevent the reoccurrence of his unlawful conduct. Respondent chose not to address any of the nineteen patient files which the Government had introduced into evidence or challenge Dr. Kennedy's expert medical opinion that Respondent's treatment for eighteen of the nineteen patients violated the Georgia standard of care. Nor did Dr. Enmon offer any persuasive assurance that he would modify his treatment of chronic pain patients. Dr. Enmon testified that the only change he would make to his practice would be to better document efforts to obtain patients' past medical records. [Tr. 358]. Therefore, there is no evidence in the record that Dr. Enmon will alter his practice of medicine in order to bring himself into compliance with federal and state law. *C.f. Jayam Krishna-Iyer, M.D.,* 74 Fed. Reg. 459, 459 (DEA 2009) (highlighting remedial measures undertaken by a physician including conducting criminal background checks on patients and developing new procedures to recognize and discharge likely drug abusers).

The only specific allegation Respondent attempted to rebut involved the documentation of the physical examinations he claimed to conduct on his patients. But Dr. Enmon's rebuttal only further demonstrates the danger his continued registration poses to the public interest. While Respondent acknowledged his patient files contained charts where ''a [physical] examination [was] not documented,'' he claimed that while he tried to ''do [his] best to document * * * sometimes days get busy.'' [Tr. 345]. As Dr. Kennedy testified, however, ''[e]very physician knows from being taught in medical school that if [a physical examination] is not documented it did not happen.'' [Tr. 164]. Respondent's cavalier approach to a fundamental requirement of medical practice, the documentation of treatment, poses a continuing danger to the public interest. [Tr. 165].

Respondent also failed to introduce any persuasive mitigating evidence under factor five. Respondent's contention that narcotic therapy was the only cost-effective treatment for his low-income patient base, a claim that other practitioners have advanced, has been squarely rejected by the Agency. *Bienvenido Tan, M.D.,* 76 Fed. Reg. 17,673, 17,680 (DEA 2011) (noting that despite the physician's claim regarding his patient base, ''given that some of these patients had the ability to purchase more drugs (and sometimes multiple drugs) on numerous occasions within a month, it seems likely that they had the ability to pay for some tests and/or consultations''). Indeed as the Government rightly points out, Respondent's own patient files do not reflect any discussions of any alternative treatments, regardless of their cost, besides the seemingly automatic prescription of scheduled medications. [Govt. Brief at 35; Govt. Exh. 12–30]. Similarly, Respondent's complaint that his entire practice could not properly be judged only on the nineteen patient files introduced into evidence also has been rejected by the Agency. [Tr. 345; *see Jacobo Dreszer, M.D.,* 76 Fed. Reg. 19,386, 19,387 (DEA 2011) (''Moreover, where the Government has seized files, it can review them and choose to present at the hearing only those files which evidence a practitioner's most egregious acts.'')]. In fact, the Agency has revoked ''other practitioners' registrations for committing as few as two acts of diversion.'' *Krishna-Iyer,* 74 Fed. Reg. at 463 (*citing Alan H. Olefsky,* 57 Fed. Reg. 928, 928–29 (DEA 1992)).

Therefore, I find that Respondent has failed to present any evidence demonstrating his acceptance of responsibility for his unlawful acts. Likewise, I find that Respondent has failed to proffer any evidence demonstrating remedial measures that he has undertaken to prevent the reoccurrence of his violations. Lastly, I find that Respondent has not presented any persuasive mitigating factors under factor five that would justify his continued registration.

V. CONCLUSION AND RECOMMENDATION

Therefore, I conclude that the DEA has met its burden of proof and has established that grounds exist for revoking the Respondent's DEA registration. The record contains ample evidence that Respondent violated federal and state law in his practice at both BWC and Ocean Care. These violations range from issuing medically illegitimate prescriptions and failing to properly document patient treatment to prescribing from an unregistered location. In light of Respondent's numerous serious violations of both federal and state law and his corresponding refusal to accept responsibility for his unlawful conduct or adopt remedial measures to prevent their reoccurence, I find that Respondent's continued registration with the DEA would be inconsistent with the public interest. Consequently, I recommend that Respondent's controlled substances registration be revoked and his application for renewal and modification of his DEA registration be denied.

Date: April 26, 2012

s/Gail A. Randall

Administrative Law Judge.

[FR Doc. 2012–22848 Filed 9–14–12; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Henri Wetselaar, M.D.; Decision and Order

On September 27, 2011, I, the Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Henri Wetselaar, M.D. (Respondent), of Las Vegas, Nevada. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration as a practitioner, and the denial of any application to renew or modify his registration, on the ground that Respondent's ''continued registration is inconsistent with the public interest.'' Show Cause Order at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)).

The Show Cause Order alleged that from April through August 2010, law enforcement personnel performed eight undercover visits during which Respondent issued prescriptions without ''a legitimate medical purpose'' and acted outside of the ''usual course of professional practice.'' *Id.* at 1–2 (citing 21 CFR 1306.04(a)). More specifically, the Order alleged, *inter alia,* that Respondent prescribed increasing doses of oxycodone, a schedule II controlled substance, at the request of the undercover officers and performed either ''cursory or no medical examinations''; ''offered large doses of alprazolam to [an] undercover officer,'' notwithstanding that the officer ''did not complain of any medical condition warranting such medication''; ''varied [his] office fee depending on the type of controlled substance [he] prescribed''; and ''allowed the undercover officers to dictate to [him] what controlled substances they preferred to receive, rather than prescribe based on [his] own medical judgment.'' *Id.* at 2.

The Show Cause Order further alleged that a medical expert had ''reviewed more than 200 patient files obtained from [Respondent's] office'' and found that he ''consistently prescribed large amounts of oxycodone and alprazolam without adequate examination and documentation to support such prescribing.'' *Id.* Finally, the Show Cause Order alleged that following the August 2010 execution of a search warrant at his office, ''prescription monitoring data has revealed that [Respondent] continue[s] to prescribe large amounts of oxycodone 30mg tablets, hydrocodone and alprazolam.'' *Id.*

On September 29, 2011, the Order, which also notified Respondent of his right to request a hearing on the allegations, or to submit a written statement in lieu of a hearing, the procedures for electing either option (including that he file his request for a hearing or his written statement within 30 days of receipt of the Order), and the consequences for failing to do either, was served on him.[1] GX 3. On November 9, 2011, Respondent, through his counsel, submitted a letter to the Hearing Clerk, Office of Administrative Law Judges, requesting an extension of forty-five days to respond to the allegations. GX 4.

Thereafter, the Government moved to terminate the proceeding on the grounds that Respondent had neither requested a hearing nor timely filed a request for an extension to request a hearing. GX 5, at 1. The Government also argued that Respondent had not established ''good cause'' for his untimely filing. *Id.* at 3.

Upon reviewing the motion, the ALJ ordered Respondent to respond to the Government's motion. GX 6. Thereafter, Respondent's counsel submitted a letter stating that he ''ha[d] voluntarily chosen to forego his right to file a Request for a Hearing'' and respond to the Show Cause Order. GX 7. The ALJ then found that Respondent had withdrawn his request for a hearing, granted the Government's motion and ordered that the proceeding be terminated. GX 8, at 1–2. Several months later, the Government forwarded the investigative record to this office with its request for Final Agency Action.

Having reviewed the record, I adopt the ALJ's finding that Respondent has withdrawn his request for a hearing. I further hold that the evidence with respect to factors two and four supports a finding that Respondent has committed acts which render his registration ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). I make the following factual findings.

Findings

Respondent is the holder of DEA Certificate of Registration BW5180372, which, prior to the issuance of the Order of Immediate Suspension, authorized him to dispense controlled substances in schedules II through V at the registered location of New Amsterdam Medical Group, 4525 S. Sandhill Road, Suite 107, Las Vegas, Nevada. GX 1. Respondent's registration was due to expire on May 31, 2011. *Id.* However, on April 5, 2011, Respondent submitted a renewal application. Because Respondent's application was timely filed under the Agency's rule, Respondent retains a registration, albeit one that has been suspended. *See* 5 U.S.C. 558(c). Accordingly, there is both a registration and an application to act upon.

The Undercover Visits

On April 6, 2010, a DEA Task Force Officer (TFO 1) visited Respondent complaining of pain in his right shin which occurred only when he ran but that he had for six months. GX 11, at 59. During the visit, Respondent asked TFO 1 what he thought caused the pain (''probably running'') and TFO 1's vital signs were taken. *Id.* at 60. Moreover, the transcript of the visit suggests that Respondent performed a physical exam during which he listened to the TFO's heart and lungs, palpated his abdomen, and examined his lower leg. *Id.* at 61–62. Also, upon examining his leg, the TFO stated that he felt tenderness in his leg, with Respondent and his assistant concluding that he had tenderness in the middle of his tibia. *Id.* at 64. Respondent also asked the TFO about his general health, whether he smoked or drank alcohol (and upon the TFO's stating that he drank, asked the TFO how often he drank), his employment and marital status, and whether the TFO had ever been hospitalized. *Id.* at 61–67.

Respondent then asked the TFO what medications worked best for his pain; the TFO replied that he ''would like to get, if I could get Percocet or Oxy.'' *Id.* at 67. Respondent asked the TFO if he had tried Percocet before; the TFO said he had and that he used it before he ran. *Id.* Respondent then asked the TFO how many times a day he had taken Percocet when he used it; the TFO stated ''twice.'' *Id.* Respondent then agreed to give Percocet to the TFO and to prescribe it three times a day. *Id.*

Respondent's assistant asked the TFO if there was any other medication he took ''for anxiety or Xanax.'' *Id.* The TFO replied that he was ''always stressed, but no, I don't take anything. I mean, I got some in the past, but.'' *Id.* Respondent's assistant then asked if that helped him, and laughing, the TFO replied: ''Yeah. Everything helps. Everything helps. Can I get some Xanax?'' *Id.* Respondent replied: ''yeah, but that's why he mentioned it. We'd be happy to write some Xanax for you, if you liked it then.'' *Id.*

The TFO then asked if he could get some testosterone cream. *Id.* at 68. However, Respondent's assistant explained that ''we don't do that type of practice'' and ''we'd have to run some blood work'' and ''we just can't give it to you.'' *Id.*[2]

The TFO subsequently asked Respondent: ''I ain't pushing my luck, but there's no way I could get oxycodone or Oxy?'' *Id.* at 72. Respondent said ''no'' and that ''it has to be medically indicated.'' *Id.* at 72–73. Respondent's assistant interjected that the ''Percocet actually has Oxycodone in it.'' *Id.* Respondent then stated that he would see the TFO again; the latter expressed his appreciation and that ''it was worth the wait.'' *Id.* at 73–74.

Respondent's assistant then suggested that the TFO might be able to get oxycodone at his next visit if ''it's not quite enough.'' *Id.* at 74. The TFO replied that he had already made his next appointment, which would be on

[1] According to the Government, the Order was served on Respondent when he was arrested and taken into custody. GX 5, at 3.

[2] The TFO also sought Viagra, and Respondent agreed to write a prescription for the drug. Tr. 68–70. The TFO then complained of having ADD, Attention Deficit Disorder, and asked if he could try Adderall. *Id.* at 70–72. Respondent, however, did not prescribe the drug, telling Respondent ''why don't we start with'' the Percocet, the Viagra, and the Xanax. *Id.* at 72.

May 4, and that he ''would like to get Oxycodone.'' *Id.* Respondent's assistant then explained that ''usually an Oxycodone visit is three hundred because that's a higher potent narcotic'' than Percocet. *Id.* The TFO replied that he would ''pay three hundred right now if I could get it,'' but Respondent's assistant said ''we'll start with'' the Percocet and that it ''might do the job.'' *Id.* According to the progress note, Respondent diagnosed the TFO as having chronic pain, right shin pain, EDD, and anxiety. Both the transcript of the visit and the progress note show that Respondent prescribed 90 Percocet and 90 Xanax. *Id.; see also* GX 18.

On May 4, 2010, TFO 1 again saw Respondent. GX 12. The TFO asserted that the Percocet was not helping and that Respondent had ''said if it didn't work,'' he could get ''something better'' and asked if it was ''possible'' to ''get OxyContin.'' *Id.* at 24. After Respondent's assistant listened to the TFO's lungs, Respondent asked the TFO if he was ''looking for some stronger thing than this.'' *Id.* at 25. The TFO said he was and that he was ''too big or fat.'' *Id.*

Respondent noted that the TFO had just ''started with us''; the TFO replied that he ''was referred to you guys.'' *Id.* After apparently discussing how crowded the waiting room was, the TFO asked if he could get 80 milligram OxyContin because he had ''tried some before and they, they helped big time.'' *Id.* Respondent replied ''no,'' explaining that ''we can do only one step at a time'' because it was too ''powerful [a] medicine to jump ahead several steps,'' and explained that ''this oxycodone is the same medication as OxyContin.'' *Id.* The TFO then asked ''[h]ow many milligrams,'' and Respondent answered: ''30 milligrams * * * since we're going to give you more * * * let's go with 180.'' *Id.*

Respondent's assistant then asked how much the TFO had paid at the previous visit; the TFO said ''200'' and added that ''you said it would be an extra hundred if,'' to which the assistant interjected: ''yeah cause Oxycodone.'' *Id.* at 25–26. The TFO replied that he didn't care and asked if he could get 200 tablets. *Id.* at 26. Respondent's assistant stated that 200 tablets could not be prescribed unless the TFO underwent a urine test for ten drugs, but that 180 could be prescribed without the test. *Id.* The TFO replied that 180 was ''cool.'' *Id.*

Next, the TFO complained about the cost of the Viagra, and ultimately said he did not need more of it. *Id.* at 26–27. However, the TFO then asked if he could get Xanax and asked for the two milligram tablets. *Id.* at 27. After Respondent's assistant acknowledged this, the TFO stated that someone had told him about Norcos and that he didn't ''know what those are.'' *Id.* After the assistant explained that this drug combined hydrocodone with acetaminophen, the TFO asked if he could ''try those while I'm working?'' *Id.* The assistant said ''no, you're getting 180 oxycodone.'' *Id.* The TFO then asked if ''that's enough''; the assistant answered that ''we need to see how you do on that first and then * * * graduate from there.'' *Id.* The TFO said he was ''sorry'' and ''didn't know,'' and Respondent replied: ''Okay, that's the Xanax and the Oxycodone.'' *Id.* at 28.

After discussing with Respondent and his assistant how he could get Viagra for cheaper, *id.* at 28–29, Respondent's assistant told the TFO that ''it'll be 300 for the visit'' and that ''we'll see you in about a month.'' *Id.* at 29. The TFO stated that he already had an appointment, thanked Respondent and his assistant, added that ''you helped me out big time.'' *Id.* Consistent with the above conversation, Respondent issued the TFO prescriptions for 180 oxycodone 30mg, and 90 Xanax 2mg. GX 20. Notably, the progress note for this visit contains no indication as to how the TFO's shin pain was affecting his ability to function and how effective the medications were.

On June 1, 2010, TFO 1 made a third visit to Respondent. Respondent noted that he had seen the TFO on May 4 and asked him where he was filling his prescriptions. GX 13, at 3. Respondent's assistant took the TFO's vitals and listened to his lungs. *Id.* at 3–4. After a comment by Respondent, the TFO asked if he could ''try something stronger than those other ones,'' claiming that ''[t]hey don't work well'' because he was ''a big guy.'' *Id.* at 4. The TFO then added that he had ''tried the Roxy's,'' and after Respondent replied that ''there's no Roxy's * * * just oxycodone,'' the TFO asked if he could ''try the other ones?'' *Id.*

Respondent then noted that the TFO was ''on 180'' and ''we could increase the number of tabs per day'' and ''do that'' as ''the first step,'' but that he didn't want to go from oxycodone to OxyContin. *Id.* at 4. The TFO asked if OxyContin was ''no good then?'' *Id.* Respondent answered that it was ''top of the line.'' *Id.*

Respondent's assistant then suggested that the TFO's prescription be ''increase[d] to 220 and then we can step up?'' *Id.* The TFO asked how many tablets that was per day, and the assistant answered: ''[a]bout 8 * * * does that work for you?'' *Id.* The TFO asked if he ''could get a little more,'' Respondent said ''good'' and after the TFO said he would ''pay for them,'' the assistant said ''we'll go to 240.'' *Id.*at 5.

The TFO then asked what strength of Xanax he was taking; Respondent stated it was two milligrams and that this ''is pretty powerful.'' *Id.* The TFO stated that he didn't ''think so'' and he ''just [didn't] feel them.'' *Id.* Respondent replied that ''most people taking 2 milligrams of Xanax'' would, ''in a few nights,'' have to be picked up ''off the floor.'' *Id.* When the TFO replied that Respondent was ''skinny and in shape'' and he was ''240 pounds,'' Respondent stated that ''most people would say the same thing'' and that the drug was ''very powerful.'' *Id.*

Respondent then discussed what drugs the TFO had gotten at the previous visit, and the TFO replied that he had not gotten Viagra because it was ''too much money.'' *Id.* at 6. Respondent's assistant than said that ''[i]t's still 300 though,'' and Respondent added: ''You were on Percocet, switched to oxycodone, and now we're increasing it * * * so you're making some pretty big steps already.'' *Id.* The TFO expressed his appreciation, and discussed with Respondent and his assistant whether he could get more drugs ''if this don't work.'' *Id.* Respondent's assistant then told the TFO to schedule his next appointment for July 1st. *Id.* Respondent gave the TFO prescriptions for 240 oxycodone 30mg and 90 Xanax 2mg. GX 20.

Notably, the progress note for this visit now listed the TFO's chief complaint as ''more pain in lower lumbar spine,'' and noted diagnoses of ''chronic lbp,'' *i.e.,* lower back pain, and ''chronic anxiety.'' GX 18. It also indicated a finding of ''tenderness L5.'' *Id.* However, at no point in the visit did the TFO complain of lower back pain.

On June 29, 2010, TFO 1 made a fourth visit to Respondent. Upon meeting, Respondent asked the TFO ''how's that going for you?'' GX 14, at 8. The TFO replied that ''[i]t could be better I guess.'' *Id.* Respondent asked the TFO if he had pain; the latter replied ''yes sir.'' *Id.* A third person (who was not present for the previous visits) then asked ''where is it?'' and the TFO replied ''all through here.'' *Id.*

Following a discussion of the whereabouts of the assistant who had been at the TFO's previous appointments, the TFO's vital signs were taken. *Id.* at 9. Next, after a discussion of the TFO's employment status, the TFO asked Respondent if he could get oxycodone instead of the Roxy's he had previously been prescribed because the latter were ''not working very well.'' *Id.* at 11. Respondent then asked if the TFO actually wanted OxyContin as he was currently getting oxycodone; the TFO stated ''that's right,'' and asked if he could try OxyContin because he thought ''they would work better for [his] pain.'' *Id.* Respondent explained that the TFO was at 220 tablets a month and would first have to go to 300 tablets and ''then we'll talk again next month.'' *Id.* at 12. The TFO replied ''okay,'' and Respondent told him to ''take two at a time.'' *Id.* The TFO said he would ''do whatever it takes'' and asked if there was ''any way'' he could ''get more Xanax.'' *Id.*

Respondent then asked the TFO how he took the Xanax. The TFO stated that he took a whole one at night to help him sleep, a whole one in the morning, and that he sometimes took a third tablet if he ''need[ed] it,'' but ''not all the time.'' *Id.* at 13.

Next, the TFO and Respondent discussed the latter's recommendation that he use a particular pharmacy. *Id.* Respondent advised the TFO that if he needed a refill, his assistant could arrange it with the pharmacy and Respondent could sign the prescription when he came back. *Id.* at 14. Respondent told the TFO that he was ''all set then'' and the TFO expressed his thanks. *Id.* at 14–15. Respondent issued the TFO prescriptions for 300 oxycodone 30mg and 90 Xanax 2mg. GX 20.

On August 10, 2010, TFO 1 made a final visit to Respondent. After Respondent's assistant called his name, the TFO stated that he had been there ''five times,'' asked if he could ''get Oxy 80s please, please,'' and offered to pay $400 for the visit. GX 15, at 12. However, the assistant replied that ''[i]t doesn't matter to me how much you pay,'' that he was ''not going to jail just because you need something,'' and that he could ''go somewhere else.'' *Id.* The TFO then said that he did not ''want to cause problems'' and asked the assistant not to ''take it the wrong way.'' *Id.* The assistant replied that ''it is the wrong way'' and that the TFO was ''on to something that is not medically ethical.'' *Id.* After the TFO insisted that ''it is medical'' and that he ''need[ed] it,'' the assistant replied: ''Then, you have to find it from a doctor that will prescribe it. We got the DEA looking at all the Oxy 80s like * * * prescriptions.'' *Id.* The TFO then said that he would ''take the Roxies'' and that he was ''sorry.'' *Id.*

Respondent then told the TFO to ''come on in,'' and upon noting that it had been ''a little over a month'' since his last visit, asked him if there were any ''major changes.'' *Id.* The TFO said ''no,'' but that he ''was going to see if I could get the Oxy 80s,'' and ''if not, the Roxies work fine for me.'' *Id.* at 12–13. Noting that the TFO ''had oxycodone,'' Respondent asked him, ''is that what you like?'' *Id.* at 13. After Respondent and his assistant discussed how many pills the TFO was getting, Respondent asked the TFO if the 300 pills ''works for you?'' *Id.* The TFO replied ''yes sir'' and asked if his prescriptions could be sent to a pharmacy in Arizona and post-dated because the pharmacy Respondent told him to use was too ''crowded.'' *Id.* Respondent and his assistant both noted that this would be illegal, and Respondent added that while he could ''write a prescription right at this moment[,] today's date has to be on it.'' *Id.* Respondent then added that he could write a prescription with an instruction to the pharmacist to not fill until a future date. *Id.* Respondent stated, however, that he did not know whether the Arizona pharmacy would be able to send the prescriptions out to the TFO. *Id.*

Respondent then asked the TFO if he would like Xanax, and the TFO asked if he could get 100 Xanax. *Id.* at 14. However, Respondent expressed concern that the ''Xanax is so powerful'' and if ''they found you on the street unconscious'' with his ''name on the bottle in [the TFO's] pocket,'' to which the TFO replied (before Respondent finished talking) that he didn't want Respondent ''to get in trouble.'' *Id.* Respondent then added that ''we have to be very careful with it.'' *Id.*

Respondent subsequently asked the TFO to explain what he had in mind with the prescriptions and ''what we could do for you other than what we are doing here,'' stating that he ''didn't quite follow with the prescriptions.'' *Id.* Respondent's assistant interjected that ''he wants you to put, not today's date, but a future date on the pills.'' *Id.* When Respondent asked why, the TFO said because he ''live[d] in Arizona,'' and the assistant interjected that a ''prescription for Class 2 narcotics are only good for two weeks'' and could not be filled after that. *Id.* Respondent again asked the TFO why he would want that and the TFO replied ''because I live in Arizona'' and ''she said she would ship it to me.'' *Id.* The TFO added that he would ''pay you guys for the visit or whatever'' and that he ''was just curious because I didn't know how that works.'' *Id.* After Respondent's assistant said that doing that would be illegal, the TFO stated that he didn't know why the pharmacist had told him that but that he thought the pharmacist ''was trying to help * * * but I guess not.'' *Id.* at 15. Shortly thereafter, Respondent left, but not before giving the TFO prescriptions for 300 oxycodone 30mg and 90 Xanax 2mg.[3] *Id.*

A second TFO made three undercover visits. The first of these occurred on June 1, 2010. After Respondent's assistant took the TFO's vitals and listened to her lungs, Respondent asked the TFO if she had pain. GX 16, at 6. The TFO responded that she had pain in her ''left arm.'' *Id.* When asked how long she had the pain, the TFO stated for ''several months'' but then added that it was ''over 6 months'' and that it was related to her former work as a cocktail server. *Id.* Respondent then asked the TFO about her general health, whether she had ever had surgery or been admitted to the hospital, and whether she smoked or drank alcohol. *Id.* at 7–8.

Next, Respondent asked the TFO what medications she had been using for her pain; the TFO stated Lortab and Soma,[4] but that the Lortab was ''not really'' helping. *Id.* at 8. Respondent then asked the TFO if she was familiar with Percocet; the TFO replied that she had heard of it but never used it. *Id.*

Respondent stated that ''the Lortab you have tried is not quite strong enough. You need to go a step further.'' *Id.* The TFO replied ''Yeah,'' and Respondent suggested that she ''go with the Percocet'' because ''it's stronger.'' *Id.* Respondent then asked the TFO how often she took the Lortab when she was taking it; the TFO replied three times a day and that she took it with Soma. *Id.* Respondent remarked ''Percocet and 90,'' and explained that ''[i]t will be three times a day but stronger. It will be three times a day but stronger than the Lortab, okay?'' *Id.* at 8–9.

The TFO replied ''okay,'' and Respondent asked her if she would ''also like some Soma as well then?'' *Id.* at 9. The TFO said ''yes please.'' *Id.* Respondent and his assistant then discussed the strength of the Percocet (10/325) and quantities he was prescribing for both drugs (90 Percocet and 60 Soma). *Id.*

[3] Before he left Respondent's office, another employee gave the TFO a slip for a ten-panel urine test, and was told ''don't forget because he won't see you if you don't get it'' and that the test was ''to make sure the drugs we give you are in your system.'' GX 15, at 15; GX 18, at 1. However, another unidentified employee then stated that ''we don't so much care about the other drugs.'' GX 15, at 15.

[4] At the time of the visits, Soma (carisoprodol) was not a federally controlled substance. However, on December 12, 2011, DEA issued a final rule placing carisoprodol in schedule IV of the Controlled Substances Act. *See* 76 FR 77330 (2011). The final rule noted the extensive evidence of carisoprodol's abuse potential, particularly when taken in combination with narcotics.

Next, the TFO asked Respondent if he would ''mind if I ask for something for stress?'' *Id.* Respondent replied ''for stress, sure,'' and his assistant interjected: ''Just one milligram of Xanax,'' and after Respondent said ''yeah,'' added ''half a pill I think.'' *Id.* Respondent said that he thought the TFO would ''sleep better'' if she was ''relaxed''; the TFO replied ''yes, please.'' *Id.* Respondent then stated: ''Yeah, let 30 Xanax[,] I think we can do 2 milligrams. I recommend you take half a tablet and at night, okay?'' *Id.* The TFO replied ''okay,'' and after the assistant asked her to fill the prescription at a particular pharmacy, Respondent told the TFO that she could break the Xanax into 4 pieces and that she might try to take ''just a quarter of a tablet and see how it works.'' *Id.* at 10. Respondent's assistant then told the TFO that the cost was $200 and discussed the date of her next appointment, which was already scheduled for July 1. *Id.*

The progress note for this visit lists Respondent's diagnoses as ''chronic L forearm pain'' but does not document the TFO's past history. GX 19. As for Respondent's plan, the note lists the three prescriptions which were discussed during the TFO's meeting with Respondent and his assistant but no diagnostic testing. GX 19. The record also contains a copy of a prescription form, which is dated June 1, 2010, and which lists prescriptions for 30 Xanax 2mg, 90 Percocet 10/325mg, and 60 Soma 350mg. GX 21.

On July 2, TFO 2 returned to Respondent's clinic. GX 17. The TFO met with Respondent's assistant, who upon determining her name, asked: ''Percocet and the uh * * * Soma? * * * Xanax?'' *Id.* at 2. The TFO responded in the affirmative and the assistant asked: ''And you paid 200?'' *Id.* The TFO replied that she did not remember, and the assistant stated: ''Yeah it's 200.'' *Id.* The TFO said ''whatever you tell me,'' the assistant told the TFO that the prescriptions would be either phoned or faxed into the same pharmacy at which they had previously asked her to fill her prescriptions, and that it would take approximately ''an hour and a half, two hours.'' *Id.* at 3. The TFO then said that although she was ''feeling better and everything,'' she had run out a week earlier. *Id.* While the assistant declined to increase the TFO's prescriptions, he advised her that he could fill her existing prescriptions and that they would be ready around 12:30. *Id.* After discussing whether she could use a different pharmacy because Respondent's preferred pharmacy was ''so busy,'' the visit ended. *Id.*

Of note, the TFO did not see Respondent on this date, and according to the progress note for the visit, Respondent was ''out of town/Las Vegas.'' GX 19. The progress note states that ''authorization of refill of medication has been authorized by'' Respondent. *Id.* Other evidence shows that the TFO filled the same three prescriptions (90 Percocet 10/325mg, 30 alprazolam 2mg, and 60 carisoprodol 350mg) as she obtained at her first visit. GX 21. However, neither the transcript of the visit nor the progress note contain any evidence that Respondent's assistant asked the TFO how the pain was affecting her ability to function.

On August 10, 2010, the TFO made a final visit to Respondent. On the progress note, Respondent listed the diagnosis as ''as previous,'' and issued prescriptions for the same three drugs as before but increased the TFO's Percocet prescription to 120 tablets, adding ''PRN pain/back.'' GX 19; *see also* GX 21. However, while the Government submitted a transcript for this visit, which the TFO apparently performed at the same time as TFO 1's visit, the transcript contains only the conversation which she had with the receptionist upon her arrival and none of the conversation which occurred during her meeting with Respondent. *See* GX 15.

Other Evidence

The Government also submitted a declaration of a Diversion Investigator regarding a conference call she and other law enforcement personnel did with a physician who had reviewed 200 patient files which were seized from Respondent pursuant to a search warrant in August 2010. GX 9, at 1. According to the affidavit, the physician provided his ''overall impressions of [Respondent's] prescribing habits, recordkeeping, and standard of patient care [and] stated that there is no question that [Respondent's] standard of care fell below the civil standard for [various] reasons,'' including that there were ''no appropriate exams in many cases; no diagnoses were given, particularly when [Respondent] prescribed Xanax (alprazolam, Schedule IV); high doses were routinely prescribed; and doses were increased without good reason.'' *Id.* The affidavit further stated that this physician ''described these actions as flagrant and pervasive'' and that he ''noted that 20-year olds were frequently prescribed doses normally given to patients being treated for cancer.'' *Id.* The affidavit then recounted ''several broad areas where [the physician] felt [Respondent's] patient treatment was lacking.'' *Id.* at 2.

In *Richardson* v. *Perales,* 402 U.S. 389 (1971), the Supreme Court held that a physician's written report could constitute substantial evidence notwithstanding that it was hearsay. Notably, among the factors the Court found significant was that ''[c]ourts have recognized the reliability and probative worth of written medical reports even in formal trials and, while acknowledging their hearsay character, have admitted them as an exception to the hearsay rule.'' 402 U.S. at 405.

There is, however, no similar tradition of courts holding affidavits relating the substance of telephone interviews of physicians to be inherently reliable. Thus, the DI's affidavit stands on a fundamentally different footing than that of a physician's written report. It is, however, unnecessary to decide whether the doctor's opinions, as related in this affidavit, can constitute substantial evidence, notwithstanding that they are hearsay within hearsay, because they are simply generalities regarding his review of some 200 files.[5]

Moreover, the legitimacy of Respondent's prescribing to these 200 patients is not before the Agency. Rather, the Government has submitted evidence regarding Respondent's prescribing to the two TFOs. While in its Request for Final Agency Action, the Government asserts that the physician reviewed the files of the two TFOs, nothing in the DI's affidavit (or any other exhibit) establishes this as a fact. Nor does anything in the affidavit reflect that the physician offered opinions specific to the prescriptions Respondent issued to the TFOs. In short, this affidavit has no probative value in determining whether Respondent violated federal law in issuing prescriptions to the TFOs.

Discussion

Section 304(a) of the Controlled Substances Act provides that a ''registration pursuant to section 823 of this title to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon

[5] As another example of why this evidence is properly given no weight, according to the affidavit, the physician stated that ''there is no documented reason for the Xanax/oxycodone combination'' and the physician explained ''that these two drugs build on each other, and can easily leave a patient over-sedated, which can lead to an overdose.'' GX 8, at 2. It is, however, unclear whether the physician was referring to a general lack of documentation in the patient charts for prescribing these drugs in combination or whether he was maintaining that drugs could never be safely prescribed together. *Id.*

a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). In determining the public interest, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f). In addition, pursuant to 21 U.S.C. 824(d), ''[t]he Attorney General may, in his discretion, suspend any registration simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to public health or safety.''

The public interest factors are considered in the disjunctive. *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application for a registration. *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also MacKay* v. *DEA,* 664 F.3d 808, 816 (10th Cir. 2011); *Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

The Government has ''the burden of proving that the requirements for * * * revocation or suspension pursuant to section 304(a) * * * are satisfied.'' 21 CFR 1301.44(e); *see also* 21 CFR 1301.44(d) (Government has ''the burden of proving that the requirements for * * * registration pursuant to section 303 * * * are not satisfied''). As no DEA regulation provides that the consequence of waiving a hearing is a default, the Government must therefore support its proposed action with substantial evidence.

Having considered all of the factors, I conclude that the Government's evidence pertinent to factors two (Respondent's experience in dispensing controlled substances) and four (Respondent's compliance with applicable laws related to controlled substances), establishes that Respondent has committed acts which render his registration ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4).[6]

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

Under a longstanding DEA regulation, to be effective, ''[a] prescription for a controlled substance * * * must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). As the Supreme Court has explained, ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

Under the CSA, it is fundamental that a practitioner must establish and maintain a bonafide doctor-patient relationship in order to act ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *Laurence T. McKinney,* 73 FR 43260, 43265 n.22 (2008); *see also Moore,* 423 U.S. at 142–43 (noting that evidence established that physician ''exceeded the bounds of 'professional practice,''' when ''he gave inadequate physical examinations or none at all,'' ''ignored the results of the tests he did make,'' and ''took no precautions against * * * misuse and diversion''). The CSA, however, generally looks to state law to determine whether a doctor and patient have established a bonafide doctor-patient relationship. *See Kamir Garces-Mejias,* 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.,* 72 FR 50397, 50407 (2007).

By regulation, the Nevada State Board of Medical Examiners has adopted by reference the Federation of State Medical Boards of the United States, Inc.'s, 2004 *Model Policy For The Use of Controlled Substances For The Treatment of Pain. See* Nev. Admin. Code 630.187. According to the Preamble of the 2004 Policy,

> [t]he Board will consider prescribing, ordering, dispensing, or administering controlled substances for pain to be for a legitimate medical purpose if based on sound clinical judgment. All such prescribing must be based on clear documentation of unrelieved pain. To be within the usual course of professional practice, a physician-patient relationship must exist and the prescribing should be based on a diagnosis and documentation of unrelieved pain. Compliance with applicable state and federal law is required.

Model Policy, I.

Section II of the *Model Policy* governs the evaluation of patients. This provision states:

> A medical history and physical examination must be obtained, evaluated, and documented in the medical record. The medical record should document the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function, and history of substance abuse. The medical record should document the presence of one or more recognized medical indications for the use of a controlled substance.

Model Policy, II.

The *Model Policy* also provides that ''[t]he written treatment plan should state objectives that will be used to determine treatment success, such as pain relief and improved physical and psychosocial function, and should indicate if any further diagnostic evaluations or other treatments are planned.'' *Id.* Moreover, ''[t]he physician should discuss the risks and benefits of the use of controlled substances with the patient.'' *Id.* II. In addition, the *Policy* provides that ''[t]he physician should keep accurate and complete records to include'' the following:

> 1. the medical history and physical examination,
> 2. diagnostic, therapeutic and laboratory results,
> 3. evaluations and consultations,
> 4. treatment objectives,
> 5. discussion of risks and benefits,
> 6. informed consent,
> 7. treatments,
> 8. medications (including date, type, dosage and quantity prescribed),
> 9. instructions and agreements, and
> 10. periodic reviews.

Id.

Finally, under a Nevada Board regulation, ''[a] person who is licensed

[6] The record contains no evidence regarding the recommendation of the state licensing board or professional disciplinary authority. *See* 21 U.S.C. 823(f)(1). While possession of state authority to dispense controlled substances is a statutory requirement for holding a DEA practitioner's registration, *see id.* 802(21), this factor does not support a finding either for, or against, the continuation of Respondent's registration. *See Joseph Gaudio,* 74 FR 10083, 10090 n.25 (2009); *Mortimer B. Levin,* 55 FR 8209, 8210 (1990).

There is also no evidence in the record that Respondent has been convicted of an offense related to the manufacture, distribution or dispensing of controlled substances. *See* 21 U.S.C. 823(f)(3). While this factor supports the continuation of Respondent's registration, DEA has long held that this factor is not dispositive. *See, e.g., Edmund Chein,* 72 FR 6580, 6593 n.22 (2007).

as a physician * * * shall not * * * [e]ngage in the practice of writing prescriptions for controlled substances to treat acute pain or chronic pain in a manner that deviates from the guidelines.'' Nev. Admin. Code 630.230(1)(l).

TFO 1's Prescriptions

As found above, at TFO 1's first visit, Respondent prescribed to him both Percocet 10 and Xanax. At this visit, the TFO unequivocally complained of pain even if he stated that it occurred only when he ran. Moreover, Respondent's assistant clearly performed a physical examination, and while the Government asserts that this was ''a cursory examination,'' Req. for Final Agency Action at 4, it offered nothing bordering on substantial evidence to support this contention.

However, even if Respondent's evaluation of TFO 1 was sufficient to support his prescribing of Percocet, other evidence establishes that Respondent was not engaged in the legitimate practice of medicine but was dealing drugs. More specifically, Respondent, without solicitation by the TFO, asked him if there was any other medication he took for anxiety or Xanax. While the TFO replied he was ''always stressed'' but was not currently taking anything, Respondent made no effort to determine the extent of the TFO's symptoms and whether they warranted a diagnosis of anxiety. Moreover, when Respondent's assistant asked the TFO if Xanax helped him, the TFO replied, laughing no less, that ''everything helps. Can I get some Xanax?'' Respondent then said ''yeah, but that's why he mentioned it. We'd be happy to write some Xanax for you, *if you liked it then.''*

Expert testimony is unnecessary to determine that controlled substances are not prescribed because patients like them, but rather to treat a legitimate medical condition. I therefore conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing Xanax to TFO 1, and therefore violated 21 CFR 1306.04(a).

Moreover, at various points in this visit, TFO 1 provided additional indication that he was a drug-seeking patient as he sought various other controlled substances such as testosterone cream and Adderall. In addition, even after Respondent had agreed to write a Percocet prescription (which contains oxycodone) for him, the TFO asked if he was pushing his luck but then said he would like to get oxycodone or Oxy. While Respondent said ''no,'' and that ''it has to be medically indicated,'' his assistant then suggested that he might be able to get it at his next visit if the Percocet was ''not quite enough.''

Following this, the TFO stated he had already made his next appointment and added that he ''would like to get oxycodone'' at it. Respondent's assistant then advised the TFO that the fee would be $300 rather than $200 for an oxycodone visit because the drug was more potent than Percocet and the TFO offered to pay $300 ''right now if [he] could get'' oxycodone. Thus, the TFO provide ample indication that he was a drug-seeking patient. Moreover, the statement of Respondent's assistant begs the question of why Respondent's charge would be $100 more if a stronger narcotic was prescribed.

At TFO 1's second visit, the TFO sought ''something better'' and asked if he could get OxyContin 80mg, which he claimed to have ''tried . . . before'' and that ''they helped big time.'' While Respondent said ''no,'' the TFO's comment did not prompt any questioning as to his source for the OxyContin. And while the TFO claimed that the Percocet was not helping, neither the transcript of the visit nor the progress note for it indicate that Respondent asked the TFO about ''the nature and intensity of the pain'' and its effect ''on [his] physical and psychological function'' as mandated by the Nevada rule.

Nonetheless, Respondent offered to prescribe oxycodone 30mg, a drug three times more potent than the Percocet the TFO had previously obtained. Moreover, he then prescribed 180 pills, thus giving the TFO a prescription for six times the amount of oxycodone he had prescribed at the previous visit. In addition, as further evidence of the TFO's drug seeking behavior, he then asked for more Xanax and if he could try some Norco, the latter being a schedule III narcotic combining hydrocodone with acetaminophen. While Respondent did not prescribe Norco (because the TFO was already getting 180 oxycodone 30mg), he did prescribe another 90 Xanax 2mg to the TFO.

I conclude that both the oxycodone 30mg and Xanax prescriptions lacked a legitimate medical purpose and were issued outside of the usual course of professional practice. As for the oxycodone, even if Respondent's initial prescription for Percocet was medically justified, there was no justification for a six-fold increase in the amount of oxycodone that he prescribed.[7]

Likewise, the transcript of the visit indicated that the TFO simply asked for more Xanax and that there was no discussion as to whether he had any symptoms which warranted the prescription.

At TFO 1's third visit, he once again sought ''something stronger'' than oxycodone 30mg, claiming they didn't ''work well.'' While Respondent stated that he did not want to go from oxycodone to OxyContin, because the latter was ''top of the line,'' Respondent increased the TFO's prescription, this time to 240 tablets of oxycodone 30mg. Here again, there was no discussion of the nature and intensity of the TFO's pain and how it was affecting his ability to function. Nor, notwithstanding that the previous prescription represented a six-fold increase in dosage, was there any discussion (other than the TFO's assertion that the drug did not ''work well'') as to the effectiveness of the previous prescription. Finally, Respondent wrote in the progress note a new and different diagnosis of chronic lower back pain even though there is no indication in the transcript of the visit that the TFO complained of having any back pain. Accordingly, I find that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in issuing the oxycodone prescription. 21 CFR 1306.04(a).

Moreover, in discussing the Xanax prescription, the TFO disagreed with Respondent's statement that the strength he was taking was ''pretty powerful'' and added that he ''just [didn't] feel them.'' Once again, there was no discussion of any symptoms the TFO had which would warrant the prescribing of Xanax. Accordingly, I conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing Xanax to the TFO. 21 CFR 1306.04(a).

At his fourth visit, TFO 1 again complained that the oxycodone was ''not working very well'' and Respondent asked if he actually wanted OxyContin. While the TFO replied that he thought that OxyContin ''would work better for [his] pain,'' once again the transcript of the visit shows that Respondent made no inquiry as to the nature and intensity of the TFO's pain and its effect on his ability to function. While Respondent did not prescribe OxyContin (because the TFO ''would first have to go to 300 tablets'' of

[7] Buttressing this conclusion is the discussion the TFO had with Respondent's assistant as to how many tablets he could obtain without undergoing a urine test. It is difficult to understand why 180 tablets would not trigger such a test but 20 additional tablets would.

oxycodone 30mg), he nonetheless increased his oxycodone prescription to 300 tablets and the TFO told him that he would ''do whatever it takes'' to get OxyContin. Thus, I conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing oxycodone to the TFO.

At his final visit, TFO 1 again asked if he could get OxyContin and offered to pay $400 for the visit. Manifesting his awareness that the TFO was not a legitimate pain patient but was engaged in drug-seeking, Respondent's assistant replied that ''[i]t doesn't matter to me how much you pay'' and that he was ''not going to jail just because you need something.'' Moreover, while Respondent asked the TFO if there had been any ''major changes'' since his last visit, the TFO said no but that he ''was going to see if I could get the Oxys 80,'' but ''if not, the Roxies work fine for me.'' After noting that the TFO had been getting oxycodone (the same drug as Roxicodone), Respondent asked the TFO, ''is that what you would like?'' and whether 300 pills ''works for you?''

Notably, at no point did the TFO complain of pain, and other than Respondent's question whether there had been any ''major changes'' since his last visit, neither Respondent nor his assistant questioned the TFO about the nature and intensity of his pain, and its effect on his ability to function. Moreover, Respondent then asked the TFO if he would like Xanax and the TFO asked if he could get 100 tablets. Manifesting that he knew the TFO was a drug abuser, Respondent expressed his concern that he could get in trouble because the ''Xanax is so powerful'' if ''they found [the TFO] on the street unconscious'' with Respondent's name on the bottle in his pocket. Notwithstanding that there was no legitimate purpose for either prescription, Respondent prescribed 300 oxycodone 30mg and 90 Xanax 2mg to the TFO, in violation of 21 CFR 1306.04(a).

TFO 2's Prescriptions

As found above, at TFO 2's first visit, she represented that she had pain in her left arm, that the pain was related to her former work as a cocktail waitress, and that she had had the pain for over six months. However, Respondent made no further inquiry into whether the TFO had suffered an injury, the nature and intensity of her pain, its effect on her physical and psychological function, and whether she had previously been treated for it. Moreover, while the TFO stated that she had used Lortab and Soma for her pain, Respondent made no inquiry as to the TFO's source for these drugs. Furthermore, the TFO then asked Respondent if he would mind if she ''ask[ed] for something for stress?'' While Respondent stated that he thought the TFO would ''sleep better'' if she was relaxed, he conducted no inquiry into what symptoms the TFO had that would warrant prescribing Xanax. Respondent then prescribed 90 Percocet 10/325, 30 Xanax 2mg, as well as Soma. Based on Respondent's clear lack of compliance with the Nevada Board's *Policy,* I conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing Percocet and Xanax to the TFO.

Moreover, at her second visit, Respondent was not present and the TFO was seen by his assistant, who either called or faxed in prescriptions for 90 Percocet and 30 Xanax. While the TFO had stated that she was ''feeling better and everything,'' Respondent's assistant conducted no inquiry into the nature and intensity of her pain and its effect on her physical and psychological functioning. Nor did Respondent's assistant discuss with the TFO her use of Xanax and whether she even needed a refill. As noted above, while Respondent was not present at his clinic, the TFO's chart noted that he authorized the prescriptions. Accordingly, I conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in authorizing the prescriptions for Percocet and Xanax and therefore violated 21 CFR 1306.04(a).[8]

Based on the numerous controlled substance prescriptions which Respondent issued in violation of 21 CFR 1306.04(a), I conclude that the evidence relevant to factors two and four supports a finding that he has ''committed such acts as would render his registration . . . inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). I further conclude that Respondent's conduct is sufficiently egregious as to warrant the revocation of his registration and the denial of his application to renew his registration. Accordingly, I will order that Respondent's registration be revoked and that his pending application be denied.

[8] Because there is no evidence establishing the substance of what actually occurred during the TFO's third visit with Respondent (other than that she received more prescriptions), I conclude that there is no basis to conclude that these prescriptions also violated federal law.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a)(4), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration BW5180372, issued to Henri Wetselaar, M.D., be, and it hereby is, revoked. I further order that any pending application of Henri Wetselaar, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[9]

Dated: August 31, 2012.

Michele M. Leonhart,

Administrator.

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BILLING CODE 4410–09–P

[9] Based on the allegations that led me to order the Immediate Suspension of Respondent's registration, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–14]

T.J. Mcnichol, M.D.; Decision and Order

On October 27, 2011, I, the Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to T.J. McNichol, M.D. (Respondent), of Brandon, Florida. ALJ. Ex. 1. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration FM0624139, which authorizes him to dispense controlled substances in schedules II through V, as a practitioner, and the denial of any pending applications to renew or modify his registration, on the ground that his ''continued registration is inconsistent with the public interest.'' *Id.* at 1 (citing 21 U.S.C. 823(f) and 824(a)(4)).

As support for the proposed action and the immediate suspension, the Show Cause Order alleged that ''[o]n six separate occasions between approximately July 28 * * * and August 25, 2011, [Respondent] distributed controlled substances (oxycodone, a Schedule II controlled substance, and alprazolam, a schedule IV controlled substance) by issuing 'prescriptions' to [four] undercover law enforcement officers [hereinafter, UC or UCs] for other than a legitimate medical purpose or outside the usual course of professional practice.'' *Id.* at 2. More specifically, the Order alleged that on July 28, 2011, Respondent ''distributed'' 180 tablets of oxycodone 30mg and 60 tablets of alprazolam 1mg to UC1 on the officer's ''first visit to [his] practice'' and that he did so ''after conducting only a cursory medical examination of [the officer] and despite [his] informing the [officer] that [his] physical exam did not correlate to any findings of pain as outlined'' on the officer's MRI, and although ''UC1 provided no history or illness that warranted the distribution of a controlled substance.'' *Id.* The Order further alleged that on August 25, 2011, Respondent distributed another 180 tablets of oxycodone 30mg and 60 tablets of alprazolam 1 mg to UC1, although UC1 ''provided no history of injury or illness that warranted the distribution of a controlled substance'' and after performing ''a cursory physical examination.'' *Id.*

Next, the Show Cause Order alleged that on July 28, 2011, Respondent distributed 150 tablets of oxycodone 30mg and 90 tablets of alprazolam 1mg to UC2 on his initial visit, even though ''UC2 provided no history of injury or illness that warranted the distribution of controlled substances'' and that Respondent ''conduct[ed] only a cursory physical examination'' which lasted ''approximately two minutes'' and ''despite the officer telling [Respondent] that he experienced little pain.'' *Id.* The Order further alleged that on August 25, 2011, Respondent distributed to UC2 an additional 150 tablets of oxycodone 30mg and 90 tablets of alprazolam 1mg after performing '' a cursory medical examination'' which ''consisted only of [Respondent placing his] hands on the mid to lower back area of UC2 and asking if [he] experienced any pain in those areas.'' *Id.* The Order also alleged that ''UC2 provided no history of injury or illness that warranted the distribution of a controlled substance'' and that Respondent's ''total interaction * * * with UC2 lasted approximately two minutes.'' *Id.*

With respect to UC3, the Show Cause Order alleged that on August 25, 2011, Respondent distributed 180 tablets of oxycodone 30mg and 30 tablets of alprazolam 2mg to the UC at his first visit, ''while conducting only a cursory physical examination and despite the officer not providing any information in his medical questionnaire about experiencing any pain.'' *Id.* at 2–3. The Order also alleged that ''UC3 provided no history of injury or illness that warranted the distribution of a controlled substance.'' *Id.* at 3.

Finally, with respect to UC4, the Show Cause Order alleged that on August 25, 2011, Respondent distributed 210 tablets of oxycodone 30mg and 60 tablets of alprazolam 2mg to the UC at his first visit. *Id.* The Order alleged that Respondent ''conduct[ed] only a cursory physical examination'' and that ''UC4 provided no history of injury or illness that warranted the distribution of a controlled substance.'' [1]

Respondent requested a hearing on the allegations; the matter was placed on the docket of the Office of Administrative Law Judges and assigned to ALJ Timothy D. Wing. Following pre-hearing procedures, the ALJ conducted a hearing on January 17–18, as well as April 10–11, 2012.[2] Upon conclusion of the hearing, the parties submitted briefs containing their proposed findings of fact, conclusions of law, and argument.

On May 17, 2012, the ALJ issued his recommended decision. With respect to factor one—the recommendation of the state licensing board—the ALJ found ''that Respondent currently holds a valid, unrestricted medical license in Florida and has never been disciplined by the Florida Department of Health.'' ALJ at 45. The ALJ thus found that, while this factor is not dispositive, it ''weighs against a finding that Respondent's continued registration would be inconsistent with the public interest.'' *Id.*

With respect to factor three—Respondent's conviction record under Federal or State laws related to the manufacture, distribution, or dispensing of controlled substances—the ALJ found that there was no evidence that Respondent has been convicted of such an offense. *Id.* While noting that this factor also is not dispositive, the ALJ concluded that it ''weighs against a finding that Respondent's continued registration would be inconsistent with the public interest.'' *Id.*

Next, the ALJ considered factors two—Respondent's experience in dispensing controlled substances—and four—Respondent's compliance with applicable laws relating to controlled substances, together. *Id.* at 46–91. The ALJ noted that, under Federal law, a prescription for a controlled substance must be ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice.'' *Id.* at 46 (citing 21 CFR 1306.04(a)).

Reasoning that because ''Respondent's prescribing practices with regard to the undercover patients visits [were] not remotely close to 'outright drug deals,''' and that ''the undercover patient visits objectively reflect that Respondent's prescribing practices included, to a degree, a documented medical history, physician examination, documented urinalysis testing, medical record release forms, and pharmacy prescribing profiles, * * * consistent with applicable Florida law,'' the ALJ explained that ''any finding that Respondent's prescribing conduct * * * was not for a legitimate medical purpose and outside the usual course of professional practice under the Florida Standards or standards generally recognized and accepted in the medical community will significantly depend on the evidentiary weight'' given to the opinion testimony of the Government's Expert. *Id.* at 50. The ALJ then explained that, while he found the Government's Expert ''qualified by education and experience generally,'' he did not find the Expert ''qualified to render an expert opinion regarding Florida law and standards of medical practice'' because he was not aware of the current state standards and the ''significant change in the regulations as of October 2010.'' *Id.* at 51.

The ALJ further stated that he found that the Expert's testimony included ''inconsistencies, factual errors, vague or nonresponsive answers to basic questions, and an overall lack of interest or even curiosity in examining all available information relevant to Respondent's prescribing conduct.'' *Id.* at 53. While acknowledging that the Expert's ''testimony at various points did find some support in the evidence, overall his testimony and related opinions repeatedly demonstrated an unwillingness to consider positive conduct by Respondent, or even inquire of any, beginning with his October 24, 2011 report.'' *Id.* The ALJ also cited the Expert's financial interest as a Government Expert and what he characterized as a ''history of near uniformity of opinion testimony on behalf of the Government'' as grounds for his conclusion that the Expert's testimony lacked ''the necessary independence, objectivity, and factual basis to be relied upon.'' *Id.* at 57–58.

Accordingly, based on what he deemed to be the absence of ''credible medical opinion testimony,'' or other ''credible evidence of misconduct by Respondent,'' the ALJ rejected the allegations that Respondent lacked a

[1] Based on the above allegations, I concluded that Respondent's continued registration during the pendency of the proceeding ''constitute[d] an imminent danger to the public health and safety.'' ALJ Ex. 1, at 3. Accordingly, I ordered the immediate suspension of Respondent's registration. *Id.*

[2] While the ALJ noted the amount of time which has passed between the date of service of the Order to Show Cause and Immediate Suspension, ''which was exclusive of any delays attributable to Respondent,'' *see* ALJ at 43 n.72 (citations omitted), the record is devoid of any explanation as to why the hearing did not reconvene until April 10. Indeed, while the ALJ cited ALJ Ex. 26 in support for his calculation, *id.,* this exhibit was not forwarded as part of the record. Nor was the record timely forwarded by the ALJ to this Office following the receipt of the Government's Exceptions.

legitimate medical purpose and acted outside of the usual course of professional practice in prescribing to each of the UCs. *Id.* at 69, 75, 82, 91. The ALJ reached this conclusion notwithstanding his finding that Respondent prescribed Xanax to one of the UCs without any inquiry into ''the medical basis for continuing the prescription'' and that this ''arguably supports a finding that such a prescription lacks a legitimate medical purpose, or is outside the usual course of professional practice.'' *Id.* at 82. The ALJ thus concluded that factors two and four ''weigh heavily against a finding that Respondent's continued registration would be inconsistent with the public interest.'' *Id.* at 91.

With respect to factor five—such other conduct which may threaten public health and safety—the ALJ noted that Respondent, who had been called to testify by the Government, invoked his Fifth Amendment privilege and refused to testify. ALJ at 92. While the Government requested that the ALJ draw an adverse inference based on Respondent's refusal to testify, the ALJ declined to do so explaining that because the Government had failed to establish a *prima facie* case that ''Respondent's conduct was contrary to the public interest,'' his ''testimonial silence with regard to acceptance of responsibility'' was not relevant. *Id.* While acknowledging that an adverse inference may be permissible, the ALJ reasoned ''that the failure to testify alone may not be taken as an admission of wrongdoing, without regard to other evidence.'' *Id.* at 92–93. Noting that ''Respondent is facing uncertain criminal liability,'' the ALJ reasoned that he did ''not find his testimonial silence during this parallel administrative proceeding to make it more likely than not that he would dispute an untrue accusation.'' *Id.* at 93. The ALJ then explained that ''in light of the fact that the Government's evidence was insufficient to establish a prima facie case, particularly given the lack of credible medical expert testimony, Respondent's silence in and of itself does not appreciably tip the balance of evidence in favor of the Government.'' *Id.* The ALJ thus explained that even were he to draw an adverse inference, he would still find the evidence insufficient to conclude that Respondent's prescribing practices were unlawful. *Id.* Because in the ALJ's view, there was no other evidence that Respondent had engaged in conduct which may threaten public health or safety, the ALJ concluded that this factor also supported the continuation of Respondent's registration. *Id.* The ALJ thus recommended that the Order to Show Cause and Immediate Suspension be dismissed. *Id.* at 94.

On June 5, 2012, the Government filed Exceptions to the ALJ's recommended decision. Thereafter, on June 14, 2012, the ALJ forwarded the record to me for Final Agency Action.

I have carefully considered the entire record including the ALJ's recommended decision and adopt his findings with respect to factors one and three. However, I reject his findings with respect to factors two and four because, with respect to many of the prescriptions (especially those for alprazolam) Respondent issued to the undercover officers, expert testimony was not necessary to prove that he lacked a legitimate medical purpose and acted outside of the usual course of professional practice in issuing them. Indeed, with respect to one of the undercover officers, the ALJ ignored nearly all of the evidence of the conversation which occurred between Respondent and the officer which shows that Respondent knew the undercover officer was a drug abuser and that he engaged in an outright drug deal.

Likewise, with respect to the alprazolam prescriptions Respondent issued to three of the undercover officers, the ALJ entirely ignored relevant evidence and failed to discuss the evidence pertaining to these prescriptions. In other instances, the ALJ mischaracterized the evidence he cited. Finally, with respect to several issues, the ALJ failed to apply properly, or ignored entirely, precedents of both the Agency and federal courts.

Accordingly, as ultimate factfinder, I reject the ALJ's legal conclusion that the Government has not met its *prima facie* burden of showing that Respondent has committed acts which render his continued registration inconsistent with the public interest. *See Reckitt & Coleman, Ltd.,* v. *Administrator,* 788 F.2d 22, 26 (DC Cir. 1986) (citing 5 U.S.C. 557(b) (''On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision * * *'')). Because even assuming, without deciding, that the Expert's testimony is not entitled to weight (notwithstanding the ALJ's inconsistent statements regarding the weight he was giving it), the record still contains substantial evidence that Respondent violated 21 CFR 1306.04(a) in issuing several of the prescriptions and he has offered no evidence that he acknowledges his misconduct and will refrain from engaging in similar acts in the future, I will order that Respondent's registration be revoked and that any pending application be denied.

I make the following

Findings of Fact

Respondent Registration and Licensing Status

Respondent is the holder of DEA Certificate of Registration FM0624139, which prior to the issuance of the Order of Immediate Suspension, authorized him to dispense controlled substances in schedules II through V as a practitioner, at the registered location of Quality Care Medical Group (hereinafter, QCMG), 143 Oakfield Drive, Suite 102, Brandon, Florida. GX 1–2. Respondent's registration does not expire until January 31, 2014. GX 2.

Respondent is also the holder of an active medical license issued by the Florida Board of Medicine, which does not expire until January 31, 2014. ALJ at 45 n.76. There is no evidence that Respondent's state license has been the subject of any disciplinary proceedings. *See id.*

The DEA Investigation of QCMG

QCMG first came to the attention of DEA in early 2010, when a Task Force Officer (TFO) received information from various sources including citizens, anonymous callers and a cooperating defendant regarding a QCMG clinic located in Bradenton, Florida. Tr. 50–53. The information included a report that persons were traveling to QCMG from out-of-state locations, that QCMG allowed sponsors to bring groups of people into the clinic, and that persons were presenting fraudulent MRIs and prescription profiles to obtain admission as patients. *Id.* at 53–55.

In June 2011, DEA commenced undercover operations at the Bradenton location and sent in several undercover officers who presented MRIs and patient profiles and were able to see the doctor who worked at that location. *Id.* at 61, 70–71. During the investigation, the officers determined that the owners of QCMG also had a clinic located in Brandon, Florida and decided to conduct undercover operations at the latter location as well. *Id.* at 72. In total, four undercover officers made visits to the Brandon location. *Id.* at 73. Two of the officers, who used the undercover names of Anthony Thompson and Robbie Payne, each made two visits to the Brandon clinic and saw Respondent on both occasions. *Id.* The other two officers, who used the undercover names of Mike Corleone and Eric McMillen, went to the Brandon location and saw Respondent once. *Id.*

The Undercover Visits of Robbie Payne

On some date not specified in the record but shortly before July 28, 2011, a Task Force Officer (TFO) using the undercover name of Robbie Payne went to the QCMG Bradenton clinic but was turned away because he did not have an appointment. Tr. 169–70. During a discussion following the operation, the investigators decided that the TFO would contact the Brandon clinic and make an appointment. *Id.* at 174. The TFO called the Brandon clinic and was able to make an appointment for July 28th. *Id.*

On July 28, the TFO went to the clinic, wearing a recording device, and brought an MRI and a profile purporting to show what prescriptions he had obtained; the latter showed that Payne had last received prescriptions for 210 tablets of oxycodone 30mg, 90 tablets of oxycodone 15mg, and 90 tablets of Xanax 2mg on April 10, more than three and a half months earlier.[3] *Id.* at 174–77; RX 4, at 15; RX 1, at 36–39. The TFO testified that he was required to fill out various forms requiring personal information, waivers, and a questionnaire which included historical information, previous medications, pain levels, and how the pain ''affected'' his life. Tr. at 175. The TFO further testified that the questionnaire used a ''0 through 10'' pain scale and asked him to rate his ''pain at that moment'' and when he was ''on medications.'' *Id.* at 175–76. While the TFO did not remember ''the exact number'' he wrote down for his pain at the present time, he testified that usually writes ''something between 0 and 4.'' *Id.* at 176. With respect to what he wrote as his pain level with medications, Payne testified that he would write ''the same number.'' *Id.*

The TFO did not, however, recall whether the questionnaire had any questions regarding whether he suffered from anxiety. *Id.* Eddie Gomez, Respondent's Medical Assistant, testified that the medical questionnaire which patients were required to fill out contained no information about anxiety. *Id.* at 984. However, Gomez then changed his testimony, explaining that the questionnaires, which were subsequently shredded under the clinic's policy, did ask about anxiety. *Id.* at 985–86.

The TFO also testified that one of the forms had a picture of a human body and that he ''deliberately'' circled a part of the body that was different than his MRI ''to disprove * * * the MRI.'' *Id.* at 180. After turning in his paperwork and paying for the visit, Payne took a seat in the waiting room. *Id.* at 176–77.

The TFO was eventually summoned from the waiting room by Eddie Gomez, who identified himself as the office manager and Respondent's assistant. *Id.* at 178; GX 14, at 4. Gomez took the TFO's height, weight and blood pressure; Gomez then asked him whether he was going to another pain management clinic (with the TFO answering ''no'') and stated that the clinic reported doctor shoppers to the authorities. Tr. 178; GX 14, at 4. Gomez explained that ''[t]hese are Schedule II drugs, C II drugs, uh * * * narcotics. You cannot share them, sell them, okay?,'' and asked the TFO if he was ''abusing pain meds or illegal substances.'' *Id.* at 5.

Gomez then said that he was going to do a drug screen on the TFO and asked him when the last time was that he took his meds. *Id.* The TFO stated that he had been prescribed drugs ''a while ago,'' and Gomez acknowledged that ''April was the last script.'' *Id.* The TFO then added that ''that was the last time * * * that I actually saw a doctor, but I take them here and there, from * * * wherever.'' *Id.* Gomez asked if the TFO had taken drugs ''this morning?'' *Id.* The TFO replied ''[n]o, no, no'' and added that it was ''a week or two.'' *Id.* Gomez then asked how long the TFO had been on pain meds, with the latter replying that he had started about a year and a half to two years ago, but that it was ''kind of sporadic.'' *Id.* at 6. Gomez then asked the TFO what clinic he had gone to; the TFO stated that the clinic was in south Florida and named ''Real Care'' but that he thought the clinic had gone out of business. *Id.*

Gomez gave the TFO a cup for a urinalysis and the TFO provided a sample. *Id.* at 6–7. Gomez then tested the TFO's sample, which ''came back all negative.'' Tr. 179; GX 14, at 8. Gomez, however, prepared a Drug Urinalysis Test form on which he circled that the TFO was ''positive'' for ''Oxy.'' RX 1, at 40. In his testimony, Gomez insisted that the TFO tested positive for oxycodone. Tr. 944–45, 959. However, I find (as did the ALJ) that Gomez falsified this form. Thereafter, Gomez escorted the TFO to an exam room.

The TFO testified that Gomez did not ask him about the source of his pain, or whether he had any problems with anxiety or sleeplessness. *Id.* at 181–82. Gomez testified at the hearing that if the TFO ''was a new patient,'' Respondent (and not himself) would ask the patient if he had pain or anxiety. *Id.* at 959–60. Moreover, Gomez testified that one of his responsibilities was to review the information that the patients provided on their medical questionnaires and enter the information into the clinic's Electronic Medical Record System (EMR). *Id.* at 932, 952.

Gomez testified that after the information was entered into the EMR, ''it was shredded.'' *Id.* at 940, 952.[4] Gomez also testified that in doing the ''review of systems,'' his role was to review the patient's ''past medical history, social history, which was on the initial paperwork, [and] any family history, if they had any family history.'' *Id.* at 942.

Respondent entered the exam room and introduced himself. GX 14, at 9. Respondent noted that the TFO had been in pain management in south Florida but that ''they went out of business.'' *Id.* The TFO said ''yes'' and Respondent surmised that his previous clinic had been ''shut down.'' *Id.* The TFO replied that he did not ''know what happened to them.'' *Id.* at 10.

Respondent reviewed the TFO's MRI, noting that it showed a ''mild disc bulge'' at ''two levels, without significant central canal or neuro.''[5] *Id.* Respondent then told the TFO that ''[t]he reason why they're out of business is cause they've been prescribing inappropriately. Okay?'' *Id.* The TFO replied, ''uh-hum,'' and Respondent stated: ''I can't give you near the pills that you were getting. Not even remotely close. You, I, I haven't even done a physical exam * * * Just based on your MRI here, its * * * I can't do it.'' *Id.*

The TFO replied that ''that's just what they prescribed, that's not what I actually took,'' and after Respondent said ''okay,'' the TFO added: ''So I didn't * * * I didn't, I can't * * * tell, you're the doctors, so I don't know * * * So that's just what they gave.'' *Id.* After acknowledging the TFO's statement, Respondent stated ''you know you got two bulging discs, with, and it doesn't talk about pushing on any

[3] The profile also showed that Payne had filled prescriptions for the same three drugs and strengths on a monthly basis between December 10, 2010 and April 10, 2011.

[4] When asked by Respondent's counsel whether there was ''a possible explanation'' for the various entries that the undercovers had no problems with anxiety and denied problems with mood disturbance, Gomez testified that the EMR system had various default entries, such that ''if something is not input or checked, it'll put whatever is on default.'' Tr. 1004. However, Gomez could not further identify what the default entries were for various sections of the medical record, *id.* at 1004–5, and did not know if there was a default entry for anxiety. *Id.* at 1008. In any event, if any of the undercovers had represented to Gomez or Respondent that he had anxiety, one must wonder why an entry documenting this would not have been made in the chart.

[5] The TFO's MRI stated that he had ''mild diffuse bulge of [the] L4–5 and L5–S1 discs, without any significant central canal or neural foraminal narrowing'' and that ''no other significant abnormality is detected in this study.'' RX 1, at 34.

nerve roots or anything like that, I mean, this is as close to a normal MRI as you can get without it being actually normal. You see what I'm saying?'' *Id.* The TFO replied ''uh-hum,'' and Respondent added: ''I mean the most I can do for you would * * * And I'm telling you this in case you don't want to come here. Okay? Cause I hate for you to spend all of your money, coming here and not get what you need.'' *Id.*

The TFO said ''alright'' and Respondent added: ''Okay? Could, and * * * what you should get, and what you need, often sometimes is two different things cause if you've been on a certain number of pills, for a long time, if you don't get those number of pills, you're going to be sick.'' *Id.* at 11. After the TFO said that he ''got that,'' Respondent stated: ''you know what I mean? So I mean, I'm at the point * * * I mean just by looking at this without even doing the physical exam yet. * * * I mean I'm looking at maybe a hundred and fifty of them.'' *Id.* The TFO replied: ''And honestly that's about where I was.'' *Id.* Respondent proceeded to conduct his physical exam which took all of one minute and thirty-nine seconds. GX 13.

During the physical exam, Respondent asked the TFO various questions regarding the location of his purported pain. GX 14, at 11. For example, Respondent asked the TFO if most of his pain was in his lower back. *Id.* The TFO replied: ''uh-hum.'' *Id.* Next, Respondent asked: ''How about out to the sides, here?'' *Id.* at 12. The TFO again replied: ''uh-hum.'' *Id.* Respondent then asked: Down on this side?'' *Id.* The TFO replied: Yeah. *Id.* Respondent then asked ''anything like that?'' *Id.* The TFO answered: ''a little bit.'' *Id.* Respondent then asked: ''[a]nything on this side?'' *Id.* The TFO replied, ''Uh-hum * * * probably the same as the other side, I guess, yeah.'' *Id.*

Following an apparent test of the TFO's reflexes, Respondent asked him to stick his legs out and whether doing so caused pain; the TFO stated ''not right now.'' *Id.* Respondent then asked the TFO to give him ''a little twist'' and whether this caused pain; the TFO said ''not at the moment.'' *Id.* Respondent said ''that's fine,'' and asked the TFO to give him ''another little twist''; the TFO again denied that the movement caused any pain. *Id.* Respondent then noted that he was done with the physical exam. *Id.*

Following a discussion of the EMR system, Respondent asked the TFO if he had been getting Xanax. *Id.* at 13. The TFO answered ''yes,'' and when Respondent asked ''for anxiety?'' the TFO said ''for sleep.'' *Id.* Respondent noted the TFO's answer and explained that he did not prescribe the two milligram dosage units of Xanax because of its ''a high street value'' and only prescribed the one milligram strength. *Id.* While Respondent told the TFO that he should not double up on the Xanax, he did not engage the TFO in any further discussion regarding his sleep problems. *Id.*

After Respondent and the TFO discussed how the latter made his living, Respondent gave the TFO his ''new patient talk,'' which included telling him to take his medication as prescribed, and that there is ''no such thing in this clinic * * * of running out of medication. *Id.* at 14–16. Respondent further explained that ''one of the reasons why we don't run out here'' is because ''I don't want you taking medication, the way you want to take them, because that will put you in jeopardy of overdose.'' *Id.* at 16. Respondent added that ''I don't want you to do that, that, I don't want you to, risk my license by doing that, and on top of that I want to keep you in the clinic.'' *Id.* Respondent explained that the TFO would be subject to random urine testing and that it was a ''no tolerance clinic.'' *Id.* Respondent also told the TFO not give to give his ''medication to anybody else,'' or ''take any from anybody else,'' and that if his medication was stolen, he needed a police report. *Id.* Respondent then asked the TFO if he had any questions; the TFO said no. *Id.* at 16–17.

Respondent added: ''We're pretty strict here * * * but we do have fun also,'' a point which he reiterated. *Id.* at 17 (''We have fun, we, you know, we're a pretty fun office, uh, but we do, we uh strictly do things by the book.''). Respondent then showed the TFO the window where he would get his prescriptions and said that he would see him ''in a month.'' *Id.* at 17–18. The visit then concluded. *Id.* at 18.

The evidence shows that Respondent wrote the TFO a prescription for 150 tablets of oxycodone 30mg, and a prescription for 90 tablets of Xanax 1mg. GX 15, at 1. In the medical record for the visit, Respondent documented the TFO's pain level as a ''3'' and that it was of mild severity.[6] RX 1, at 26. Moreover, in the physical exam portion of the record, Respondent documented having palpated the TFO's cervical spine as well as paravertebral muscle groups, yet the video recording of the visit clearly shows that this was never done. RX 1, at 28; GX 13. In addition, Respondent documented findings based on range of motion tests (rotation, bending, flexion, and extension) for all three portions of the TFO Payne's spine (cervical, thoracic and lumbar). RX 1, at 28. Here again, the video shows that while Respondent had the TFO twist his torso and do a straight leg raise of both legs, he did not test the TFO's range of motion on bending, extension or flexion. GX 13. Nor did he do any tests of the TFO's range of motion in his cervical spine. *Id.*

In the TFO's medical record, Respondent further recorded a diagnosis of ''generalized anxiety disorder,'' which he deemed to be ''active'' and ''chronic,'' notwithstanding that under the ''psychiatric'' section of the ''review of systems'' section, Respondent noted that ''Patient denied problems with mood disturbance. No problems with anxiety.'' RX 1, at 27–28.

Likewise, under the ''psychiatric'' section of the physical examination, Respondent noted: ''Oriented with normal memory. Mental status, judgment and affect are grossly intact and normal for age.'' *Id.* at 20.[7] *See also* Tr. 190–92 (TFO's testimony that Respondent did not discuss whether he had generalized anxiety disorder and whether he saw another physician for treatment of anxiety'').

In addition, in the ''Instructions'' section of the medical record, Respondent wrote the following:

> Patient appears to understand risks. Patient instructed to RTC/call clinic if patient experiences any non-urgent side effect such as constipation, nausea, itching, rash & etc. Return to clinic as scheduled. Patient instructed to go to emergency room immediately if the patient has any serious symptoms such as SOB, severe allergic reactions, LOC, Syncope, new neurologic deficits, bowel/bladder incontinence, excessive drowsiness and vomiting.

RX 1, at 29. At no point during this visit, however, did Respondent discuss with the TFO any of these instructions. *See* GX 13–14. Most significantly, at no time did Respondent ask the TFO what caused his pain or injury and how he gotten by when his last prescriptions were issued more than three months earlier, or why he had tested positive for oxycodone given when he had purportedly last filled prescriptions for the drug.

[6] Mr. Gomez testified that the pain levels recorded in the EMR were with medications. Tr. 964–65. However, the TFO testified that he wrote the same pain number for his pain both with and without medications. *Id.* at 176. Notably, there is no evidence that Respondent addressed this with the TFO.

[7] Respondent also diagnosed the TFO as having lumbar disc displacement, lumbar lumbosacral disc degeneration, and backache unspecified, which was chronic and active. RX 1, at 28.

On August 25, the TFO, again wearing a recording device, returned to the Brandon clinic. Tr. 192. Upon his arrival, the TFO checked in with the receptionist and paid the fee for the visit. RX 4, at 21–22. Before even seeing Respondent, the receptionist gave the TFO an appointment for a follow-up visit. *Id.* at 22.

After about twenty-five minutes, Eddie Gomez called the TFO back to the triage room and took his weight and blood pressure. GX 17, at 2–3. Gomez then told the TFO to return to the waiting room and that he would be called next. *Id.* at 3. After a short wait, Gomez told the TFO to go to an exam room. RX 4, at 22–23.

Respondent entered the exam room and asked the TFO ''what's going on''; the TFO replied: ''How you doing?'' GX 17, at 4. Respondent answered, ''All right, what's up? How did your month go?'' *Id.* After the TFO said that ''everything is good,'' Respondent asked: ''Medication treatin[g] your pain well?'' *Id.* The TFO answered ''Yeah,'' and added that he had ''no problems or issues.'' *Id.* Respondent asked: ''No questions?'' The TFO replied: No, mm-mm. Everything is good.'' *Id.*

Respondent then stated that he would ''be feeling [the TFO's] lower back and get you going''; Respondent then asked: ''[a]ny pain down in this areas here, how about here?'' *Id.* The TFO replied: ''Mm-mm.'' Respondent then asked: ''Anything out on the sides at all?'' The TFO answered: ''Nothing that was, uh, * * * any different than the last.'' *Id.* Respondent asked: ''Nothing was—nothing like this, right?'' *Id.* The TFO replied: ''Mm-mm.'' *Id.* Respondent then said ''all right. Questions? Nope, you are all set.'' *Id.* The TFO then thanked Respondent. *Id.* At the conclusion of the visit, Respondent issued the TFO prescriptions for another 150 oxycodone 30mg and 90 Xanax 1mg. GX 18.

The entire interaction between the TFO and Respondent lasted less than two minutes. GX 17. As the TFO wrote in his report for the visit:

> [Respondent] asked the UC ''are the meds treating your pain well?'' to which the UC replied ''yes, no issues.'' [Respondent] asked if the UC had any questions, and the UC replied that he did not. [Respondent] then got up and walked toward the door. Before exiting, [Respondent] stated ''let me feel your lowerback and get you going.'' The UC scooted forward in his chair and [Respondent] placed his right hand on the UC's lower back. [Respondent] asked, ''pain down here in this area?'' to which the UC stated ''uh-huh.'' [Respondent] then moved his hand to the right and left of the UC's spine and asked ''anything over here?'' to which the UC stated ''nothing is different than last time.'' [Respondent] removed his hand from the UC's lower back and stood straight up, asked if there are any more questions, to which the UC stated ''no,'' and then [Respondent] told the UC he was all set.

RX 4, at 23.

Here again, evidence shows that Respondent made findings in the medical record notwithstanding that he never performed various tests. For example, the medical record for the visits noted that there was ''no change'' in the pain's ''status,'' noted that it radiated into his ''upper back,'' that the ''timing'' of the pain was ''constantly, during the day and EVENING,'' and that its ''quality'' was ''radiating and dull.'' The record further listed ''sleep and physical activity'' as ''affected daily activities.'' RX 1, at 30.

Respondent also documented that he had done a neurologic examination, in which he found that the TFO had ''[n]ormal and symmetrical deep tendon reflexes with no pathological reflexes.'' RX 1, at 31. Likewise, Respondent made findings that he had palpated the TFO's cervical spine and the surrounding areas, as well as that he had had the TFO perform various range of motion tests of various portions of his spine. *Id.* at 31–32. However, as the TFO's report makes clear, Respondent did not do anything other than palpate his lower back area. RX 4, at 22–23.

The Undercover Visits of Anthony Thompson

On July 27, 2011, a Special Agent, who used the name of Anthony Thompson, attempted to see a doctor at the QCMG clinic Bradenton. Tr. 240. While the Agent was turned away because he was not thirty years of age and his MRI could not be verified, a staff member advised him to go to the Brandon clinic because it was not ''as strict as the Bradenton clinic.'' *Id.* at 240–41.

The next day, the Agent, who was wearing a recording device, went to the Brandon clinic and presented an MRI[8] and a prescription profile. *Id.* at 240–41. The Agent filled out various forms covering his personal information, past history and family history of illnesses, and a questionnaire regarding his pain levels. *Id.* at 243. The Agent did not recall the actual numbers he had written on the pain questionnaire, but stated that he would have written a five or below. *Id.* The Agent did not recall whether any of the questionnaires asked if he had anxiety. *Id.* at 244. According to the medical record, the Agent's pain was of ''mild'' severity and was ''4 on pain scale,'' and that it radiated into the ''neck and upper back.'' RX 1, at 15. In addition, while the medical record indicates that the Agent complained that his pain occurred ''frequently and nocturnally'' and was aggravated by sleeping, walking and standing for a long period of time,'' the Agent denied that he told this to either Mr. Gomez or Respondent. Tr. 282–83; RX 1, at 15.

Mr. Gomez called the Agent and identified himself as the doctor's assistant. GX 7, at 3. Mr. Gomez proceeded to review the rules of the pain contract, told the Agent that the clinic reported doctor shoppers, asked if he was taking ''any illegal substances,'' and what pain management clinic he was going to. *Id.* The Agent replied that he had seen a Dr. Barton, who had since died. *Id.* Mr. Gomez then asked the Agent about Dr. Burns, a physician who was listed as the Agent's physician on the MRI. *Id.,* RX 1, at 23. The Agent replied that Burns was ''somebody that the MRI place referred me to,'' noting that he ''had to get a new MRI.'' GX 7, at 3. Gomez then asked the Agent when he had last gotten his pills and when he had last taken them; the Agent replied that he thought he had filled his prescriptions ''in the middle of June.'' *Id.* Gomez then said: ''So you shouldn't have anything in your system,'' and the Agent answered: ''Right, I don't have anything; I've been out for a while.'' *Id.* at 3–4. Gomez then said he was going to do a drug screen on the Agent. *Id.* at 4.

After taking the Agent's weight and blood pressure, Gomez asked him about his employment status, education level, marital status, and whether he had kids; whether he smoked, used alcohol or caffeine; whether he had any blood transfusions; whether he had body piercings or tattoos; whether he exercised; and whether he had any significant family history. *Id.* at 5–6. Gomez then tested the Agent's urine sample. *Id.*

According to the Drug Urinalysis Test form, the Agent tested positive for benzodiazepines and oxycodone. RX 1, at 24. At the hearing, however, the Agent testified that he did not take either benzodiazepines or oxycodone; that in his position, he was subject to drug testing; and that he could not take these medications unless they were prescribed to him. Tr. 301. While Gomez insisted in his testimony that the Agent had tested positive for these

[8] The MRI findings included: A ''[l]eft posterolateral disc herniation at L5–S1 with moderate ventral effacement of thecal sac and moderate effacement of the left S1 nerve root''; a ''[c]entral and left posterolateral disc herniation at L4–5 with moderate secondary central spinal stenosis''; ''[s]mall central disc herniation'' at both L2–3 and L1–2; and a ''[d]iffuse central disc bulging at L3–4.'' RX 1, at 23. The MRI included a notation that it was verified on ''7/28/11.'' *Id.*

drugs, and noted that the form was signed, Tr. 943–44, 962–63; the ALJ noted that the Agent did not recall signing the form and that both the recording and the Agent's report concerning the visit show that Gomez had confirmed that the test was negative. ALJ at 71. Accordingly, the ALJ did not find Gomez's testimony credible and I adopt this finding.

Following a discussion of the clinic's recordkeeping system, Gomez took the Agent to an exam room. GX 7, at 7. Respondent eventually entered the room, introduced himself, and proceeded to look at the Agent's MRI. *Id.* at 7–8. Respondent then asked the Agent if most of his pain was in his lower back. *Id.* at 8. The Agent replied: ''Um kinda up towards the mid back too.'' *Id.* Respondent replied ok, and asked how the Agent ''hurt [his] back.'' *Id.* The Agent answered that ''[i]t's just something that, it's over time.'' *Id.* Respondent asked if it had ''gotten worse?'' and the Agent said ''Ah huh.'' *Id.*

Respondent said ''ok,'' and proceeded to conduct a physical exam which lasted less than two minutes. *Id.* During the exam, Respondent placed a stethoscope on the Agent's back and stomach and asked him to breath, tested the reflexes in the Agent's knees, and had him sit on the edge of an exam table and extend his legs out straight and asked if this caused pain in his back; the Agent replied: ''It's ok.'' *Id.* Respondent then placed his hands on the Agent's shoulder, and pressing downward, asked the Agent to turn his torso to each side and whether this was painful. *Id;* RX 4, at 4–5. The Agent replied ''mmm,'' to which Respondent said ''mmm? You don't have to; it doesn't mean anything it just helps me assess.'' GX 7, at 9. The Agent said ''ok,'' and the physical exam ended. *Id.*

The Agent then asked Respondent how long he had been at the clinic; Respondent said that he had been there since February and that when he started there, the doctors who had come before him ''would basically give anything to anybody.'' *Id.* Respondent also stated that the clinic had had an employee, who ''was doing shady things'' but had since been fired and reported to DEA. *Id.* Respondent further maintained that he had ''clean[ed] the practice up a bit'' by ''dropping people down to reasonable levels on their medications, that * * * what the state and medical personnel would deem what is appropriate.'' *Id.* He also stated that ''it seemed like everyone was on'' the ''trifecta'' of Oxycodone, Xanax, and Soma, which was ''just asking for trouble'' in the form of overdose deaths. *Id.* Respondent noted that Soma metabolizes into a substance, which reacts and magnifies the effect of oxycodone and Xanax, which ''are respiratory suppressants to begin with.'' *Id.* Respondent then stated that ''we want to comply with all of the laws, we want to do things appropriately, and not piss the DEA or any law enforcement agency off.'' *Id.* Respondent added that ''we're naïve to think they haven't sent people through here as fake patients'' but that he was fine with this because he doesn't ''do anything I'm not supposed to do.'' *Id.* at 9–10.

Respondent then told the Agent that his physical exam did not ''one hundred percent correlate with [the] finding on your MRI,'' and that his ''physical exam [wa]s a lot better than your MRI,'' but that ''there is some stuff on your MRI that would justify you having pain.'' *Id.* at 10. Respondent then asked ''why were they giving you 30's and 15's?'' *Id.* The Agent replied, ''That's what he had prescribed.'' *Id.*

Respondent replied that ''that's very odd'' because ''the 30's and 15's are * * * both break through medications'' and ''do the same thing.'' *Id.* After the Agent interrupted, asking ''splitting them up like that?,'' Respondent stated that this was ''a common way for doctors to hide more medication.'' *Id.* Respondent then explained that ''I wouldn't say hide'' but that ''the unofficial max is like 240, 210, 240 on 30's,'' and that doctors would write ''a prescription for 240 then they'll throw in a 120 15 * * * instead of writing 300 or so'' in the event ''they get investigated.'' *Id.* Continuing, Respondent added that he would ''rather not do both types of medications,'' meaning the 30s and the 15's. *Id.*

Respondent then told the Agent that based on the latter's MRI and physical exam, he would give him 180 tablets of oxycodone 30mg but not the 15s. *Id.* The Agent replied ''ok,'' and Respondent added: ''Just to give you essentially the same amount of milligrams all along, * * * what I'd like to do is taper you down as far as we can go, where that you're still comfortable.'' *Id.* at 11. Respondent then noted that the Agent was ''fairly young, your [sic] 29'' and that most people under the age of 30 don't need to be on pain management.'' *Id.*

Next, Respondent said: ''I take it you have some anxiety as well is that what's going on with you?'' *Id.* After the Agent replied, ''Yeah, that's the Zanny's help out,'' Respondent said: ''Ok, first of all let me tell you we don't call them Zanny's or bars or any of the street terms in here, ok, we call them Xanax or alprazolam, whichever one you want to call them.'' *Id.* Respondent then explained that ''I don't typically give the two milligrams out[,] I give the ones * * * the twos have too much of a street value.'' *Id.*

Respondent then observed that ''on July 1st[,] the law states now that if the patient has a psychiatric um problem along with being on pain management the law states we have refer you to psychiatry.'' *Id.* After the Agent said ''ok,'' Respondent said ''that doesn't necessarily mean you have to follow up with that, that just means I have to tell you to go, which is I am telling you to go.'' *Id.*

Respondent did not, however, provide the Agent with the name of any psychiatrist to see. Tr. 255. Moreover, in the psychiatric section of the ''review of systems,'' Respondent noted: ''Patient denies problems with mood disturbance. No problems with anxiety.'' RX 1, at 16. Likewise, in the psychiatric portion of the physical examination, Respondent documented: ''Oriented with normal memory. Mental status, judgment and affect are grossly intact and normal for age.'' *Id.* at 17. Respondent nonetheless recorded a diagnosis of ''Generalized Anxiety Disorder'' which was ''active'' and ''chronic.'' *Id.*

Respondent then gave the Agent his ''new patient speech'' and the visit ended. *Id.* at 11–12. According to the medical record, Respondent diagnosed the Agent as having lumbar disc displacement, lumbar lumbosacral disc degeneration, and backache unspecified, all of which were ''active'' and ''chronic.'' RX 1, at 17. At the conclusion of the visit, Respondent issued the Agent prescriptions for 180 tablets of oxycodone 30mg and 60 tablets of Xanax 1mg. GX 8, at 1.

On August 25, 2011, the Agent returned to the clinic, and again wore a recording device. Tr. 256. The Agent met the receptionist, paid the fee for the visit and sat down in the waiting room. RX 4, at 10–11. After approximately thirty minutes, the Agent was called by Mr. Gomez for triage, who took his weight and blood pressure. GX 10, at 6; RX 4, at 11. Mr. Gomez did not, however, ask the Agent any questions regarding his health. GX 10, at 6; RX 4, at 11. The Agent then returned to the waiting room. RX 4, at 11. Moreover, the Agent testified that he did not recall filling out any forms at this visit. Tr. 295.

Shortly thereafter, Mr. Gomez called the Agent and took him to an exam room. Respondent entered the exam room, and after exchanging pleasantries, asked the Agent if the ''medication is working ok?'' GX 10, at 7. The Agent answered: ''Yep, great.'' *Id.* Respondent asked: ''Questions for me at all?'' *Id.* The Agent replied, ''No, I'm good.'' *Id.* Respondent then asked: ''The medications are controlling your pain well?'' *Id.* The Agent replied: ''Yeah, everything's great.'' *Id.*

Respondent then had the Agent stand up and explained that ''[t]he state makes me do a physical exam each time.'' *Id.* Respondent placed his hand on the Agent's mid to lower back and asked: ''Most of the pain in here at all? Is this where it is or is it down further.'' *Id.;* RX 4, at 12. The Agent stated: ''Right around that whole area.'' GX 10, at 7. Respondent replied: ''Right around this whole area? All right.'' *Id.* Respondent ''then directed the [Agent] out of the'' exam room and the two walked up to the receptionist's counter, where Respondent obtained two printed prescriptions, which he signed and gave to the UC. RX 4, at 12. The prescriptions were for 180 tablets of oxycodone 30mg and 60 tablets of Xanax 1mg. GX 11.

The medical record for this visit indicates that the Agent presented with low back pain, with a severity which was ''mild'' and a ''4 on the pain scale,'' that there was ''no change'' in the pain's status, and that the pain radiated into the Agent's ''neck and upper back.'' RX 1, at 19. In the review of systems section, the record again states: ''Patient denied problems with mood disturbance. No problems with anxiety.'' *Id.* And, as before, in the psychiatric section of physical examination portion, the record states: ''Oriented with normal memory. Mental status, judgment and affect are grossly intact and normal for age.'' *Id.*

The medical record further documents various tests as having been performed which clearly were not. For example, under the neurologic findings for the physical exam, the record states ''normal and symmetrical deep tendon reflexes with no reflexes.'' *Id.* Yet there is no evidence that Respondent tested the Agent's reflexes.

Likewise, with respect to the Agent's lumbar spine, the record states: ''Full active ROM with rotation, Full active ROM with bending. Full active ROM with flexion and Full active ROM with extension.'' RX 1, at 21. And with respect to the Agent's thoracic spine, the record states: ''Full active ROM with extension. Full active ROM with flexion. Full active ROM with bending. Full active ROM with Rotation.'' *Id.* at 21. Here again, the evidence shows that these tests were not performed.

The Undercover Visit of Eric McMillen

On August 25, 2011, another Special Agent, using the name of Eric McMillen, saw Respondent at the Brandon Clinic. However, on July 21, 2011, the Agent had seen a Dr. Mosley at the QCMG Bradenton clinic. GX 20; Tr. 348–55. The Agent acknowledged that he had provided a pharmacy profile and MRI,[9] *id.* at 385 & 353; filled out a medical questionnaire at this clinic, which asked that he rate his pain, *id.* at 349–50; that a physician's assistant had asked him some questions about the nature of his pain, as well as why he was in Bradenton when his driver's license indicated that he was from Fort Lauderdale, *id.* at 352; that he had complained of pain in his ''lower back, specifically the lower back right side,'' *id.* at 355; and that it was possible that he had noted on the paperwork that when the pain was at its worst, he had ''some trouble sleeping.'' *Id.* at 356. The Agent further testified that he ''probably'' saw the doctor at the Bradenton clinic for ''at least thirty minutes,'' and on cross-examination agreed that Mosley's exam was ''pretty thorough.'' *Id.* at 413. At the conclusion of the visit, the Agent obtained prescriptions from Dr. Mosley for 180 tablets of oxycodone 30mg and 30 tablets of Xanax 2mg. *Id.* at 356–58; GX 20.

The Agent's medical record also includes a chart for his initial visit with Dr. Mosley. RX 1, at 60–61. While the chart lists Dr. Mosley's prescriptions to include ''Xanax 2 mg qhs PRN Anxiety #30,'' notably the chart contains no findings pertinent to the Agent's having anxiety (or sleeping problems) and Mosley did not list anxiety as one of his diagnoses in the diagnosis/assessment section of the chart. *See id.* Indeed, on the first page of the chart, under ''Psych Hx,'' the block for anxiety (as well as other mental health conditions) is blank, and in the portion of the form for noting whether the patient had a family history of various conditions including ''mental health,'' Mosley wrote ''none.'' *Id.* at 61.

On August 25, 2011, the Agent, who wore a recording device, went to the Brandon clinic where he saw Respondent. Tr. 358–59, 363. While the Bradenton clinic was supposed to fax over the Agent's medical record, it had not done so; the Agent was subsequently required to fill out a medical questionnaire which asked about the location of the pain, how it had occurred, and what medications he was on. *Id.* at 365. However, the forms did not include a pain chart with a numeric scale. *Id.* at 366.

The Agent was eventually called by Mr. Gomez, who asked how tall he was and took his weight and blood pressure. *Id.* at 366; GX 22, at 3. Mr. Gomez then took him to an exam room. GX 22, at 4.

After a short hiatus, Respondent entered the room, introduced himself, reviewed the Agent's paperwork, and began making entries on a touch screen computer monitor. RX4, at 44. Respondent asked if ''[m]ost of the pain [wa]s in his lower back'' and ''[h]ow it all happened?'' GX 22, at 7. The Agent replied that he ''use [sic] to work in a warehouse lifting boxes and moving stuff'' but didn't ''remember the exact day.'' *Id.* Respondent asked: ''Wear and tear over time?'' *Id.* The Agent replied: ''Yeah.'' *Id.*

Following a discussion of the EMR system, Respondent asked the Agent to lean forward, placed his stethoscope on the Agent's back and asked him to take a deep breath followed by a normal breath, and asked if the pain was ''down here in your lower back?'' *Id.* at 8. The Agent replied, ''Yeah, right around there.'' *Id.* Respondent then said he was going to press various places and instructed the Agent to tell him if he had pain; according to the Agent, Respondent proceeded to press various parts on the Agent's lower back. RX 4, at 44; GX 22, at 9. The Agent stated that he had ''a little bit'' on the left and that ''in the middle it's a little worse.'' GX 22, at 9. Respondent then asked: ''[h]ow about over here?'' *Id.* The Agent replied: ''Yeah,'' Respondent noted that ''[i]t's significantly tighter right there''; the Agent stated: ''Yeah, on the right side.'' *Id.*

Respondent then asked: ''How about over here?'' *Id.* The Agent replied: ''Yeah a little more * * * right around there.'' *Id.* Respondent asked: ''How about down in this area?'' *Id.* The Agent answered ''No.'' *Id.*

Respondent stated ''okay'' and that he had ''just left [the Agent] on everything that you were on down there.'' *Id.* The Agent stated, ''Okay, that's fine.'' *Id.* Respondent added: ''Okay, I usually don't try to mess with it * * *. you know, try to play with it * * * unless I'm trying to increase it or whatever.'' *Id.* The Agent replied: ''No problem.'' *Id.*

[9] The pharmacy profile showed that McMillen had filled prescriptions for 180 tablets of oxycodone 30mg and 60 tablets of Xanax 2mg issued by a Dr. Malcom Foster on March 14, April 12, May 11, and June 10, 2011. RX 1, at 50–51.

The MRI report noted a ''[s]mall posterocentral protrusion of L5–S1 disc, with annular tear, cause mild narrowing of the central canal,'' and a ''[m]ild diffuse bulge of L4–5 disc, with left extraforaminal annular tear, without any significant central canal or neural foraminal narrowing.'' GX 19. The MRI includes a notation that it was verified on the date of the Agent's Bradenton visit. RX 1, at 46.

Respondent then stated: ''Alright we have to have a plan at some point, okay? Cause you're not going to be able to be on these meds for the rest of your life. You know what I mean?'' *Id.* at 10. The Agent stated: ''Okay, yeah sure * * * I hope * * * I hope not,'' and Respondent told the Agent ''[y]ou're all set.'' *Id.* Respondent then escorted the Agent to the receptionist's desk and the receptionist gave the Agent prescriptions for 180 tablets of oxycodone 30mg and 30 tablets of Xanax 2mg, each of which bore the signature of Respondent. RX 4, at 45; GX 23.

The oxycodone prescription listed diagnoses of ''[l]umbar lumbosacral disc degeneration'' and ''lumbar disc displacement.'' GX 23. The Xanax prescription listed a diagnosis of ''GENERALIZED ANXIETY DISORDER.'' *Id.* These diagnoses are also documented in the medical record as ''chronic'' and ''active.'' RX 1, at 43.

However, in the psychiatric portion of the review of systems section of the medical record for the visit, Respondent wrote: ''Patient denies problems with mood disturbance. No problems with anxiety.'' RX 4, at 41. Likewise, in the psychiatric portion of the physical examination section, Respondent noted: ''Oriented with normal memory. Mental status, judgment and affect are grossly intact and normal for age.'' *Id.* at 42.[10] Notably, at no point during the Agent's visit with Respondent, did Respondent (or Gomez) ask the Agent whether he had anxiety or suffered from sleeplessness.[11] GX 22; Tr. 372, 377–78.

[10] The ALJ noted that the medical record for the August 25 visit lists ''sleep, work, and physical activity'' as daily activities affected by the Agent's back pain, and that the Agent testified that he filled out a medical questionnaire but that ''[t]he record is unclear on exactly what information [the Agent] provided in answering the medical questionnaires on August 25, 2011 on the issue of anxiety, sleep disturbance, or pain.'' ALJ at 82. However, as noted above, the evidence showed that the questionnaires were shredded by Respondent's staff. And in any event, one would expect that a doctor would review with the patient his answers to questions pertinent to various conditions before prescribing a controlled substance to treat a condition.

[11] During cross-examination, Respondent's counsel engaged in the following colloquy with the Agent:

Respondent's counsel: ''And you presented to them [i.e., the Bradenton clinic], a patient profile that showed that you had a history of having pain controlled by narcotic pain medication, correct?

Agent: ''Yes sir.''

Respondent's counsel: ''And alprazolam to help you with the anxiety or sleeping, right?''

Agent: ''Yes sir.''

Tr. 397. Notwithstanding the Agent's answers, a patient pharmacy profile does not establish that the drugs were prescribed for any legitimate medical condition.

The Undercover Visit of Michael Corleone

On August 25, 2011, a TFO, using the name Michael Corleone, also visited Respondent at the Brandon clinic. Tr. 447, 464. The TFO had made two previous visits to the QCMG clinic in Bradenton (June 15 and July 20, 2011), and saw Dr. Mosley on each occasion. GX 25; RX 4, at 25 & 30.

At his first visit (to Bradenton), the TFO provided his driver's license, an MRI, and a prescription profile to the receptionist and was given several forms to complete including a patient questionnaire. RX 4, at 30–31. On the patient questionnaire, the TFO noted that he had ''pain in the lower back and right shoulder,'' that his ''[c]urrent pain level was at a two'' and that his ''average maximum pain level was at a five'' on a one to ten scale, that the pain was ''a sharp ache,'' which ''occurs on a weekly basis,'' that it affected his ''sleep and physical activity,'' and that ''helpful treatments * * * included heat/ice and physical therapy.'' *Id.* at 31. The TFO further noted that the receptionist had verified his MRI. *Id.* at 31–32.

Shortly after paying the $300 office visit fee, the TFO was summoned by a nurse, who questioned him about his driver's license which listed his address as being in Orlando. *Id.* The nurse further told the TFO about the penalties for trafficking and doctor shopping, and that the clinic conducted urine drug tests, and that marijuana remains in the body for thirty days but that the clinic gave patients the option to reschedule their appointment if they tested positive. *Id.* at 31–32. Subsequently, the TFO was required to provide a urine sample, and after doing so, was told to return to the waiting room. *Id.* at 32.

Later, the nurse called the TFO to another room where he proceeded to take the TFO's vital signs, asked various personal questions, and then asked about the location of his pain, his previous clinic and his current medications. *Id.* Upon completion of these tasks, the nurse escorted the TFO to Dr. Mosley's office. *Id.*

Following a discussion of various non-medical subjects, Mosley asked the TFO where his pain was, with the TFO responding that it was in his lower back and right shoulder and that the pain was caused by playing softball. *Id.* at 32–33. Mosley proceeded to perform a physical exam, during which Mosley stated that the TFO's back felt tight. *Id.* at 33. However, while Mosley had the TFO perform several movements, the TFO did not express any discomfort with the exception of one exercise when he said his back was sore. *Id.* at 33–34. Mosley then had the TFO sit on the exam table and placed his stethoscope on various portions of the TFO's back and chest and told the TFO to breath. *Id.* at 34. Thereafter, Mosley tapped the TFO's knees and then used a light to look into the TFO's eyes, mouth and nose. *Id.* According to the TFO, during this time, he was turning his upper body, with no discomfort, while he conversed with Mosley. *Id.* However, during direct examination, the TFO testified that he believed that he told Dr. Mosley that he ''had some trouble sleeping.'' Tr. 454. He also testified that Mosley's exam ''was fairly thorough.'' *Id.* at 455.

Mosley returned to his desk and began completing paperwork. RX 4, at 34. Mosley then advised that he would not write the TFO prescriptions for 240 oxycodone and 90 alprazolam, which were the amounts the TFO had reported that he had previously received. *Id.* Mosley completed the paperwork, gave the file to the TFO, and told him to take it to the front desk, which the TFO did. *Id.* Upon arriving at the front desk, the receptionist opened the file and gave the TFO two prescriptions which were signed by Mosley: one for 199 tablets of oxycodone 30mg, with the notation ''PRN pain,'' and one for 60 tablets of alprazolam 2mg ''PRN anxiety.'' *Id.; see also* GX 25.

However, in the medical record for the TFO's initial visit, Dr. Mosley made no findings in the section for psychiatric history and did not check the line for anxiety. RX 1, at 5. In the family history section, which included a prompt for ''mental health,'' Mosley wrote ''none.'' *Id.* Moreover, in the diagnosis section of the chart, Mosley wrote: ''mild diffuse bulge + small ® paracentral tear L5–S1 disc,'' and ''diffuse bulge L4–5 disc.''[12] Id. at 8. No diagnosis of anxiety was listed.

On July 20, 2011, the TFO returned to the Bradenton clinic and signed in. RX 4, at 25. After a short wait, the TFO was called by the receptionist, who collected the payment for the visit and gave him an appointment card for his next visit. RX 4, at 26. The receptionist also gave the TFO forms to complete, including one that asked about his current medications and pain level. *Id.* The TFO completed the forms and returned them to the receptionist. *Id.*

Thereafter, the TFO was called to a room by a nurse, who took his weight

[12] The MRI presented by the TFO had listed as its ''impression,'' a ''[m]ild diffuse bulge and small right paracentral annular tear of L5–S1 disc, causing mild narrowing of the central canal and neural foramina, bilaterally,'' and a [m]ild diffuse bulge of L4–5 disc, without any significant central canal or neural foraminal narrowing.''

and blood pressure, and confirmed his name. *Id.* The nurse asked the TFO what his pain levels were with and without medication on a one to ten scale; the TFO replied that his pain was six or seven without medications and three with medications. *Id.* The nurse also asked the TFO if he had adverse reactions and if he used tobacco. *Id.* Upon completing the TFO's paperwork, the nurse took him to an exam room, which was across from Dr. Mosley's office, and left the exam room door open and placed the TFO's file in a tray on the door. *Id.* at 26–27.

After a patient left Dr. Mosley's office, Mosley told the TFO to enter his office and bring his file; the TFO did as instructed and gave his file to Mosley, who was seated at his desk facing a computer. *Id.* at 27. Mosley and the TFO had a conversation in which they discussed the TFO's clothing, beard and tattoos. *Id.* Mosley asked the TFO a single question about his medication and did not perform a physical examination. *Id.* Mosley then completed the paperwork and handed the file to the TFO; the TFO took the file to the front desk and handed it to a clinic employee. *Id.* The employee opened the file and gave the TFO two prescriptions; the prescriptions were for 199 tablets of oxycodone 30mg, with the notation ''PRN Pain,'' and 60 tablets of alprazolam 2mg, with the notation ''PRN anxiety.'' *Id.;* [13] GX 25.

On August 25, 2011, the TFO went to the Brandon clinic and saw Respondent. Tr. 464. The TFO signed in, and after a short wait, was called by the receptionist who asked for his driver's license and current address, and collected payment for the visit; the receptionist then provided the TFO with an appointment card for a visit of September 22, 2011. RX 4, at 39. The TFO then took a seat in the waiting room. *Id.*

Thereafter, the TFO was called by a male nurse to an exam room where he had his vital signs taken. *Id.* The nurse then told the TFO to return to the waiting room. *Id.* A short while later, the nurse took the TFO to another exam room and placed his file in a tray near the door. *Id.*

Respondent removed the TFO's file, entered the room, and introduced himself. *Id.,* GX 27, at 1. Respondent and the TFO discussed the reason why he had come to the Brandon clinic (''I don't know if it was just they couldn't get me in'' and ''[m]aybe, I told them I was thinking about moving up here''), how many times the TFO had seen Dr. Mosley (''twice''), whether the TFO lived in Orlando (''that's an old address'') and where he now lived (''Bradenton''), and his employment status (''I don't work right now''), and what he formerly did for employment (''a lot of warehouse stuff'' and ''some heavy lifting''). GX 27, at 1–2.

Next, Respondent asked the TFO if he had insurance; the TFO said ''No.'' *Id.* at 2. Respondent remarked, ''[o]k, so, you're getting two hundred of these pills, that's probably about four hundred fifty dollars. How are you affording all these meds?'' *Id.* The TFO answered that he ''had some money saved up from before,'' and Respondent said ''ok.'' *Id.* Respondent and the TFO then discussed the problem of people not showing for their appointments and the clinic's policy for no shows. *Id.* at 2–3.

Respondent then discussed the TFO's MRI, stating:

> Alright, so I reviewed your MRI. I mean, it's, you got a few things here and there, but not a ton. You know, my honest opinion, I'm a straight shooter, I don't BS anybody. Uh, my honest opinion is that you're a little bit over-medicated. But I'm going to leave you on what you've been on.

Id. at 4. The TFO replied ''ok, thanks,'' and Respondent added: ''we'll, you know if it comes down to it later, down the road that we need to bring you down a bit, we'll do it. But (at which point the TFO interjected with ''ok'') I don't think we'll need to. The only reason why we would need to is because if the government makes me.'' *Id.*

The TFO replied, ''ok, gotcha, gotcha,'' Respondent stated ''So, um,'' and the TFO stated: ''Yeah, you guys get people in and out quick here. It's nice.'' *Id.* Respondent said ''yeah'' and that ''we try not to play around,'' and after the TFO said, ''Yeah,'' Respondent asked the TFO if he ''ha[d] any questions for me?'' *Id.* The TFO answered ''nope.''

Respondent then asked to feel the TFO's ''low back''; the TFO stood up, and Respondent pressed against the TFO's lower back in several locations, asking if it was painful. *Id.;* RX 4, at 39–40. The TFO replied, ''Yeah. It's a little sore,'' and then agreed with Respondent that it was ''more on the right.'' GX 27, at 4.

The TFO was instructed to sit in a chair, and raise each leg separately and then simultaneously. *Id.* Respondent then asked, ''How's your range of motion, pretty good?'' *Id.* The TFO replied ''yeah, it gets better when it loosens up throughout the day. Like in the mornings, the mornings always rough.'' *Id.* Respondent said ''[r]ight,'' and the TFO added: ''And if I sit down for a long time, it hurts.'' *Id.* Respondent stated: ''Alright. You're all set,'' the TFO expressed his thanks, and Respondent took the TFO and the file to a reception area. *Id.* at 5. *See also* Tr. 469 (When asked to describe how brief Respondent's physical examination was, TFO testified: ''He pressed on my lower back and had me raise both of my legs, and that was it.'').

[13] While Respondent introduced medical records for the undercover officers, the record for Mike Corleone does not contain a progress note for his second visit with Dr. Mosley. *See* RX 1, at 1–13. At several points in his recommended decision, including with respect to this undercover officer, the ALJ expressed that ''I have no confidence, based on the record evidence before me, that the Government produced all of the relevant portions of the patient files, particularly given various testimony at hearing that the Government has not 'had time' to review much of the seized material since October 28, 2011.'' ALJ at 84 n.111; *see also id.* 69 n.95 (noting absence of pharmacy profile in patient record for Anthony Thompson notwithstanding Agent's testimony that he had provided one at his initial visit). *See also id.* at 78 n.104 (reasoning that ''[it] is also worth noting that the Government bears the initial burden of proof in this matter, yet it is not entirely clear from any of the testimony whether the undercover patient charts produced at hearing are complete'').

The charts for the four undercover officers, however, were entered into evidence by Respondent and not the Government. Moreover, the custodian of records for the QCMG Brandon clinic testified that she had reviewed Respondent's Exhibit #1 (which comprised the records maintained by the clinic on the four undercover officers) prior to the day of her testimony, and when asked whether the records were ''a fair and accurate representation of the medical charts,'' answered ''yes.'' Tr. 893–94; *see also id.* at 887. Indeed, Respondent has not contended that any of the charts pertaining to the undercover officers were incomplete.

Nor does the testimony cited by the ALJs support his implication that the Government failed to turn over relevant evidence. While it is true that the TFO testified on the first day of the hearing, that she had not time to review the paper copy all of the records, she also testified that ''we don't have any of the UC files yet'' because ''[t]hey're all electronic.'' Tr. 140. The TFO was subsequently recalled to testify on the issue of when certain records were provided to the Government's Expert and testified that the Government had not obtained the electronic medical records until some point during or after February 2012, when it issued a subpoena to the entity which managed the EMR system. *Id.* at 1003. Moreover, both of Respondent's employees testified that various documents including patient IDs, MRIs, patient consents, and urinalysis results were scanned into the EMR, and that the clinic was not ''keeping papers anymore.'' Tr. 891, 908, & 952. To the extent there were any missing documents (such as a pharmacy profile for Anthony Thompson or a progress note for Mike Corleone's second visit with Dr. Mosley, assuming Mosley even prepared one), given that the clinic was using the EMR system and did not have hard copies of the files for the four UCs, it is unclear why the electronic files did not contain this information. What is clear, however, is that the ALJ's implication is nothing more than speculation.

In any event, for reasons explained in the discussion of the legality of the prescriptions issued to Bobby Payne, the existence of a pharmacy profile showing that a patient had obtained controlled substance from other physicians is not exculpatory evidence. As for the absence of a progress note for Mike Corleone's second visit with Dr. Mosley, there is no evidence that Mosley ever created one.

Respondent then gave the TFO prescriptions for 210 tablets of oxycodone 30mg and 60 tablets of alprazolam 2mg. RX 4, at 40; GX 28. On the oxycodone prescription, Respondent listed his diagnosis as ''[l]umbar lumbosacral disc degeneration'' and ''[l]umbar disc displacement.'' GX 28. On the Xanax prescription, Respondent listed his diagnosis as ''generalized anxiety disorder.'' *Id.*

With respect to his visit to the Brandon clinic, the TFO testified that he was not required to complete any paperwork. Tr. 464. In addition, with respect to the intake process at the Brandon clinic, the TFO testified that ''I met with the nurse and he took some information, as far as blood pressure and weight and that was really it. He also made some reference to my name,'' this being the same as that of one of the leading characters in the movie, ''The Godfather.'' *Id.* at 465. Based on the TFO's testimony and the report he filed for the visit, I conclude that the nurse did not ask the TFO any questions regarding his pain. *Id.; see also* RX 4, at 39.

In the medical record documenting this visit, Respondent noted that there was ''[n]o change'' in the status of the TFO's pain, that the severity was ''4 on pain scale,'' that the pain radiated into his ''shoulder blades and right arm,'' that the ''trend'' was ''tolerable'' and that the pain affected his ''sleep and physical activity.'' RX 1, at 9. Yet there is no evidence that any of these issues were raised by the Nurse or Respondent with the TFO.

Also, in the psychiatric portion of the review of systems, the record states: ''Patient denies problems with mood disturbance. No problems with anxiety.'' *Id.* Likewise, in the psychiatric portion of the physical examination findings, the record states: ''Oriented with normal memory. Mental status, judgment and affect are grossly intact and normal for age.'' *Id.* at 10.

Likewise, under the neurologic findings, Respondent noted that the TFO had ''[n]ormal and symmetrical deep tendon reflexes with no pathological reflexes.'' RX 1, at 10. Yet, the TFO testified that Respondent did not check his reflexes. Tr. 474. Moreover, for his range of motion findings with respect to the TFO's lumbar spine, Respondent noted that the he had ''[f]ull active ROM with rotation, [f]ull active ROM with bending, [f]ull active ROM with flexion and Full active ROM with extension.'' RX 1, at 11. Yet, the TFO testified that Respondent did not ask him to do any range of motion exercise ''other than just lifting up the legs.'' Tr. 474.

Respondent's Evidence

In addition to the testimony of Mr. Gomez, which was discussed above, Respondent elicited testimony from Stephanie Baez, who was an employee of the QCMG Brandon clinic from January 2011 until the end of October 2011.[14] Tr. 886–87. Ms. Baez testified that she was the clinic's custodian of records and handled ''all of the intake'' of patients. *Id.* at 887. She testified that as part of the intake process, she would collect a patient's photo ID, MRI, and pharmacy history, and that she would call the company that did the MRI and verify the patient's name, birth date, date of the MRI and the MRI's impressions. *Id.* at 888.

Ms. Baez also testified that if a patient transferred from the Bradenton to Brandon clinic, his records would be transferred and that if any form was missing, the patient would have to complete the form again. *Id.* at 890–91. Ms. Baez also testified that the clinic required the patients to complete an authorization for release of their medical information from previous providers. *Id.* 899–900. While there are such releases in the patient files of Mike Corleone and Eric McMillan, both of whom completed these forms during the initial visits to the Bradenton clinic, but neither of which was filled out by listing their previous doctors, *see* RX 1, at 2 & 53, there are no such forms in the patient files of Anthony Thompson and Bobby Payne, both of whom initially presented at the Brandon clinic. *See generally* RX 1. Moreover, none of the four undercover patient files contain any medical records from prior physicians or clinics, even though they presented that they had been treated by other physicians, or notes indicating that the clinic attempted to obtain such records but could not do so. *Id.* Also, when questioned on cross-examination as to whether Respondent had attempted to verify whether several of the undercovers had been treated by another doctor, Ms. Baez testified that she did not know. Tr. 912 (testimony regarding whether Respondent verified that patient Corleone was treated by Coast to Coast clinic with either Dr. Mosley or Coast to Coast), *id.* at 925 (testimony regarding whether Respondent verified that patient McMillan was treated by Dr. Foster).

Respondent was called to testify by the Government. However, he invoked his Fifth Amendment privilege and declined to answer any questions. Tr. 37–38. Nor, even after the Government presented its case in chief, did Respondent testify regarding any of the allegations.

Discussion

Before proceeding to analyze the evidence under the public interest factors, a review of the ALJ's discussion of the Agency's obligation to disclose what he deemed to be exculpatory evidence is warranted. Therein, the ALJ noted that the Government had resisted turning over investigative reports prepared by the undercover officers (which were relied upon by the Government's Expert) until after Respondent's counsel had completed the first day of his cross-examination of the Government's Expert. ALJ at 10. However, the Government did eventually turn over the investigative reports and Respondent was able to cross-examine the Expert with them. Notwithstanding his conclusion ''that denial of Respondent's motions for discovery were [sic] consistent with applicable legal precedent, and supported by other procedural deficiencies in Respondent's pleadings,'' and that, in fact, his discussion was entirely gratuitous because the Government did turn over the reports and Respondent raised no claim of prejudice in his post-hearing brief, the ALJ found ''that [the] existing Agency holdings and practice with regard to exculpatory evidence warrants further discussion.'' *Id.*

While noting that ''the term 'exculpatory' should be carefully defined in the context of an administrative proceeding,''—an admonition which, as explained below, the ALJ promptly proceeded to ignore—the ALJ reasoned that ''other Agencies have found it appropriate to establish by regulation a practice of reviewing and disclosing exculpatory evidence to litigants during administrative hearings, while recognizing such disclosure is not constitutionally mandated.'' *Id.* at 12. After noting that three federal agencies have provided for disclosure of exculpatory evidence in administrative proceedings,[15] the ALJ opined that ''[a]

[14] Respondent also called TFO Wendy Zarvis, who was involved in sending materials to the Expert for his review. Tr. 1013. Respondent called the Agent to impeach the testimony of the Expert regarding whether he had been provided certain documents at the time he produced his report, as well as to show what documents he had been provided and when he received them. *Id.* at 1017–18. Because for reasons explained later in this decision, the Expert's testimony is not necessary to decide this matter, I conclude that there is no need to make any findings regarding when she sent various documents to him.

[15] Most federal agencies do not, however, provide for the disclosure of exculpatory evidence in administrative proceedings, and several federal appeals courts have held that *Brady* v. *Maryland,* 373 U.S. 83 (1963), does not apply in this type of

Continued

disclosure practice that emphasizes only what is alleged in the [Order to Show Cause], along with only that evidence the Government chooses to disclose in its pre-hearing statement, supplements thereto, and related documentary evidence, by definition de-emphasizes any investigative interest in considering evidence favorable to a Respondent, which, by extension, permeates the entire record'' and that ''[s]uch a systemic practice *may* also contravene clear guidance from federal appellate courts.'' *Id.* at 13 (emphasis added).

The ALJ then quoted from the unpublished decision of the Eleventh Circuit in *Jayam Krishna-Iyer,* which vacated an agency order for failing ''to consider [Dr. Krishna-Iyer's] experience with twelve patients whose medical charts were seized by the DEA * * * [or] consider any of Petitioner's positive experience in dispensing controlled substances.'' *Id.* at 13–14 (quoting *Krishna-Iyer* v. *DEA,* 249 Fed. Appx. 159, 160 (11th Cir. 2007)). Notwithstanding that under the Eleventh Circuit's rules an unpublished opinion is not ''binding precedent,'' 11th Cir. R. 36–2, the ALJ then asserted that the ''impact of this [decision] as precedential authority in DEA decision-making, to include the interpretation of 'positive experience,' apparently remains a matter of some confusion.'' ALJ at 14. The confusion, however, rests entirely with the ALJ, who ignored both the Agency's subsequent decision on remand in *Krishna-Iyer,* which addressed the role of ''positive experience'' evidence in cases where the Government has proved intentional or knowing diversion, subsequent Agency cases applying this rule, and several court of appeals' decisions (including that of the Eleventh Circuit), which have since upheld the Agency's position.

On remand in *Krishna-Iyer,* I assumed that the respondent's prescribing to not only the twelve patients whose files were seized, but also to the thousands of other patients (other than the undercover operatives to whom she had unlawfully distributed controlled substances) constituted evidence of dispensing controlled substances in circumstances which did not constitute diversion. However, as I explained, Dr. Krishna-Iyer's ''prescribings to thousands of other patients do not * * * render her prescribings to the undercover officers any less unlawful, or any less acts which are 'inconsistent with the public interest.''' *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009). As I further explained:

> under the CSA, a practitioner is not entitled to a registration unless she ''is authorized to dispense * * * controlled substances under the laws of the States in which [she] practices.'' 21 U.S.C. 823(f). Because under law, registration is limited to those who have authority to dispense controlled substances in the course of professional practice, and patients with legitimate medical conditions routinely seek treatment from licensed medical professionals, every registrant can undoubtedly point to an extensive body of legitimate prescribing over the course of her professional career. Thus, in past cases, this Agency has given no more than nominal weight to a practitioner's evidence that he has dispensed controlled substances to thousands of patients in circumstances which did not involve diversion.

Id. (citing *Paul J. Caragine, Jr.,* 63 FR 51592, 51600 (1998) (noting that ''even though the patients at issue are only a small portion of Respondent's patient population, his prescribing of controlled substances to these individuals raises serious concerns regarding [his] ability to responsibly handle controlled substances in the future'')); *Medicine Shoppe-Jonesborough,* 73 FR 364, 386 & n.56 (2008) (even though pharmacy ''had 17,000 patients,'' ''[n]o amount of legitimate dispensings'' could render the pharmacy's ''flagrant violations [acts which are] 'consistent with the public interest'''), *aff'd, Medicine Shoppe-Jonesborough* v. *DEA,* 300 Fed. Appx. 409 (6th Cir. 2008).

Accordingly, in *Krishna-Iyer,* I held that ''evidence that a practitioner has treated thousands of patients [without violating the CSA] does not negate a prima facie showing that a practitioner has committed acts inconsistent with the public interest.'' 74 FR at 463. I further explained that ''[w]hile such evidence may be of some weight in assessing whether a practitioner has credibly shown that she has reformed her practices, where a practitioner commits intentional acts of diversion and insists she did nothing wrong, such evidence is entitled to no weight.'' *Id.*

Subsequent to *Krishna-Iyer,* I adhered to this rule in *Dewey C. MacKay,* 75 FR 49956 (2010), *pet. for rev. denied, MacKay* v. *DEA,* 664 F.3d 808 (10th Cir. 2011). To be clear, the ALJ entirely ignored both the decision of the Agency as well as that of the Tenth Circuit in *MacKay.*

In *MacKay,* I held that, based on the substantial evidence that the physician had knowingly diverted controlled substances to two patients who acted in an undercover capacity, the Government had satisfied its *prima facie* burden of showing that Respondent had committed acts which rendered his registration inconsistent with the public interest. 75 FR at 49977. Relying on the Agency's decision on remand in *Krishna-Iyer,* I rejected the physician's contention that ''[a] better assessment of [his] medical practice and habits can be ascertained from [his] numerous positive experiences in prescribing controlled substances, some of which were recounted by the patients themselves * * * at the hearing.'' *Id.* (quoting Resp. Br. at 3). I therefore held that ''even assuming, without deciding, that Respondent's prescribing practices to all of his other patients (including those whose medical records were reviewed by the Government's Expert but who did not perform undercover visits [16]) fully complied with the CSA and Utah law, these prescribings do not refute the evidence showing that he intentionally diverted to [the two undercovers] in violation of both the CSA and Utah law.'' 75 FR at 49977. Noting that Dr. MacKay had failed to testify and offer evidence that he recognized the extent of his misconduct and was prepared to remedy his prescribing, I revoked his registration.

The Tenth Circuit denied MacKay's petition for review. *MacKay v. DEA,* 664 F.3d 808 (10th Cir. 2011). Of relevance here, the Tenth Circuit specifically addressed and rejected MacKay's argument that the Agency had failed to consider his ''positive experience'' in dispensing controlled substances. As the Court of Appeals explained:

> Despite Dr. MacKay's claim to the contrary, the Deputy Administrator considered the entire record, including the evidence in Dr. MacKay's favor. She determined, however, that none of Dr. MacKay's evidence negated the DEA prima facie showing that Dr. MacKay had intentionally diverted drugs to K.D. and M.R. Indeed, she found that even if Dr. MacKay had provided proper medical care to all of his other patients, that fact would not overcome the government's evidence with regard to M.R. and K.D.
>
> None of the evidence presented by Dr. MacKay undermines the evidence relating to M.R. and K.D. Although numerous patients and colleagues of Dr. MacKay related their positive experiences with him, none had any personal knowledge regarding his treatment of M.R. and K.R. Notably, Dr. MacKay's medical expert, Dr. Fine, failed to specifically discuss and justify Dr. MacKay's treatment of M.R. and K.D. As a result, none of Dr. MacKay's evidence contradicts the testimony and evidence presented by the DEA relating

proceeding. *See Mister Discount Stockbrokers, Inc.* v. *SEC,* 768 F.2d 875, 878 (7th Cir. 1985); *NLRB* v. *Nueva Eng. Inc.,* 761 F.2d 961, 969 (4th Cir. 1985). *Cf. Echostar Comm. Corp.* v. *FCC,* 292 F.3d 749, 755–56 (D.C. Cir. 2002) (rejecting litigant's claim that ''the Agency's decision to deny it discovery * * * denied it due process''); *Silverman* v. *CFTC,* 549 F.2d 28, 33 (7th Cir. 1977) (''There is no basic constitutional right to pretrial discovery in administrative proceedings.'') (citations omitted).

[16] In light of the evidence provided by the undercover visits of the two patients, I found it unnecessary to make any findings based on the Expert's chart review. 75 FR at 49972.

to the knowing diversion of drugs to these two patients.

664 F.3d at 819.

The Court of Appeals thus concluded that ''[a]lthough Dr. MacKay may have engaged in the legitimate practice of pain medicine for many of his patients, the conduct found by the Deputy Administrator with respect to K.D. and M.R. is sufficient to support her determination that his continued registration is inconsistent with the public interest.'' *Id.* Given that the Court of Appeals' decision in *MacKay* was circulated to the Office of Administrative Law Judges, and in any event, had been issued nearly five months prior to the ALJ's issuance of his recommended decision in this matter, it is inexplicable that the ALJ entirely ignored it.

More recently, I revoked the registration of a Florida-based physician for violations of the CSA's prescription requirement. *See Ronald Lynch, M.D.,* 75 FR 78745, 78750–54 (2010). The physician then filed a petition for review in the Eleventh Circuit. Before the court of appeals, the physician argued that the Agency's order was arbitrary and capricious because ''it limited its consideration of [his] experience to only ten prescriptions issued to out of state patients, the two undercover patients, and the use of a rubber stamp on nine prescriptions.'' Brief of Petitioner at 31, *Lynch* v. *DEA,* 2012 WL 1850092 (11th Cir. 2012) (No. 11–10207–EE). The physician further argued that the Agency had failed to ''consider the evidence that he had been dispensing controlled substances for over twenty years,'' that ''[e]ven with respect to the undercover patients, the DEA Order did not consider the fact that the two undercover patients did not get the medication they requested or that the consultation [between the physician and the patients] was thoughtful and thorough,'' and that the Order ''ignore[d] the fact that one of the undercover patients asked [him] for stronger schedule II drugs'' and that he declined the request. *Id.* The physician thus contended that the Agency's order was arbitrary and capricious because it ''fail[ed] to consider any of [his] positive experiences with dispensing controlled substances.'' *Id.* at 32 (citing *Krishna-Iyer,* 249 Fed. Appx. at 160).

In an unpublished decision, the Eleventh Circuit denied Lynch's petition for review. *See* 2012 WL 1850092, *2. The Court of Appeals noted that ''[a]fter reviewing the record, reading the parties' briefs and having the benefit of oral argument,'' it had concluded that the Agency's order was supported by substantial evidence and that the revocation of Lynch's registration ''was not arbitrary, capricious, an abuse of discretion, or contrary to law.'' *Id.* Significantly, the Court of Appeals did not deem Lynch's argument that the Agency had failed to consider his positive experience to warrant any discussion.

Ignoring both *MacKay* and *Lynch,* the ALJ opined ''that the evidence of record in this case is fully consistent with an administrative practice that only focused on evidence in support of revocation to the virtual exclusion of any 'positive experience' by Respondent, particularly relating to his prescribing practices and other conduct that may have evidenced compliance with applicable law and regulations.'' ALJ at 15. The ALJ then explained that:

> For purposes of this Recommended Decision, I have interpreted 'positive experience' in a common sense fashion, which appears to me to have been the intent of the Eleventh Circuit Court of Appeals in 2007 given their decision not to define it further. In other words, if there is investigative evidence that refutes the allegations in the [Order to Show Cause] or materially supports a finding that Respondent's prescribing practices are consistent with the public interest, such as that found in patient files, it must be made available to a respondent, and if found to be 'competent, relevant, material, and not unduly repetitious,' must be considered in any Agency decision.

Id. at n.16.

As support for his contention that the Agency's investigation had failed to consider evidence of Respondent's positive experience, the ALJ cited a TFO's purported testimony that although she was aware that Respondent had stated to an undercover officer that he ''had previously reported misconduct by a clinic employee to DEA,'' the TFO ''testified that she did not view such information as 'important' to the investigation and had not followed up on'' it. *Id.* (quoting Tr. 120–21). The ALJ then asserted that ''[t]he significance and relevance of such positive conduct by Respondent, if confirmed to be true, could demonstrate Respondent's compliance with various applicable DEA regulations, and materially refute to a degree the allegation in the [Order to Show Cause] that Respondent's conduct was contrary to the public interest.'' *Id.* (citing 21 CFR 1301.76, which requires a registrant to report the theft or loss of controlled substances; 21 CFR 1301.91, stating Agency's position that the employee of a registrant has an obligation to report diversion by another employee; and 21 CFR 1301.92, stating Agency's position that where an employee engages in unlawful activities with controlled substances, employer should immediately assess the need for disciplinary actions).

However, the Government did not allege that Respondent had failed to comply with any of the regulations cited by the ALJ. *See* ALJ Ex. 1, at 2–3 (Order to Show Cause); ALJ Ex. 5 (Gov. Pre-Hearing Statement). Rather, the Government's case was based entirely on the allegations that Respondent violated the CSA by ''issuing prescriptions to undercover law enforcement officers for other than a legitimate medical purpose or outside the usual course of professional practice.'' Order to Show Cause (ALJ Ex. 1), at 2.[17]

As set forth in countless cases brought under sections 303 and 304 of the CSA, violations of the prescription requirement strike at the core of the Act's purpose of preventing the diversion of controlled substances. *See United States* v. *Moore,* 423 U.S. 122, 135 (1975) (''Congress was particularly concerned with the diversion of drugs from legitimate channels to illegitimate channels. It was aware that registrants, who have the greatest access to controlled substances and therefore the greatest opportunity for diversion, were responsible for a large part of the illegal drug traffic.'') (citations omitted). Accordingly, the Agency has held that proof of a single act of intentional or knowing diversion is sufficient to satisfy the Government's *prima facie* burden of showing that a practitioner's continued registration is inconsistent with the public interest, and if unrebutted by a showing that the practitioner accepts responsibility for his misconduct and will not engage in future misconduct, warrants the revocation of a registration. *See MacKay,* 75 FR at 49977; *see also*

[17] Even if such conduct was relevant, Respondent's statement is hearsay, which was uncorroborated by any other evidence, and because he invoked his Fifth Amendment privilege, could not be tested by examining him. *See J.A.M. Builders, Inc.,* v. *Herman,* 233 F.3d 1350 (11th Cir. 2000).

It is further noted that during the colloquy cited by the ALJ, the TFO was not questioned as to whether she found it significant that Respondent had stated to one of the undercovers that he had reported a clinic employee to the Agency. *See* Tr. 120–21. Rather, the question asked if she found it significant that Respondent had said to an undercover ''that he was cleaning up the clinic and had made reports of patients to the DEA.'' *Id.* at 120. In response, the TFO stated that she did not consider it significant ''because it was just constantly mentioned and it just doesn't seem the norm for a doctor to talk about DEA and law enforcement, during a patient visit, unless that's something that's a constant problem with a medical office.'' Tr. 120. This is just one of many instances in which the ALJ misstated the evidence.

Alan H. Olefsky, 57 FR 928, 928–29 (1992) (revoking registration based on physician's presentation of two fraudulent prescriptions to pharmacist in single act where physician failed to acknowledge his misconduct). Contrary to the ALJ's understanding, whether Respondent complied with other provisions of the Agency's regulations does not ''materially refute'' to any degree whether he violated the CSA's prescription requirement.

The ALJ further faulted the Government for not having reviewed the patient charts, other than those for the four undercover officers, which had been seized pursuant to the search warrants which were executed at the Brandon and Bradenton locations. ALJ at 15–16. Noting the testimony of a TFO that she had reviewed only a part of those records, as well as the Expert's testimony that while he had received an additional fifteen patient charts approximately one week before the hearing but had not had time to review them, the ALJ reasoned that ''[t]he lack of investigative effort or 'time' to develop any evidence that might enlighten the administrative record of positive prescribing practices by Respondent, or permit access to such information by Respondent or the fact-finder, underscores the due process limitations of DEA's existing 'discovery' practice.'' *Id.* at 15–16.

Contrary to the ALJ's ludicrous suggestion, the Government was not required to go through all of Respondent's patient charts looking for evidence of his so-called ''positive prescribing practices'' and ''develop evidence to enlighten the administrative record.'' *See MacKay,* 664 F.3d at 819. Having garnered evidence of what it believed to be unlawful prescriptions issued to the four undercover officers, the Government was entitled to go to hearing with that evidence. Whether the Government's evidence was sufficiently ''reliable, probative, and substantial'' to satisfy its burden of proof—after considering relevant and material evidence which might refute the allegations—is one thing. But as the Tenth Circuit recognized in *MacKay,* even if Respondent prescribed controlled substances to numerous other persons in circumstances which did not involve diversion, such evidence is not material to the allegations that he unlawfully prescribed to any of the four undercover officers and thus is not exculpatory.

In short, the ALJ did not identify any undisclosed material evidence that would tend to exculpate Respondent from the allegations that, in prescribing to the undercover officers, he lacked a legitimate medical purpose and acted outside of the usual course of professional practice. Indeed, no such claim is even raised by Respondent in his brief. And given that the Government fully disclosed the evidence it intended to rely on in proving the allegations, and Respondent has raised no contention that it was prejudiced by the lateness of the disclosure, the Government has satisfied due process. *See Goldberg* v. *Kelly,* 397 U.S. 254, 270 (1970) (''where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue''); *see also Bowman Transp., Inc.,* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 288 n.4 (1974) (''A party is entitled * * * to know the issues on which [the] decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it.'').[18] Indeed, given that the Agency's procedures comply with the Supreme Court's (and various court of appeals') teachings as to the scope of due process, it is absurd to suggest, as the ALJ did, that the procedures are ''fundamentally at odds with basic concepts of fairness.'' ALJ at 17.

In short, neither the Supreme Court, nor any federal appeals court—who, unlike the ALJ, are the ultimate arbiters of whether an Agency's procedures satisfy the fundamental fairness that the Due Process Clause requires—has ever held that the Clause imposes on any federal agency the far-reaching obligation proposed by the ALJ. I thus reject it.

The Public Interest Factors

Section 304(a) of the Controlled Substances Act (CSA) provides that a registration to ''dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * *has committed such acts* as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4) (emphasis added). With respect to a practitioner, the Act requires the consideration of the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
(2) The applicant's experience in dispensing * * * controlled substances.
(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
(5) Such other conduct which may threaten the public health and safety.

Id. 823(f).

''[T]hese factors are * * * considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). It is well settled that I ''may rely on any one or a combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether a registration should be revoked.'' *Id.; see also MacKay,* 664 F.3d at 816; *Volkman* v. *DEA,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222 (quoting *Hoxie,* 419 F.3d at 482)).[19]

The Government has the burden of proving, by a preponderance of the evidence, that the requirements for revocation or suspension pursuant to 21 U.S.C. 824(a) are met. 21 CFR 1301.44(e). However, ''once the [G]overnment establishes a prima facie case showing a practitioner has committed acts which render his registration inconsistent with the public interest, the burden shifts to the practitioner to show why his continued registration would be consistent with the public interest. *MacKay,* 664 F.3d at 817 (citing *Medicine Shopper-*

[18] In any event, DEA precedent has already made clear that where an expert relies on data or documents in forming his opinions, the failure of the sponsoring party to produce the data or documents denies the other party a meaningful opportunity to cross-examine the expert and show that his opinions are unfounded, and that where challenged by the other party, this also ''precludes a finding that the expert's conclusions are supported by substantial and reliable evidence.'' *See CBS Wholesale Distributors,* 74 FR 36746, 36749 (2009); *see also Bowman,* 419 U.S. at 288 n.4 (''[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.''). In short, if the Government fails to disclose underlying data or documents that its expert relied, it runs the very substantial risk that the expert's conclusions will be rejected. It is, however, for the Government to assess this risk.

[19] In short, this is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct. *Jayam Krishna-Iyer,* 74 FR 459, 462 (2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

Jonesborough, 73 FR 364, 387 (2008) (citing cases)).

In this matter, while I adopt the ALJ's findings of fact and legal conclusions that neither factor one (the recommendation of the state licensing board), nor factor three (Respondent's conviction record under laws related to the manufacture, distribution or dispensing of controlled substances), supports the revocation of Respondent's registration, it has long been settled that neither factor is dispositive. *See MacKay,* 664 F.3d at 817; *see also Krishna-Iyer,* 74 FR at 461; *Edmund Chein,* 72 FR 6580, 6593 n.22 (2007), *pet. for rev. denied* 533 F.3d 828 (DC Cir. 2008); *Mortimer B. Levin,* 55 FR 8209, 8210 (1990). Rather, the primary focus of this proceeding is whether, as alleged by the Government, Respondent violated the CSA's prescription requirement, 21 CFR 1306.04(a), when he prescribed to the undercover officers. Whether this conduct is considered under factor two—Respondent's Experience in Dispensing Controlled Substances—or factor four—Respondent's Compliance with Applicable Laws Related to Controlled Substances, or both factors, is of no legal consequence, because, if proven, the conduct would be sufficient to support a finding that Respondent ''has committed such acts as would render his registration * * * inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). *See Krishna-Iyer,* 74 FR at 462. Accordingly, I turn to whether the record as a whole supports the allegations.

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Record of Compliance With Applicable Controlled Substance Laws

Under a longstanding DEA regulation, a prescription for a controlled substance is not ''effective'' unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). Under the CSA, it is fundamental that a practitioner must establish a bonafide doctor-patient relationship in order to act ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *See United States* v. *Moore,* 423 U.S. 122, 142–43 (1975); *United States* v. *Lovern,* 590 F.3d 1095, 1100–01 (10th Cir. 2009); *United States* v. *Smith,* 573 F.3d 639, 657 (8th Cir. 2009); *see also* 21 CFR 1306.04(a) (''an order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances'').

As the Supreme Court recently explained, ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *Moore,* 423 U.S. 122, 135, 143 (1975)).

The ALJ rejected each of the Government's allegations, explaining that he did ''not find Respondent's prescribing practices with regard to the undercover patient visits to be remotely close to 'outright drug deals.''' ALJ at 50 (quoting *Cynthia M. Cadet,* 76 FR 19450, 19450 n.3 (2011)). The ALJ also reasoned that ''the undercover patient visits objectively reflect that Respondent's prescribing practices included, to a degree, a documented medical history, physical examination, documented urinalysis testing, medical record release forms, and pharmacy prescribing profiles, among other information, consistent with applicable Florida law.'' *Id.* (citations omitted). The ALJ thus reasoned that ''any finding that Respondent's prescribing conduct in this case was not for a legitimate medical purpose and outside the usual course of professional practice * * * will significantly depend on the evidentiary weight to be given to the opinion testimony of the Government's sole expert witness,'' whom the ALJ did not find credible. *Id.*

However, with respect to the first undercover visit of Bobby Payne, the ALJ's conclusion that the evidence does not establish that Respondent's prescribing practices with respect to the undercover officers were ''remotely close to 'outright drug deals,''' ignores nearly all of the evidence of the actual conversation which occurred between Payne and Respondent. *See* ALJ at 61–67. Nor, contrary to the ALJ's understanding, does the Agency's decision in *Cadet* stand for the proposition that the only circumstance in which expert testimony is not required to prove violations by a physician of 21 CFR 1306.04(a) is where a physician manifests his knowledge that he is engaging in an outright drug deal. Rather, as *Cadet* makes clear it, it simply cited a single example of where expert testimony is not required to prove a violation of 21 CFR 1306.04(a).

Indeed, the ALJ ignored numerous decisions of both federal and state courts in criminal cases (which require proof beyond a reasonable doubt rather than simply a preponderance of the evidence) which have found violations of 21 CFR 1306.04(a) or 21 U.S.C. 841, or similar state laws, without requiring expert testimony. *See United States* v. *Pellman,* 668 F.3d 918, 924 (7th Cir. 2012) (quoting *United States* v. *Armstrong,* 550 F.3d 382, 388–89 (5th Cir. 2008) (''While expert testimony may be both permissible and useful, a jury can reasonably find that a doctor prescribed controlled substances not in the usual course of professional practice or for other than a legitimate medical purpose from adequate lay witness evidence surrounding the facts and circumstances of the prescriptions.'')); *Armstrong,* 550 F.3d at 389 (''Jurors have had a wide variety of their own experiences in doctors' care over their lives, thus and expert testimony is not necessarily required for jurors to rationally conclude that seeing patients for as little as two or three minutes before prescribing powerful narcotics is not in the usual course of professional conduct.''). *See also United States* v. *Word,* 806 F.2d 658, 663 (6th Cir. 1986); *United States* v. *Larson,* 507 F.2d 385, 387 (9th Cir. 1974); *United States* v. *Bartee,* 479 F.2d 484, 488–89 (10th Cir. 1973); *State* v. *Moody,* 393 So.2d 1212, 1215 (La. 1981).

The ALJ also ignored several decisions of this Agency which have found violations of the prescription requirement notwithstanding the absence of expert testimony. *See Morris W. Cochran,* 77 FR 17505, 17519–20 (2011) (holding, without expert testimony, that prescriptions lacked a legitimate medical purpose where physician noted in patient medical records that patients had no pain, did not document any findings to support a diagnosis, and yet diagnosed patients as having chronic pain); *Robert F. Hunt,* 75 FR 49995, 50003 (2010) (holding, without expert testimony, that physician lacked a legitimate medical purpose based on statements made during undercover visits and falsification of chart). *See also Jack A. Danton,* 76 FR 60900, 60904 (2011).

Thus, while it true that ''where a physician ma[kes] some attempt to comply with various state medical practice standards and the adequacy of those efforts is at issue,'' expert testimony is typically necessary to establish that a physician violated 21 CFR 1306.04(a), *see id.* & n.13, the facts and circumstances surrounding the issuance of the prescription may nonetheless establish a violation even without expert testimony. Here, while the ALJ noted that Respondent's prescribing practices included ''a medical history, a physical examination, documented urinalysis testing, medical record release forms, and pharmacy prescribing profiles,'' ALJ at 50, a fact-finder can nonetheless consider the totality of the facts and circumstances of the visit and conclude that a registrant did not prescribe in the course of legitimate medical treatment but rather was creating a sham justification to support an unlawful prescription.

The Prescriptions for Bobby Payne

As found above, at Payne's first visit (July 28, 2011), he presented a prescription profile showing that he had filled prescriptions for 210 tablets of oxycodone 30mg, 90 tablets of oxycodone 15mg, and 90 tablets of alprazolam 2mg, on a monthly basis from December 10, 2010, but had last filled the prescriptions on April 10, 2011, more than three and a half months before his visit. Moreover, Respondent's assistant falsified Payne's urine drug screen to show that he was positive for oxycodone. While the ALJ observed that there was no evidence to show that ''Respondent had any knowledge of the false entry,'' ALJ at 63, Respondent, notwithstanding the lengthy gap since Payne had last filled prescriptions for oxycodone, did not question him about why he had tested positive for the drug.

Indeed, the evidence is clear and convincing that Respondent knew that Payne was not seeking treatment for a legitimate medical condition but was either engaged in self-abuse or diversion. Notably, without even discussing whether Payne had any symptoms or his pain levels, Respondent noted that Payne's MRI showed two mild disc bulges, that the reason Payne's prior clinic was out of business was because they were ''prescribing inappropriately,'' and that based on the MRI and without even doing a physical exam, he could not give Payne ''near the pills that you were getting. Not even remotely close.''

Moreover, even after Payne said that the amounts of his previous prescriptions were ''just what they prescribed, and ''that's not what I actually took,'' thus suggesting that he diverted some of his prescriptions to others, Respondent did not question him regarding what he did with the drugs he did not take. Thereafter, Respondent put to rest any doubt as to whether he knew Payne was not a legitimate patient, stating that Payne's MRI did not show any ''pushing on any nerve roots or anything like that'' and was ''as close to a normal MRI as you can get without it being actually normal,'' and adding: ''I mean the most I can do for you would * * * And I'm telling you this in case you don't want to come here. Okay? Cause I hate for you to spend all of your money, coming here and not get what you need.''

This was followed by Respondent telling Payne that what he needed and what he should get ''sometimes is two different things,'' because if ''you've been on a certain number of pills, for a long time, if you don't get those number of pills, you're going to be sick.'' Respondent then stated that ''just by looking at this [the MRI] without even doing the physical exam,'' he was looking at prescribing ''maybe a hundred and fifty,'' the amount of oxycodone 30mg which he subsequently prescribed to Payne. Notably absent from Respondent's interaction with Payne was a discussion of the causes of his pain, its nature and intensity, and how it affected his ability to function. *See* Fla. Admin Code r. 64B8–9.013(3)(a). In short, Respondent's comments manifest that he knew that Payne was an abuser of controlled substances; his negotiation with Payne over the amount of oxycodone he could prescribe based on his MRI and without even having performed a physical examination likewise manifests that this was not a legitimate medical evaluation but rather a drug deal.

It is true that Respondent subsequently performed a physical exam. Yet throughout the exam, Payne generally denied that the various tests caused pain or gave vague responses such as ''uh-hum,'' and never complained that the tests caused anything more than ''a little bit'' of pain. Indeed, given Respondent's comments prior to the exam, it is manifest that the exam was done to go through the motions and not to engage in a legitimate clinical evaluation. Moreover, Respondent documented in the medical record that he palpated Payne's cervical spine area even though the video recording shows that he did not do so. He also documented having performed various range of motion tests on each portion of Payne's spine (including his lumbar region) even though the video shows that he did not do so.

Furthermore, subsequent to the exam, Respondent made additional comments which demonstrate that he had knowledge that Payne was a self-abuser. For example, during his ''new patient talk,'' Respondent stated: ''I don't want you taking medication, the way you want to take them, because that will put you in jeopardy of overdose,'' and that the UC's doing so, would place his license at risk. Respondent then added that while ''we're pretty strict here * * * we do have fun also,'' a point which he reiterated.

As for the alprazolam prescription, while Respondent listed a diagnosis of ''generalized anxiety disorder,'' which he deemed to be ''chronic'' and ''active,'' the medical record contains the findings that ''patient denies problems with mood disturbance. No problems with anxiety.'' In addition, Respondent documented that Payne's ''[m]ental status, judgment and affect are grossly intact and normal for age.''

While Respondent offered the testimony of his medical assistant to the effect that the EMR provided certain default entries when information was not entered into the patient's record, he could not identify what any of the specific entries were. Moreover, if a patient had actually complained of anxiety and a discussion of his symptoms had occurred, one would expect that the complaint and the nature of the symptoms would be documented in the patient's record. Indeed, the rules of the Florida Board of Medicine require such. *See* Fla. Admin. Code r.64B8–9.003(3) (''The medical record shall contain sufficient information to identify the patient, support the diagnosis, [and] justify the treatment * * * .''); Fla. Admin. Code r. 64B8–9.013(3)(f) (''The physician is required to keep accurate and complete records * * * .''). Finally, other than his single question to the TFO of whether he was getting Xanax ''for anxiety,'' with Payne saying he was getting it for sleep, there is no evidence that Respondent (or Gomez for that matter) discussed with Payne any problems he had with anxiety or with sleeping.

In rejecting the Government's evidence, the ALJ noted that at the time of Respondent's initial evaluation, he ''had evidence of [Payne's] prior treatment for pain from December 2010 until April 10, 2011, by two different physicians.'' ALJ at 67. This is a gross mischaracterization of the evidence, as Respondent did not have any medical records from the two physicians showing that they treated Payne for pain, but rather only a prescription profile showing that the two physicians had prescribed drugs to Payne. That profile, however, establishes only the dates and drugs that various doctors prescribed and says nothing about the legitimacy of the prescriptions. Moreover, given the date of the profile (June 14, 2011) and the absence of any prescriptions since April 10, one might reasonably ask whether the patient had been discharged by his prior doctor and attempt to contact that doctor. Beyond this, as Respondent's own comments manifest, he surmised that Respondent's prior clinic had been shut down for prescribing inappropriately.

The ALJ also noted that Respondent had a ''verified MRI report, correlating, to a limited extent, [the TFO's] statement of pain and reported history of 'low back pain.' '' *Id.* The ALJ ignored, however, that Payne testified that one of the forms he filled out had a picture of a human body and that he deliberately circled a part of his body different than his MRI, to, in his words, ''disprove basically the MRI.'' Tr. 180; *see also* ALJ at 20 (ALJ finding that ''[w]ith regard to his stated pain complaint, [the] TFO * * * recalled one of the forms had a picture of a human body and he believed he circled part of the body that was different than his MRI, 'just to disprove basically the MRI.'''). Notably, the ALJ did not reconcile his finding that the MRI correlated with Payne's ''reported history of 'low back pain''' and his earlier finding that the TFO had circled a different part of the body as the area in which he had pain. *See* ALJ at 67. In addition, it should be noted that Respondent's own witness testified that the clinic shredded the patient questionnaires.

The ALJ then noted that ''at the outset of the patient visit, [Respondent] made clear that he intended to decrease the amount of controlled substances [Payne] had previously been provided, particularly given the limited correlation of reported pain in the MRI report.'' *Id.* Contrary to the ALJ's understanding, that a practitioner prescribes a lesser quantity of a controlled substance than what a patient had previously received does not establish that the prescription was lawfully issued. Rather, what determines whether a prescription complies with Federal law is whether the physician had a legitimate medical purpose and acted within the usual course of professional practice. 21 CFR 1306.04(a)

The ALJ also reasoned that Respondent's statement that ''[w]hat you should get and what you need, oftentimes is two different things cause if you've been on a certain number of pills, for a long time, if you don't get those number of pills, you're going to be sick,'' ''reflect[s] positively on his prescribing conduct or intent in this case.'' ALJ 66. However, when considered in the context of the entire conversation which occurred between Respondent and the TFO, and as demonstrated by Respondent's subsequent statement that ''I don't want you taking medication, the way you want to take them, because that will put you in jeopardy of overdose,'' it is clear that Respondent believed that Payne was a drug abuser.

The ALJ's reasoning likewise reflects a stunning disregard for Federal law, which, however, does not permit a practitioner to prescribe schedule II controlled substances such as oxycodone to a narcotic dependent person for the purpose of maintaining him on narcotics and preventing withdrawal symptoms.[20] *See* 21 CFR 1306.04(c). Rather, when a patient presents as narcotic dependent, a practitioner may only administer (and not prescribe) narcotic drugs ''for the purpose of relieving acute withdrawal symptoms when necessary while arrangements are being made for referral for treatment,'' may not administer more than ''one day's medication at a time,'' and may not do so ''for more than three days.'' 21 CFR 1306.07. Thus, contrary to the ALJ's understanding, there is nothing positive in Respondent's decision to prescribe 150 tablets of oxycodone 30mg (as well as Xanax) to a person he knew was a drug abuser.[21]

I therefore conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing oxycodone and Xanax (alprazolam) to Payne. Moreover, by themselves, Respondent's issuance of these two prescriptions is enough to establish a *prima facie* showing that he has committed such acts as to render his registration inconsistent with the public interest. 21 U.S.C. 824(a)(4). *See Dewey C. MacKay,* 75 FR at 49977; *Jayam Krishna-Iyer,* 74 FR at 463; *Olefsky,* 57 FR at 928–29 (revoking registration based on physician's presentation of two fraudulent prescriptions to pharmacy).

Likewise, with respect to the TFO's second visit, the ALJ did not find the evidence sufficient to support the conclusion that Respondent violated federal law. According to the ALJ, the evidence showed that ''Respondent did review the course of treatment with the patient, to include an inquiry about how the medication was working and a physical examination, albeit short.'' ALJ at 68. Indeed, the entire interaction between Respondent and Payne lasted two minutes. *See Armstrong,* 550 F.3d at 389.

Respondent is, of course, charged with the knowledge he obtained at Payne's first visit that he was a substance abuser, none of which is documented in the medical record. *See* Fla Admin Code r. 64B8–9.013(3)(a) & (f) (requiring documentation of history of substance abuse). Moreover, while Respondent asked Payne if the medication was treating his ''pain well,'' neither Respondent nor Gomez asked Payne if there was any change in the status of his pain, whether it still radiated into his upper back, nor any questions about the timing and quality of the pain, and whether it still affected his sleep and physical activity. *See id.* r.64B8–9.013(3)(d). Yet such findings were documented in the medical record for the visit.

Moreover, as found above, the medical record documented that Respondent had performed a neurologic exam, that he had palpated Payne's cervical spine and surrounding areas, and that he had required Payne to perform range of motion tests for various portions of his spine. However, Respondent did not perform a neurologic exam, nor any range of motion tests of any portions of Payne's spine, and the only area that he palpated was Payne's lower back. Once again, the evidence shows that Respondent falsified the medical record.[22] Respondent also falsified the

[20] A practitioner may prescribe narcotic drugs for the purpose of maintenance or detoxification treatment only if ''the prescription is for a Schedule III, IV, or V narcotic drug approved by the Food and Drug Administration specifically for use in maintenance or detoxification treatment and the practitioner is in compliance with requirements in 1301.28 of this chapter.'' 21 CFR 1306.04(c). Oxycodone is a Schedule II drug and cannot be prescribed for this purpose. Moreover, Respondent is not authorized to dispense narcotic drugs for maintenance or detoxification treatment under either 21 U.S.C. 823(g)(1) or 823(g)(2).

[21] So too, that Respondent explained various clinic policies in his new patient speech, *see* ALJ at 67, does nothing to refute the conclusion that he knowingly prescribed oxycodone to a drug abuser. Rather, it is simply a case of Respondent's going through the motions.

[22] While the ALJ opined that there was no evidence that Respondent knowingly falsified the medical records, each of the visit notes (for all four UCs) prepared by Respondent includes the statement:

I declare that I have read and verified the document.

T.J. McNichol, MD.

See RX 1, at 29; *id.* at 33. *See also id.* at 12(8/25/11 visit note for Mike Corleone); *id.* at 18 & 22 (7/28/11 and 8/25/11 visit notes for Anthony Thompson); *id.* at 44 (8/25/11 visit note for Eric McMillen).

The ALJ also noted that ''[t]here are also various entries in the relevant patient chart for the[UCs] that do not correlate to other objective evidence and testimony of what transpired during the examination.'' ALJ at 70. As an example, the ALJ cited a statement in the chart for Anthony Thompson that ''there were 'no external hemorrhoids or rectal masses. Stool Hemoccult was negative[,]' '' and that the Agent testified that ''no examination was performed consistent with such findings in the patient chart.'' *Id.* (quoting RX 1, at 17; and citing Tr. 253). The ALJ then reasoned that there was no evidence that ''the forgoing errors, such as gastrointestinal findings as to hemorrhoids, had any rational relationship to Respondent's

Continued

record by documenting that Payne had ''active'' and ''chronic'' ''generalized anxiety disorder.''

Here again, the evidence shows that Respondent's evaluation of Payne was simply a case of going through the motions. Moreover, notwithstanding the substantial probative evidence of irregularities in his prescribing practices, Respondent failed to testify regarding them. Under these circumstances, an adverse inference is warranted that Respondent knowingly diverted oxycodone and alprazolam to Payne on his second visit as well.[23] *See Baxter* v. *Palmigiano,* 425 U.S. 308, 318 (1976) (''[T]he Fifth Amendment does not forbid adverse inference against parties to civil actions when they refuse to testify in response *to probative evidence* offered against them'') (emphasis added); *MacKay,* 664 F.3d *at* 820 (quoting *Keating* v. *Office of Thrift Supervision,* 45 F.3d 322, 326 (9th Cir. 1995) (''Not only is it permissible to conduct a civil [administrative] proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil [administrative] proceeding.''); *Hoxie,* 419 F.3d at 483. *See also* 21 CFR 1306.04(a). Respondent's issuance of these prescriptions provides further support for the conclusion that he has committed acts which render his registration inconsistent with the public interest. 21 U.S.C. 824(a)(4).

The Prescriptions Issued To Anthony Thompson

With respect to Thompson's first visit, the ALJ noted that there were ''various entries in the relevant patient charts for [this undercover], * * * that do not correlate to other objective evidence and testimony of what transpired during the examination,'' ALJ at 70, that Respondent's medical assistant had falsified the urine drug screen report to show that Thompson tested positive for benzodiazepines and oxycodone, *id.* at 71, and that Respondent's physical examination at the initial visit lasted all of two minutes. *Id.* at 72. The ALJ nonetheless concluded that these ''irregularities'' do not ''support a finding by a preponderance of the evidence that Respondent's prescribing conduct on July 28 * * * 2011, was not for a legitimate medical purpose or outside the usual course of professional practice.'' ALJ at 75.

However, even if expert testimony was required to demonstrate that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing the oxycodone prescription, there is nonetheless substantial evidence to support the conclusion that Respondent's prescribing of alprazolam to Thompson lacked a legitimate medical purpose. Here, Respondent's discussion of Thompson's need for Xanax was limited to Respondent's asking: ''I take it you have some anxiety as well[,] is that what's going on with you?,'' with Thompson using the street term for Xanax to reply, ''Yeah, that's the Zanny's help out.'' While Respondent then advised Thompson that ''we don't call them Zanny's or bars or any of the street terms, here, ok?'' Respondent engaged in no further inquiry as to whether Thompson actually had symptoms consistent with generalized anxiety disorder, let alone symptoms which warranted the prescribing of alprazolam. Moreover, while Respondent then stated that under state law if a pain patient had a psychiatric problem, he had to be referred to psychiatry, he then added that Thompson did not necessarily have to go. Nor did Respondent provide the name of any psychiatrists to see.

Most significantly, in the medical record for this visit, Respondent noted in the psychiatric portion of the review of systems that ''Patient denies problems with mood disturbance. No problems with anxiety.'' And in the physical examination findings, Respondent documented that Thompson's ''[m]ental status, judgment and affect are grossly intact and normal for age.'' Notwithstanding these findings, Respondent documented a diagnosis of generalized anxiety disorder which was ''active'' and ''chronic'' and prescribed 60 Xanax 1mg to Thompson.[24]

In his discussion of Thompson's visits, the ALJ completely ignored the evidence showing that: (1) Respondent's discussion of Thompson's use of Xanax was limited to a single question with Thompson using the street name for the drug and involved no discussion of the nature and duration of any symptoms which might support a diagnosis of ''chronic'' and ''active'' generalized anxiety disorder; (2) the evidence that Respondent documented that Thompson had ''[n]o problems with anxiety''; and (3) Respondent's finding that Thompson's ''mental status, judgment and affect are grossly intact and normal for age.'' See ALJ at 69–74. And while it is true that the Florida standards of practice do not mandate a referral for psychiatric treatment, *see id.* at 74 & n.98 (characterizing Respondent's referral as ''half-hearted''), this does nothing to refute the

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prescribing of controlled substances[,]'' and that ''[t]here is also no evidence that any of the discrepancies in the patient chart were * * * related in any material way to his prescribing of controlled substances in this case.'' *Id.*

Even if gastrointestinal findings are not materially related to a complaint of lower back pain, as found above, there was evidence with respect to several of the undercovers (including the TFO who posed as Bobbie Payne) that Respondent documented various findings including having performed various range of motion tests on the TFO's lumbar spine, which was the area of his purported pain complaint. *See* RX 1, at 21. However, the ALJ entirely ignored this evidence. As for the ALJ's reasoning that there is no evidence these discrepancies were materially related to Respondent's prescribing, if findings related to the area of the body which a patient complains is causing him pain are not materially related to the making of the diagnosis and decision to prescribe controlled substances, then nothing in a medical record is material. The Florida standards, however, suggest otherwise. *See* Fla. Admin Code r.64B8–9.003(3) (''The medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, * * * examination results. * * *'').

[23] I reject the ALJ's reasoning that ''in light of the fact that the Government's evidence was insufficient to establish a prima facie case * * * Respondent's silence in and of itself does not appreciably tip the balance of evidence in favor of the Government'' as contrary to settled law. *See Baxter,* 425 U.S. at 318. Here, the Government did not rely solely on Respondent's failure to testify to prove its case. Rather, it introduced independent and probative evidence as to the illegality of the prescriptions through the testimony of the undercovers officers and the recordings (and transcripts) of their visits. Moreover, Respondent's own evidence, which included the patient charts and the undercover officers' reports of investigation, also provides independent and probative evidence of Respondent's illegal conduct, which he failed to address. Accordingly, as ultimate factfinder, I conclude that an adverse inference is warranted with respect to the prescriptions issued to Payne, as well as the alprazolam prescriptions issued to the other three undercover officers.

[24] The progress note for the visits of the Agent include the following statement under the caption of ''History of Present Illness'' and ''Low Back Pain'':

Associated Conditions: None. Aggravated by standing, walking, and exercise. Denies None with pertinent positives of stiffness and anxiety and [sic] relieved by rest and pain medications.

RX 1, at 15, 19. Similar statements are found in the progress notes for two of the other UCs. *See* RX 1, at 9 (Corleone; ''Associated conditions: None. Aggravated by sitting, climbing stairs, cold, lifting, exercise, and driving. Denies None with pertinent positives of anxiety and [sic] relieved by ice, rest, and pain medications''); *id.* at 26 (Payne; ''Associated Conditions: None. Aggravated by movement, climbing stairs, and lifting. Denies None with pertinent positives of stiffness and anxiety and [sic] relieved by lying down, rest, and pain medications'').

No explanation was offered as to how either Respondent or Gomez could have documented that the UCs had no history of associated conditions but nonetheless had ''pertinent positives'' of anxiety, and given that each of the charts contains the finding that the ''Patient denies problems with mood disturbance. No problem with anxiety[,]'' *see, e.g.,* RX 1, at 16, the statements are obvious gibberish.

conclusion that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing Xanax to Thompson.

In short, where a medical record contains no findings that support a diagnosis, or, as in this case, those findings contradict a diagnosis, in the absence of credible testimony from Respondent explaining the reason for the inconsistency, expert testimony is not necessary to conclude that a prescription lacked a legitimate medical purpose. 21 CFR 1306.04(a); *see also Baxter,* 425 U.S. at 318; *Cochrane,* 76 FR at 17519–20. I thus hold that there is substantial evidence to support the conclusion that the Respondent lacked a legitimate medical purpose and acted outside the course of professional practice when he prescribed Xanax to the Agent at the July 28 visit.

Likewise, on Thompson's second visit, neither Respondent's assistant, nor Respondent, discussed with Thompson whether he had any symptoms consistent with an anxiety diagnosis and which warranted a prescription for Xanax. Moreover, here again, the medical record contains the same findings as on the previous visit that ''Patient denies problems with mood disturbance. No problems with anxiety'' and that Thompson's ''[m]ental status, judgment and affect are grossly intact and normal for age.'' Yet, once again, Respondent prescribed Xanax to Thompson.

Here again, the ALJ failed to even consider any of the evidence regarding Respondent's prescribing of Xanax to Thompson. ALJ at 74–75. For the same reasons as discussed above, I conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing Xanax to Thompson at the latter's second visit. *See* 21 CFR 1306.04(a).

The Prescriptions Issued to Michael Corleone

As found above, a TFO, using the name of Michael Corleone, saw Respondent on August 25, 2011, after having seen Dr. Mosley at the Brandon clinic on two prior occasions. With respect to Respondent's prescribing of controlled substance to Corleone, the ALJ noted Respondent's statements to the TFO that he believed that the TFO ''was 'a little bit over-medicated,'' but that he was ''going to leave [him] on what [he had] been on,'' as well as his statement that '''you know if it comes down to it later, down the road that we need to bring you down a bit, we'll do it * * * I don't think we'll need to. The only reason why we would need to is because the government makes me.'' '' ALJ at 87.

The ALJ further noted that Respondent ''conducted a brief physical examination * * * which in context appears to be somewhat perfunctory since Respondent had also communicated his intent to leave [the TFO] on his current medications prior to initiating the examination.'' *Id.* As the ALJ noted, the exam was limited to Respondent pressing against the TFO's lower back in several locations and asking if it was painful, with the TFO responding that his back was ''a little sore,'' as well as Respondent directing the TFO to sit in a chair and raise each leg both separately and simultaneously, with the TFO expressing ''no discomfort.'' *Id.*

The ALJ then noted that ''[t]he forgoing evidence is certainly suggestive of questionable prescribing by Respondent in this instance, particularly given Respondent's comments about dosing and future reductions based on government action, rather than his medical judgment,'' and that ''Respondent's physical examination appears perfunctory since his decision to prescribe was made moments after his review of the patient file, apparently in reliance on the medical judgment of Dr. Mosley.'' *Id.* at 88. However, the ALJ explained that notwithstanding this evidence, ''Respondent's deference to another physician's medical judgment appears to be a relevant factor since a comparison of the limited patient files made available by the Government in this case reflects that Respondent initially prescribed lower doses of oxycodone and alprazolam to similarly situated patients than his colleague, Dr. Mosley.'' *Id.* The ALJ further noted the testimony of the Government's Expert that ''physicians can and do ascribe some deference to the prior prescriber's approach, assuming that the physician has either spoken with the prior prescriber or has the records from the prior prescriber's intervention.'' *Id.* (citing Tr. 591).[25]

It is true that Respondent had available to him the TFO's medical records which were maintained by Dr. Mosley. However, in the absence of testimony by Respondent that he deferred to Dr. Moseley's medical judgment when he prescribed to the TFO, the ALJ's suggestion is unsupported by substantial evidence and is pure speculation. As the ALJ was want to explain, ''[s]peculation is, of course, no substitute for evidence.'' ALJ at 90 (internal quotations and citations omitted).

Moreover, even assuming, that under the Florida standards of medical practice, a physician can appropriately prescribe a controlled substance based on his review of the records from the patient's prior physician, the evidence still establishes that Respondent lacked a legitimate medical purpose when he prescribed alprazolam to the TFO. As the record for the TFO's first visit with Dr. Mosley shows, Mosley did not make any findings which support a diagnosis of anxiety.

More specifically, in the section of the progress note for documenting Corleone's primary complaint, Mosley did not document a complaint of anxiety. Moreover, in the section for documenting Corleone's psychiatric history, Mosley did not check the blank for anxiety or any other mental illness. And in the section for documenting whether Corleone had a family history of mental health (as well as other conditions), Mosley wrote ''none.'' Finally, Mosley did not document a diagnosis of any type of anxiety disorder. Indeed, in the record for the visit, the only mention of anxiety is where Mosley listed the medications he was prescribing and wrote: ''Xanax 2mg, q12hrs, PRN anxiety # 60.''

Thus, there were no findings, let alone a diagnosis, to support the prescribing of Xanax for anxiety, in the record maintained by Dr. Mosley on the TFO. The ALJ did not, however, explain why it would be reasonable to defer to the medical judgment of a prior physician when that prior physician did not make any findings which would support a diagnosis, let alone a make a diagnosis of anxiety. Indeed, notwithstanding his surmise that Respondent had deferred ''to another physician's medical judgment'' when he prescribed controlled substances to Corleone, ALJ at 88, the ALJ completely ignored the evidence showing a total lack of documentation of findings to

[25] It is strange, given the ALJ's finding that the Government's Expert was so biased as to ''preclude[] *any reliance* on his opinion testimony,'' ALJ at 89 n.118 (emphasis added), that the ALJ then disregarded his own finding and relied on this testimony. However, the Expert's entire testimony was that ''it still is an absolute expectation of a physician, even if you've inherited a patient on certain medications, it's certainly—it's an expectation that a physician evaluate the database and form their own opinion.'' Tr. 591. Continuing, the expert testified that while the new physician's opinion ''can be influenced. It can be, in some ways, deferential to the prior prescriber, but it still is the individual physician[']s opinion and decision, when it comes to prescribing to that patient, when that physician has taken over the care of that patient.'' *Id.* at 591–92. No explanation was provided by the ALJ for disregarding the rest of the Expert's testimony on this issue.

support an anxiety diagnosis in the medical record created by Dr. Mosley.[26]

It is true that in the medical record for the TFO's August 25 visit with Respondent, there is a notation that his pain affected his sleep and physical activity. Yet there is no evidence that any of these issues were raised by the nurse or Respondent with the TFO. Nor is there any evidence that Respondent discussed with the TFO whether he had anxiety.

There is also evidence in the psychiatric portion of the record's review of systems section that ''[p]atient denies problems with mood disturbance. No problems with anxiety.'' Likewise, in the findings for the physical examination, Respondent wrote: ''Oriented with normal memory. Mental status, judgment and affect are grossly intact and normal for age.'' Yet Respondent diagnosed Corleone as having chronic and active generalized anxiety disorder and prescribed to him 60 alprazolam 2mg.[27]

Just as he ignored the evidence showing that Mosley had failed to make any findings to support a diagnosis of anxiety, the ALJ entirely ignored the evidence showing that the findings Respondent made during the TFO's August 25 visit were inconsistent with his diagnosis of generalized anxiety disorder and did not support his prescription for alprazolam. *See* ALJ at 83–91. Here again, Respondent failed to testify and offer an explanation for the inconsistency between his findings and his diagnosis. I therefore conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice when he prescribed 60 tablets of alprazolam 2mg to the TFO.

The Prescriptions Issued To Eric McMillen

As with the previous undercover officer, a DEA Special Agent, who used the name of Eric McMillen, initially saw Dr. Mosley at the Bradenton clinic prior to seeing Respondent. The Agent acknowledged that he had seen Mosley for at least thirty minutes and performed a physical exam, and on cross-examination, agreed that the exam was ''pretty thorough.'' He also testified that it was ''possible'' that he noted on paperwork he completed that he had ''some trouble sleeping.'' At the conclusion of the visit, Dr. Mosley prescribed 180 tablets of oxycodone 30mg and 30 tablets of Xanax 2mg.

Regarding the Agent's visit with Respondent, the ALJ found that Respondent had available to him the Agent's file including the progress note from the previous visit, as well as the information obtained during the triage procedures. ALJ at 79. The ALJ also noted that the Agent had filled out a medical questionnaire during his second visit. *Id.* However, the ALJ credited the Agent's testimony that during the triage procedures Mr. Gomez did not ask him about anxiety or sleeplessness. ALJ at 80 (citing Tr. 366–67). Moreover, at no point during the Agent's visit with Respondent did the latter ask the Agent whether he had problems with anxiety or sleeplessness.

Regarding the alprazolam prescription Respondent issued to the Agent, the ALJ noted that ''[t]he evidence * * * reflect[sic] some irregularities,'' noting that ''the final diagnosis of generalized anxiety disorder facially conflicts with the patient chart entry stating '' '[p]atient denies problems with mood disturbance. No problems with anxiety.' '' ALJ at 81–82. The ALJ also noted that the Agent's ''testimony also reflects no questioning by Mr. Gomez or Respondent about ongoing issues with anxiety or sleeplessness'' and that ''[t]he absence of any inquiry by Respondent about the medical basis for continuing the prescription for Xanax arguably supports a finding that such a prescription lacks a legitimate medical purpose, or is outside the usual course of professional practice.'' *Id.* at 82.

However, the ALJ then concluded that the Government had failed to established by preponderance of the evidence that the prescription lacked a legitimate medical purpose or was issued outside the usual course of professional practice, reasoning that ''there is other credible evidence of record that Respondent had information available to him as of August 25, 2011 that would support the continued prescription for Xanax.'' *Id.* According to the ALJ, this information included ''Dr. Mosley's initial diagnosis of anxiety and corresponding prescription for two milligram Xanax over a thirty day time period,'' as well as a pharmacy printout showing that similar prescriptions had been issued by ''another physician * * * covering the time period from March 14, 2011 to June 10, 2011.'' ALJ at 82. In addition, the ALJ noted that the Agent testified that he had filled out a medical questionnaire on August 25, 2011, but that ''[t]he record is unclear on exactly what information [the Agent] provided in answering the medical questionnaire * * * on the issue of anxiety, sleep disturbance, or pain.'' *Id.* However, the ALJ noted that the August 25 patient file stated that the patient's affected daily activities included ''sleep, work, and physical activity.'' *Id.*

Here again, Respondent did not testify and explain what he relied on in concluding that a prescription for Xanax was medically warranted,[28] and thus the ALJ's conclusion is nothing more than speculation. Moreover, even assuming that Respondent relied on the evidence cited by the ALJ, contrary to the ALJ's understanding, none of it refutes the conclusion that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing Xanax to the Agent.

As for Dr. Mosley's purported ''initial diagnosis,'' once again the ALJ misstated the evidence. As found above, in the medical record Dr. Mosley prepared for the Agent's July 21 visit, Mosley did not document that the Agent had a psychiatric history even though the form included a place for indicating that the Agent had anxiety, nor document that there was a family history of mental health conditions, or make any other findings consistent with an anxiety diagnosis. Indeed, Dr. Mosley did not list anxiety as among his various diagnoses. Thus, Mosley's record did not support the prescription he issued and Respondent could not have reasonably relied on it as a basis for concluding that the Agent had generalized anxiety disorder.[29]

As for the prescription profile which the Agent provided, as explained previously, that profile establishes only that another doctor had prescribed alprazolam (and oxycodone) to the Agent on various occasions. The profile, however, says nothing about whether

[26] As found above, the patient file for Corleone does not contain a progress note for the TFO's second visit with Dr. Mosley, which was of an extremely short duration. Respondent produced no evidence that Mosley ever prepared a note for the visit, and in any event, Respondent did not testify and thus cannot claim to have relied on any findings contained in such a note when he decided to prescribe to the TFO.

[27] As found above, on the alprazolam prescription, Respondent listed his diagnosis as ''Generalized Anxiety Disorder.'' GX 28.

[28] It is acknowledged that during the visit, Respondent told the Agent had he had ''just left [him] on everything that you were on down there.'' GX 22, at 9. This does not, however, establish anything more than that he reviewed the prescription issued by Dr. Mosley. As explained previously, that another physician has issued a prescription does not establish that that physician issued the prescription for a legitimate medical purpose and acted within the usual course of professional practice.

[29] The ALJ also stated that there is no ''evidence to support a finding that Respondent's reliance on records of Dr. Mosley's prescribing in this instance was unreasonable or unlawful.'' ALJ at 79. However, absent from the ALJ's discussion of the note for the Agent's visit with Dr. Mosley is any acknowledgement that Mosley made no findings that the Agent had anxiety and did not include anxiety among his diagnoses. *See id.* at 78.

the prescriptions issued by the previous doctor were for a legitimate medical purpose and issued within the usual course of professional practice.

As for the Respondent's purported reliance on the information in the August 25 progress note that the Agent's pain affected his sleep, the ALJ noted that the record is unclear as to what information the Agent provided in answering the medical questionnaire on the issues of anxiety [and] sleep disturbance,'' thus suggesting the possibility that the information the Agent provided was not consistent with what Mr. Gomez (who falsified two urine drug screen reports and admitted that he shredded the medical questionnaires pursuant to clinic policy) entered into the EMR. However, even if Gomez's destruction of the questionnaire does not support an adverse inference, the ALJ's conclusion is not supported by substantial evidence.

As explained above, Respondent did not testify that he relied on this notation. Moreover, if Respondent was engaged in legitimate medical practice, one would expect that at some point he (or Gomez) would have inquired of the Agent as to how the pain was affecting his sleep. Yet there was no such inquiry of the Agent. Also, while it may be that a patient's sleep problems may be a symptom of generalized anxiety disorder, there is no evidence establishing that this alone is sufficient to diagnose a patient as having generalized anxiety disorder, especially when the doctor finds that the patient ''denies any problems with anxiety'' and that the patient's ''[m]ental status, judgment and affect are grossly intact and normal for age.'' Again, because Respondent failed to testify and address the basis for his diagnosis and offer a credible explanation for why he diagnosed the Agent with general anxiety disorder while finding that he ''denies any problems with anxiety,'' I conclude that an adverse inference is warranted and hold that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice when he prescribed Xanax to the Agent.[30]

[30] With respect to the oxycodone prescription issued by Respondent, the ALJ wrote: ''Notably, Dr. Parran's report and testimony neglect to make any reference to [the Agent's] report of mild pain on the right side during the August 25, 2011 physical examination, or discuss whether such a report of mild pain would be consistent with a patient taking pain medication in the quantities and strengths prescribed to SA Rice by Dr. Mosely [sic].'' ALJ at 81. Contrary to the ALJ's statement, the Expert testified at length as to the appropriateness of prescribing schedule II narcotics to a patient who complains of only mild pain.

For example, after the Expert noted that the UCs had generally complained of pain levels which ''were four or less,'' the Government asked if a ''reported pain level of four or less'' was significant in his review. Tr. 628. The Expert answered: ''A pain level of a four or less indicates mild pain, and a pain which is typically not treated with opiate analgesics, certainly not treated with around the clock opiate analgesics that are Schedule II.'' *Id.* at 629. Subsequently, the expert explained that ''typically, reports that are certainly below four are considered mild pain and pain which is, you know, not impactful or very impactful on patient function, and typically not prescribed certainly * * * high potency Schedule II opiate analgesics.'' *Id.* at 630–31. The Expert then explained that there are risks and benefits to prescribing opiate analgesics and that while the drugs can help patients improve their function, there is ''[t]he risk * * * that patients can and will develop physical dependence,'' as well as other problems such as endocrine changes and sedation, and that ''if a person's impairment of function and/or pain level is in the mild range, then the risk of putting a person on these kinds of medications are [sic] typically considered to outweigh the potential benefit.'' *Id.* at 631–32. Notably, none of this testimony was refuted or shown to be inconsistent through other evidence.

Subsequently, the Expert was asked (albeit with respect to his review of the visit of another UC), whether Respondent's prescribing of alprazolam was problematic. After noting that based upon the information contained on the recordings there did not seem ''to be a diagnosis established [to] prescribe the alprazolam,'' the Expert further testified:

> And my concern goes beyond that, that prescribing Alprazolam on top of Schedule II opiate medication increases the risk of the Schedule II opiate medications, because Alprazolam potentiates the problematic side of opiate medications. It potentiates the sedation, the respiratory depression and the euphoria of opiate medications.

Id. at 636. Notably, the ALJ did not offer any explanation for why he rejected this testimony other than his view that the Expert was so biased as to ''preclude[] any reliance on his opinion testimony,'' ALJ at 89 n. 118, except for when he did rely on it.

Summary of Evidence as to Factors Two and Four

As explained above, even assuming, without deciding, that the ALJ properly failed to give weight to the Expert's testimony, there is still substantial evidence that Respondent violated 21 CFR 1306.04(a) when he prescribed oxycodone and alprazolam to the undercover officer who presented as Robbie Payne. Moreover, the record contains substantial evidence that Respondent violated 21 CFR 1306.04(a) when he prescribed alprazolam to the undercover officers who presented as Anthony Thompson, Michael Corleone, and Eric McMillen.

I therefore conclude that the Government has satisfied its *prima facie* burden of showing that Respondent ''has committed such acts as would render his registration * * * inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). *See also MacKay,* 664 F.3d at 819 (Upholding Agency determination, noting that ''[i]n light of Dr. MacKay's misconduct relating to factors two and four, the government made a prima facie showing that Dr. MacKay's continued registration is inconsistent with the public interest. Although Dr. MacKay may have engaged in the legitimate practice of pain medicine for many of his patients, the conduct found by the Deputy Administrator with respect to [two patients] is sufficient to support her determination that his continued registration is inconsistent with the public interest.'').

Sanction

Under Agency precedent, where, as here, the Government has made out a *prima facie* case that a registrant has committed acts which render his ''registration inconsistent with the public interest,'' he must '''present[] sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.''' *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988)). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs., Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), this Agency has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe-Jonesborough,* 73 FR at 387. As the Sixth Circuit has recognized, this Agency also ''properly considers'' a registrant's admission of fault and his candor during the investigation and hearing to be ''important factors'' in the public interest determination. *See Hoxie,* 419 F.3d at 483.

More recently, the Tenth Circuit upheld the Agency's rule, explaining that:

> When faced with evidence that a doctor has a history of distributing controlled substances unlawfully, it is reasonable for the * * * Administrator to consider whether that doctor will change his or her behavior in the future. And that consideration is vital to whether [his] continued registration is in the public interest. Without Dr. MacKay's testimony, the * * * Administrator had no evidence that Dr. MacKay recognized the extent of his misconduct and was prepared to remedy his prescribing practices.

MacKay, 664 F.3d at 820.

So too, here, Respondent failed to testify and acknowledge his wrongdoing and provide evidence that he will not engage in future misconduct. In short, Respondent put on no evidence to rebut the Government's showing that his registration is inconsistent with the public interest.[31] And here, too, it is appropriate to draw an adverse inference from Respondent's failure to testify. *See MacKay,* 664 F.3d at 820.

Contrary to the ALJ's understanding, the existence of a pending criminal prosecution does not preclude the Agency from drawing an adverse inference from Respondent's failure to testify. *See id.* Indeed, as the Tenth Circuit recognized in *MacKay,* '''[n]ot only is it permissible to conduct a civil [administrative] proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil [administrative] proceeding.''' *Id.* (quoting *Keating,* 45 F.3d at 326). *See also Baxter,* 425 U.S. at 318 (''[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them * * * .''); *Hoxie,* 419 F.3d at 483. Moreover, ''the Fifth Amendment privilege is not 'a sword whereby a claimant asserting the privilege [is] freed from adducing proof in support of a burden which would otherwise have been his.''' *Grider Drug #1 & Grider Drug #2,* 77 FR 44069, 44104 (2012) (quoting *United States* v. *Rylander,* 460 U.S. 752, 758 (1983)).

I therefore hold that Respondent has failed to rebut the Government's *prima facie* case. Moreover, as the Supreme Court explained in *Gonzales,* the core purpose of the Act's prescription requirement is to prevent the diversion of controlled substances to those who seek the drugs for the purpose of engaging in self-abuse or selling them to others. *See* 546 U.S. at 274 (''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'') (citing *Moore,* 423 U.S. at 135 & 143).[32]

As I have previously explained, the Agency has revoked other practitioners' registrations for committing as few as two acts of diversion, *see Krishna-Iyer,* 74 FR at 463 (citing *Alan H. Olefsky,* 57 FR at 928–29), and the Agency can revoke based on a single act of intentional or knowing diversion. *See MacKay,* 75 FR at 49977. Because Respondent's misconduct in diverting controlled substances is egregious and he has failed to accept responsibility for his misconduct and demonstrate why he can be entrusted with a registration, I conclude that his continued registration is inconsistent with the public interest. 21 U.S.C. 824(a)(4). Accordingly, I will order that Respondent's registration be revoked and that any pending application be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration FM0624139, issued to T.J. McNichol, M.D., be, and it hereby is, revoked. I further order that any application of T.J. McNichol, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effectively immediately.[33]

Dated: August 29, 2012.

Michele M. Leonhart,

Administrator.

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BILLING CODE 4410–09–P

[31] Respondent did not even put on evidence that Mr. Gomez, who clearly falsified the urine drug screens of two of the undercovers to show they were taking drugs when they were not, had been fired.

[32] *See Jayam Krishna-Iyer,* 74 FR at 463 (quoting National Center on Addiction and Substance Abuse, *Under the Counter: The Diversion and Abuse of Controlled Prescription Drugs in the U.S.* 3 (2005) [hereinafter, *Under the Counter*]). As noted in *Krishna-Iyer,* ''[t]he diversion of controlled substances has become an increasingly grave threat to this nation's public health and safety. According to The National Center on Addiction and Substance Abuse (CASA), '[t]he number of people who admit abusing controlled prescription drugs increased from 7.8 million in 1992 to 15.1 million in 2003.''' 74 FR at 463 (quoting *Under the Counter,* at 3). CASA also found that '''[a]pproximately six percent of the U.S. population (15.1 million people) admitted abusing controlled prescription drugs in 2003, 23 percent more than the combined number abusing cocaine (5.9 million), hallucinogens (4.0 million), inhalants (2.1 million) and heroin (328,000).''' *Id.* (quoting *Under the Counter,* at 3). Finally, CASA found that '''[b]etween 1992 and 2003, there has been a * * * 140.5 percent increase in the self-reported abuse of prescription opioids,'' and in the same period, the ''abuse of controlled prescription drugs has been growing at a rate twice that of marijuana abuse, five times greater than cocaine abuse and 60 times greater than heroin abuse.'' *Id.* (quoting *Under the Counter,* at 4).

[33] For the same reasons which led me to order the immediate suspension of Respondent's registration, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0224]

Agency Information Collection Activities: Proposed Collection; Comment Request; National Youth Gang Survey

ACTION: 60-Day notice of information collection under review.

The U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''60 days'' until November 16, 2012. This process is conducted in accordance with 5 CFR 1320.10.

If you have additional comments, especially on the estimated public burden or associated reponse time, or suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Mr. Dennis Mondoro, (202) 514–3913, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, 810 Seventh Street NW., Washington, DC 20531. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the function 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.
- 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:* Extension of a currently approved collection.

2. *Title of the Form/Collection:* National Youth Gang Survey.

3. *Agency form number, if any, and the applicable component of the U.S. Department of Justice sponsoring the collection:* Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Local, state, or tribal law enforcement agencies.

Other: None.

Abstract: This collection will gather information related to youth and their activities for research and assessment purposes.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 2,100 respondents will take ten minutes each to complete the survey.

6. *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 425 total annual burden hours associated with this collection.

If additional information is required, contact Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Dated: September 11, 2012.

Jerri Murray,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 2012–22729 Filed 9–14–12; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request: Weekly Claims and Extended Benefits Data and Weekly Initial and Continued Weeks Claimed

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Weekly Claims and Extended Benefits Data and Weekly Initial and Continued Weeks Claimed,'' 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 October 17, 2012.

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–ETA, 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: Forms ETA–538 and ETA–539 are computerized weekly reports that contain information on initial Unemployment Insurance claims and continued weeks claimed. These figures are important economic indicators. Form ETA–538 provides information allowing release of national unemployment claims information to the public five days after the close of the reference period. Form ETA–539 contains more detailed weekly claims information and the State's 13-week insured unemployment rate that is used to determine eligibility for the Extended Benefits program.

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 if the collection of information 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 1205–0028. The current approval is scheduled to expire on September 30, 2012; 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 June 12, 2012 (77 FR 35060).

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 1205–0028. 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–ETA.

Title of Collection: Weekly Claims and Extended Benefits Data and Weekly Initial and Continued Weeks Claimed.

OMB Control Number: 1205–0028.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Number of Responses: 5,512.

Total Estimated Annual Burden Hours: 3,675.

Total Estimated Annual Other Costs Burden: $0.

Dated: September 10, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–22857 Filed 9–14–12; 8:45 a.m.]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Self-Employment Assistance of the Federal Emergency Unemployment Compensation Program

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Self-Employment Assistance of the Federal Emergency Unemployment Compensation Program,'' 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 October 17, 2012.

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–ETA, 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: The Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, provides States with the opportunity to allow Unemployment Insurance claimants in the Federal Emergency Unemployment Compensation program of 2008 to participate in a reemployment program that helps them start their own businesses. This is known as the Self-Employment Assistance (SEA) program. Currently, a handful of States use this reemployment program, for which a minor amount of information (claimants entering the program and weeks and amounts paid) is collected under OMB Control Number 1205–0010. With the expansion of this program to something that could involve more people and with a need to collect data documenting State activities and results, the ETA seeks an extension of the OMB approval under Control Number 1205–0490 for a reporting instrument specific to the SEA program.

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 if the collection of information 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 1205–0490. The current approval is scheduled to expire on September 30, 2012; 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 June 22, 2012 (77 FR 37715).

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 1205–0490. 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–ETA.

Title of Collection: Self-Employment Assistance of the Federal Emergency Unemployment Compensation Program.

OMB Control Number: 1205–0490.

Affected Public: Individuals or Households and State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 72,026.

Total Estimated Number of Responses: 144,312.

Total Estimated Annual Burden Hours: 76,624.

Total Estimated Annual Other Costs Burden: $0.

Dated: September 10, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–22860 Filed 9–14–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Safety Standards for Roof Bolts in Metal and Nonmetal Mines and Underground Coal Mines

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) revision titled, ''Safety Standards for Roof Bolts in Metal and Nonmetal Mines and Underground Coal Mines,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*).

DATES: Submit comments on or before October 17, 2012.

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: Accidents involving falls of roof, face, and rib in underground mines or falls of highwall in surface mines have historically been among the leading causes of mining injuries and deaths. Prevention or control of falls of roof, face, and rib is uniquely difficult because of the variety of conditions encountered in mines that can affect the stability of various types of strata and the changing nature of the forces affecting ground stability at any given operation and time. Roof and rock bolts and accessories are an integral part of ground control systems and are used to prevent the fall of roof, face, and rib. Advancements in technology of roof and rock bolts and accessories have aided in reducing the hazards associated with falls of roof, face, and rib. This ICR addresses recordkeeping requirements associated with regulations 30 CFR 56.3203, 57.3203, and 75.204(a) and (f)(6).

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 if the collection of information 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 1219–0121. The current approval is scheduled to expire on September 30, 2012; 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 June 1, 2012 (77 FR 32698).

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 1219–0121. 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: Safety Standards for Roof Bolts in Metal and Nonmetal Mines and Underground Coal Mines.

OMB Control Number: 1219–0121.

Affected Public: Private Sector—businesses or other for profits.

Total Estimated Number of Respondents: 1,215.

Total Estimated Number of Responses: 129,060.

Total Estimated Annual Burden Hours: 785.

Total Estimated Annual Other Costs Burden: $0.

Dated: September 11, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–22863 Filed 9–14–12; 8:45 a.m.]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR Part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below to modify the application of existing mandatory safety standards codified in Title 30 of the Code of Federal Regulations.

DATES: All comments on the petitions must be received by the Office of Standards, Regulations and Variances on or before October 17, 2012.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 202–693–9441.
3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, Attention: George F. Triebsch, Director, Office of Standards, Regulations and Variances. Persons delivering documents are required to check in at the receptionist's desk on the 21st floor. Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations and Variances at 202–693–9447 (Voice), *barron.barbara@dol.gov* (Email), or 202–693–9441 (Facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

(1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

(2) That the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petitions for Modification

Docket No: M–2012–158–C.

Petitioner: Blue Mountain Energy, Inc., 3607 County Road #65, Rangely, Colorado 81648.

Mine: Deserado Mine, MSHA I.D. No. 05–03505, located in Rio Blanco County, Colorado.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance to permit the use of battery-powered nonpermissible surveying equipment in or inby the last open crosscut, including, but not limited to, portable battery-operated mine transits, total station surveying equipment, distance meters, and data loggers. The petitioner states that:

(1) To comply with requirements for mine ventilation maps and mine maps in 30 CFR 75.372 and 75.1200, use of the most practical and accurate surveying equipment is necessary.

(2) Underground mining by its nature and size, and the complexity of mine plans, requires that accurate and precise measurements be completed in a prompt and efficient manner. The petitioner proposes the following as an alternative to the existing standard:

(a) Nonpermissible electronic surveying equipment will be used when equivalent permissible electronic surveying equipment is not available. Such nonpermissible surveying equipment includes portable battery-operated total station surveying equipment, mine transits, distance meters, and data loggers.

(b) All nonpermissible electronic surveying equipment to be used in or inby the last open crosscut will be examined by surveying personnel prior to use to ensure the equipment is being maintained in a safe operating condition. These examinations will include the following steps:

(i) Checking the instrument for any physical damage and the integrity of the case.

(ii) Removing the battery and inspecting for corrosion.

(iii) Inspecting the contact points to ensure a secure connection to the battery.

(iv) Reinserting the battery and powering up and shutting down to ensure proper connections.

(v) Checking the battery compartment cover to ensure that it is securely fastened.

(c) The results of such examinations will be recorded and retained for one year and made available to MSHA on request.

(d) A qualified person as defined in 30 CFR 75.151 will continuously monitor for methane immediately before and during the use of nonpermissible surveying equipment in or inby the last open crosscut.

(e) Nonpermissible surveying equipment will not be used if methane is detected in concentrations at or above one percent for the area being surveyed. When methane is detected at such levels while the nonpermissible surveying equipment is being used, the equipment will be deenergized immediately and the nonpermissible electronic equipment withdrawn outby the last open crosscut.

(f) All hand-held methane detectors will be MSHA-approved and maintained in permissible and proper operating condition as required in 30 CFR 75.320.

(g) Batteries in the surveying equipment will be changed out or charged in fresh air outby the last open crosscut.

(h) Qualified personnel who use surveying equipment will be properly trained to recognize the hazards associated with the use of nonpermissible surveying equipment in areas where methane could be present.

(i) The nonpermissible surveying equipment will not be put into service until MSHA has initially inspected the equipment and determined that it is in compliance with all the terms and conditions in this petition.

The petitioner asserts that application of the existing standard would result in a diminution of safety to the miners and that the proposed alternative method will at all times guarantee the miners no less than the same measure of protection as that afforded by the existing standard.

Docket Number: M–2012–159–C.

Petitioner: Blue Mountain Energy, Inc., 3607 County Road #65, Rangely, Colorado 81648.

Mine: Deserado Mine, MSHA I.D. No. 05–03505, located in Rio Blanco County, Colorado.

Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance to permit the use of battery-powered nonpermissible surveying equipment in return airways, including, but not limited to, portable battery-operated mine transits, total station surveying equipment, distance meters, and data loggers. The petitioner states that:

(1) To comply with requirements for mine ventilation maps and mine maps in 30 CFR 75.372 and 75.1200, use of the most practical and accurate surveying equipment is necessary.

(2) Underground mining by its nature and size, and the complexity of mine plans, requires that accurate and precise measurements be completed in a prompt and efficient manner. The petitioner proposes the following as an alternative to the existing standard:

(a) Nonpermissible electronic surveying equipment will be used when equivalent permissible electronic surveying equipment is not available. Such nonpermissible surveying equipment includes portable battery-operated total station surveying equipment, mine transits, distance meters, and data loggers.

(b) All nonpermissible electronic surveying equipment to be used in return airways will be examined by surveying personnel prior to use to ensure the equipment is being maintained in a safe operating condition. These examinations will include the following steps:

(i) Checking the instrument for any physical damage and the integrity of the case.

(ii) Removing the battery and inspecting for corrosion.

(iii) Inspecting the contact points to ensure a secure connection to the battery.

(iv) Reinserting the battery and powering up and shutting down to ensure proper connections.

(v) Checking the battery compartment cover to ensure that it is securely fastened.

(c) The results of such examinations will be recorded and retained for one year and made available to MSHA on request.

(d) A qualified person as defined in 30 CFR 75.151 will continuously monitor for methane immediately before and during the use of nonpermissible surveying equipment in return airways.

(e) Nonpermissible surveying equipment will not be used if methane is detected in concentrations at or above one percent for the area being surveyed. When methane is detected at such levels while the nonpermissible surveying equipment is being used, the equipment will be deenergized immediately and the nonpermissible electronic equipment withdrawn out of the return airways.

(f) All hand-held methane detectors will be MSHA-approved and maintained in permissible and proper operating condition as required in 30 CFR 75.320.

(g) Batteries in the surveying equipment will be changed out or charged in fresh air out of the return airways.

(h) Qualified personnel who use surveying equipment will be properly trained to recognize the hazards associated with the use of nonpermissible surveying equipment in areas where methane could be present.

(i) The nonpermissible surveying equipment will not be put into service until MSHA has initially inspected the equipment and determined that it is in compliance with all the terms and conditions in this petition.

The petitioner asserts that application of the existing standard would result in a diminution of safety to the miners and that the proposed alternative method will at all times guarantee no less than the same measure of protection as that afforded by the existing standard.

Docket Number: M–2012–160–C.

Petitioner: Blue Mountain Energy, Inc., 3607 County Road #65, Rangely, Colorado 81648.

Mine: Deserado Mine, MSHA I.D. No. 05–03505, located in Rio Blanco County, Colorado.

Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance to permit the use of battery-powered nonpermissible surveying equipment within 150 feet of pillar workings and longwall faces, including, but not limited to, portable battery-operated mine transits, total station surveying equipment, distance meters, and data loggers. The petitioner states that:

(1) To comply with requirements for mine ventilation maps and mine maps in 30 CFR 75.372, 75.1002(a), and 75.1200, use of the most practical and accurate surveying equipment is necessary. To ensure the safety of the miners in active mines, and in future mines that may be in close proximity, it is necessary to determine the exact location and extent of the mine workings.

(2) Underground mining by its nature and size, and the complexity of mine plans, requires that accurate and precise measurements be completed in a prompt and efficient manner. The petitioner proposes the following as an alternative to the existing standard:

(a) Nonpermissible electronic surveying equipment will be used when equivalent permissible electronic surveying equipment is not available. Such nonpermissible surveying equipment includes portable battery-operated total station surveying equipment, mine transits, distance meters, and data loggers.

(b) All nonpermissible electronic surveying equipment to be used within 150 feet of pillar workings will be examined by surveying personnel prior to use to ensure the equipment is being maintained in a safe operating condition. These examinations will include the following steps:

(i) Checking the instrument for any physical damage and the integrity of the case.

(ii) Removing the battery and inspecting for corrosion.

(iii) Inspecting the contact points to ensure a secure connection to the battery.

(iv) Reinserting the battery and powering up and shutting down to ensure proper connections.

(v) Checking the battery compartment cover to ensure that it is securely fastened.

(c) The results of such examinations will be recorded and retained for one year and made available to MSHA on request.

(d) A qualified person as defined in 30 CFR 75.151 will continuously monitor for methane immediately before and during the use of nonpermissible surveying equipment within 150 feet of pillar workings or longwall faces.

(e) Nonpermissible surveying equipment will not be used if methane is detected in concentrations at or above one percent for the area being surveyed. When methane is detected at such levels while the nonpermissible surveying equipment is being used, the equipment will be deenergized immediately and the nonpermissible electronic equipment withdrawn further than 150 feet from pillar workings or longwall faces.

(f) All hand-held methane detectors will be MSHA-approved and maintained in permissible and proper operating condition as required in 30 CFR 75.320.

(g) Batteries in the surveying equipment will be changed out or charged in fresh air more than 150 feet from pillar workings or longwall faces.

(h) Qualified personnel who use surveying equipment will be properly trained to recognize the hazards associated with the use of nonpermissible surveying equipment in areas where methane could be present.

(i) The nonpermissible surveying equipment will not be put into service until MSHA has initially inspected the equipment and determined that it is in compliance with all the terms and conditions in this petition.

The petitioner asserts that application of the existing standard would result in a diminution of safety to the miners and that the proposed alternative method will at all times guarantee no less than the same measure of protection as that afforded by the existing standard.

Docket Number: M–2012–005–M.

Petitioner: Intrepid Potash–New Mexico, LLC, Post Office Box 101, Carlsbad, New Mexico 88221.

Mine: Intrepid Potash East Mine, MSHA I.D. No. 29–00170 and Intrepid Potash West Mine, MSHA I.D. No. 29–00175, located in Eddy County, New Mexico.

Regulation Affected: 30 CFR 57.11050(a) and (b) (Escapeways and Refuges).

Modification Request: The petitioner requests a modification of the existing standard to permit exit from the Intrepid East Mine to the Intrepid West Mine and from the Intrepid West Mine to the Intrepid East Mine. The petitioner proposes to provide an escapeway to the surface where the East Mine connects to the West Mine, and where the West Mine connects to the East Mine. The petitioner states that:

(1) The Intrepid East Mine and the Intrepid Potash West Mine are connected via airlock doors at an underground location.

(2) For each mine there are three escape routes, one of which directs personnel to the adjacent East or West Mine. After personnel pass through the airlock located at the connection between the mines, they are in a mine that operates on separate ventilation, electrical, and pager phone systems.

(3) The isolation provides protection for evacuating personnel equal to or better than escape to the surface through one of the two escapeways in the originating mine.

(4) The capability of exiting to the adjacent mine improves safety in that it provides a third alternative escape route that is closer in proximity to the mining areas than the two escape shafts.

(5) The petitioner proposes to provide:

(a) Electronic communication to both mines at the connection between the mines.

(b) Airlock doors separating the mines such that:

(i) Only one set of airlock doors will be open at any time and air currents from each mine are maintained separate and distinct;

(ii) The airlock doors will be constructed of fire-resistant materials and/or protected with a fire-resistant coating; and

(iii) The condition of the airlock doors will be inspected monthly.

(c) Instructions will be provided for checking out of the East Mine and into the West Mine, and out of the West Mine into the East Mine using electronic communication at the connection between the mines.

(d) Instructions will be provided for personnel on how to navigate to the escape shafts of the adjacent mine at the connection between the mines.

(e) A mine map showing the escape routes of the West Mine will be posted at the connection in the West Mine and a mine map showing the escape routes of the East Mine will be posted at the connection in the East Mine.

The petitioner further states that training on escape using the connection between the mines will be provided for affected personnel at least semi-annually. In addition, at least one annual evacuation drill, as required by 30 CFR 57.4361, will direct personnel to escape to the other mine via the connection.

Dated: September 12, 2012.

George F. Triebsch,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 2012–22805 Filed 9–14–12; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Existing Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: *Pharmacy Billing Requirements.* A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before November 16, 2012.

ADDRESSES: Ms Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0701, fax (202) 693–2447, Email *ferguson.yoon@dol.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION:

I. Background: The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.,* and the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384 *et seq.* All three of these statutes require that OWCP pay for covered medical treatment provided to beneficiaries; this medical treatment can include medicinal drugs dispensed by pharmacies. In order to determine whether amounts billed for drugs are appropriate, OWCP must receive the required data elements, including the name of the patient/beneficiary, the National Drug Code (NDC) number of the drugs prescribed, the quantity provided, the prescription number and the date the prescription was filled. The regulations implementing these statutes require the collection of information needed to enable OWCP to determine if bills for drugs submitted directly by pharmacies, or reimbursement requests submitted by claimants, should be paid. There is no standardized paper form for submission of the billing information collected in this Information Collection Request (ICR). Over the past several years, almost all pharmacy bills submitted to OWCP have been submitted electronically using one of the industry-wide standard formats for the electronic transmission of billing data through nationwide data clearinghouses devised by the National Council for Prescription Drug Programs (NCPDP). None of the electronic billing formats have been designed by or provided by OWCP; they are billing formats commonly accepted by other Federal programs and in the private health insurance industry for drugs. Nonetheless, the three programs (FECA, BLBA and EEOICPA) provide instructions for the submission of necessary pharmacy bill data elements in provider manuals distributed or made available to all pharmacies enrolled in the programs. This information collection is currently approved for use through December 31, 2012.

II. Review Focus: The Department of Labor is particularly interested in comments which:

- 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 submissions of responses.

III. Current Actions: The Department of Labor is seeking public comments on the extension of this currently approved information collection.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Pharmacy Billing Requirements.

OMB Number: 1240–0050.

Affected Public: Business or other for-profit.

Total Respondents: 4,128.

Total Responses: 1,489,532.

Time per Response: 1–5 Minutes.

Frequency: On Occasion.

Estimated Total Burden Hours: 26,917.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: September 12, 2012.

Yoon Ferguson,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2012–22828 Filed 9–14–12; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Existing Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: *Claim for Medical Reimbursement (OWCP–915).* A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before November 16, 2012.

ADDRESSES: Ms Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0701, fax (202) 693–2447, Email *ferguson.yoon@dol.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION:

I. Background: The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.,* and the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384 *et seq.* All three statutes require OWCP to pay for covered medical treatment that is provided to beneficiaries, and also to reimburse beneficiaries for any out-of-pocket covered medical expenses they have paid. Form OWCP–915, Claim for Medical Reimbursement, is used for this purpose and collects the necessary beneficiary and medical provider data in a standard format. Regulations implementing the FECA, BLBA and EEOICPA programs require the collection of information that is needed to determine if reimbursement claims submitted by beneficiaries can be paid. (20 CFR 10.802, 30.702, 725.701 and 725.705). This information collection is currently approved for use through December 31, 2012.

II. Review Focus: The Department of Labor is particularly interested in comments which:

• 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 submissions of responses.

III. Current Actions: The Department of Labor seeks the approval of the extension of this currently approved information collection in order to carry out its responsibility to provide payment for certain covered medical services to injured employees who are covered under the Acts.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Claim for Medical Reimbursement.

OMB Number: 1240–0007.

Agency Number: OWCP–915.

Affected Public: Individual or Households; Business or other-for-profit; Not-for-profit institutions.

Total Respondents: 8,309.

Total Responses: 25,872.

Time per Response: 10 minutes.

Estimated Total Burden Hours: 4,294.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $42,689.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: September 12, 2012.

Yoon Ferguson,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2012–22829 Filed 9–14–12; 8:45 am]

BILLING CODE 4510–CR–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site visit review of the Materials Research Science and Engineering Center (MRSEC) at Brandeis University by the Division of Materials Research (DMR) #1203.

Dates & Times: Oct 11, 2012; 7:15 a.m.—8:30 p.m., Oct 12, 2012; 7:15 a.m.–4:30 p.m.

Place: Brandeis University, Waltham, MA.

Type of Meeting: Part open.

Contact Person: Dr. Mary E. Galvin, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–8562.

Purpose of Meeting: To provide advice and recommendations concerning further support of the MRSEC at Brandeis University.

Agenda

Thursday, Oct 11, 2012

7:15 a.m.–4:30 p.m. Open—Review of the MRSEC,

5:00 p.m.—6:45 p.m. Closed—Executive Session.

Friday, Friday Oct 12, 2012

7:15 a.m.–9:50 a.m. Closed—Executive Session,

9:50 a.m.–4:30 p.m. Closed—Executive Session, Draft and Review Report.

Reason For Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the MRSEC. These matters are exempt under 5 U.S.C. 552 b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: September 11, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–22748 Filed 9–14–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site visit review of the Materials Research Science and Engineering Center (MRSEC) at The Ohio State University (OSU) by the Division of Materials Research (DMR) #1203.

Dates & Times: Oct 22, 2012, 7:15 a.m.–6:45 p.m., Oct 23, 2012, 8:00 a.m.–3:15 p.m.

Place: The Ohio State University, Columbus, Ohio.

Type Of Meeting: Part open.

Contact Person: Dr. Charles Ying, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–8428.

Purpose Of Meeting: To provide advice and recommendations concerning further support of the MRSEC at The Ohio State University.

Agenda

Monday, October 22, 2012

7:15 a.m.–8:15 a.m. Closed—Executive Session

8:15 a.m.–5:00 p.m. Open—Review of the OSU MRSEC

5:00 p.m.–6:45 p.m. Closed—Executive Session

Tuesday, October 23, 2012

8:00 a.m.–3:15 p.m. Closed—Executive session & Report Writing

Reason For Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the MRSEC. These matters are exempt under 5 U.S.C. 552 b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: September 11, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–22749 Filed 9–14–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee For Geosciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Geosciences (1755).

Dates: October 10, 2012 (8:30 a.m.–5:00 p.m.)–October 11, 2012; 8:30 a.m.–2:00 p.m.

Place: Stafford I, Room 1235, National Science Foundation, 4201Wilson Blvd., Arlington, Virginia 22230.

Type of Meeting: Open.

Contact Person: Melissa Lane, National Science Foundation, Suite 705, 4201 Wilson Blvd., Arlington, Virginia 22230. Phone 703–292–8500.

Minutes: May be obtained from the contact person listed above.

Purpose Of Meeting: To provide advice, recommendations, and oversight concerning support for geosciences.

Agenda

Wednesday, October 10, 2012

- Update on Directorate Activities and Plans
- Updates on NSF-wide Programmatic Efforts such as Science, Engineering and Education for Sustainability
- Meeting with the Director and Deputy Director
- Division Subcommittee Meetings

Thursday, October 11, 2012

- Division Subcommittee Reports
- Review and Approval of FY 2012 Committee of Visitor Reports
- Action Items/Planning for Fall Meeting

Dated: September 11, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–22750 Filed 9–14–12; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30200; File No. 812–13993]

Prudential Investment Portfolios 3, et al.; Notice of Application

September 11, 2012.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 12(d)(1)(A) and (B) of the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act.

SUMMARY: *Summary of the Application:* The requested order would permit certain registered open-end management investment companies that operate as ''funds of funds'' to acquire shares of certain registered open-end management investment companies and unit investment trusts (''UITs'') that are within and outside the same group of investment companies as the acquiring investment companies.

APPLICANTS: Prudential Investment Portfolios 3 (''PIP 3''), The Prudential Investment Portfolios, Inc. (''PIP Inc.'', together with PIP 3, the ''Trusts'') and Prudential Investments LLC (''PI'' or the ''Adviser'').

DATES: *Filing Dates:* The application was filed on December 21, 2011, and amended on May 9, 2012, and September 10, 2012.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 5, 2012, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: Gateway Center Three, 100 Mulberry Street, 4th Floor, Newark, New Jersey 07102–4061.

FOR FURTHER INFORMATION CONTACT: Lewis B. Reich, Senior Counsel, at (202) 551–6919, or Jennifer L. Sawin, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. PIP 3 is an open-end management investment company registered under the Act and organized as a Delaware statutory trust. PIP 3 is a series trust and currently offers four series, each with its own investment objectives and policies. PIP Inc. is an open-end management investment company registered under the Act and organized as a Maryland corporation. PIP Inc. is a series trust and currently offers six series, each with its own investment objectives and policies.[1] One series of PIP 3 and three series of PIP Inc. currently operate as Funds of Funds and intend to rely on the requested order.

2. PI, a New York limited liability company that is a wholly-owned direct subsidiary of Prudential Financial, Inc., is registered as an investment adviser under the Investment Advisers Act of 1940 and serves as investment adviser to the Trusts. PI currently employs certain entities either controlling, controlled by or under common control with PI as subadvisers to the Funds.

3. Applicants request an order under section 12(d)(1)(J) of the Act exempting them from sections 12(d)(1)(A) and (B) of the Act to permit (1) a Fund of Funds to acquire shares in excess of the limits set forth in section 12(d)(1)(A) of the Act of (a) registered open-end management investment companies that are not part of the same ''group of investment companies,'' within the meaning of section 12(d)(1)(G)(ii) of the Act, as the Fund of Funds (''Unaffiliated Investment Companies'') and UITs that are not part of the same group of investment companies as the Fund of Funds (''Unaffiliated Trusts,'' together with the Unaffiliated Investment Companies, ''Unaffiliated Funds'')[2] and (b) registered open-end management investment companies and UITs that are part of the same group of investment companies as the Fund of Funds (collectively, ''Affiliated Funds,'' together with the Unaffiliated Funds, ''Underlying Funds'') and (2) each Underlying Fund, any principal underwriter for the Underlying Fund, and any broker or dealer registered under the Securities Exchange Act of 1934 (''Broker'') to sell shares of the Underlying Fund to the Fund of Funds in excess of the limits set forth in section 12(d)(1)(B) of the Act.[3] Applicants also request an order under sections 6(c) and 17(b) of the Act to exempt applicants from section 17(a) to the extent necessary to permit Underlying Funds to sell their shares to Funds of Funds and redeem their shares from Funds of Funds.

Applicants' Legal Analysis

A. Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act, in relevant part, prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, and any broker or dealer from selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Applicants seek an exemption under section 12(d)(1)(J) of the Act to permit (a) the Funds of Funds to acquire shares of the Underlying Funds in excess of the limits in section 12(d)(1)(A), and (b) the Underlying Funds, their principal underwriters, and any Broker to sell shares of an Underlying Fund to a Fund of Funds in excess of the limits in section 12(d)(1)(B) of the Act.

3. Applicants state that the proposed arrangement will not give rise to the policy concerns underlying sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants state that the proposed arrangement will not result in the exercise of undue influence by a Fund of Funds or its affiliated persons over the Underlying Funds. The concern about undue influence does not arise in connection with a Fund of Funds' investment in the Affiliated Funds, since they are part of the same group of investment companies. To limit the control that a Fund of Funds or its affiliated persons may have over an Unaffiliated Fund, applicants propose a condition prohibiting the Adviser, any person controlling, controlled by, or under common control with the Adviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Adviser or any person controlling, controlled by, or under common control with the Adviser (collectively, the ''Group'') from controlling (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply (individually and in the aggregate) to any other investment adviser within the meaning of section 2(a)(20)(B) of the Act to a Fund of Funds (''Subadviser''), any person controlling, controlled by or under common control with the Subadviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Subadviser or any person controlling, controlled by or under common control with the Subadviser (the ''Subadviser Group''). Applicants propose other conditions to limit the potential for undue influence over the Unaffiliated Funds, including that no Fund of Funds or Fund of Funds

[1] Applicants request that the relief apply to the Trusts and to any existing or future registered open-end management investment company or series thereof that (i) is advised by PI or by an entity controlling, controlled by or under common control with PI and (ii) invests in other registered open-end management investment companies in reliance on section 12(d)(1)(G) of the Act (any such investment companies or series thereof, together with any series of either Trust, a ''Fund'', and any Fund that operates as a fund of funds, a ''Fund of Funds'').

[2] Certain of the Unaffiliated Funds may be registered under the Act as either UITs or open-end investment companies and have received exemptive relief to permit their shares to be listed and traded on a national securities exchange at negotiated prices (''ETFs'').

[3] All entities that currently intend to rely on the requested order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions set forth in the application.

Affiliate[4] (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an officer, director, trustee, advisory board member, investment adviser, Subadviser or employee of the Fund of Funds, or a person of which any such officer, director, trustee, investment adviser, Subadviser, member of an advisory board or employee is an affiliated person (each, an ''Underwriting Affiliate''; however any person whose relationship to the Unaffiliated Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate). An offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate is referred to as an ''Affiliated Underwriting.''

5. To further ensure that an Unaffiliated Investment Company understands the implications of an investment by a Fund of Funds under the requested order, prior to a Fund of Funds' investment in the shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute an agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (''Participation Agreement''). Applicants note that an Unaffiliated Investment Company other than an ETF whose shares are purchased by a Fund of Funds in the secondary market will retain its right at all times to reject any investment by a Fund of Funds.[5]

6. Applicants state that they do not believe that the proposed arrangement will involve excessive layering of fees. The Board of each Fund of Funds, including a majority of the trustees who are not ''interested persons'' (within the meaning of section 2(a)(19) of the Act) (''Independent Trustees''), will find that the advisory fees charged under any Fund of Funds investment advisory or management contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under any Underlying Fund's advisory contract. In addition, the Adviser will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any Subadviser for a Fund of Funds will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received by the Subadviser or an affiliated person of the Subadviser from an Unaffiliated Fund, other than any advisory fees paid to the Subadviser or an affiliated person by the Unaffiliated Fund, in connection with the investment by the Fund of Funds in the Unaffiliated Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in Rule 2830 of the Conduct Rules of the NASD (''NASD Conduct Rule 2830'').[6]

7. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Underlying Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except in certain circumstances identified in condition 11 below.

B. Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3) of the Act defines an ''affiliated person'' of another person to include (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

2. Applicants state that a Fund of Funds and the Affiliated Funds might be deemed to be under common control of the Adviser and therefore affiliated persons of one another. Applicants also state that a Fund of Funds and the Unaffiliated Funds might be deemed to be affiliated persons of one another if the Fund of Funds acquires 5% or more of an Unaffiliated Fund's outstanding voting securities. In light of these and other possible affiliations, section 17(a) could prevent an Underlying Fund from selling shares to and redeeming shares from a Fund of Funds.[7]

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction, including the consideration to be paid or received, are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants submit that the proposed transactions satisfy the standards for relief under sections 17(b) and 6(c) of the Act.[8] Applicants state

[4] A ''Fund of Funds Affiliate'' is the Adviser, any Subadviser, promoter or principal underwriter of a Fund of Funds, as well as any person controlling, controlled by, or under common control with any of those entities. An ''Unaffiliated Fund Affiliate'' is an investment adviser, sponsor, promoter, or principal underwriter of an Unaffiliated Fund, as well as any person controlling, controlled by, or under common control with any of those entities.

[5] An Unaffiliated Investment Company, including an ETF would retain its right to reject any initial investment by a Fund of Funds in excess of the limit in section 12(d)(1)(A)(i) of the Act by declining to execute the Participation Agreement with the Fund of Funds.

[6] Any references to NASD Conduct Rule 2830 include any successor or replacement FINRA rule to NASD Conduct Rule 2830.

[7] Applicants state that to the extent purchases and sales of shares of an ETF occur in the secondary market (and not through principal transactions directly between a Fund of Funds and an ETF), relief from section 17(a) would not be necessary. The requested relief is intended to cover, however, transactions directly between ETFs and a Fund of Funds. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where an ETF could be deemed an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds because the investment adviser to the ETF or an entity controlling, controlled by or under common control with the investment adviser to an ETF also is an investment adviser to the Fund of Funds.

[8] Applicants acknowledge that receipt of any compensation by (a) an affiliated person of a Fund

that the terms of the transactions are reasonable and fair and do not involve overreaching. Applicants state that the terms upon which an Underlying Fund will sell its shares to or purchase its shares from a Fund of Funds will be based on the net asset value of the Underlying Fund. Applicants state that the proposed transactions will be consistent with the policies of each Fund of Funds and each Underlying Fund and with the general purposes of the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. The members of a Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The members of a Subadviser Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of an Unaffiliated Fund, the Group or a Subadviser Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of the Unaffiliated Fund, then the Group or the Subadviser Group will vote its shares of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares. This condition will not apply to a Subadviser Group with respect to an Unaffiliated Fund for which the Subadviser or a person controlling, controlled by, or under common control with the Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act (in the case of an Unaffiliated Investment Company) or as the sponsor (in the case of an Unaffiliated Trust).

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in shares of an Unaffiliated Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or an Unaffiliated Fund Affiliate.

3. The Board of each Fund of Funds, including a majority of the Independent Trustees, will adopt procedures reasonably designed to assure that its Adviser and any Subadviser(s) to the Fund of Funds are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or Fund of Funds Affiliate from an Unaffiliated Fund or an Unaffiliated Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, the Board of the Unaffiliated Investment Company, including a majority of the Independent Trustees, will determine that any consideration paid by the Unaffiliated Investment Company to a Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Investment Company; (b) is within the range of consideration that the Unaffiliated Investment Company would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between an Unaffiliated Investment Company and its investment adviser(s) or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in any Affiliated Underwriting.

6. The Board of an Unaffiliated Investment Company, including a majority of the Independent Trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Unaffiliated Investment Company in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board of the Unaffiliated Investment Company will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Unaffiliated Investment Company. The Board of the Unaffiliated Investment Company will consider, among other things, (a) whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Investment Company; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Unaffiliated Investment Company in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board of the Unaffiliated Investment Company will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

7. Each Unaffiliated Investment Company shall maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and shall maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth the: (a) Party from whom the securities were acquired, (b) identity of the underwriting syndicate's members, (c) terms of the purchase, and (d) information or materials upon which the determinations of the Board of the Unaffiliated Investment Company were made.

8. Prior to its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute a Participation Agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Unaffiliated Investment

of Funds, or an affiliated person of such person, for the purchase by a Fund of Funds of shares of an Underlying Fund or (b) an affiliated person of an Underlying Fund, or an affiliated person of such person, for the sale by the Underlying Fund of its shares to a Fund of Funds may be prohibited by section 17(e)(1) of the Act. The Participation Agreement also will include this acknowledgement.

Company of the investment. At such time, the Fund of Funds will also transmit to the Unaffiliated Investment Company a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Unaffiliated Investment Company of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Unaffiliated Investment Company and the Fund of Funds will maintain and preserve a copy of the order, the Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. Before approving any advisory contract under section 15 of the Act, the Board of each Fund of Funds, including a majority of the Independent Trustees, shall find that the advisory fees charged under such advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. Such finding and the basis upon which the finding was made will be recorded fully in the minute books of the appropriate Fund of Funds.

10. The Adviser will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b-1 under the Act) received from an Unaffiliated Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received by the Subadviser, or an affiliated person of the Subadviser, from an Unaffiliated Fund, other than any advisory fees paid to the Subadviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds.

11. No Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund: (a) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (b) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to (i) acquire securities of one or more investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

12. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to funds of funds set forth in NASD Conduct Rule 2830.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22792 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting.

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, September 20, 2012 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in closed session, and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Thursday, September 20, 2012 will be:

and settlement of injunctive actions; institution and settlement of administrative proceedings; an adjudicatory matter; and other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: September 13, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–22968 Filed 9–13–12; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67797; File No. SR–NYSEArca–2012–85]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Certain NYSE Arca Equities Rules To Replace References to "NYSE Amex" With "NYSE MKT" Reflecting the Recent Name Change of NYSE Amex LLC to NYSE MKT LLC

September 7, 2012.

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 August 28, 2012, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, 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 certain NYSE Arca Equities rules to replace references to "NYSE Amex" with "NYSE MKT" to reflect the recent name change of NYSE Amex LLC to NYSE MKT LLC. 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, 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 certain NYSE Arca Equities rules to replace references to ''NYSE Amex'' with ''NYSE MKT'' to reflect the recent name change of NYSE Amex LLC to NYSE MKT LLC.[4]

The Exchange proposes to replace references to NYSE Amex in NYSE Arca Equities Rules 5.2(b), 5.5(a), 7.31, and 7.45 with references to NYSE MKT. The Exchange also proposes to replace references to American Stock Exchange, a predecessor of NYSE Amex, in NYSE Arca Equities Rules 5.2(d) and 5.2(e) with references to NYSE MKT.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[5] in general, and Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 would add clarity to the Exchange's rules by correctly reflecting the current name of NYSE MKT, which is in 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.

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[7] and Rule 19b–4(f)(6) thereunder.[8] 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to rule-comments@sec.gov. Please include File Number SR–NYSEARCA–2012–85 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2012–85. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2012–85 and should be submitted on or before October 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22725 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

[4] *See* Securities Exchange Act Release No. 67037 (May 21, 2012), 77 FR 31415 (May 25, 2012) (SR–NYSEAmex-2012–32).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(6).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67825; SR–Phlx–2012–27; SR–Phlx–2012–54]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Relating to Complex Order Fees and Rebates for Adding and Removing Liquidity in Select Symbols

September 11, 2012.

On March 1, 2012 and April 23, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') 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] two proposed rule changes relating to the transaction fees for certain Complex Order transactions.[3]

In SR–Phlx–2012–27 (filed on March 1, 2012), Phlx proposed to amend the Exchange's Fee Schedule to increase the transaction fees and rebates for certain Complex Order transactions and create a new rebate for certain Complex Orders. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] Notice of filing of the proposed rule change was published for comment in the **Federal Register** on March 15, 2012.[5]

In SR–Phlx–2012–54 (filed on April 23, 2012), Phlx proposed to replace a portion of SR–Phlx–2012–27 to provide additional information concerning the Directed Participant and Market Maker fees for removing liquidity in Complex orders (''Second Proposal,'' and, together with SR–Phlx–2012–27, the ''Phlx Proposals''). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[6] Notice of filing of the proposed rule change was published for comment in the **Federal Register** on May 4, 2012. [7]

The Commission received no comment letters on the Phlx Proposals.

On April 30, 2012, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule changes.[8] Thereafter, NASDAQ OMX Group, Inc. submitted a response letter in support of the Phlx Proposals on July 26, 2012.[9]

Section 19(b)(2) of the Act [10] provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of the filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule changes were published for notice and comment in the **Federal Register** on March 15, 2012 and May 4, 2012, respectively. September 11, 2012 is 180 days from March 15, 2012 and November 10, 2012 is an additional 60 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the Phlx Proposals so that it has sufficient time to consider the Phlx Proposals and the issues raised by those proposals, and the Exchange's response to such issues in its response letter.[11] The Commission also finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule changes so that it has sufficient time to consider data that has been provided by the Exchange in support of its proposals, including additional data that it anticipates will be provided by the Exchange.[12]

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[13] designates November 10, 2012, and December 30, 2012, as the respective dates by which the Commission should either approve or disapprove the proposed rule changes (SR–Phlx–2012–27 and SR–Phlx–2012–54).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22785 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Complex Order is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced at a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy. A Complex Order may also be a stock-option order, which is an order to buy or sell a stated number of units of an underlying stock or exchange-traded fund (''ETF'') coupled with the purchase or sale of options contract(s). *See* Exchange Rule 1080, Commentary .08(a)(i).

[4] 15 U.S.C. 78s(b)(3)(A).

[5] *See* Securities Exchange Act Release No. 66551 (March 9, 2012) 77 FR 15400.

[6] 15 U.S.C. 78s(b)(3)(A).

[7] *See* Securities Exchange Act Release No. 66883 (April 30, 2012) 77 FR 26591.

[8] *See* Securities Exchange Act Release No. 66884, 77 FR 26595(May 4, 2012) (''Order Instituting Proceedings'').

[9] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Joan C. Conley, Senior Vice President & Corporate Secretary, NASDAQ OMX Group, Inc., dated July 26, 2012.

[10] 15 U.S.C. 78s(b)(2).

[11] For example, in the order instituting proceedings to determine whether to approve or disapprove the proposed rule changes, the Commission sought comment on whether discrimination on the basis of whether a market maker has an off-exchange arrangement to pay an order flow provider to direct its orders to that market maker is a ''fair'' basis for discrimination among exchange members with respect to the fees charged by the exchange. The Commission also sought comment on whether the Phlx Proposals adequately addressed the reasonableness of the proposed fees (and thus the proposed fee differential).

[12] To date, the Exchange has provided data on price improvement for directed customer complex orders, and the rates of interaction with customer complex orders by types of market participant, among other things.

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67826; File No. SR–OCC–2012–13]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Correct an Administrative Oversight in SR–OCC–2012–10

September 11, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on August 29, 2012, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II and III below, which Items have been prepared primarily by OCC. OCC filed the proposal pursuant to Section 19(b)(3)(A)(i) [2] of the Act, and Rule 19b–4(f)(1) [3] thereunder, so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change is to correct an administrative oversight in rule filing SR–OCC–2012–10, a rule filing intended

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(i).

[3] 17 CFR 240.19b–4(f)(1).

to eliminate OCC's pledge program in its entirety.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this proposed rule change is to correct an administrative oversight in rule filing SR–OCC–2012–10, a rule filing intended to eliminate OCC's pledge program in its entirety.

In SR–OCC–2012–10, OCC proposed to eliminate its pledge program, which was primarily contained within OCC Rule 614, ''Pledge Program.'' The Commission approved SR–OCC–2012–10 on August 22, 2012. OCC subsequently learned that it inadvertently made an administrative oversight in Item 1 of SR–OCC–2012–10 and did not include the entire text of Rule 614 as ''material proposed to be deleted.''

OCC now proposes to eliminate the remaining language of Rule 614, which was intended to be deleted in SR–OCC–2012–10.

The proposed changes to OCC's Rules are consistent with the purposes and requirements of Section 17A of the Act [4] because they will allow OCC to remove a rarely used operational function and focus its resources on core clearing operations. Moreover, OCC believes that elimination of the Program will not materially affect clearing members given its limited and infrequent use. The proposed rule change is not inconsistent with any rules of OCC, including any proposed to be amended.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

[4] 15 U.S.C. 78q–1.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(i) [5] of the Act and Rule 19b–4(f)(1) [6] thereunder because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. Notwithstanding the foregoing, OCC will delay implementation of the rule change until it is deemed certified under CFTC Regulation § 40.6. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–OCC–2012–13 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–OCC–2012–13. 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 filings also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.optionsclearing.com/about/publications/bylaws.jsp.* 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–OCC–2012–13 and should be submitted on or before October 9, 2012.

[5] 15 U.S.C. 78s(b)(3)(A)(i).

[6] 17 CFR 240.19b–4(f)(1).

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22786 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67830; File No. SR–Phlx–2012–112]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Rebates and Fees for Adding and Removing Liquidity in Select Symbols

September 11, 2012.

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 August 31, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 the Exchange's Pricing Schedule at Section I titled ''Rebates and Fees for Adding and Removing Liquidity in Select Symbols.'' [3] Specifically, the Exchange proposes to amend certain Simple Order Fees for Removing Liquidity. The Exchange also proposes various technical amendments to the Pricing Schedule.

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 September 4, 2012.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXfilings,* 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 the proposed rule change is to amend Section I of the Exchange's Pricing Schedule. Specifically, the Exchange is proposing to amend Section I of the Pricing Schedule to increase certain Simple Order Fees for Removing Liquidity. Despite the increase to these fees, the Exchange believes that the fees remain competitive with fees assessed by other options exchanges.

The Exchange is also proposing to make technical amendments to Section I of the Pricing Schedule.

The Exchange is proposing to amend Section I, Part A of the Pricing Schedule to increase the Simple Order Fees for Removing Liquidity for Customers from $0.39 per contract to $0.43 per contract and increase the Simple Order Fees for Removing Liquidity for Specialists [4] and Market Makers [5] from $0.39 to $0.45 per contract.

Also, the Exchange is proposing to make technical corrections in Section I, Part A by replacing ''$0.00'' with ''N/A'' for several categories. This is not a change to these fees, but a technical amendment since in these instances ''N/A'' better reflects that a fee is not relevant for this category rather than ''$0.00'' which simply reflects that no fee is currently being charged for this category.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act [6] in general, and furthers the objectives of Section 6(b)(4) of the Act [7] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities.

The Exchange believes that its proposal to increase the Simple Order Fees for Removing Liquidity for Customers, from $0.39 to $0.43 per contract, and the Simple Order Fees for Removing Liquidity for Specialists and Market Makers, from $0.39 to $0.45 per contract, is reasonable because the increases remain competitive with fees assessed by other options exchanges.[8]

The Exchange believes that its proposal to increase the Simple Order Fees for Removing Liquidity for Customers, Specialists and Market Makers is equitable and not unfairly discriminatory because the Exchange would assess all market participants, except Customers, a $0.45 per contract Simple Order Fee for Removing Liquidity. The Exchange proposes to assess a lower Simple Order Fee for Removing Liquidity to Customers of $0.43 per contract as compared to $0.45 per contract for all other market participants because Customer order flow enhances liquidity on the Exchange for the benefit of all market participants.

The Exchange believes that the technical amendments proposed to Section II, Part A are reasonable, equitable and not unfairly discriminatory because the amendments are not substantive but rather technical amendments to provide more detail in the Pricing Schedule for greater clarity.

The Exchange operates in a highly competitive market, comprised of ten 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 or rebates to be inadequate. Accordingly, the fees that are assessed and the rebates paid by the Exchange must remain competitive with fees charged and rebates paid 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[9] 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.

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[3] The rebates and fees in Section I apply to certain Select Symbols which are listed in Section I of the Pricing Schedule.

[4] A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

[5] A ''Market Maker'' includes Registered Options Traders (''ROTs'') (Rule 1014(b)(i) and (ii), which include Streaming Quote Traders (''SQTs'') (*See* Rule 1014(b)(ii)(A)) and Remote Streaming Quote Traders (''RSQTs'') (*See* Rule 1014(b)(ii)(B)).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] NYSE Arca, Inc. assesses Customers, Firms, Broker-Dealers and Market Makers a $0.45 take fee. *See* NYSE Arca, Inc.'s Fee Schedule.

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

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 (*h http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2012–112 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–2012–112. 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–Phlx–2012–112 and should be submitted on or before October 9, 2012

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22789 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67842; File No. SR–NASDAQ–2012–090]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change to Amend Rule 4626—Limitation of Liability

September 12, 2012.

On July 23, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') 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 Exchange Rule 4626—Limitation of Liability. The proposed rule change was published for comment in the **Federal Register** on August 1, 2012.[3] The Commission received eleven comment letters on this proposal.[4]

Section 19(b)(2) of the Act[5] 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 for this filing is September 15, 2012. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change, which relates to a voluntary accommodation policy for claims arising from systems difficulties that NASDAQ experienced during the initial public offering of Facebook, Inc. on May 18, 2012, the comment letters that have been submitted in connection with this proposed rule change, and any response to the comment letters submitted by the Exchange.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates October 30, 2012, 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–NASDAQ–2012–090).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22846 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67827; File No. SR–CBOE–2012–085]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Relating to Complex Order Auctions

September 11, 2012.

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 August 30, 2012, Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67507 (July 26, 2012), 77 FR 45706.

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Sis DeMarco, Chief Compliance Officer, Triad Securities Corp., dated August 20, 2012; Eugene P. Torpey, Chief Compliance Officer, Vandham Securities Corp., dated August 21, 2012; John C. Nagel, Managing Director and General Counsel, Citadel LLC, dated August 21, 2012; Benjamin Bram, Watermill Institutional Trading LLC, dated August 22, 2012; Daniel Keegan, Managing Director, Citigroup Global Markets Inc., dated August 22, 2012; Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated August 22, 2012; Mark Shelton, Group Managing Director and General Counsel, UBS Securities LLC, dated August 22, 2012; Andrew J. Entwistle and Vincent R. Cappucci, Entwistle & Cappucci LLP, dated August 22, 2012; Douglas G. Thompson, Michael G. McLellan, and Robert O. Wilson, Finkelstein Thompson LLP, Christopher Lovell, Victor E. Stewart, and Fred T. Isquith, Lovell Stewart Halebian Jacobson LLP, Jacob H. Zamansky and Edward H. Glenn, Zamansky & Associates LLC, dated August 22, 2012; James J. Angel, Associate Professor of Finance, Georgetown University, McDonough School of Business, dated August 23, 2012; and Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., dated August 29, 2012.

[5] 15 U.S.C. 78s(b)(2).

[6] 15 U.S.C. 78s(b)(2).

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 proposed to amend its Rules regarding complex order auctions. 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'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

On a class-by-class basis, the Exchange may activate the electronic complex order request for responses (''RFR'') auction (''COA''), which is a process by which eligible complex orders [3] are given an opportunity for price improvement before being routed to the electronic complex order book (''COB'') or once on a PAR workstation. Rule 6.53C(d) provides that prior to routing a complex order to the COB or once on PAR, eligible complex orders may be subject to a COA. On receipt of a COA-eligible order and request from the Trading Permit Holder representing the order that it be COA'd, the Exchange will send an RFR message to all Trading Permit Holders who have elected to receive RFR messages.[4] The RFR message identifies the component series, the size of the COA-eligible order and any contingencies, but not the side of the market. Eligible Trading Permit Holders may then submit responses to the RFR message (''RFR Responses'') during the Response Time Interval.[5]

Responders to the auction, not knowing the side of the COA order, may send RFR Responses on both sides of the market. The CBOE Hybrid System (the ''System'') [6] only considers RFR Responses on the opposite side of the COA order. RFR Responses that are on the same side as the COA order cannot trade with it and thus are unnecessary, and as a result, the System automatically rejects these RFR Responses.

The Exchange proposes to amend its rules to provide that the RFR message will identify the side of the market of the COA-eligible order and to clarify that RFR Responses must be on the opposite side of the market of the COA order. Identification of the side of the market of the COA order in the RFR message will eliminate the entry of unnecessary RFR Responses on the same side of the market of the COA order that the System automatically rejects. The Exchange believes that the proposed rule change will therefore improve the efficiency of the COA process by eliminating excess RFR Responses that can never actually trade with the COA order. The Exchange believes that providing this additional information to Trading Permit Holders in the RFR message could result in more meaningful and effective RFR Responses. RFR Responses that exist at the end of the Response Time Interval with respect to COA-eligible orders will still be firm. The Exchange will announce the implementation date of the proposed rule change by Regulatory Circular to be published no later than 90 days following the effective date. The implementation date will be no later than 180 days following the effective date.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [8] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, 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.

In particular, the Exchange believes the proposed rule change protects investors and is in the public interest because it will eliminate the submission of unnecessary RFR Responses on the same side of the market as a COA order (which the System rejects because they cannot trade with the COA order), which will ultimately make the COA process more efficient. The Exchange believes this added efficiency could lead to more meaningful and competitive price RFR Responses, which responses may result in better prices for customers.

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

[3] An eligible complex order, referred to in Rule 6.53C as a ''COA-eligible order,'' means a complex order that, as determined by the Exchange on a class-by-class basis, is eligible for a COA considering the order's marketability (defined as a number of ticks away from the current market), size, complex order type, and complex order origin type (i.e. non-broker-dealer public customer, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange). All determinations by the Exchange on COA-eligible order parameters are announced to Trading Permit Holders by Regulatory Circular. *See* Rule 6.53C(d)(i)(2) and Interpretation and Policy .01 to Rule 6.53C.

[4] *See* Rule 6.53C(d)(ii).

[5] Each Market-Maker with an appointment in the relevant option class, and each Trading Permit Holder acting as agent for orders resting at the top of the COB in the relevant option series, may submit responses to the RFR message. Alternatively, the Exchange may determine on a class-by-class basis to permit COA responses by all Trading Permit Holders. *See* Rule 6.53C(d)(iii). A ''Response Time Interval'' means the period of time during which RFR Responses may be entered, the length of which is determined by the Exchange on a class-by-class basis but may not exceed three seconds. *See* Rule 6.53C(d)(iii)(2). RFR Response sizes will be limited to the size of the COA-eligible order for allocation purposes and may be expressed on a net price basis in a multiple of the minimum increment or in a smaller increment that may not be less than $0.01, as determined by the Exchange on a class-by-class basis. RFR responses are not visible other than by the COA system. *See* Rule 6.53C(d)(iii)(1). Rule 6.53C(d)(iv) through (viii) describes the processing, execution, and routing of COA-eligible orders, firm quote requirements for COA-eligible orders, and handling of unrelated complex orders.

[6] The System is a trading platform that allows automatic executions to occur electronically and open outcry trades to occur on the floor of the Exchange. To operate in this ''hybrid'' environment, the Exchange has a dynamic order handling system that has the capability to route orders to the trade engine for automatic execution and book entry, to Trading Permit Holder and PAR Official workstations located in the trading crowds for manual handling, and/or to other order management terminals generally located in booths on the trading floor for manual handling. Where an order is routed for processing by the Exchange order handling system depends on various parameters configured by the Exchange and the order entry firm itself.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

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 neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the 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–2012–085 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–2012–085. 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–2012–085 and should be submitted on or before October 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22787 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67828; File No. SR–C2–2012–030]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Relating to Complex Order Auctions

September 11, 2012.

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 August 30, 2012, C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') 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 proposed to amend its Rules regarding complex order auctions. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, 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

On a class-by-class basis, the Exchange may activate the electronic complex order request for responses (''RFR'') auction (''COA''), which is a process by which eligible complex orders[3] are given an opportunity for price improvement before being routed to the complex order book (''COB''). Rule 6.13(c) provides that prior to routing a complex order to the COB, eligible complex orders may be subject to a COA. On receipt of a COA-eligible order and request from the Participant representing the order that it be processed through COA, the Exchange will send an RFR message to all Participants who have elected to receive RFR messages.[4] The RFR message identifies the component series, the size of the COA-eligible order and any contingencies, but not the side of the market. Eligible Participants may then submit responses to the RFR message

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] An eligible complex order, referred to in Rule 6.13 as a ''COA-eligible order,'' means

acomplex order that, as determined by the Exchange on a class-by-class basis, is eligible for a COA considering the order's marketability (defined as a number of ticks away from the current market), size, complex order type, and complex order origin type (i.e. non-broker-dealer public customer, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange). All determinations by the Exchange on COA-eligible order parameters are announced to Trading Permit Holders by Regulatory Circular. *See* Rule 6.13(c)(1)(B) and Interpretation and Policy .01 to Rule 6.13.

[4] *See* Rule 6.13(c)(2).

(''RFR Responses'') during the Response Time Interval.[5]

Responders to the auction, not knowing the side of the COA order, may send RFR Responses on both sides of the market. The System[6] only considers RFR Responses on the opposite side of the COA order. RFR Responses that are on the same side as the COA order cannot trade with it and thus are unnecessary, and as a result, the System automatically rejects these RFR Responses.

The Exchange proposes to amend its rules to provide that the RFR message will identify the side of the market of the COA-eligible order and to clarify that RFR Responses must be on the opposite side of the market of the COA order. Identification of the side of the market of the COA order in the RFR message will eliminate the entry of unnecessary RFR Responses on the same side of the market of the COA order that the System automatically rejects. The Exchange believes that the proposed rule change will therefore improve the efficiency of the COA process by eliminating excess RFR Responses that can never actually trade with the COA order. The Exchange believes that providing this additional information to Trading Permit Holders in the RFR message could result in more meaningful and effective RFR Responses. RFR Responses that exist at the end of the Response Time Interval with respect to COA-eligible orders will still be firm. The Exchange will announce the implementation date of the proposed rule change by Regulatory Circular to be published no later than 90 days following the effective date. The implementation date will be no later than 180 days following the effective date.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, 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.

In particular, the Exchange believes the proposed rule change protects investors and is in the public interest because it will eliminate the submission of unnecessary RFR Responses on the same side of the market as a COA order (which the System rejects because they cannot trade with the COA order), which will ultimately make the COA process more efficient. The Exchange believes this added efficiency could lead to more meaningful and competitive price RFR Responses, which responses may result in better prices for customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

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

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–C2–2012–030 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–C2–2012–030. 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–C2–2012–030 and should be submitted on or before October 9, 2012.

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[5] The Exchange will determine, on a class-by-class basis, which of the following two groups of Participants may submit responses to the RFR message (''RFR Responses'') during the Response Time Interval: (a) Each Market-Maker registered in the relevant option class, and each Participant acting as agent for orders resting at the top of the COB in the relevant options series; or (b) all Participants. *See* Rule 6.13(c)(3). A ''Response Time Interval'' means the period of time during which RFR Responses may be entered, the length of which is determined by the Exchange on a class-by-class basis but may not exceed three seconds. *See* Rule 6.13(c)(3)(B). RFR response sizes will be limited to the size of the COA-eligible order for allocation purposes and may be expressed on a net price basis in a multiple of the minimum increment or in a smaller increment that may not be less than $0.01, as determined by the Exchange on a class-by-class basis. RFR responses are not visible other than by the COA system. *See* Rule 6.13(c)(3)(A). Rule 6.13(c)(4) through (8) describes the processing, execution, and routing of COA-eligible orders, firm quote requirements for COA-eligible orders, and handling of unrelated complex orders.

[6] The System is the automated trading system used by the Exchange for the trading of options contracts.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22788 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67831; File No. SR–Phlx–2012–111]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees to NOM

September 11, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19–4[2] thereunder, notice is hereby given that, on August 31, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt certain Routing Fees to recoup costs incurred by the Exchange when routing to the NASDAQ Options Market LLC (''NOM'').

While the changes proposed herein are effective upon filing, the Exchange has designated these changes to be operative on September 4, 2012.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXfilings,* 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 recoup costs that the Exchange incurs for routing and executing certain orders in equity options to NOM, specifically, options on Facebook, Inc. (''FB''), Google Inc. (''GOOG'') and Groupon, Inc. (''GRPN'').

The Exchange's Pricing Schedule at Section V currently includes the following Routing Fees for routing Customer, Professional,[3] Firm, Broker-Dealer, Market Maker[4] and Specialist[5] orders to away markets.

Exchange	Customer	Professional	Firm/broker-dealer/specialist/market maker
NYSE AMEX	$0.11	$0.31	$0.55
BATS Penny	0.55	0.55	0.55
BATS non-Penny	0.86	0.91	0.91
BOX	0.11	0.11	0.55
BX Options	0.11	0.54	0.54
CBOE	0.11	0.31	0.55
CBOE orders greater than 99 contracts in RUT, RMN, NDX, MNX, ETFs, ETNs and HOLDRs	0.29	0.31	0.55
C2	0.55	0.56	0.55
ISE	0.11	0.29	0.55
ISE Select Symbols[13]	0.31	0.39	0.55
NYSE ARCA (Penny Pilot)	0.55	0.55	0.55
NYSE ARCA (Standard)	0.11	0.11	0.55
NOM	0.54	0.54	0.55
NOM-MNX	0.56	0.56	0.55
NOM-NDX	0.11	0.81	0.81

[13] These fees are applicable to orders routed to ISE that are subject to Rebates and Fees for Adding and Removing Liquidity in Select Symbols. See ISE's Schedule of Fees for the complete list of symbols that are subject to these fees.

The Exchange is proposing to adopt NOM Routing Fees when routing options overlying FB, GOOG and GRPN to NOM to account for the new NOM fees for removing liquidity and other routing costs incurred by the Exchange when routing to NOM in FB, GOOG and GRPN, as follows:

Exchange	Customer	Professional	Firm/broker-dealer/specialist/market maker
NOM—FB, GOOG and GRPN	$0.86	$0.91	$0.91

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 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).

[4] A ''Market Maker'' includes Registered Options Traders (''ROTs'') (Rule 1014(b)(i) and (ii), which include Streaming Quote Traders (''SQTs'') (*See* Rule 1014(b)(ii)(A)) and Remote Streaming Quote Traders (''RSQTs'') (*See* Rule 1014(b)(ii)(B)).

[5] A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

NOM recently filed an immediately effective rule change to adopt Fees for Removing Liquidity applicable to FB, GOOG and GRPN which will become operative on September 4, 2012.[6] NOM will assess the applicable Fees for Removing Liquidity to Phlx market participants, Customers, Professionals, Firms, Broker-Dealers, Market Makers or Specialists, when orders are routed from Phlx to NOM. The Exchange is seeking to adopt new Routing Fees to account for these new fees and other routing costs incurred by the Exchange when routing options overlying FB, GOOG or GRPN to NOM.

In May 2009, the Exchange adopted Rule 1080(m)(iii)(A) to establish Nasdaq Options Services LLC (''NOS''), a member of the Exchange, as the Exchange's exclusive order router.[7] NOS is utilized by the Exchange's fully automated options trading system, PHLX XL®,[8] solely to route orders in options listed and open for trading on the PHLX XL system to destination markets. Each time NOS routes to away markets NOS is charged a $0.06 clearing fee and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange currently recoups clearing and transaction charges incurred by the Exchange as well as certain other costs incurred by the Exchange when routing to away markets, such as administrative and technical costs associated with operating NOS, membership fees at away markets, and technical costs associated with routing options.[9] The Exchange proposes to title the new fees ''NOM—FB, GOOG and GRPN.''

As with all fees, the Exchange may adjust these Routing Fees in response to competitive conditions by filing a new proposed rule change.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act[10] in general, and furthers the objectives of Section 6(b)(4) of the Act[11] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that the proposed NOM Routing Fees are reasonable because they seek to recoup costs that are incurred by the Exchange when routing Customer, Professional, Firm, Broker-Dealer, Specialist and Market Maker orders to NOM on behalf of members, respectively. Each destination market's transaction charge varies and there is a standard clearing charge for each transaction incurred by the Exchange along with other administrative and technical costs that are incurred by the Exchange. The Exchange believes that the proposed Routing Fees would enable the Exchange to recover the remove fees assessed to market participants by NOM on options overlying FB, GOOG and GRPN, plus clearing and other administrative and technical fees for the execution of Customer, Professional, Firm, Broker-Dealer, Specialist and Market Maker orders when routed to NOM. The Exchange also believes that the proposed NOM Routing Fees are equitable and not unfairly discriminatory because they would be uniformly applied to all Customer, Professional, Firm, Broker-Dealer, Specialist and Market Maker orders that are routed to NOM.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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–2012–111 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–2012–111. 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

[6] *See* SR–NASDAQ–2012–102 (not yet published). NOM filed to adopt Fees for Removing Liquidity applicable to FB, GOOG and GRPN as follows: $0.79 per contract fee for Customers, $0.85 per contract fee for Professionals, Firms, Non-NOM Market Makers and $0.79 per contract fee for NOM Market Makers.

[7] *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

[8] This proposal refers to ''PHLX XL'' as the Exchange's automated options trading system. In May 2009 the Exchange enhanced the system and adopted corresponding rules referring to the system as ''Phlx XL II.'' *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32). The Exchange intends to submit a separate technical proposed rule change that would change all references to the system from ''Phlx XL II'' to ''PHLX XL'' for branding purposes.

[9] In addition to membership fees and transaction fees, the Exchange also incurs an Options Regulatory Fee when routing to an away market that assesses that fee. The Exchange's proposed Routing Fees for NOM for FB, GOOG and GRPN would include the NOM Fees for Removing Liquidity of $0.79 per contract fee for Customers, $0.85 per contract fee for Professionals, Firms and Non-NOM Market Makers, and $0.79 per contract fee for NOM Market Makers, as well as a $0.06 clearing cost and another $0.05 per contract fee associated with administrative and technical costs for operating NOS. At this time, the Exchange has determined to assess a maximum fee of $0.91 per contract for routing options overlying FB, GOOG and GRPN to NOM. While this does not recover all of the Exchange's costs, the Exchange has determined at this time to not assess more than a $0.91 per contract Routing Fee.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

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–Phlx–2012–111 and should be submitted on or before October 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22790 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67832; File No. SR–C2–2012–031]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Make Technical Amendments to the Rules

September 11, 2012.

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 September 4, 2012, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') 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 Substance of the Proposed Rule Change

C2 proposes to make technical amendments to the C2 rules. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), 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, Proposed Rule Change

1. Purpose

The Exchange proposes to make technical amendments to chapters in the Exchange rulebook that incorporate by reference rules of the Chicago Board Options Exchange, Incorporated (''CBOE''). CBOE Chapter 4—Business Conduct (which includes Interpretation and Policy .06 to Rule 4.11—Position Limits) is incorporated into the C2 rules by reference as C2 Chapter 4.[3] Interpretation and Policy .06 to CBOE Rule 4.11 describes the procedures and criteria by which a TPH organization may obtain a facilitation exemption from applicable standard position limits in non-multiply-listed Exchange options for the purposes of facilitating some orders, pursuant to the provisions of CBOE Rule 6.74(b). CBOE Rule 6.74(b) describes the process that allows a floor broker to cross orders. Because C2, as an all-electronic exchange, does not have floor brokers, CBOE Rule 6.74(b) does not apply to C2 (and indeed, is not incorporated into C2 rules). And since Interpretation and Policy .06 to Rule 4.11 relies on the inapplicable-to-C2 CBOE Rule 6.74(b), Interpretation and Policy .06 to Rule 4.11 is thereby itself inapplicable to C2. As such, the Exchange proposes to state that, with respect to applicability to C2 only, Interpretation and Policy .06 to CBOE Rule 4.11 is not applicable to C2.

The Exchange also proposes to amend its Rule 17.50—Imposition of Fines for Minor Rule Violations to fix inaccurate references. CBOE Chapter 17—Discipline (which includes Rule 17.50—Imposition of Fines for Minor Rule Violations) is incorporated into the C2 rules by reference as C2 Chapter 17.[4] CBOE Rule 17.50 references CBOE Rule 3.23—Integrated Billing System. However, C2's Integrated Billing System rule is C2 Rule 3.9. Therefore, C2 proposes to state that any references in Rule 17.50 to Rule 3.23 should be read, in reference to C2 only, to C2 Rule 3.9. Substantively, CBOE Rule 3.23 and C2 Rule 3.9 are identical.

C2 also proposes to amend its Chapter 17 to state that, with respect to applicability to C2 only, CBOE Rules 17.50(g)(4), 17.50(g)(5) and 17.50(g)(7) are not applicable to C2. Sections (g)(4), (g)(5) and (g)(7) of CBOE Rule 17.50 are not applicable to C2 because those sections apply to floor-based trading, and C2, as an all-electronic exchange, does not have any floor-based trading. CBOE Rule 17.50(g)(4) imposes fines for the failures to submit trade information on time and to the price reporter. On C2, trade information is submitted automatically (and the Exchange represents that C2 has appropriate systems in place to ensure that this occurs), rendering CBOE Rule 17.50(g)(4) inapplicable.

CBOE Rule 17.50(g)(5) imposes fines for the failure of a Market-Maker or Floor Broker to (1) honor the firm quote requirements of CBOE Rule 8.51, and (2) honor the priority of marketable customer orders maintained in the Customer Limit Order Book pursuant to CBOE Rule 6.45. Due to C2's nature as all-electronic, Market-Makers lack the requisite control to commit such violations (and C2 does not have Floor Brokers). The Exchange represents that C2 has appropriate systems in place to ensure that firm quote violations do not occur and customer order priority is automatically honored. CBOE Rule 17.50(g)(5) also imposes fines for the failure of a Market-Maker or Floor Broker to use due diligence in the execution of orders for which the floor Trading Permit Holder maintains an agency obligation pursuant to CBOE Rule 6.73. This section is inapplicable to C2 because C2 does not have floor Trading Permit Holders.

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–62323 (June 17, 2010), 75 FR 36144 (June 24, 2012) (SR–C2–2010–002).

[4] *See* Securities Exchange Act Release No. 34–62323 (June 17, 2010), 75 FR 36144 (June 24, 2012) (SR–C2–2010–002).

CBOE Rule 17.50(g)(7) imposes fines for failure to submit trade data on the trade date. On C2, such trade data is submitted automatically (and the Exchange represents that C2 has appropriate systems in place to ensure that trade data is submitted in a timely manner), rendering CBOE Rule 17.50(g)(7) inapplicable.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with 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 the Section 6(b)(5)6 requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, 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. By correcting references and removing inapplicable sections within Rule 17.50 and Interpretation and Policy .06 to Rule 4.11, the Exchange eliminates confusion that could arise from reading Exchange rules, thereby removing impediments to and perfecting the mechanism for a free and open market.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

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

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. Impose any significant burden on competition; and

C. Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)[7] of the Act and Rule 19b–4(f)(6)[8] thereunder.

At any time within 60 days of the filing of this 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–C2–2012–031 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.

All submissions should refer to File Number SR–C2–2012–031. 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 C2. 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–C2–2012–031 and should be submitted on or before October 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22791 Filed 9–14–12; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b 4(f)(6).

[9] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions to and extensions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Director at the following addresses or fax numbers.

(OMB)

Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA)

Social Security Administration, DCRDP, Attn: Reports Clearance Director, 107 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than November 16,

2012. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. *Substitution of Party Upon Death of Claimant—20 CFR 404.957(c)(4) and 416.1457(c)(4)—0960–0288.* An administrative law judge (ALJ) may dismiss a request for a hearing on a pending claim of a deceased individual for Social Security benefits or Supplemental Security Income (SSI) payments. Individuals who believe they may be adversely affected by the dismissal may ask to be a substitute party for the deceased claimant by completing Form HA–539. The ALJs and the hearing office support staff use this form to (1) maintain a written record of the request; (2) establish the relationship of the requester to the deceased claimant; (3) determine the substituted individual's wishes regarding an oral hearing or decision on the record; and (4) admit the data into the claimant's official record as an exhibit. The respondents are individuals requesting to be a substitute party for a deceased claimant.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
HA–539	4,000	1	5	333

2. *Continuation of SSI Benefits for the Temporarily Institutionalized—Certification of Period and Need to Maintain Home—20 CFR 416.212(b)(1)—0960–0516.* When SSI recipients (1) enter a public institution or (2) enter a private medical treatment facility with Medicaid paying more than 50 percent of expenses, SSA must reduce recipients' SSI payments to a nominal sum. However, if this institutionalization is temporary (defined as a maximum of three months), SSA may waive the reduction. Before SSA can waive the SSI payment reduction, the agency must receive the following documentation: (1) A physician's certification stating the SSI recipient will only be institutionalized for a maximum of 3 months and (2) certification from the recipient, the recipient's family, or friends confirming SSI payments are needed to maintain the living arrangements to which the individual will return post-institutionalization. The respondents are SSI recipients, their family or friends, and doctors.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Certifications from physicians, and other respondents	60,000	1	5	5,000

3. *Representative Payee Report of Benefits and Dedicated Account—20 CFR 416.546, 416.635, 416.640, 416.665–0960–0576.* SSA requires representative payees (RP) to submit a written report accounting for the use of money paid to Social Security or SSI recipients, and to establish and maintain a dedicated account for these payments. SSA uses Form SSA–6233 to ensure the RPs are using the benefits for the recipient's current maintenance and personal needs, and the expenditures of funds from the dedicated account are in compliance with the law. Respondents are RPs for SSI and Social Security recipients.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–6233	30,000	1	20	10,000

4. *Application for Circuit Court Law—20 CFR 404.985 & 416.1458–0960–0581.* Persons claiming an acquiescence ruling (AR) would change SSA's prior determination or decision must submit a written readjudication request with specific information. SSA reviews the information in the requests to determine if the issues stated in the AR pertain to the claimant's case, and if the claimant is entitled to readjudcation. If readjudication is appropriate, SSA considers only the issues the AR covers. Any new determination or decision is subject to administrative or judicial review as specified in the regulations. Respondents are claimants for Social Security benefits and SSI payments who request readjudication. This information collection request is for the information claimants must provide to request readjudication.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
AR-based Readjudication Requests	10,000	1	17	2,833

Dated: August 12, 2012.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2012–22843 Filed 9–14–12; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 8022]

Advisory Committee on International Economic Policy; Notice of Open Meeting

The Advisory Committee on International Economic Policy (ACIEP) will meet from 2 p.m. to 4 p.m. on Wednesday, October 3, 2012, in room 1107 of the Harry S. Truman Building at the U.S. Department of State, 2201 C Street NW., Washington, DC. The meeting will be hosted by the Assistant Secretary of State for Economic and Business Affairs Jose W. Fernandez and Committee Chair Ted Kassinger. The ACIEP serves the U.S. Government in a solely advisory capacity, and provides advice concerning issues and challenges in international economic policy. The meeting will examine U.S.-Egypt relations. Subcommittee reports will be led by the Investment Subcommittee, the Sanctions Subcommittee, the Subcommittee on Women in International Economic Policy, and the Stakeholder Advisory Board on the U.S. National Contact Point for the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises.

This meeting is open to public participation, though seating is limited. Entry to the building is controlled; to obtain pre-clearance for entry, members of the public planning to attend should provide, by Friday, September 28 their name, professional affiliation, valid government-issued ID number (i.e., U.S. Government ID [agency], U.S. military ID [branch], passport [country], or drivers license [state]), date of birth, and citizenship, to Ronelle Jackson by fax (202)647–5936, email (*JacksonRS@state.gov*), or telephone (202) 647–9204. Participants may enter the Department of State from the entrance on 23rd Street. Because of escorting requirements, non-Government attendees should plan to arrive 15 minutes before the meeting begins. Requests for reasonable accommodation should be made to Ronelle Jackson prior to Wednesday, September 26. Requests made after that date will be considered, but might not be possible to fulfill.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at *http://www.state.gov/documents/organization/103419.pdf* for additional information.

For additional information, contact Deputy Outreach Coordinator Greg Maggio, Office of Economic Policy Analysis and Public Diplomacy, Bureau of Economic and Business Affairs, at (202) 647–2231 or *MaggioGF@state.gov.*

Dated: August 30, 2012.

Shawn Flatt,

Acting Director, Office of Economic Policy Analysis and Public Diplomacy, U.S. Department of State.

[FR Doc. 2012–22626 Filed 9–14–12; 8:45 am]

BILLING CODE 4710–07–P

OFFICE OF THE TRADE REPRESENTATIVE

Fiscal Year 2013 Tariff-rate Quota Allocations for Raw Cane Sugar, Refined and Specialty Sugar, and Sugar-Containing Products

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The Office of the United States Trade Representative (USTR) is providing notice of country-by-country allocations of the Fiscal Year (FY) 2013 in-quota quantity of the tariff-rate quotas for imported raw cane sugar, refined and specialty sugar, and sugar-containing products.

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

ADDRESSES: Inquiries may be mailed or delivered to Ann Heilman-Dahl, Director of Agricultural Affairs, Office of Agricultural Affairs, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: Ann Heilman-Dahl, Office of Agricultural Affairs, telephone: 202–395–6127 or facsimile: 202–395–4579.

SUPPLEMENTARY INFORMATION: Pursuant to Additional U.S. Note 5 to Chapter 17 of the Harmonized Tariff Schedule of the United States (HTS), the United States maintains tariff-rate quotas (TRQs) for imports of raw cane sugar and refined sugar. Pursuant to Additional U.S. Note 8 to Chapter 17 of the HTS, the United States maintains a TRQ for imports of sugar-containing products.

Section 404(d)(3) of the Uruguay Round Agreements Act (19 U.S.C. 3601(d)(3)) authorizes the President to allocate the in-quota quantity of a TRQ for any agricultural product among supplying countries or customs areas. The President delegated this authority to the United States Trade Representative in Presidential Proclamation 6763 (60 FR 1007).

On September 10, 2012, the Secretary of Agriculture (Secretary) announced the sugar program provisions for fiscal year (FY) 2013 (Oct. 1, 2012, through Sept. 30, 2013). The Secretary announced an in-quota quantity of the TRQ for raw cane sugar for FY 2013 of 1,117,195 metric tons* raw value (MTRV), which is the minimum amount to which the United States is committed to provide access for under the World Trade Organization (WTO) Agreement. USTR is allocating this quantity (1,117,195 MTRV) to the following countries in the amounts specified below:

Country	FY 2013 Raw cane sugar allocations (MTRV)
Argentina	46,154
Australia	89,087
Barbados	7,513
Belize	11,807
Bolivia	8,587
Brazil	155,634
Colombia	25,760
Congo	7,258
Costa Rica	16,100
Cote d'Ivoire	7,258
Dominican Republic	188,908
Ecuador	11,807
El Salvador	27,907
Fiji	9,660
Gabon	7,258
Guatemala	51,520
Guyana	12,880
Haiti	7,258
Honduras	10,733
India	8,587
Jamaica	11,807
Madagascar	7,258
Malawi	10,733
Mauritius	12,880
Mozambique	13,953
Nicaragua	22,540
Panama	31,127
Papua New Guinea	7,258
Paraguay	7,258
Peru	44,007
Philippines	144,901
South Africa	24,687
St. Kitts & Nevis	7,258
Swaziland	17,174
Thailand	15,027
Trinidad & Tobago	7,513
Uruguay	7,258
Zimbabwe	12,880

These allocations are based on each country's historical shipments to the United States. The allocations of the in-quota quantities of the raw cane sugar TRQ to countries that are net importers of sugar are conditioned on receipt of the appropriate verifications of origin, and certificates for quota eligibility must accompany imports from any country for which an allocation has been provided.

On September 10, 2012, the Secretary announced the establishment of the in-quota quantity of the FY 2013 refined sugar TRQ at 117,254 MTRV for which the sucrose content, by weight in the dry state, must have a polarimeter reading of 99.5 degrees or more. This amount includes the minimum amount to which the United States committed to provide market access under the WTO Agreement (22,000 MTRV of which 1,656 MTRV is reserved for specialty sugar) and an additional 95,254 MTRV for specialty sugars. USTR is allocating 12,050 MTRV of refined sugar to Canada and 8,294 MTRV of refined sugar to be administered on a first-come, first-served basis.

Imports of all specialty sugar will be administered on a first-come, first-served basis in five tranches. The Secretary has announced that the total in-quota quantity of specialty sugar will be the 1,656 MTRV included under the U.S. WTO commitment plus an additional 95,254 MTRV. The first tranche of 1,656 MTRV will open October 12, 2012. All types of specialty sugars are eligible for entry under this tranche. The second tranche of 35,245 MTRV will open on October 26, 2012. The third, fourth, and fifth tranches of 20,003 MTRV each will open on January 11, 2013, April 11, 2013 and July 11, 2013, respectively. The second, third, fourth and fifth tranches will be reserved for organic sugar and other specialty sugars not currently produced commercially in the United States or reasonably available from domestic sources.

With respect to the in-quota quantity of 64,709 metric tons (MT) of the TRQ for imports of certain sugar-containing products maintained under Additional U.S. Note 8 to Chapter 17 of the HTS, USTR is allocating 59,250 MT to Canada. The remainder, 5,459 MT, of the in-quota quantity is available for other countries on a first-come, first-served basis.

Raw cane sugar, refined and specialty sugar and sugar-containing products for FY 2013 TRQs may enter the United States as of October 1, 2012.

*Conversion factor: 1 metric ton = 1.10231125 short tons.

Ron Kirk,

Ambassador, United States Trade Representative.

[FR Doc. 2012–22868 Filed 9–14–12; 8:45 am]

BILLING CODE 3190–W2–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Dispute No. WTO/DS437]

WTO Dispute Settlement Proceeding Regarding United States—Countervailing Duty Measures on Certain Products from China

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (AUSTR@) is providing notice that on August 20, 2012, the People's Republic of China (''China'') requested the establishment of a dispute settlement panel with the United States under the *Marrakesh Agreement Establishing the World Trade Organization* (''WTO Agreement'') concerning countervailing duty determinations and orders by the Department of Commerce (''DOC'') on imports of the products from China listed below. The panel request may be found at *www.wto.org* contained in a document designated as WT/DS437/2. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before November 2, 2012, to be assured of timely consideration by USTR.

ADDRESSES: Public comments should be submitted electronically to *www.regulations.gov,* docket number USTR–2012–0010. If you are unable to provide submissions by *www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

If (as explained below) the comment contains confidential information, then the comment should be submitted by fax only to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: Ben Kostrzewa, Assistant General Counsel, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20508, (202) 395–9579.

SUPPLEMENTARY INFORMATION: Section 127(b) of the Uruguay Round Agreements Act (''URAA'') (19 U.S.C. 3537(b)(1)) requires that notice and opportunity for comment be provided after the United States submits or receives a request for the establishment of a WTO dispute settlement panel. Consistent with this obligation, USTR is providing notice that a dispute settlement panel has been established pursuant to the WTO Dispute Settlement Understanding (''DSU''). The panel will hold its meetings in Geneva, Switzerland.

Major Issues Raised by China

On August 20, 2012, China requested the establishment of a panel concerning the determinations to initiate countervailing duty investigations and the preliminary and final countervailing duty determinations and countervailing duty orders issued by the DOC on the following imports from China: Lightweight Thermal Paper (Investigation C–570–921); Circular Welded Austenitic Stainless Pressure Pipe (Investigation C–570–931); Certain Circular Welded Carbon Quality Steel Line Pipe (Investigation C–570–936); Citric Acid and Certain Citrate Salts (Investigation C–570–938); Certain Tow Behind Lawn Groomers and Certain Parts Thereof (Investigation C–570–940); Certain Kitchen Appliance Shelving and Racks (Investigation C–570–942); Certain Oil Country Tubular Goods (Investigation C–570–944); Pre-Stressed Concrete Steel Wire Strand (Investigation C–570–946); Certain Steel Grating (Investigation C–570–948); Wire Decking (Investigation C–570–950); Certain Magnesia Carbon Bricks (Investigation C–570–955); Certain Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe (Investigation C–570–957); Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (Investigation C–570–959); Drill Pipe (Investigation C–570–966); Aluminum Extrusions (Investigation C–570–968); Multilayered Wood Flooring (Investigation C–570–971); Certain Steel Wheels (Investigation C–570–974); Steel Wire (Investigation C–570–976); High Pressure Steel Cylinders (Investigation C–570–978); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules (Investigation C–570–980); Utility Scale Wind Towers (Investigation C–570–982); and Drawn Stainless Steel Sinks (Investigation C–570–984) (together, the ''challenged determinations and orders''). China alleges that the United States acted inconsistently with Article VI of the *General Agreement on Tariffs and Trade 1994* (''GATT 1994''); Articles 1, 2, 10, 11, 12, 14, and 32 the *Agreement on*

Subsidies and Countervailing Measures (''SCM Agreement''); and Article 15 the *Protocol on the Accession of the People's Republic of China* (''Protocol of Accession''). The challenged determinations and orders are available at the following web page of the Department of Commerce: *http://ia.ita.doc.gov/frn/index.html*.

China also states that it is requesting the establishment of a panel with respect to the ''rebuttable presumption'' established and applied by the DOC, under which the DOC considers majority government ownership of an enterprise sufficient to determine that an enterprise is a ''public body'' within the meaning of Article 1.1 of the SCM Agreement, unless a party is able to demonstrate that majority government ownership does not result in 'control' of the enterprise.''

The panel request was largely similar to the consultations request filed on May 25, 2012.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit public comments electronically to *www.regulations.gov* docket number USTR–2012–0010. If you are unable to provide submissions by *www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

To submit comments via *www.regulations.gov,* enter docket number USTR–2012–0010 on the home page and click ''search.'' The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Submit a Comment'' (For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use This Site'' on the left side of the home page.)

The *www.regulations.gov* site provides the option of providing comments by filling in a AType Comments field, or by attaching a document using an ''upload file'' field. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''Type Comments'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to andy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter:

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as ''SUBMITTED IN CONFIDENCE''

at the top and bottom of the cover page and each succeeding page; and

(3) Must provide a non-confidential summary of the information or advice.

Any comment containing confidential information must be submitted by fax. A non-confidential summary of the confidential information must be submitted to *www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection. Pursuant to section 127(e) of the Uruguay Round Agreements Act (19 U.S.C. 3537(e)), USTR will maintain a docket on this dispute settlement proceeding accessible to the public at *www.regulations.gov,* docket number USTR–2012–0010.

The public file will include non-confidential comments received by USTR from the public with respect to the dispute. If a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, any non-confidential submissions, or non-confidential summaries of submissions, received from other participants in the dispute, will be made available to the public on USTR's Web site at *www.ustr.gov,* and the report of the panel, and, if applicable, the report of the Appellate Body, will be available on the Web site of the World Trade Organization, *www.wto.org.* Comments open to public inspection may be viewed on the *www.regulations.gov* Web site.

Juan Millan,

Acting Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 2012–22870 Filed 9–14–12; 8:45 am]

BILLING CODE 3290–F2–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0031]

Agency Information Collection Activities; Extension of Currently-Approved Information Collection Request: Quarterly Report of Class I Motor Carriers of Property (Formerly OMB 2139–0002)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval. FMCSA requests approval to revise an ICR entitled, ''Quarterly Report of Class I Motor Carriers of Property (formerly OMB 2139–0002),'' which the Agency uses to ensure that motor carriers comply with its financial and operating statistics requirements in chapter III of title 49 CFR part 369 entitled, ''*Reports of Motor Carriers.*'' FMCSA invites public comment on this ICR. On April 20, 2012, FMCSA published a **Federal Register** notice allowing for a 60-day comment period on the ICR. In response to the above notice, the Agency received one comment from the National Motor Freight Traffic Association, Inc. (NMFTA), which requested that these reports no longer be required. FMCSA may consider this request in a future rulemaking regarding this information collection requirement.

DATES: Please send your comments by October 17, 2012. OMB must receive your comments by this date in order to act quickly on the ICR.

ADDRESSES: All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA–2012–0031. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of

Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ms. Vivian Oliver, Transportation Specialist, Office of Information Technology, Operations Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: 202–366–2974; email Address: *vivian.oliver@dot.gov*. Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Quarterly Report of Class I and Class II Motor Carriers of Property (formerly OMB 2139–0002).

OMB Control Number: 2126–0033.

Type of Request: Extension of a currently-approved information collection.

Respondents: Class I and Class II Motor Carriers of Property.

Estimated Number of Respondents: 111 (per year).

Estimated Time per Response: 1.8 hours (27 minutes per quarter).

Expiration Date: September 30, 2012.

Frequency of Response: Quarterly.

Estimated Total Annual Burden: 200 hours [111 respondents x 1.8 hours to complete form = 200].

Background: The Quarterly Report of Class I and Class II Motor Carriers of Property (Form QFR) is a mandated reporting requirement for all for-hire motor carriers (See 49 U.S.C. 14123 and implementing FMCSA regulations in 49 CFR part 369). Motor carriers (including interstate and intrastate) subject to the Federal Motor Carrier Safety Regulations are classified on the basis of their gross carrier operating revenues.[1]

[1] For purposes of the Financial and Operating Statistics (F&OS) program, carriers are classified into three groups: (1) Class I carriers are those having annual carrier operating revenues (including interstate and intrastate) of $10 million or more after applying the revenue deflator formula as set forth in Note A of 49 CFR 369.2; (2) Class II carriers are those having annual carrier operating revenues (including interstate and intrastate) of at least $3 million, but less than $10 million after applying the revenue deflator formula as set forth in 49 CFR 369.2; and (3) Class III carriers are those having annual carrier operating revenues (including interstate and intrastate) of less than $3 million after applying the revenue deflator formula as set forth in Note A of 49 CFR 369.2.

Under the Financial and Operating Statistics (F&OS) program, FMCSA collects balance sheet and income statement data from Class I and Class II property carriers along with information on safety needs, tonnage, mileage, employees, transportation equipment, and other related data. FMCSA may also ask carriers to respond to surveys concerning their operations. The data and information collected would be made publicly available, and FMCSA would use both to determine a motor carrier's compliance with the F&OS program requirements prescribed in chapter III of title of 49 CFR part 369.

In the past, the former Interstate Commerce Commission issued these regulations. Later this authority transferred to the Secretary on January 1, 1996, by Chapter 141 of the ICC Termination Act of 1995(ICCTA) (Pub. L..104–88, 109 Stat. 803, 893 (Dec. 29, 1995)), now codified at 49 U.S.C. 14123. On September 30, 1998, the Secretary delegated and transferred the authority to administer the F&OS program to the former Bureau of Transportation Statistics (BTS), now part of the Research and Innovative Technology Administration (RITA).

On September 29, 2004, the Secretary transferred the responsibility for the F&OS program from BTS to FMCSA in the belief that the program was more aligned with FMCSA's mission and its other motor carrier responsibilities (69 FR 51009). On August 10, 2006, the Secretary published a final rule (71 FR 45740) that transferred and redesignated certain motor carrier financial and statistical reporting regulations of BTS, that were formerly located in chapter XI, subchapter B of title 49 CFR part 1420, to FMCSA under chapter III of title 49 CFR part 369.

Public Comments Invited: FMCSA requests comments on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued on: September 4, 2012.

Kelly Leone,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2012–22882 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0031]

Agency Information Collection Activities; Extension of Currently-Approved Information Collection Request: Quarterly Report of Class I Motor Carriers of Property (Formerly OMB 2139–0002)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval. FMCSA requests approval to revise an ICR entitled, ''Quarterly Report of Class I Motor Carriers of Property (formerly OMB 2139–0002),'' which the Agency uses to ensure that motor carriers comply with its financial and operating statistics requirements in chapter III of title 49 CFR part 369 entitled, *''Reports of Motor Carriers.''* FMCSA invites public comment on this ICR. On April 20, 2012, FMCSA published a **Federal Register** notice allowing for a 60-day comment period on the ICR. In response to the above notice, the Agency received one comment from the National Motor Freight Traffic Association, Inc. (NMFTA), which requested that these reports no longer be required. FMCSA may consider this request in a future rulemaking regarding this information collection requirement.

DATES: Please send your comments by October 17, 2012. OMB must receive your comments by this date in order to act quickly on the ICR.

ADDRESSES: All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA–2012–0031. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and

Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ms. Vivian Oliver, Transportation Specialist, Office of Information Technology, Operations Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: 202–366–2974; email Address: *vivian.oliver@dot.gov.* Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Quarterly Report of Class I and Class II Motor Carriers of Property (formerly OMB 2139–0002).

OMB Control Number: 2126–0033.

Type of Request: Extension of a currently-approved information collection.

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Estimated Number of Respondents: 111 (per year).

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Expiration Date: September 30, 2012.

Frequency of Response: Quarterly.

Estimated Total Annual Burden: 200 hours [111 respondents x 1.8 hours to complete form = 200].

Background: The Quarterly Report of Class I and Class II Motor Carriers of Property (Form QFR) is a mandated reporting requirement for all for-hire motor carriers (See 49 U.S.C. § 14123 and implementing FMCSA regulations in 49 CFR part 369). Motor carriers (including interstate and intrastate) subject to the Federal Motor Carrier Safety Regulations are classified on the basis of their gross carrier operating revenues.[1]

Under the Financial and Operating Statistics (F&OS) program, FMCSA collects balance sheet and income statement data from Class I and Class II property carriers along with information on safety needs, tonnage, mileage, employees, transportation equipment, and other related data. FMCSA may also ask carriers to respond to surveys concerning their operations. The data and information collected would be made publicly available, and FMCSA would use both to determine a motor carrier's compliance with the F&OS program requirements prescribed in chapter III of title of 49 CFR part 369.

In the past, the former Interstate Commerce Commission issued these regulations. Later this authority transferred to the Secretary on January 1, 1996, by Chapter 141 of the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104–88, 109 Stat. 803, 893 (Dec. 29, 1995)), now codified at 49 U.S.C. 14123. On September 30, 1998, the Secretary delegated and transferred the authority to administer the F&OS program to the former Bureau of Transportation Statistics (BTS), now part of the Research and Innovative Technology Administration (RITA).

On September 29, 2004, the Secretary transferred the responsibility for the F&OS program from BTS to FMCSA in the belief that the program was more aligned with FMCSA's mission and its other motor carrier responsibilities (69 FR 51009). On August 10, 2006, the Secretary published a final rule (71 FR 45740) that transferred and redesignated certain motor carrier financial and statistical reporting regulations of BTS, that were formerly located in chapter XI, subchapter B of title 49 CFR part 1420, to FMCSA under chapter III of title 49 CFR part 369.

Public Comments Invited: FMCSA requests comments on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued on: September 4, 2012.

Kelly Leone,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2012–22884 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–EX–P

[1] For purposes of the Financial and Operating Statistics (F&OS) program, carriers are classified into three groups: (1) Class I carriers are those having annual carrier operating revenues (including interstate and intrastate) of $10 million or more after applying the revenue deflator formula as set forth in Note A of 49 CFR § 369.2; (2) Class II carriers are those having annual carrier operating revenues (including interstate and intrastate) of at least $3 million, but less than $10 million after applying the revenue deflator formula as set forth in 49 CFR § 369.2; and (3) Class III carriers are those having annual carrier operating revenues (including interstate and intrastate) of less than $3 million after applying the revenue deflator formula as set forth in Note A of 49 CFR § 369.2.

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Intent To Prepare an Environmental Impact Statement for a Light Rail Operations and Maintenance Satellite Facility, King and Snohomish Counties, Washington

AGENCY: Federal Transit Administration, United States Department of Transportation.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement.

SUMMARY: The Federal Transit Administration (FTA) and the Central Puget Sound Regional Transit Authority (Sound Transit) are planning to prepare an Environmental Impact Statement (EIS) for Sound Transit's proposed new Light Rail Operations and Maintenance Satellite Facility (OMSF). The OMSF would allow Sound Transit to meet future maintenance and storage needs of an expanded fleet of light rail vehicles identified in the Sound Transit 2 (ST2) Plan. The EIS will be prepared in accordance with the National Environmental Policy Act (NEPA) and Washington's State Environmental Policy Act (SEPA). This Notice of Intent initiates scoping for the EIS, invites interested parties to participate in the EIS process, provides information about the preliminary purpose and need for the proposed transit project, includes site alternatives being considered for evaluation in the EIS, and identifies potential environmental effects to be considered. The notice invites public comments on the scope of the EIS and announces the public scoping meetings that will be conducted. Alternatives being considered for evaluation include a No-Build alternative and five sites where the OMSF could be built.

DATES: Written comments on the scope of alternatives and impacts to be considered in the EIS must be received no later than October 22, 2012, and must be sent to Sound Transit as indicated below. Information about the proposed project, the Scoping Information Report, and the EIS process will be available at two public scoping meetings (on Oct. 8 and Oct. 11) and one scoping meeting for tribal and agency representatives (on Oct. 9) at the locations described below. Sound Transit and FTA will accept comments at those meetings.

ADDRESSES: Written comments on the scope of the EIS should be sent to Kent Hale, Senior Environmental Planner, Sound Transit, 401 S. Jackson Street, Seattle, WA 98104–2826, or by email to *OMSF@soundtransit.org.*

At the public and agency scoping meetings, Sound Transit will provide information on the project along with opportunities for written comments.

1. October 8, 2012, 4:00 p.m.–6:00 p.m., Highland Community Center, 14224 Bel-Red Road, Bellevue, WA.

2. October 11, 2012, 5:00 p.m.–7:00 p.m., Lynnwood Convention Center, 3711 196th St. SW., Lynnwood, WA.

3. (Agency and Tribal Meeting) October 9, 2012, 1:00 p.m.–3:00 p.m., Sound Transit, 401 S. Jackson Street, Seattle, WA 98104.

Invitations to the interagency and tribal scoping meeting have been sent to appropriate Federal, tribal, state, and local governmental units. All public meeting locations are accessible to persons with disabilities who may also request materials be prepared and supplied in alternate formats by calling Luke Lamon, (206) 903–7469 at least 48 hours in advance of the meeting for Sound Transit to make necessary arrangement. Persons who are deaf or hard of hearing may call (888) 713–6030 TTY. Scoping information as well as general information is available at: *http://www.soundtransit.org/OMSF.* The scoping period extends to October 22, 2012, or 30 days from the date of this notice, whichever is later. Written scoping comments are requested by October 22, 2012 at the address above, or they can be submitted at the public meetings.

FOR FURTHER INFORMATION CONTACT: Dan Drais, FTA Environmental Protection Specialist, phone: (206) 220–4465.

SUPPLEMENTARY INFORMATION:

The Proposed Project. Sound Transit is implementing a system-wide expansion of its Link light rail transit service as part of the Sound Transit 2 (ST2) Plan of transit investments approved by the voters in 2008. To provide the service required by the ST2 Plan, Sound Transit will have to increase its light rail vehicle fleet to approximately 180 vehicles by 2023. Its existing light rail operations and maintenance facility (OMF), located on a 25-acre site south of South Forest Street and west of Airport Way in the industrial area south of Downtown Seattle, is configured to serve up to 104 vehicles.

The Purpose of and Need for the Project. The project's purpose is to enable Sound Transit to meet the maintenance and storage needs of the expanded fleet of light rail vehicles identified in the ST2 Plan. ST2's vehicle acquisition and delivery schedule requires additional capacity to be operational by the end of 2020. The OMSF project will:

- Accommodate expansion of the Link system to Lynnwood, Overlake and South King County (Kent or Des Moines);
- Provide efficient and reliable light rail service and minimize system operating costs; and
- Support regional long-range plans, including the Puget Sound Regional Council's (PSRC) VISION 2040 and Transportation 2040 plans, and Sound Transit's Regional Transit Long-Range Plan.

The project is needed because the existing OMF site cannot store, maintain, or deploy the vehicles associated with the expanded service called for in the ST2 Plan. Sound Transit cannot provide reliable service without adequate maintenance facility capacity. Approximately 180 vehicles are needed for the ST2 expansion; the existing OMF can store only 104 vehicles. Therefore, to implement ST2 the Link system will require more storage area and greater capacity for necessary service, maintenance, and inspection functions. Moreover, the storage and maintenance facility must be sited to support efficient and reliable operations and deployment of vehicles to serve the entire Link system.

Potential EIS Alternatives. Sound Transit and FTA are considering several alternatives for study in the EIS. Potentially viable sites that meet minimum requirements of size, configuration, proximity to the light rail system, and operational feasibility have been identified along the Lynnwood Link Extension and in the East Link Corridor. FTA and Sound Transit invite comments on these preliminary alternatives; public and agency input received during the scoping period will help FTA and Sound Transit develop a range of reasonable alternatives to evaluate in the Draft EIS.

Lynnwood Link Corridor. One site is at 52nd Ave and SW 208th St., north of I–5 and east of 52nd Ave W/Cedar Valley Road in Lynnwood. It is located along all of the proposed Lynnwood Link alignments being evaluated in the Lynnwood Link Extension Draft EIS.

East Link Corridor. Four potential sites are on the East Link alignment in Bellevue: (1) Between the BNSF railway corridor on the west and 120th Ave. NE on the east, south of SR 520 and north of NE 12th St.; (2) south of SR 520 and north of Northup Way/NE 20th St., east of 130th Ave. NE and west of 140th Ave. NE; (3) East of 140th Ave. NE., between NE 20th St. and NE 24th St., and southeast of SR 520; and (4) west of 130th Ave. NE., east of 124th Ave. NE., and south of Northup Way.

No-Build Alternative. NEPA requires consideration of a No-Build Alternative as a baseline against which to measure impacts of the action alternatives. It includes the existing transportation system plus the transportation improvements included in PSRC's Transportation Improvement Program.

Scope of Environmental Analysis. The EIS process explores in a public setting the potentially significant effects of implementing the proposed action (and alternatives to the proposed action) on the physical, human, and natural environment. Areas of investigation for this project may include, but might not be limited to, transportation, land use and consistency with applicable plans, land acquisition and displacements, socioeconomic impacts, park and recreation resources, historic and cultural resources, environmental justice, visual and aesthetic qualities, air quality, noise and vibration, energy use, safety and security, and ecosystems, including threatened and endangered species. These effects will be evaluated for both the construction period and the long-term period of operation. Indirect, secondary and cumulative impacts will also be evaluated. The EIS will identify measures to avoid, minimize, or mitigate significant adverse impacts.

Roles of Participating Agencies and the Public. NEPA, and FTA's own authorities, call for public involvement in the EIS process, including: (1) Invitations to other Federal and non-Federal agencies and Indian tribes that may have an interest in the proposed project to become ''cooperating'' or ''participating agencies,'' (2) opportunities for involvement by agencies and the public in helping to define the proposed project's purpose and need, as well as the range of alternatives for consideration in the impact statement, and (3) a plan for coordinating public and agency participation in and comment on the environmental review process.

An invitation to become a participating agency will be extended to other Federal and non-Federal agencies and Indian tribes that may have an interest in the proposed project. Any agency or tribe interested in the project that does not receive such an invitation should promptly notify the Senior Environmental Planner identified above under **ADDRESSES.**

A draft Coordination Plan for public and agency involvement is available for review at the project Web site. It identifies the project's coordination approach and structure, details the major milestones for agency and public involvement, and includes an initial list of interested agencies and organizations.

FTA and Sound Transit welcome comments from interested individuals, organizations, tribes and agencies. Comments are invited regarding the preliminary statement of purpose and need; the alternatives to be evaluated in the EIS; and any significant environmental issues related to the alternatives. Suggested reasonable alternatives that meet the project purpose and need will be seriously considered. To assist the public during scoping, Sound Transit has prepared an Environmental Scoping Information Report describing the project, potential site alternatives, potential impact areas to be evaluated, and the preliminary EIS schedule. You may request a copy of it from Luke Lamon, Sound Transit, 401 S. Jackson Street, Seattle, WA 98104–2826, telephone: (206) 903–7469 or email: *luke.lamon@soundtransit.org.* It is also available at *http://www.soundtransit.org/OMSF.* After the comment period, Sound Transit will publish a summary of the public and agency comments it received. After scoping concludes later this year, the Sound Transit Board is expected to consider a motion addressing the purpose and need for the project, the scope of environmental review, and alternatives to be considered in the draft EIS.

FTA and Sound Transit will comply with all applicable Federal environmental laws, regulations, and executive orders during the environmental review process. These requirements include, but are not limited to, the regulations of the Council on Environmental Quality implementing NEPA, and FTA's own NEPA regulations (40 CFR parts 1500–1508, and 23 CFR part 771); the air quality conformity regulations of the U.S. Environmental Protection Agency (EPA) (40 CFR part 93); the Section 404(b)(1) guidelines of EPA (40 CFR part 230); the regulations implementing Section 106 of the National Historic Preservation Act (36 CFR part 800); the regulations implementing Section 7 of the Endangered Species Act (50 CFR part 402); Section 4(f) of the Dept. of Transportation Act (23 CFR part 774); Executive Orders 12898 on Environmental Justice, 11988 on floodplain management, and 11990 on wetlands; and DOT Order 5610.2(a) on Environmental Justice.

Paperwork Reduction. The Paperwork Reduction Act seeks, in part, to minimize the cost to the taxpayer of the creation, collection, maintenance, use, dissemination, and disposition of information. Consistent with this goal and with principles of economy and efficiency in government, FTA limits as much as possible the distribution of complete sets of printed environmental documents. Accordingly, absent a specific request for a complete printed set of environmental documents (preferably in advance of printing), Sound Transit will distribute only the executive summary of the environmental document together with a compact disc of the complete environmental document. A complete printed set of the environmental document will be available for review at the grantee's offices and elsewhere; an electronic copy of the complete environmental document will also be available on Sound Transit's Web page.

Issued on: September 6, 2012.

Kenneth A. Feldman,

Deputy Regional Administrator, FTA Region 10.

[FR Doc. 2012–22823 Filed 9–14–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2010–0152]

Technical Report on Fatality Risk, Mass, and Footprint of Model Year 2000–2007 Passenger Cars and LTVs

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for comments on technical report.

SUMMARY: This notice announces NHTSA's publication of a technical report describing relationships between a vehicle's mass, footprint (size), and body type and its rate of involvement in fatal crashes. The report's title is: *Relationships Between Fatality Risk, Mass, and Footprint in Model Year 2000–2007 Passenger Cars and LTVs—Final Report.*

DATES: Comments must be received no later than January 15, 2013.

ADDRESSES:

Report: The technical report is available on the Internet for viewing in PDF format at *http://www-nrd.nhtsa.dot.gov/Pubs/811665.pdf.* You may obtain a copy of the report free of charge by sending a self-addressed mailing label to Charles J. Kahane (NVS–431), National Highway Traffic Safety Administration, Room W53–312, 1200 New Jersey Avenue SE., Washington, DC 20590.

Comments: You may submit comments [identified by Docket Number NHTSA–2010–0152] by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

You may call Docket Management at 202–366–9826.

Instructions: For detailed instructions on submitting comments, see the Procedural Matters section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Charles J. Kahane, Chief, Evaluation Division, NVS–431, National Center for Statistics and Analysis, National Highway Traffic Safety Administration, Room W53–312, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: 202–366–2560. Email: *chuck.kahane@dot.gov.*

SUPPLEMENTARY INFORMATION: Mass reduction while holding a vehicle's footprint (size) constant is a potential strategy for meeting footprint-based CAFE and GHG standards. An important corollary issue is the possible effect of mass reduction that maintains footprint on fatal crashes. One way to estimate these effects is statistical analyses of societal fatality rates per VMT, by vehicles' mass and footprint, for the current on-road vehicle fleet. Societal fatality rates include occupants of all vehicles in the crash as well as pedestrians. The analyses comprised MY 2000–2007 cars and LTVs in CY 2002–2008 crashes. Fatality rates were derived from FARS data, 13 State crash files, and registration and mileage data from R.L. Polk. The table presents the estimated percent increase in societal fatality rates per 100-pound mass reduction while holding footprint constant for five classes of vehicles:

MY 2000–2007 CY 2002–2008	Fatality increase (%) per 100-pound mass reduction while holding footprint constant Point estimate	95% confidence bounds
Cars < 3,106 pounds	1.56	+ .39 to +2.73
Cars ≥ 3,106 pounds	.51	− .59 to +1.60
CUVs and minivans	− .37	−1.55 to + .81
Truck-based LTVs < 4,594 pounds	.52	− .45 to +1.48
Truck-based LTVs ≥ 4,594 pounds	− .34	− .97 to + .30

Only the 1.56 percent risk increase in the lighter cars is statistically significant. There are non-significant increases in the heavier cars and the lighter truck-based LTVs and non-significant societal benefits for mass reduction in CUVs, minivans, and the heavier truck-based LTVs. Based on these results, potential combinations of mass reductions that maintain footprint and are proportionately somewhat higher for the heavier vehicles may be safety-neutral or better as point estimates and, in any case, unlikely to significantly increase fatalities. The primarily non-significant results are not due to a paucity of data, but because the societal effect of mass reduction while maintaining footprint, if any, is small.

This report is also available in two NHTSA dockets—NHTSA–2010–0152–0040 and NHTSA–2010–0131–0336—as well as at *http://www-nrd.nhtsa.dot.gov/Pubs/811665.pdf.* This final report updates and supersedes a preliminary report issued in November 2011 (76 FR 73008, report available at NHTSA–2010–0152–0023), in response to public comments and to three researchers' peer-reviews of the preliminary report. Information about the public comments and the peer review is available in Docket No. NHTSA–2010–0152, including the peer-review charge at NHTSA–2010–0152–0024, the names of the reviewers at NHTSA–2010–0152–0025, and the three reviews at NHTSA–2010–0152–0035, NHTSA–2010–0152–0036, and NHTSA–2010–0152–0037.

This report also supersedes earlier NHTSA reports on vehicle mass, size and fatality risk issued in 2010 (75 FR 25324, Docket No. NHTSA–2010–0152, report available at *http://www.nhtsa.gov/staticfiles/rulemaking/pdf/cafe/CAFE_2012-2016_FRIA_04012010.pdf,* pp. 464–542); 2003 (68 FR 66153, Docket No. NHTSA–2003–16318, report available at *http://www-nrd.nhtsa.dot.gov/Pubs/809662.PDF*); and 1997 (62 FR 34491, Docket No. NHTSA–1997–3725, report available at *http://www-nrd.nhtsa.dot.gov/Pubs/808570.PDF*).

Procedural Matters

How can I influence NHTSA's thinking on this subject?

NHTSA welcomes public review of the technical report. NHTSA will submit to the Docket a response to the comments and, if appropriate, will supplement or revise the report.

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the Docket number of this document (NHTSA–2010–0152) in your comments.

Your primary comments must not be more than 15 pages long (49 CFR 553.21). However, you may attach additional documents to your primary comments. There is no limit on the length of the attachments.

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) or you may visit *http://regulations.gov.*

Please send two paper copies of your comments to Docket Management, fax them, or use the Federal eRulemaking Portal. The mailing address is U. S. Department of Transportation, Docket Management Facility, M–30, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The fax number is 1–202–493–2251. To use the Federal eRulemaking Portal, go to *http://www.regulations.gov* and follow the online instructions for submitting comments.

We also request, but do not require you to send a copy to Charles J. Kahane, Chief, Evaluation Division, NVS–431, National Highway Traffic Safety Administration, Room W53–312, 1200 New Jersey Avenue SE., Washington, DC 20590 (or email them to *chuck.kahane@dot.gov*). He can check if your comments have been received at the Docket and he can expedite their review by NHTSA.

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, send three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter supplying the information specified in our confidential business information regulation (49 CFR Part 512).

In addition, send two copies from which you have deleted the claimed confidential business information to U. S. Department of Transportation, Docket Management Facility, M–30, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, or submit them via the Federal eRulemaking Portal.

Will the agency consider late comments?

In our response, we will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under DATES. To the extent possible, we will also consider comments that Docket Management receives after that date.

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 check the Docket for new material.

How can I read the comments submitted by other people?

You may read the materials placed in the docket for this document (e.g., the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. You may also read the materials at the Docket Management Facility by going to the street address given above under **ADDRESSES**. The Docket Management Facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

Authority: 49 U.S.C. 30111, 30168; delegation of authority at 49 CFR 1.50 and 501.8.

James F. Simons,

Director, Office of Regulatory Analysis and Evaluation.

[FR Doc. 2012–22779 Filed 9–14–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35668]

Iowa Pacific Holdings, LLC and Permian Basin Railways—Continuance in Control Exemption—Rusk, Palestine & Pacific Railroad, LLC

Iowa Pacific Holdings, LLC (IPH) and its wholly owned subsidiary, Permian Basin Railways (PBR), have filed a verified notice of exemption pursuant to 49 CFR 1180.2(d)(2) to continue in control of Rusk, Palestine & Pacific Railroad, LLC (RP&P),[1] formerly American Heritage Railways of Texas, LLC (American), upon RP&P's becoming a Class III rail carrier. IPH and PBR filed a corrected copy of that notice on September 7, 2012.

In a concurrently filed verified notice of exemption, RP&P seeks Board approval to operate as a common carrier approximately 27 miles of railroad (the Line) between Rusk and Palestine, Tex.[2] The Line has no mileposts. It is currently owned by the Texas Parks and Wildlife Authority and it is leased to the Texas State Railroad Authority, which has entered into an operating agreement with American/RP&P. American had been operating a noncommon carrier intrastate excursion passenger railroad over the Line using the name Texas State Railroad. RP&P plans to continue that service using the name Texas State Railroad and plans to restore common carrier freight service over the Line using the name ''Rusk, Palestine & Pacific Railroad''. *Rusk, Palestine & Pacific R.R.—Operation Exemption—Tex. State R.R. Auth.,* Docket No. FD 35669.

The transaction may be consummated on or after September 29, 2012 (the effective date of the exemption).

IPH and PBR subsidiary railroads include: (1) Chicago Terminal Railroad, located in and around Chicago, Ill.; (2) Mount Hood Railroad, located in Oregon; (3) San Luis & Rio Grande Railroad, located in Colorado; (4) Saratoga & North Creek Railway, located in New York; (5) Texas-New Mexico Railroad, located in New Mexico and Texas; and (6) West Texas & Lubbock Railway, located in Texas. IPH and PBR recently have obtained Board authority to continue in control of a new noncarrier subsidiary in California, the Santa Cruz and Monterey Bay Railway Company, upon its becoming a Class III rail carrier. *Iowa Pac. Holdings, LLC and Permian Basin Rys.—Continuance in Control Exemption—Santa Cruz and Monterey Bay Ry.,* FD 35632 (STB served Aug. 17, 2012).

IPH and PBR represent that: (1) The Line does not connect with any other railroads in the corporate family; (2) the transaction is not part of a series of anticipated transactions that would connect the Line with any other railroads in the corporate family; and (3) the transaction does not involve a Class I rail carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the verified 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. Stay petitions must be filed no later than September 21, 2012 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35668, 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 John D. Heffner, Strasburger & Price, LLP, 1700 K Street NW., Suite 640, Washington, DC 20006.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: September 12, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Clearance Clerk,

Derrick A. Gardner.

[FR Doc. 2012–22841 Filed 9–14–12; 8:45 am]

BILLING CODE 4915–01–P

[1] RP&P is a wholly owned subsidiary of IPH.

[2] RP&P also seeks incidental trackage rights for the purpose of interchange over approximately 1.3 miles of track owned and operated by the Union Pacific Railroad Company (UP) that connects to UP's rail yard in Palestine, Tex.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35669]

Rusk, Palestine & Pacific Railroad, LLC—Operation Exemption—Texas State Railroad Authority

Rusk, Palestine & Pacific Railroad, LLC (RP&P), formerly American Heritage Railways of Texas, LLC (American), a noncarrier subsidiary of Iowa Pacific Holdings, LLC (IPH), has filed a verified notice of exemption under 49 CFR 1150.31 to operate approximately 27 miles of railroad[1] (the Line) between Rusk and Palestine, Tex., currently owned by the Texas Parks and Wildlife Authority. The Line is leased to the Texas State Railroad Authority, which has entered into an operating agreement with American/RP&P. American had been operating a noncommon carrier intrastate excursion passenger railroad over the Line using the name Texas State Railroad. RP&P plans to continue that service using the name Texas State Railroad and plans to restore common carrier freight service over the Line using the name RP&P.[2] RP&P also seeks incidental trackage rights for the purpose of interchange over approximately 1.3 miles of track owned and operated by the Union

[1] RP&P states there are no mileposts on the line.

[2] RP&P states that there are no agreements applicable to the line imposing any interchange commitments.

Pacific Railroad Company (UP) that connects to UP's rail yard in Palestine, Tex.[3]

This transaction is related to a concurrently filed verified notice of exemption in *Iowa Pacific Holdings, LLC and Permian Basin Railways—Continuance in Control Exemption—Rusk, Palestine & Pacific Railroad, LLC,* Docket No. FD 35668, in which IPH and Permian Basin Railways seek to continue in control of RP&P, upon RP&P's becoming a Class III rail carrier.

The transaction may be consummated on or after September 29, 2012 (30 days after the notice of exemption was filed).

RP&P certifies that its projected annual revenues as a result of this transaction will not result in RP&P's becoming a Class I or Class II rail carrier and will not exceed $5 million.

If the verified 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 September 21, 2012 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35669, 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 John D. Heffner, Strasburger & Price, LLP, 1700 K Street NW., Suite 640, Washington, DC 20006.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: September 12, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2012–22842 Filed 9–14–12; 8:45 am]

BILLING CODE 4915–01–P

[3] On August 31, 2012, UP submitted a letter to the Board confirming that it is willing to enter into an interchange agreement with RP&P and that such an agreement has been drafted but not yet executed.

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

September 12, 2012

The Department of the Treasury will submit 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, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before October 17, 2012 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov,* or the entire information collection request maybe found at *www.reginfo.gov.*

Internal Revenue Service (IRS)

OMB Number: 1545–0190.

Type of Review: Extension without change of a currently approved collection.

Title: Election to be treated as an Interest Charge DISC.

Form: 4876–A.

Abstract: A domestic corporation and its shareholders must elect to be an interest charge domestic international sales corporation (IC- DISC). Form 4876–A is used to make the election. IRS uses the information to determine if the corporation qualifies to be an IC–DISC.

Affected Public: Private Sector: Business or other for-profits.

Estimated Total Burden Hours: 6,360.

OMB Number: 1545–0973.

Type of Review: Extension without change of a currently approved collection.

Title: Geographic Availability Statement.

Form: 8569.

Abstract: The data collected from this form is used by the executive panels responsible for screening internal and external applicants for the SES Candidate Development Program, and other executive position.

Affected Public: Individuals or Households.

Estimated Total Burden Hours: 84.

OMB Number: 1545–1251.

Type of Review: Extension without change of a currently approved collection.

Title: TD 8437 (PS–5–91) Limitations on Percentage Depletion in the Case of Oil and Gas Wells (Final).

Abstract: Section 1.613A–3(e)(6)(i) of the regulations requires each partner to separately keep records of the partner's share of the adjusted basis of partnership oil and gas property.

Affected Public: Private Sector: Business or other for-profits.

Estimated Total Burden Hours: 49,950.

OMB Number: 1545–1344.

Type of Review: Extension without change of a currently approved collection.

Title: TD 8560 (CO–30–92) Consolidated Returns—Stock Basis and Excess Loss Accounts, Earnings and Profits, Absorption of Deductions and Losses, Joining and Leaving Consolidated Groups, Worthless (Final).

Abstract: The reporting requirements affect consolidated taxpayers who will be making elections (if made) to treat certain loss carryovers as expiring and an election (if made) allocating items between returns. The information will facilitate enforcement of consolidated return regulations.

Affected Public: Private Sector: Business or other for-profits.

Estimated Total Burden Hours: 18,600.

OMB Number: 1545–1499.

Type of Review: Extension without change of a currently approved collection.

Title: Revenue Procedure 2006–10, Acceptance Agents.

Abstract: Revenue Procedure 2006–10 describes application procedures for becoming an acceptance agent and the requisite agreement that an agent must execute with IRS.

Affected Public: Private Sector: Business or other for-profits.

Estimated Total Burden Hours: 24,960.

OMB Number: 1545–1541.

Type of Review: Extension without change of a currently approved collection.

Title: Revenue Procedure 97–27, Changes in Methods of Accounting.

Abstract: The information requested in sections 6, 8, and 13 of Revenue Procedure 97–27 is required in order for the Commissioner to determine whether the taxpayer is properly requesting to change its method of accounting and the terms and condition of that change.

Affected Public: Private Sector: Business or other for-profits.

Estimated Total Burden Hours: 9,083.

OMB Number: 1545–1828.

Type of Review: Extension without change of a currently approved collection.

Title: REG–131478–02 (TD 9048; 9254) Guidance under Section 1502; Suspension of Losses on Certain Stock Disposition.

Abstract: The information in § 1.1502–35(c) is necessary to ensure that a consolidated group does not obtain more than one tax benefit from both the utilization of a loss from the disposition of stock and the utilization of a loss or deduction with respect to another asset that reflects the same economic loss; to allow the taxpayer to make an election under § 1.1502–35(c)(5) that would benefit the taxpayer, the election in § 1.1502–35(f) provides taxpayers the choice in the case of a worthless subsidiary to utilize a worthless stock deduction or absorb the subsidiary's losses; and § 1.1502–35(g)(3) applies to ensure that taxpayers do not circumvent the loss suspension rule of § 1.1502–35(c) by deconsolidating a subsidiary and then re-importing to the group losses of such subsidiary.

Affected Public: Private Sector: Business or other for-profits.

Estimated Total Burden Hours: 15,000.

OMB Number: 1545–1990.

Type of Review: Extension without change of a currently approved collection.

Title: Application of Section 338 to Insurance Companies.

Abstract: These regulations will allow companies to retroactively apply the regulations to transactions completed prior to the effective data and to stop an election to use a historic loss payment pattern.

Affected Public: Private Sector: Business or other for-profits.

Estimated Total Burden Hours: 12.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. 2012–22832 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2006–25

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 Notice 2006–25, Qualifying Gasification Project Program.

DATES: Written comments should be received on or before November 16, 2012 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 regulations should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202)622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Qualifying Gasification Project Program.

Notice Number: 1545–2002.

Abstract: This Notice establishes the qualifying gasification project program under § 48B of the Internal Revenue Code. The notice provides the time and manner for a taxpayer to apply for an allocation of qualifying gasification project credits.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other-for-profit organizations.

Estimated Number of Respondents: 20.

Estimated Time per Respondent: 51 minutes.

Estimated Total Annual Reporting Burden Hours: 1,700.

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: September 11, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22865 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Schedule H (Form 1040)

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 Schedule H (Form 1040), Household Employment Taxes.

DATES: Written comments should be received on or before November 16, 2012 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: Household Employment Taxes.

OMB Number: 1545–1971.

Form Number: Schedule H (Form 1040).

Abstract: Schedule H (Form 1040) is used by individuals to report their employment taxes. The data is used to verify that the items reported on the form are correct and also for general statistical use.

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: 168,434.

Estimated Time Per Respondent: 4 hours 22 minutes.

Estimated Total Annual Burden Hours: 734,373.

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: September 11, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22871 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2006–54

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 Notice 2006–54, Alternative Fuel Motor Vehicle Credit.

DATES: Written comments should be received on or before November 16, 2012 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 notice should be directed to Allan Hopkins, at (202) 622–6665, or 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: Alternative Fuel Motor Vehicle Credit.

OMB Number: 1545–1993.

Notice Number: Notice 2006–54.

Abstract: This notice sets forth a process that allows taxpayers who purchase alternative fuel motor vehicles to rely on the domestic manufacturer's (or, in the case of a foreign manufacturer, its domestic distributor's) certification that both a particular make, model, and year of vehicle qualifies as an alternative fuel motor vehicle under § 30B(a)(4) and (e) of the Internal Revenue Code and the amount of the credit allowable with respect to the vehicle.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 30.

Estimated Average Time Per Respondent: 20 hrs.

Estimated Total Annual Burden Hours: 600.

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: September 11, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22875 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

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 8935, Airline Payments Report, and Form 8935–T, Transmittal of Airline Payments Reports.

DATES: Written comments should be received on or before November 16, 2012 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 this regulation should be directed to Allan Hopkins, (202) 622–6665, 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: Permitted Elimination of Preretirement Optional Forms of Benefit.

OMB Number: 1545–2140.

Form Number: Form 8935 and Form 8935–T.

Abstract: Form 8935 will provide to the employee, current or former, the amount of the payment that was received from the airline that is eligible for rollover treatment into a Roth IRA.

Form 8935–T (Transmittal form) will provide the Secretary the names, years, and amounts of such payments.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and not-for-profit institutions.

Estimated Number of Responses: 40.

Estimated Average Time per Respondent: 1 hour and 6 minutes.

Estimated Total Annual Burden Hours: 44.

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: September 11, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22876 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5735 and Schedule P (Form 5735)

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 5735, Possessions Corporation Tax Credit (Under Sections 936 and 30A), and Schedule P (Form 5735), Allocation of Income and Expenses Under Section 936(h)(5).

DATES: Written comments should be received on or before November 16, 2012 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, at (202) 622–6665, or 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: Possessions Corporation Tax Credit (Under sections 936 and 30A), and Allocation of Income and Expenses Under Section 936(h)(5).

OMB Number: 1545–0217.

Form Number: Form 5735 and Schedule P (Form 5735).

Abstract: Form 5735 is used to compute the possessions corporation tax credit under sections 936 and 30A. Schedule P (Form 5735) is used by corporations that elect to share their income or expenses with their affiliates. The forms provide the IRS with information to determine if the corporations have computed the tax credit and the cost-sharing or profit-split method of allocating income and expenses.

Current Actions: There are no changes being made to the forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 10.

Estimated Time per Respondent: 12 hours, 42 minutes.

Estimated Total Annual Burden Hours: 127.

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: September 10, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22877 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 851

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 851, Affiliations Schedule.

DATES: Written comments should be received on or before November 16, 2012 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, 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: Affiliations Schedule.

OMB Number: 1545–0025.

Form Number: 851.

Abstract: Form 851 is filed by the parent corporation for an affiliated group of corporations that files a consolidated return (Form 1120). Form 851 provides IRS with information on the names and identification numbers of the members of the affiliated group, the taxes paid by each member of the group, and stock ownership, changes in stock ownership and other information to determine that each corporation is a qualified member of the affiliated group as defined in Internal revenue Code section 1504.

Current Actions: There are no changes being made to Form 851 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations and farms.

Estimated Number of Responses: 4,000.

Estimated Time per Response: 12 hrs., 46 min.

Estimated Total Annual Burden Hours: 51,040.

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: September 10, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22878 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 4506–A

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 4506–A, Request for Public Inspection or Copy of Exempt Organization Tax Form.

DATES: Written comments should be received on or before November 16, 2012 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, at (202) 622–6665, or 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: Request for Public Inspection or Copy of Exempt Organization IRS Form.

OMB Number: 1545–0495.

Form Number: 4506–A.

Abstract: Internal Revenue Code section 6104 states that if an organization described in section 501(c) or (d) is exempt from taxation under section 501(a) for any taxable year, the application for exemption is open for public inspection. This includes all supporting documents, any letter or other documents issued by the IRS concerning the application, and certain annual returns of the organization. Form 4506–A is used to request public inspection or a copy of these documents.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, Business or other for-profit organizations, Not-for-profit institutions, Farms, and Federal, state, local or tribal governments.

Estimated Number of Responses: 20,000.

Estimated Time per Response: 57 minutes.

Estimated Total Annual Burden Hours: 19,400.

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: September 10, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22881 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8611

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 8611, Recapture of Low-Income Housing Credit.

DATES: Written comments should be received on or before November 16, 2012 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 at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Recapture of Low-Income Housing Credit.

OMB Number: 1545–1035.

Form Number: 8611.

Abstract: IRC section 42 permits owners of residential rental projects providing low-income housing to claim a credit against their income tax. If the property is disposed of or if it fails to meet certain requirements over a 15-year compliance period and a bond is not posted, the owner must recapture on Form 8611 part of the credits taken in prior years.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 7 hours, 50 minutes.

Estimated Total Annual Burden Hours: 7,842.

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: September 10, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22883 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 13285–A

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 13285–A, Reducing Tax Burden on America's Taxpayers.

DATES: Written comments should be received on or before November 16, 2012 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: Reducing Tax Burden on America's Taxpayers.

OMB Number: 1545–2009.

Form Number: 13285–A.

Abstract: The IRS Office of Taxpayer Burden Reduction (TBR) needs the taxpaying public's help to identify meaningful taxpayer burden reduction opportunities that impact a large number of taxpayers. This form should be used to refer ideas for reducing taxpayer burden to the TBR for consideration and implementation.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, Business or other for-profit organizations, non-profit institutions, farms, Federal Government, State, local or tribal governments.

Estimated Number of Respondents: 250.

Estimated Number of Respondents: 25 minutes.

Estimated Total Annual Burden Hours: 62.

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: September 10, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–22903 Filed 9–14–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

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 health insurance portability for group health plans and interim rules for health insurance portability for group health plans.

DATES: Written comments should be received on or before November 16, 2012 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 regulations should be directed to Allan Hopkins, at (202) 622–6665, or 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: Health Insurance Portability for Group Health Plans, and temporary regulation, Interim Rules for Health Insurance Portability for Group Health Plans.

OMB Number: 1545–1537. *Regulation Project Number:* REG–253578–96 (Final).

Abstract: These regulations contain rules governing access, portability, and renewability requirements for group health plans and issuers of health insurance coverage offered in connection with a group health plan. The regulations also provide guidance for group health plans and the employers maintaining them regarding requirements imposed on plans relating to preexisting condition exclusions, discrimination based on health status, and access to coverage.

Current Actions: There is no change to these existing regulations.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and state, local, or tribal governments.

Estimated Number of Responses: 33,440,000.

Estimated Time per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 262,289.

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: September 10, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–22901 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2011–4, Revenue Procedure 2011–5, Revenue Procedure 2011–6, and Revenue Procedure 2011–8

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 Revenue Procedure 2011–4 (Letter Rulings), Revenue Procedure 2011–5 (Technical Advice), Revenue Procedure 2011–6 (Determination Letters), and Revenue Procedure 2011–8 (User Fees).

DATES: Written comments should be received on or before November 16, 2012 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 revenue procedures should be directed to Allan Hopkins, at (202) 622–6665, or 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: Revenue Procedure 2011–4 (Letter Rulings), Revenue Procedure 2011–5 (Technical Advice), Revenue Procedure 2011–6 (Determination Letters), and Revenue Procedure 2011–8 (User Fees).

OMB Number: 1545–1520.

Revenue Procedure Number: Revenue Procedure 2011–4, Revenue Procedure 2011–5, Revenue Procedure 2011–6, and Revenue Procedure 2011–8.

Abstract: The information requested in these revenue procedures is required to enable the Office of the Division Commissioner (Tax Exempt and Government Entities) of the Internal Revenue Service to give advice on filing letter ruling, determination letter, and technical advice requests, to process such requests, and to determine the amount of any user fees.

Current Actions: There are no changes being made to these revenue procedures at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for-profit institutions, farms, and state, local or tribal governments.

Estimated Number of Respondents: 83,074.

Estimated Time per Respondent: 2 hours, 8 minutes.

Estimated Total Annual Burden Hours: 178,146.

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: September 10, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22900 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

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 limitations on corporate net operating loss carryforwards.

DATES: Written comments should be received on or before November 16, 2012 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 regulation should be directed to Allan Hopkins, at (202) 622–6665, or 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: Final Regulations under Section 382 of the Internal Revenue Code of 1986; Limitations on Corporate Net Operating Loss Carryforwards.

OMB Number: 1545–1260.

Regulation Project Number: CO–62–89 (Final).

Abstract: Internal Revenue Code section 382(l)(5) provides relief from the application of the section 382 limitation for bankruptcy reorganizations in which the pre-change shareholders and qualified creditors maintain a substantial continuing interest in the loss corporation. These regulations concern the election a taxpayer may make to treat as the change date the effective date of a plan of reorganization in a title 11 or similar case rather than the confirmation date of a plan.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations

Estimated Number of Respondents: 10.

Estimated Time per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 1 hour.

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: September 10, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–22899 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1099–CAP

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 1099–CAP, Changes in Corporate Control and Capital Structure.

DATES: Written comments should be received on or before November 16, 2012 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, at (202) 622–6665, or 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: Changes in Corporate Control and Capital Structure.

OMB Number: 1545–1814.

Form Number: 1099–CAP.

Abstract: Any corporation that undergoes reorganization under Regulation section 1.6043–4T with stock, cash, and other property over $100 million must file Form 1099–CAP with IRS shareholders.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and individuals.

Estimated Number of Responses: 350.

Estimated Time per Response: 11 minutes.

Estimated Total Annual Burden Hours: 67.

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: September 10, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–22872 Filed 9–14–12; 8:45 am]

BILLING CODE 4830–01–P

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Part II

Bureau of Consumer Financial Protection

12 CFR Part 1024

2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal; Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1024

[Docket No. CFPB–2012–0034]

RIN 3170–AA14

2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (the Bureau) is proposing to amend Regulation X, which implements the Real Estate Settlement Procedures Act of 1974 (RESPA) and the official interpretation of the regulation. The proposed amendments implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provisions regarding mortgage loan servicing. Specifically, this proposal requests comment regarding proposed additions to Regulation X to address seven servicer obligations: To correct errors asserted by mortgage loan borrowers; to provide information requested by mortgage loan borrowers; to ensure that a reasonable basis exists to obtain force-placed insurance; to establish reasonable information management policies and procedures; to provide information about mortgage loss mitigation options to delinquent borrowers; to provide delinquent borrowers access to servicer personnel with continuity of contact about the borrower's mortgage loan account; and to evaluate borrowers' applications for available loss mitigation options.

This proposal would also modify and streamline certain existing servicing-related provisions of Regulation X. For instance, the proposal would revise provisions relating to a mortgage servicer's obligation to provide disclosures to borrowers in connection with a transfer of mortgage servicing, and a mortgage servicer's obligation to manage escrow accounts, including the obligation to advance funds to an escrow account to maintain insurance coverage and to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan.

Published elsewhere in today's **Federal Register**, the Bureau proposes companion regulations implementing amendments to the Truth In Lending Act (TILA) in Regulation Z (the 2012 TILA Servicing Proposal).

DATES: Comments must be received on or before October 9, 2012, except that comments on the Paperwork Reduction Act analysis in part IX of this **Federal Register** notice must be received on or before November 16, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2012–0034 or RIN 3170–AA14, by any of the following methods:

- *Electronic: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

Instructions: All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov*. In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

e-Rulemaking Initiative

The Bureau is working with the Cornell e-Rulemaking Initiative (CeRI) on a pilot project, Regulation Room, 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. The TILA and RESPA proposed rulemakings on mortgage servicing are the subject of the project. The Bureau has undertaken this project to increase effective public involvement in the rulemaking process and strongly encourages all parties interested in this rulemaking to visit the Regulation Room Web site, *http://www.regulationroom.org*, to learn about the Bureau's proposed mortgage servicing rules and the rulemaking process, to discuss the issues in the rules with other persons and groups, and to participate in drafting a summary of that discussion that CeRI will submit to the Bureau.

Note that Regulation Room is sponsored by CeRI, and is not an official United States Government Web site. Participating in the discussion on that site will not result in individual formal comments that will be included in the Bureau's rulemaking record. If you would like to add a formal comment, please do so through the means identified above. The Bureau anticipates that CeRI will submit to the Bureau's rulemaking docket a summary of the discussion that occurs on the Regulation Room site and that participants will have a chance to review a draft and suggest changes before the summary is submitted. For questions about this project, please contact Whitney Patross, Attorney, Office of Regulations, at (202) 435–7700.

FOR FURTHER INFORMATION CONTACT: *Regulation X (RESPA):* Jane Gao, Mitchell E. Hochberg, and Michael Scherzer, Counsels at (202) 435–7700; Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection; 1700 G Street NW., Washington, DC 20552.

Regulation Z (TILA): Whitney Patross, Attorney and Marta Tanenhaus, Senior Counsel at (202) 435–7700; Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection; 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Overview

A. Background

The recent financial crisis exposed pervasive consumer protection problems across major segments of the mortgage servicing industry. As millions of borrowers fell behind on their loans, many servicers failed to provide the level of service necessary to serve the needs of those borrowers. Many servicers simply had not made the investments in resources and infrastructure necessary to service large numbers of delinquent loans. Existing weaknesses in servicer practices, including inadequate recordkeeping and document management and lack of oversight of service providers, made it harder to sort out borrower problems to achieve optimal results. In addition, many servicers took short cuts that made things even worse. As one review of fourteen major servicers found, companies ''emphasize[d] speed and cost efficiency over quality and accuracy'' in their foreclosure processes.[1]

[1] Federal Reserve System, Office of the Comptroller of the Currency, & Office of Thrift

The Dodd-Frank Act (Pub. L. 111–203, July 21, 2010) adopts several new servicing protections.[2] The Bureau has the authority to promulgate regulations to implement the new servicing protections. These changes will significantly improve disclosures to make it easier for consumers to monitor their mortgage loans and servicers' activities. The changes also address critical servicer practices, including error resolution, prompt crediting of payments, and ''force-placing'' insurance where borrowers have allowed their hazard insurance policies to lapse.

The Dodd-Frank Act also gives the Bureau discretionary authority to develop additional servicing rules. The Bureau proposes to use this authority to adopt requirements relating to reasonable information management policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications when the servicer makes loss mitigation options available in the ordinary course of business. These proposals address fundamental problems that underlie many consumer complaints and recent regulatory and enforcement actions. The Bureau believes these changes will reduce avoidable foreclosures and improve general customer service. The proposals cover nine major topics, as summarized below.

The Bureau's proposal is split into two parts because Congress imposed some requirements under TILA and some under RESPA.[3] This proposed rule would amend Regulation X, which implements RESPA, to implement section 1463 of the Dodd-Frank Act concerning error resolution and force-placed insurance and to impose additional requirements concerning reasonable information management policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications.

B. Scope of Coverage

The proposed rules generally apply to closed-end mortgage loans, with certain exceptions. Under the proposed amendments to Regulation X, open-end lines of credit and certain other loans, such as construction loans and business-purpose loans, are excluded. Under the proposed amendments to Regulation Z, the periodic statement and adjustable-rate mortgage (ARM), disclosure provisions apply only to closed-end mortgage loans, but the prompt crediting and payoff statement provisions apply both to open-end and closed-end mortgage loans. In addition, reverse mortgages and timeshares are excluded from the periodic statement requirement, and certain construction loans are excluded from the ARM disclosure requirements. As discussed below, the Bureau is seeking comment on whether to exempt small servicers from certain requirements or modify certain requirements for small servicers.

C. Summary

The proposals cover nine major topics, summarized below. More details can be found in the proposed rules, which are split into two notices issued under the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA), respectively.

1. Periodic billing statements. The Dodd-Frank Act generally mandates that servicers of closed-end residential mortgage loans (other than reverse mortgages) must send a periodic statement for each billing cycle. These statements must meet the timing, form, and content requirements provided for in the rule. The proposal contains sample forms that servicers could use. The periodic statement requirement generally would not apply for 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 is made available to the consumer. The proposal also includes an exception for small servicers that service 1000 or fewer mortgage loans and service only mortgage loans that they originated or own.

2. Adjustable-rate mortgage interest-rate adjustment notices. Servicers would have to provide a consumer whose mortgage has an adjustable rate with a notice 60 to 120 days before an adjustment which causes the payment to change. The servicer would also have to provide an earlier notice 210 to 240 days prior to the first rate adjustment. This first notice may contain an estimate of the rate and payment change. Other than this initial notice, servicers would no longer be required to provide an annual notice if a rate adjustment does not result in an increase in the monthly payment. The proposal contains model and sample forms that servicers could use.

3. Prompt payment crediting and payoff payments. As required by the Dodd-Frank Act, servicers must promptly credit payments from borrowers, generally on the day of receipt. If a servicer receives a payment that is less than a full contractual payment, the payment may be held in a suspense account. When the amount in the suspense account covers a full installment of principal, interest, and escrow (if applicable), the proposal would require the servicer to apply the funds to the oldest outstanding payment owed. A servicer also would be required to send 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. As required by the Dodd-Frank Act, servicers would not be permitted to charge a borrower for force-placed insurance coverage unless the servicer has a reasonable basis to believe the borrower has failed to maintain hazard insurance and has provided required notices. One notice to the borrower would be required at least 45 days before charging for forced-place insurance coverage, and a second notice would be required no earlier than 30 days after the first notice. The proposal contains model forms that servicers could use. If a borrower provides proof of hazard insurance coverage, then the servicer would be required to cancel any force-placed insurance policy and refund any premiums paid for periods in which the borrower's policy was in place. In addition, if a servicer makes payments for hazard insurance from a borrower's escrow account, a servicer would be required to continue those payments rather than force-placing a separate policy, even if there is insufficient money in the escrow account. The rule would also provide that charges related to forced place insurance (other than those subject to State regulation as the business of insurance or authorized by Federal law for flood insurance) must relate to a service that was actually performed. Additionally, such charges would have to bear a reasonable relationship to the servicer's cost of providing the service.

5. Error resolution and information requests. Pursuant to the Dodd-Frank Act, servicers would be required to meet certain procedural requirements for responding to information requests or complaints of errors. The proposal defines specific types of claims which constitute an error, such as a claim that the servicer misapplied a payment or assessed an improper fee. A borrower

Supervision, *Interagency Review of Foreclosure Policies and Practices,* at 5 (Apr. 2011) (Interagency Foreclosure Report), available at *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf.*

[2] *See* Dodd-Frank Act sections 1418, 1420, 1463, and 1464.

[3] Note that TILA and RESPA differ in their terminology. Consumers and creditors are the defined terms used in Regulation Z. Borrowers and lenders are the defined terms used in Regulation X.

could assert an error either orally or in writing. Servicers could designate a specific phone number and address for borrowers to use. Servicers would be required to acknowledge the request or complaint within five days. Servicers would have to correct or respond to the borrower with the results of the investigation, generally within 30 to 45 days. Further, servicers generally would be required to acknowledge borrower requests for information and either provide the information or explain why the information is not available within a similar amount of time. A servicer would not be required to delay a scheduled foreclosure sale to consider a notice of error unless the error relates to the servicer's improperly proceeding with a foreclosure sale during a borrower's evaluation for alternatives to foreclosure.

6. Information management policies and procedure. Servicers would be required to establish reasonable information management policies and procedures. The reasonableness of a servicer's policies and procedures would take into account the servicer's size, scope, and nature of its operations. A servicer's policies and procedures would satisfy the rule if the servicer regularly achieves the document retention and servicing file requirements, as well as certain objectives specified in the rule. Examples of such objectives include providing accurate and timely information to borrowers and the courts or enabling servicer personnel to have prompt access to documents and information submitted in connection with loss mitigation applications. In addition, a servicer must retain records relating to each mortgage until one year after the mortgage is discharged or servicing is transferred and must create a mortgage servicing file for each loan containing certain specified documents and information.

7. Early intervention with delinquent borrowers. Servicers would be required to make good faith efforts to notify delinquent borrowers of loss mitigation options. If a borrower is 30 days late, the proposal would require servicers to make a good faith effort to notify the borrower orally and to let the borrower know that loss mitigations options may be available. If the borrower is 40 days late, the servicer would be required to provide the borrower with a written notice with certain specific information, including examples of loss mitigation options available, if applicable, and information on how to obtain more information about loss mitigation options. The notice would also provide information to the borrower about the foreclosure process. The rule contains model language servicers could use for these notices.

8. Continuity of contact with delinquent borrowers. Servicers would be required to provide delinquent borrowers with access to personnel to assist them with loss mitigation options where applicable. The proposal would require servicers to assign dedicated contact personnel for a borrower no later than five days after providing the early intervention notice. Servicers would be required to establish reasonable policies and procedures designed to ensure that the servicer personnel perform certain specified functions where applicable, such as access the borrower's records and provide the borrower with information about how and when to apply for a loss mitigation option and about the status of the application.

9. Loss mitigation procedures. Servicers that offer loss mitigation options to borrowers would be required to implement procedures to ensure that complete loss mitigation applications are reasonably evaluated before proceeding with a scheduled foreclosure sale. The proposal would require servicers to exercise reasonable diligence to secure information or documents required to make an incomplete loss mitigation application complete. In certain circumstances, this could include notifying the borrower within five days of receiving an incomplete application. Within 30 days of receiving a borrower's complete application, the servicer would be required to evaluate the borrower for all available options, and, if the denial pertains to a requested loan modification, notify the borrower of the reasons for the servicer's decision, and provide the borrower with at least a 14-day period within which to appeal the decision. The proposal would require that appeals be decided within 30 days by different personnel than those responsible for the initial decision. A servicer that receives a complete application for a loss mitigation option could not proceed with a foreclosure sale unless (i) the servicer had denied the borrower's application and the time for any appeal had expired; (ii) the servicer had offered a loss mitigation option which the borrower declined or failed to accept within 14 days of the offer; or (iii) the borrower failed to comply with the terms of a loss mitigation agreement. The proposal would require that deadlines for submitting an application for a loss mitigation option be no earlier than 90 days before a scheduled foreclosure sale.

D. Small Servicers

As discussed below, the Bureau convened a Small Business Regulatory Enforcement Fairness Act (SBREFA) 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. Informed by this process, the 2012 TILA Servicing Proposal contains an exemption from the periodic statement requirement for certain small servicers. The Bureau seeks comment on whether other exemptions might be appropriate for small servicers.

E. Effective Date

As discussed below, the Bureau is seeking comment on when this final rule should be effective. Because the final rule will provide important benefits to consumers, the Bureau seeks to make it effective as soon as possible. However, the Bureau understands that the final rules will require servicers to make revisions to their software and to retrain their staff. In addition, some entities will be required to implement other Dodd-Frank Act provisions, which are subject to separate rulemaking deadlines under the statue and will have separate effective dates. Therefore, the Bureau is seeking comment on how much time industry needs to make these changes.

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.[4] 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.[5] Over

[4] Inside Mortgage Finance, Outstanding 1–4 Family Mortgage Securities, Mortgage Market Statistical Annual (2012). For general background on the market and the recent mortgage crisis, *see* the 2012 TILA–RESPA Proposal available at: *http://www.consumerfinance.gov/knowbeforeyouowe/*.

[5] As of the end of 2011, approximately 33% of outstanding mortgage loans were held in portfolio, 57% of mortgage loans were owned through mortgage-backed securities issued by government sponsored enterprises (GSEs), and 11% of loans were owned through private label mortgage-backed securities. Inside Mortgage Finance, Issue 2012:13, at 11 (March 30, 2012). A securitization results in the economic separation of the legal title to the mortgage loan and a beneficial interest in the

60% 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.[6]

Several aspects of the mortgage servicing business make it uniquely challenging for consumer protection purposes. Given the nature of their activities, servicers can have a direct and profound impact on borrowers. However, industry compensation practices and the structure of the mortgage servicing industry create wide variations in servicers' incentives to provide effective customer service to borrowers. Also, because borrowers cannot choose their own servicers, it is particularly difficult for them to protect themselves from shoddy service or harmful practices.

Mortgage servicing is performed by banks, thrifts, credit unions, and non-bank servicers 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.[7]

These different servicing structures can create difficulties for borrowers if a servicer makes mistakes, fails to invest sufficient resources in its servicing operations, or does not properly service the borrower's loan. Although the mortgage servicing industry has numerous participants, the industry is highly concentrated, with the five largest servicers servicing approximately 55 percent of outstanding mortgage loans in this country.[8] 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.[9]

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 investors can transfer servicing rights to a different servicer.

Compensation structures vary somewhat for loans held in portfolio and securitized loans,[10] but have tended to make pure mortgage servicing (where the servicer has no role in origination) a high-volume, low-margin business in which servicers have little incentive to invest in customer service. A servicer will expect to recoup its investment in purchasing mortgage servicing rights and earn a profit through a net servicing fee (which is expressed as a constant rate assessed on unpaid mortgage balances),[11] fees assessed on borrowers, 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 provide minimal customer service to ensure profitability. Servicers also have an incentive to look for opportunities to impose fees on borrowers to enhance revenues and are generally not subject to market discipline because consumers have no opportunity to switch providers. Additionally, servicers may have financial incentives to foreclose rather than engage in loss mitigation.[12]

These attributes of the servicing market created problems for certain borrowers even prior to the national mortgage crisis. For example, borrowers experienced problems with mortgage servicers even during regional mortgage market downturns that preceded the mortgage crisis.[13] Borrowers were subjected to improper fees that servicers had no reasonable basis to impose on borrowers, improper force-placed insurance practices, and improper foreclosure and bankruptcy practices.[14]

When the mortgage crisis erupted, many servicers were ill-equipped to handle the high volumes of delinquent mortgages, loan modification requests,

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).

[6] *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.'').

[7] *See, e.g.,* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755, 763 (2011) (Thompson), available at *http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1074/86WLR755.pdf.*

[8] *See, e.g,* Inside Mortgage Finance, Issue 2012:13, at 12 (Mar. 30, 2012). As of the end of the fourth quarter of 2011, the top five largest servicers serviced $5.66 trillion of mortgage loans. *See id.* at 12.

[9] *See, e.g.,* 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*.

[10] 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, *Mortgage Servicing Primer,* at 3 (Apr. 17, 2012).

[11] *See, e.g.,* Thompson, 86 Wash. L. Rev. 755, 767.

[12] National Consumer Law Center, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior,* at v (Oct. 2009) (''Servicers, unlike investors or homeowners, do not generally lose money on foreclosure. Servicers may even make money on a foreclosure.''); *see also, The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Housing, Transportation, and Community Affairs of the Senate Comm. on Banking, Housing and Urban Affairs,* S. Hrg. 112–139, 112th Cong. 126 (2011) (statement of Diane E. Thompson, National Consumer Law Center), at 15 (''...modification will also likely reduce future income, cost more in the present in staffing, and delay recovery of expenses. Moreover, the foreclosure process itself generates significant income for servicers.''), available at *http://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf.*

[13] *See Problems in Mortgage Servicing From Modification to Foreclosure: Hearings Before the Comm. on Banking, Housing and Urban Affairs,* S. Hrg. 111–987, 111th Cong. 53–54 (2010) (statement of Thomas J. Miller, Iowa Attorney General) (Miller Testimony). *See also,* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers 15:3 Housing Policy Debate* (2004), available at *http://ssrn.com/abstract=992095*

[14] *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers 15:3 Housing Policy Debate* (2004), available at *http://ssrn.com/abstract=992095* (collecting cases).

and foreclosures they were required to process. These servicers lacked the infrastructure, trained staff, controls, and procedures needed to manage effectively the flood of delinquent mortgages they were forced to handle. 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 and the Federal Reserve Board undertook formal enforcement actions against several major servicers for unsafe and unsound residential mortgage loan servicing practices.[15] 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 foreclosures 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 sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.[16] Congress has held significant detailed hearings on the issue of servicer ''robo-signing'' of foreclosure related documentation.[17]

Servicers have also 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. These problems became pervasive in broad segments of the mortgage servicing industry and had profound impacts on borrowers, particularly delinquent borrowers.[18]

The Bureau further understands from mortgage investors that there is a pervasive belief that servicers are making discretionary decisions based on the best interests of the servicer rather than to achieve results that will benefit owners or assignees of mortgages loans. 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.[19] Specifically, ''liquidation and modification of securitized first mortgages are 60% [to] 70% less likely respectively and no action is 13% more likely when the servicer of that securitized first mortgage holds on its portfolio the second lien attached to the first mortgage.'' [20] These failures to take actions that may benefit both consumers and owners or assignees of first lien mortgage loans harm consumers.

The mortgage servicing industry, however, is not monolithic. Some servicers provide high levels of customer service. Some of these servicers may be compensated by investors in a way that incentivizes them to provide high levels of customer service in order to optimize investor outcomes. Other servicers provide high levels of customer service because they rely on providing other products and services to consumers 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 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.[21]

B. Mortgage Servicing Consumer Protection Regulation Before the Recent Crisis

Prior to the adoption of the Dodd-Frank Act, the mortgage servicing industry was subject to limited Federal consumer financial protection regulation. RESPA set forth basic protections with respect to mortgage servicing that were implemented by the U.S. Department of Housing and Urban Development (HUD). 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.[22] RESPA 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 a restricted definition of the ''servicing'' of the borrower's mortgage loan.[23]

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 of Governors of the Federal Reserve System (the Board) to include certain limited requirements directly on servicers, such as requirements to timely credit payments, provide payoff balances and prohibit pyramiding of late fees.[24] Servicers also had some obligations under other Federal laws, including, for example, the Servicemembers Civil Relief Act.[25]

Although TILA and RESPA did not impose many requirements on servicers, servicers were still required to navigate overlapping requirements governing their servicing responsibilities. In addition to Federal law, servicers were required to consider the impact of State and even local regulation on mortgage servicing. Servicers also had to comply with investor requirements to the extent they serviced loans owned or guaranteed by various types of entities. These include (1) servicing guidelines required by Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), together known as the government-sponsored enterprises (GSEs), as well as servicing guidelines required by the Government National Mortgage Association (Ginnie Mae); (2) government insured program

[15] OCC Press Release, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (April 13, 2011), available at: *http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html*, and 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*, and accompanying documents. In addition to enforcement actions against major servicers, Federal agencies have also undertaken formal enforcement actions against major service providers to mortgage servicers. See *id.*

[16] See *id.* None of the servicers admitted or denied the OCC's or Federal Reserve Board's findings.

[17] *See, e.g., Problems in Mortgage Servicing From Modification to Foreclosure: Hearings Before the Comm. on Banking, Housing and Urban Affairs,* S. Hrg. 111–987, 111th Cong. 53–54 (2010) (statement of Diane E. Thompson, NCLC) (Thompson Testimony).

[18] *See* U.S. Government Accountability Office, *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Actions,* at 14–16 (Jun, 2010); Miller Testimony at 54.

[19] Sumit Agarwal *et al.,* Second Liens and the Holdup Problem in First Mortgage Renegotiation (Dec, 2011), available at *http://ssrn.com/abstract=2022501*.

[20] *Id.*

[21] *See* Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking (Small Business Review Panel Report) (Jun, 11, 2012). A copy of the report is available at: *http://www.consumerfinance.gov*.

[22] *See* 12 U.S.C. 2605(a)–(e).

[23] *See* 12 U.S.C. 2605(e) and 2609.

[24] *See* 12 CFR 1026.36(c).

[25] *See* 50 U.S.C. App. 501 *et seq.*

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. All those requirements remain in effect today and going forward.

C. The National Mortgage Settlement and Other Regulatory Actions

In response to the unprecedented mortgage 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, 49 State attorneys general,[26] joined by numerous Federal agencies including the Bureau, entered into a National Mortgage Settlement (National Mortgage Settlement) with the nation's five largest servicers in February 2012.[27] The National Mortgage Settlement applies to loans held in portfolio and serviced by the five largest servicers. Loans owned by GSEs, private investors, or smaller servicers are not covered by the settlement.

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.

In addition to the settlement, other Federal regulatory agencies have 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] The Bureau and other Federal agencies have also engaged since spring 2011 in informal discussions about the potential development of national mortgage servicing standards through regulations and guidance.

The Bureau's proposed rules under Regulation Z and X represent another important step towards establishing uniform minimum national standards. When adopted in final form, the Bureau's rules will apply to all mortgage servicers, whether depository institutions or non-depository institutions, and to all segments of the mortgage market, regardless of the ownership of the loan. The proposals focus both on implementing the specific mortgage servicing requirements of the Dodd-Frank Act and on addressing broader systemic problems that the Bureau believes are critical to ensure that the mortgage servicing market functions to serve consumer needs. To that end, the proposed TILA and RESPA mortgage servicing rules incorporate elements from four categories of the National Mortgage Settlement—(1) foreclosure and bankruptcy information and documentation, (4) loss mitigation, (6) restrictions on servicing fees, and (7) force-placed insurance. In addition, the proposed requirement to maintain reasonable information management policies and procedures addresses oversight of service providers, which impacts category (2) of the settlement.

The Bureau continues to consider whether to incorporate other settlement standards into rules or guidance, either alone or in conjunction with other Federal regulatory agencies; certain requests for comment in this proposal reflect these considerations. The Bureau is also continuing ongoing discussions with other regulators to ensure appropriate coordination of rulemaking and other initiatives relating to mortgage servicing issues.

D. The Statutory Requirements and Additional Proposals

The Dodd-Frank Act mandates several protections for homeowners in the servicing of their loans. The Act requires new disclosures, specifically periodic statements (unless coupon books are provided in certain circumstances), notices prior to the reset of adjustable-rate mortgages, and force-placed insurance notices. These disclosures are designed to provide consumers with comprehensive and comprehensible information when they need it and in a form they can use, so they can better manage their obligations and avoid unnecessary problems.

The Dodd-Frank Act also imposes new requirements on servicers to respond in a timely way to borrowers who assert that their servicer made an error. The statute also requires servicers to respond in a timely way to borrower requests for information.

The Dodd-Frank Act contains requirements relating to the prompt crediting of payments, so that consumers are not wrongly penalized with late fees or other fees because servicers did not credit their payments quickly. The statute also requires servicers to provide timely responses to consumer requests for payoff amounts, so consumers can get this information when they need it, such as when refinancing.

The Bureau is proposing additional standards to improve the way servicers treat all borrowers, including delinquent borrowers. Some servicers have made it very difficult for delinquent borrowers to explore and take advantage of potential alternatives to foreclosure. For example, servicers have frequently neglected to reach out or respond to such borrowers to discuss alternatives to foreclosure, lost or misplaced the documents of borrowers who have sought modifications or other relief, failed to keep track of borrower communications, and forced borrowers who have invested substantial time communicating with an employee of the servicer to repeat the process with a different employee.[32]

To address these concerns, the Bureau is proposing new servicing standards in

[26] Oklahoma elected not to join the settlement.

[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 http://www.nationalmortgagesettlement.com/.*

[29] Office of the Comptroller of the Currency, Bulletin 2011–29 (Jun. 30, 2011), available at: *http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-29.html*; Letter from Edward J. DeMarco, Acting Director of FHFA, to Hon. Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform, U.S. House of Representatives (Jan. 20, 2012), available at: *http://www.fhfa.gov/webfiles/23056/PrincipalForgivenessltr12312.pdf*; Guidance, Home Affordable Modification Program, available at: *https://www.hmpadmin.com/portal/programs/guidance.jsp.* FHFA, Frequently Asked Questions—Servicing Alignment Initiative, available at: *http://www.fhfa.gov/webfiles/21191/FAQs42811Final.pdf.*

[30] *See* 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.

[31] *See* Interagency Foreclosure Report at 5; Federal Reserve Board, Press Release (May 24, 2012), available at: *http://www.federalreserve.gov/newsevents/press/enforcement/20120524a.htm*; Federal Reserve Board, Press Release (Feb. 27, 2012), available at: *http://www.federalreserve.gov/newsevents/press/enforcement/20120227a.htm*; Office of the Comptroller of the Currency, News Release 2011–47 (Apr. 13, 2011), available at: *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html.*

[32] *See, e.g.,* Larry Cordell *et al., The Incentives of Mortgage Servicers: Myths and Realities,* at 9 (Federal Reserve Board, Working Paper No. 2008–46, Sept. 2008).

four areas. First, servicers would have to establish and maintain information management policies and procedures that would have to be reasonably designed to achieve certain objectives and address certain obligations, including accessing and providing accurate information, evaluating borrowers for loss mitigation options, facilitating oversight of, and compliance by, service providers, and facilitating servicing transfers. Second, servicers would have to intervene early with delinquent borrowers to provide them with information about, and encourage them to explore, available alternatives to foreclosure. Third, servicers would have to provide delinquent borrowers with a point of contact on the servicer's staff that provides continuity in the borrowers' dealings with the servicer. At such point of contact, staff must have access to complete records about that borrower, including records of prior communications with the borrower, and be able to assist the borrower in pursuing loss mitigation options.

Fourth, servicers that offer loss mitigation options in the ordinary course of business would be required to follow certain procedures to ensure that borrowers' completed loss mitigation applications are evaluated in a timely manner, that borrowers are notified of the results, and that borrowers have a right to appeal the denial of a loan modification option. Servicers would also be required to provide borrowers who submit incomplete loss mitigation applications with timely notice about the additional documents or information needed to make a loss mitigation application complete.

The Bureau recognizes that a one-size-fits-all approach may not be optimal with regard to either the mandated or additional requirements. As discussed below, the Bureau seeks comment on to what extent it may be appropriate to adjust these standards for small servicers.

III. Summary of Statute and Rulemaking Process

A. Overview of the Statute

The Dodd-Frank Act imposes certain new requirements related to mortgage servicing. Some of these new requirements are amendments to RESPA addressed in this proposal and others are amendments to TILA.

RESPA amendments. Section 1463 of the Dodd-Frank Act imposes a number of new servicing related requirements under RESPA that broadly relate to force-placed insurance and error resolution/responses to requests for information. First, the statute prohibits a servicer from obtaining force-placed hazard insurance, unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirement to maintain property insurance. A servicer may not impose any charge on any borrower for force-placed insurance with respect to any property secured by a federally related mortgage, unless the servicer sends, by first-class mail, two written notices to the borrower, at least 30 days apart. 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 demonstrate that they have coverage, and state that the servicer may obtain coverage at the borrower's expense if the borrower fails to provide evidence of coverage. Servicers must terminate force-placed insurance coverage and refund to borrowers any premiums charged during any period when the borrower had private insurance coverage. The statute also provides 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.

Second, the statute prohibits certain acts and practices by servicers of federally related mortgages with regard to resolving errors and responding to requests for information. Specifically, the statute prohibits servicers of federally related mortgages from charging fees for responding to valid qualified written requests. The statute also provides that a servicer of a federally related mortgage must 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, avoiding foreclosure, or other standard servicer duties.

Finally, the statue requires a servicer of a federally related mortgage to 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. The statue also reduces the amount of time that servicers of federally related mortgages have to correct errors and respond to inquiries generally, as well as refund escrow accounts upon payoff.[33]

In addition, the statute provides that a servicer of a federally related mortgage must "comply with any other obligation found by the Consumer Financial Protection Bureau, by regulation, to be appropriate to carry out the consumer protection purposes of this Act." [34] This provision gives the Bureau broad authority to adopt additional regulations to govern the conduct of servicers of federally related mortgage loans. In light of the systemic problems in the mortgage servicing industry, the Bureau is proposing to exercise this authority to require servicers of federally related mortgages to: Establish reasonable information management policies and procedures; undertake early intervention with delinquent borrowers; provide delinquent borrowers with continuity of contact with staff equipped to assist them; and require servicers that offer loss mitigation options in the ordinary course of business to follow certain procedures when evaluating loss mitigation applications.

TILA amendments. 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. TILA section 128A states that, for hybrid ARMs with a fixed interest rate for an introductory period that adjusts or resets to a variable 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 borrower, for each billing cycle, a periodic statement that sets forth certain specified information in a conspicuous and prominent manner. The statute also gives the Bureau the authority 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 where the borrower 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 codify existing Regulation Z requirements for the prompt crediting of mortgage payments received by servicers in connection with

[33] Other changes in section 1463 of the Dodd-Frank Act relate to increases in penalties for violations. These provisions are not addressed in this rulemaking.

[34] 12 U.S.C. 2605(k)(1)(E).

consumer credit transactions secured by a consumer's dwelling. The statute also requires a creditor or servicer to send accurate and timely responses to borrower requests for payoff amounts for home loans.

The statutory provisions with enumerated mortgage servicing requirements become effective on January 21, 2013, unless final rules are issued on or before that date.

B. Outreach and Consumer Testing

The Bureau has conducted extensive outreach in developing the mortgage servicing proposals. Bureau staff met with mortgage servicers, force-placed insurance carriers, industry trade associations, consumer advocates, other Federal regulatory agencies, and other interested parties to discuss various aspects of the statute and the servicing industry.

In preparing this proposed rule, 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 (SBA) and the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).[35] The Small Business Review Panel's findings and recommendations are contained in the Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking (Small Business Review Panel Report).[36]

The Bureau also engaged in other meetings and roundtables with a variety of other stakeholders to gather factual information about the servicing industry and to discuss various elements of the Bureau's proposals as they were being developed. 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 proposals and the need for and potential contents of national mortgage servicing standards in general. As it considers public comment and works to develop final rules on mortgage servicing, the Bureau will continue to seek input from all interested parties.

In addition, 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 ARM notices, the force-placed insurance notices, and the periodic statements. 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 for the new disclosures required by Dodd-Frank Act section 1418, 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, as well as to learn about how they would use the information presented in each of the disclosures. The disclosures were revised after each round of testing. Specific findings from the consumer testing are discussed in detail throughout the **SUPPLEMENTARY INFORMATION** where relevant.[37]

C. Other Dodd-Frank Act Mortgage-Related Rulemakings

Including this proposal, the Bureau currently is engaged in seven rulemakings relating to mortgage credit to implement requirements of the Dodd-Frank Act:

- *TILA–RESPA Integration:* On July 9, 2012, the Bureau released proposed rules and forms combining the TILA mortgage loan disclosures with the Good Faith Estimate (GFE) and settlement statement required under RESPA, pursuant to Dodd-Frank Act section 1032(f) as well as sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively. 12 U.S.C. 2603(a); 15 U.S.C. 1604(b) (the 2012 TILA–RESPA Proposal).[38]
- *HOEPA:* On July 9, 2012, the Bureau released proposed rules to implement Dodd-Frank Act requirements expanding protections for ''high-cost'' mortgage loans under 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.[39] Such loans have requirements on servicers of ''high-cost'' mortgage loans related to payoff statements, late fees, prepayment penalties, and fees for loan modifications or deferrals.
- *Loan Originator Compensation:* The Bureau is in the process of developing a proposal to implement provisions of the Dodd-Frank Act requiring certain creditors and mortgage loan originators to meet duty of care qualifications and prohibiting mortgage 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, pursuant to TILA section 129B as established by Dodd-Frank Act sections 1402 through 1405. 15 U.S.C. 1639b.
- *Appraisals:* The Bureau, jointly with Federal prudential regulators and other Federal agencies, is in the process of developing a proposal to implement Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, appraisal management companies, and automated valuation models, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471, 15 U.S.C. 1639h, and sections 1124 and 1125 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) as established by Dodd-Frank Act sections 1473(f), 12 U.S.C. 3353, and 1473(q), 12 U.S.C. 3354, respectively. In addition, the Bureau is developing rules to implement section 701(e) of the Equal Credit Opportunity Act (ECOA), as amended by Dodd-Frank Act section 1474, to require 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 (collectively, Appraisals Rulemaking). 15 U.S.C. 1691(e).

[35] The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) 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 Public Law 110–28, sec. 8302 (2007)).

[36] *See* Small Business Review Panel Report (Jun. 11, 2012). A copy of the report is available at: *http://www.consumerfinance.gov.*

[37] A copy of the Macro report on consumer testing is available at: *http://www.consumerfinance.gov/notice-and-comment/.*

[38] Available at: *http://www.consumerfinance.gov/notice-and-comment/.*

[39] *Id.*

• *Ability to Repay:* The Bureau is in the process of finalizing a proposal issued by the Board to implement provisions of the Dodd-Frank Act requiring creditors to determine that a consumer can repay a mortgage loan and establishing standards for compliance, such as by making a ''qualified mortgage,'' pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411 and 1412 (ATR Rulemaking). 15 U.S.C. 1639c.

• *Escrows:* The Bureau is in the process of finalizing a proposal issued by the Board to implement provisions of the Dodd-Frank Act requiring certain escrow account disclosures and exempting from the higher-priced mortgage loan escrow requirement loans made by certain small creditors, among other provisions, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461 and 1462 (Escrows Rulemaking). 15 U.S.C. 1639d.

With the exception of the requirements being implemented in the 2012 TILA–RESPA Proposal, the Dodd-Frank Act requirements referenced above 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. To provide an orderly, coordinated, and efficient comment process, the Bureau is generally setting the deadlines for comments on this and other proposed mortgage rules based on the date the proposal is issued, instead of the date this notice is published in the **Federal Register**. Therefore, the Bureau is providing 60 days for comment on those proposals, which will ensure that the Bureau receives comments with sufficient time remaining to issue final rules by January 21, 2013. Because the precise date this notice will be published cannot be predicted in advance, setting the deadlines based on the date of issuance will allow interested parties that intend to comment on multiple proposals to plan accordingly.

The Bureau regards the foregoing rulemakings as components of a larger undertaking; many of them intersect with one or more of the others. Accordingly, the Bureau is coordinating carefully the development of the proposals and final rules identified above. Each rulemaking will adopt new regulatory provisions to implement the various Dodd-Frank Act mandates described above. In addition, each of them may include other provisions the Bureau considers necessary or appropriate to ensure that the overall undertaking is accomplished efficiently and that it ultimately yields a regulatory scheme for mortgage credit that achieves the statutory purposes set forth by Congress, while avoiding unnecessary burdens on industry.

Thus, many of the rulemakings listed above involve issues that extend across two or more rulemakings. In this context, each rulemaking may raise concerns that might appear unaddressed if that rulemaking were viewed in isolation. For efficiency's sake, however, the Bureau is publishing and soliciting comment on a proposed approach to certain issues raised by two or more of its mortgage rulemakings in whichever rulemaking is most appropriate, in the Bureau's judgment, for addressing each specific issue. Accordingly, the Bureau urges the public to review this and the other mortgage proposals identified above, including those previously published by the Board, together. Such a review will ensure a more complete understanding of the Bureau's overall approach and will foster more comprehensive and informed public comment on the Bureau's several proposals, including provisions that may have some relation to more than one rulemaking but are being proposed for comment in only one of them.

D. Small Servicers

The small entity representatives (SERs) who provided feedback to the SBREFA panel generally emphasized that their business models required a ''high touch'' approach to customer service and that they did not engage in many of the practices that contributed to the mortgage market process. The SERs indicated that they take a proactive approach to providing consumer information, resolving errors and working with delinquent borrowers to find alternatives to foreclosure. Nevertheless, they indicated that some elements of the proposals under consideration were not consistent with their current business practices and expressed concern about the need to begin providing extensive documentation to prove compliance with the proposed standards. The SERs urged the Bureau to adopt standards that would allow small servicers to stay in the market and provide choices to consumers.[40] The SERs were particularly concerned about the costs and burdens of complying with the periodic statement requirements, as well as certain aspects of the process for resolving errors and responding to inquiries.[41]

Informed by this process, the Bureau is proposing in the 2012 TILA Servicing Proposal to exempt certain small servicers from the periodic statement requirement. The Bureau is also proposing that certain requirements, such as the requirement to maintain reasonable information management policies and procedures under Regulation X, should be applied in light of the scale of the servicer's operations as well as other contextual factors. The Bureau does not believe that these provisions, described more fully in the section-by-section analysis of the applicable proposal, would impair consumer protection. The Bureau is also seeking comment more broadly on whether other exemptions or adjustments for small servicers would be warranted to reduce regulatory burden while appropriately balancing consumer protections.

E. Request for Comment on Effective Date

The Bureau specifically requests comment on the appropriate effective date for each of the servicing-related rules contained in this proposal and the 2012 TILA Servicing Proposed Rule. As discussed above, the Dodd-Frank Act servicing requirements take effect automatically on January 21, 2013, unless final rules are issued on or before that date.[42] Where rules are required to be issued, the Dodd-Frank Act permits the Bureau to provide up to 12 months for implementation. For all other rules, the implementation period is left to the discretion of the Bureau.

Given the significant consumer benefits offered by the proposals and the challenges faced by delinquent borrowers in dealing with their servicers, the Bureau generally believes that the final rules should be made effective as soon as possible. However, the Bureau understands that various elements of the final rules would require servicers to adopt or revise existing software to generate compliant disclosures, retrain staff, assess and revise policies and procedures, and/or take other implementation measures. The Bureau therefore seeks detailed comment on the nature and length of implementation process for each individual servicing rule and in light of interactions between the rules. The Bureau is particularly interested in analyzing the impacts on both consumers and servicers of a staggered implementation sequence as compared to imposing a single date by which all rules must be implemented.

The Bureau also notes that some companies may also need to implement

[40] Small Business Review Panel Report at 16, 21.

[41] *Id.* at 16–19, 21, and 23–24.

[42] Public Law 111–203, 124 Stat. 1376, section 1400(c) (2010).

other new requirements under other parts of the Dodd-Frank Act, as described above. The Bureau believes based on conversations and analysis to date that there is more overlap and interaction among the various proposals relating to mortgage origination than there is between the servicing proposals and the origination proposals. However, the Bureau seeks comment specifically on this issue and on whether the general cumulative burden on entities that are subject to both sets of rules will complicate implementation.

Finally, the Bureau seeks comment on any particular implementation challenges faced by small servicers, and on whether an extended implementation period would be appropriate or useful. For instance, to the extent that small servicers rely heavily on outside software vendors, the Bureau seeks comment on whether a delayed effective date would provide significant relief if the vendors will have to develop software solutions for larger servicers on a shorter timeline anyway. The Bureau also seeks comment on the impacts of delayed implementation on consumers and on other market participants.

IV. Summary of Proposed Rule

The proposal contains a number of significant revisions to Regulation X. As a preliminary matter, the Bureau proposes to reorganize Regulation X to include three distinct subparts. Subpart A (General) would include general provisions of Regulation X, including provisions that apply to both subpart B and subpart C. Subpart B (Mortgage settlement and escrow accounts) would include provisions relating to settlement services and escrow accounts, including disclosures provided to borrowers relating to settlement services. Subpart C (Mortgage servicing) would include provisions relating to obligations of mortgage servicers. The Bureau also proposes to set forth a commentary that includes official Bureau interpretations of Regulation X.

With respect to mortgage servicing-related provisions, the proposed rule would amend existing provisions currently published in 12 CFR 1024.21, which relate to disclosures of mortgage servicing transfers and servicer obligations to borrowers. The Bureau is proposing to include these provisions within the proposed subpart C as proposed §§ 1024.33–1024.34. The Bureau also proposes 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 establish procedures for investigating and resolving alleged errors and responding to requests for information. The requirements would be set forth in proposed §§ 1024.35–1024.36. As proposed, these sections would require servicers to respond to errors and information requests from borrowers, which would include qualified written requests. The Bureau's goal is to conform and consolidate the pre-existing procedures applicable to qualified written requests with the new requirements imposed by the Dodd-Frank Act to respond to errors and information requests under section 6(k)(1)(C) and 6(k)(1)(D) of RESPA. The Bureau proposes to create a unified requirement for servicers to respond to errors and information requests provided by borrowers, without regard to whether the request constitutes a qualified written request.[43] To that end, the proposed rule would implement 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.

The proposed rule would implement limitations on servicers obtaining force-placed insurance in § 1024.37. The proposed rule would require servicers to provide notices to borrowers at certain timeframes before a servicer could impose a charge on a borrower. *See* proposed § 1024.37. Further, the proposed rule would require 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 must be bona fide and reasonable. Finally, and as set forth in more detail below, the proposed rule would also 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 generally advance funds to maintain the borrowers' own hazard insurance policies even if the loan is delinquent.

The proposed rule would also implement the Dodd-Frank Act amendment to RESPA section 6(g) in proposed § 1024.34(b) by proposing requirements on servicers for the refund or transfer of funds in an escrow account when a mortgage loan is paid in full.

The proposed rule would also impose obligations on servicers in four additional areas not specifically required by the Dodd-Frank Act: Reasonable information management policies and procedures, early intervention for delinquent borrowers, continuity of contact, and loss mitigation procedures. *See* proposed §§ 1024.38–1024.41. The Bureau is proposing rules in these areas to address significant problems in the mortgage servicing industry and the difficulties that borrowers, particularly delinquent borrowers, have encountered when dealing with servicers. The early intervention for delinquent borrower provisions would require 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 provisions would require servicers to make available to borrowers direct phone access to personnel who could assist borrowers in pursuing loss mitigation options. The reasonable information management policies and procedures would require servicers to implement policies and procedures to manage documents and information to achieve defined objectives that ensure borrowers are not harmed by servicers' information management operations. These objectives include providing accurate information to borrowers, correcting errors on borrower accounts, providing oversight of service providers, protecting borrowers from lost information during servicing transfers, and ensuring that servicers have access to all information necessary to evaluate loss mitigation options, as appropriate. The information management policies and procedures would also have to include standard requirements. Policies and procedures would satisfy the requirements if they do not result in a pattern or practice of failing to comply with the standard requirements or achieving the objectives. The loss mitigation procedures would require servicers that offer loss mitigation

[43] 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 or to provide information regarding an owner or assignee of a mortgage loan without reference to the ''qualified written request'' process. The Bureau's proposal would integrate all error resolution and information request processes, including requirements applicable to ''qualified written requests.'' Although a borrower would still be able to submit a ''qualified written request,'' under the proposed rule, a ''qualified written request'' would be subject to the same error resolution or information request requirements applicable to any other type written error notice or information request to a servicer and a servicer's liability for failure to respond to a qualified written request would be the same as for any other written error or information request notice.

options to borrowers to evaluate complete and timely applications for loss mitigation options. Servicers would be required to permit borrowers to appeal denials of loss mitigation applications for loan modification programs. A servicer that receives a complete application for a loss mitigation option may not proceed with a foreclosure sale unless (i) the servicer has denied the borrower's application and the time for any appeal has expired; (ii) the servicer has offered a loss mitigation option which the borrower has declined or failed to accept within 14 days of the offer; or (iii) the borrower fails to comply with the terms of a loss mitigation agreement.

The proposed new protections would significantly improve the transparency of mortgage servicing operations, provide substantive protections, enhance borrowers' ability to obtain information from and assert errors to servicers, and provide borrowers, particularly delinquent borrowers, with information and options necessary to undertake informed actions with respect to mortgage loan obligations.

V. Legal Authority

Section 1463 of the Dodd-Frank Act creates statutory mandates under new sections 6(k), 6(l) and 6(m) of RESPA. Section 1463 of the Dodd-Frank Act also amends certain consumer protection provisions set forth in sections 6(e), 6(f) and 6(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 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 a charge for a force-placed insurance policy may be imposed on the borrower. 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. *See* RESPA section 6(l).

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, must be bona fide and reasonable. *See* RESPA section 6(m).

The Dodd-Frank Act also amends sections 6(e), 6(f), and 6(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.

In addition to the statutory mandates and amendments, RESPA section 6(k) authorizes the Bureau 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 for servicing federally related mortgage loans that are intended to protect borrowers. RESPA has established a consumer protection paradigm of requiring disclosures to consumers, and establishing servicer obligations, all of which are intended to protect consumers regarding servicer actions. The disclosures include, for example, disclosures regarding escrow account balances and disbursements, transfers of mortgage servicing among mortgage servicers, and force-placed insurance. Obligations limiting servicer actions include obligations for servicers to respond to qualified written requests from borrowers and obligations with respect to escrow account payments. Servicers incur liability for failure to comply with such requirements.

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. Each of the provisions proposed in this rulemaking address these purposes. RESPA section 19(a) 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. In addition, RESPA section 6(j)(3) authorizes the Bureau to establish any requirements necessary to carry out the purposes of section 6 of RESPA.

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 in issuing this proposal. As described in more detail elsewhere in the **SUPPLEMENTARY INFORMATION**, the provisions proposed in part or in whole pursuant to the Bureau's authority in RESPA sections 6(j)(3), 6(k) and 19(a) include: §§ 1024.17(k)(5), 1024.30—1024.41.[44]

The Bureau's proposal 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 proposed practice of setting forth official Bureau interpretations in the supplement substitutes for the prior practice of the HUD of publishing Statements of Policy with respect to interpretations of RESPA.[45]

Dodd-Frank Act Section 1032(a)

As discussed in the section-by-section analysis for proposed § 1024.37, the Bureau is proposing disclosures and model forms for force-placed insurance notices pursuant to its authority under RESPA sections 6(k), 6(j)(3), 19(a), as well as its authority under Dodd-Frank Act section 1032. Section 1032(a) of the

[44] Throughout the **SUPPLEMENTARY INFORMATION**, the Bureau is citing its authority under RESPA sections 6(j)(3), 6(k), and 19(a) for purposes of simplicity. The Bureau notes, however, that with respect to some of the provisions referenced in the text, use of only one of the authorities may be sufficient.

[45] 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.

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 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 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). In developing proposed rules under Dodd-Frank Act section 1032(a) for this proposal, 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. The Bureau has considered the evidence developed through its consumer testing of the force-placed insurance notices.

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, using a clear format and design, such as readable type font, and succinctly explains the information that must be communicated to the consumer. Dodd-Frank Act 1032(b)(2); 12 U.S.C. 5532(b)(2). As discussed in the section-by-section analysis for proposed § 1024.37, the Bureau is proposing model forms for force-placed insurance notices. As discussed in this notice, the Bureau is proposing these model forms pursuant to its authority under Dodd-Frank Act section 1032(b)(1).

VI. Section-by-Section Analysis

Subpart A—General

The Bureau proposes to create three distinct subparts within Regulation X. Subpart A titled ''General'' would include general provisions as well as provisions that are applicable to both subpart B and subpart C of Regulation X. Subpart B titled ''Mortgage settlement and escrow accounts'' would include provisions relating to settlement services and escrow accounts, including disclosures required to be provided to borrowers with respect to settlement service providers. Subpart C titled ''Mortgage servicing'' would include provisions relating to mortgage servicing and would include most of the provisions in this proposal.

In order to organize the general provisions of Regulation X, as well as the provisions that would be applicable to both subpart B and subpart C, the Bureau proposes placing §§ 1024.1 through 1024.5 in subpart A.

Current § 1024.1 sets forth the designation and applicability of Regulation X and would be republished without change. Current § 1024.2 sets forth definitions that are applicable to transactions covered by this regulation, including the definition of federally related mortgage loan that is referenced in the proposed definition of the term ''mortgage loan'' in subpart C. *See* proposed § 1024.31. Current § 1024.2 would generally be republished without changed, except for a deletion from the definitions of ''Federally related mortgage loan'' and ''Mortgage broker'' and additions to the definitions of ''Public Guidance Documents'' and ''Servicer.''

The deletion to the definition of ''Federally related mortgage loan'' eliminates the use of the short term ''mortgage loan'' as a substitute for ''Federally related mortgage loan'' in light of the definition of the term ''mortgage loan'' in proposed § 1024.31. Conforming edits have also been proposed for the definitions of ''Origination service,'' ''Servicer,'' and ''Servicing.'' Conforming edits have also been proposed for 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 deletion to the definition of ''Mortgage broker'' removes a reference to loan correspondents that are approved under 24 CFR 202.8. HUD amended 24 CFR 202.8 on April 20, 2010 to eliminate the FHA approval process for loan correspondents and determined that loan correspondents would no longer be approved participants in FHA programs.[46] The deletion of the reference to FHA approved loan correspondents in the definition of ''Mortgage broker'' removes the now obsolete reference.

The addition to the definition of ''Public Guidance Documents'' provides that such documents are available from the Bureau upon request and provides an address that could be used to request the ''Public Guidance Documents.''

The addition to the definition of ''Servicer'' is intended to clarify the treatment 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 definition of ''Servicer'' currently 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 addition to the definition of ''servicer'' clarifies 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 union 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 NCUA for appointment of a conservator or liquidating agent of a servicer (or an entity by which the servicer is owned or controlled). The definition of ''servicer'' also has been edited to clarify that it relates to servicers of federally related mortgage loans.

With respect to the additions to the definition of ''Servicer,'' the Bureau relies on its authority in section 19(a) of RESPA to make such interpretations and to grant such reasonable exemptions for classes of transactions as may be necessary to achieve the consumer protection purposes of the Act. 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 in light of the fact that Congress has

[46] *See* 75 FR 20718.

specifically stated that the FDIC, when it is providing assistance to an insured depository institution or in its role as conservator or receiver of an insured deposition institution, should not be considered a servicer.

Current § 1024.3 would be removed and the substance of § 1024.23 would be moved to proposed § 1024.3. Current § 1024.3 sets forth the process for the public to submit questions or suggestions regarding RESPA or to receive copies of Public Guidance Documents. Although the Bureau welcomes questions and suggestions from the public regarding Regulation X, the Bureau does not believe a provision of Regulation X must be specifically designated for that purpose. 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 Bureau has proposed including contact information to request copies of Public Guidance Documents in the definition of Public Guidance Documents in proposed § 1024.2 as discussed above.

Current § 1024.23 states that provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act), which permits electronic disclosures to consumers if certain conditions are met, apply to Regulation X. The Bureau believes that the E-Sign Act provisions are applicable to all provisions in the regulation, and, therefore, should be moved to subpart A. The Bureau has made technical edits to the language of the provision to conform to the language of other similar Bureau regulations.

Current § 1024.4 sets forth provisions relating to reliance upon rules, regulations, or interpretations by the Bureau. The Bureau proposes 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, proposes to include the substance of this provision in the introduction to the commentary.

Current § 1024.5 sets forth exemptions with respect to the applicability of Regulation X. The Bureau proposes to make a technical correction to current § 1024.5(b)(7) to reflect that mortgage servicing related provisions of Regulation X will be included in the new subpart C and will no longer be placed in current § 1024.21.

The Bureau further proposes to remove current § 1024.22. 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 is proposing removing current § 1024.22 because the section is unnecessary and the inclusion of the current section in Regulation X is inconsistent with the drafting of other Bureau regulations. A court reviewing Regulation X should presume that provisions of Regulation X are severable in the absence of an indication that the Bureau intended the provisions to be non-severable.[47] 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.

Subpart B—Mortgage Settlement and Escrow Accounts

The Bureau proposes to establish the provisions of Regulation X relating to settlement services and escrow accounts within subpart B of Regulation X. These provisions include §§ 1024.6 through 1024.21.

Section 1024.17 Escrow Accounts

17(k) Timely Payments

The Bureau proposes to modify § 1024.17(k), which, pursuant to proposed § 1024.34(a) discussed below, sets forth requirements a servicer must follow when making payments from a borrower's escrow account. The Bureau proposes to add a new § 1024.17(k)(5) to Regulation X to address circumstances in which servicers are required to make payments from a borrower's escrow account to continue a borrower's hazard insurance policy. The Bureau has reviewed a number of issues concerning force-placed insurance in order to implement the new Dodd-Frank Act requirements on force-placed insurance discussed below. During that process, for reasons set forth below, the Bureau concluded that if a borrower has escrowed for hazard insurance (*i.e.* established an escrow account for the payment of hazard insurance premiums), it would be appropriate to require servicers to continue paying for the borrower's existing hazard insurance when practicable. The Bureau understands that it is practicable for a servicer to pay the hazard insurance premium of such borrower unless the borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. Under proposed § 1024.37(a)(2)(ii) discussed below, the Bureau is proposing that hazard insurance obtained by a borrower but renewed by the borrower's servicer as required by § 1024.17(k)(1), (k)(2), or (k)(5) is not considered to be force-placed insurance under § 1024.37.

Current § 1024.17(k)(1) and (k)(2) require servicers to make timely disbursements from a borrower's escrow account, and to advance funds if necessary, as long as the borrower's mortgage payment is not more than 30 days past due. Proposed § 1024.17(k)(5) would amend the requirements of § 1024.17(k)(1) and (k)(2) with respect to the timely payment of hazard insurance premiums. Proposed § 1024.17(k)(5) provides that notwithstanding § 1024.17(k)(1) and (k)(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 such insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. The proposal would require the servicer to advance funds to pay the premium charge if the borrower's escrow account does not contain sufficient funds.

Proposed comment 17(k)(5)–1 clarifies 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 servicer with a reasonable

[47] *See Regan* v. *Time,* 468 U.S. 641, 653 (1984) (stating that the presumption regarding the review of statutes is always in favor of severability); *Community for Creative Non-Violence* v. *Turner,* 893 F.2d 1387, 1394 (D.C. Cir. 1990) (applying presumption against severability in *Regan* to administrative regulations); *Stupak-Thrall* v. *United States,* 89 F.3d 1269, 1289 (6th Cir. 1996) (same).

basis to believe that the borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges.

Proposed comment 17(k)(5)–2 contains three examples of a borrower's hazard insurance being canceled or not renewed for reasons other than the nonpayment of premium charges, to the extent permitted by State or other applicable law. Proposed comment 17(k)(5)–2.i describes a situation in which the borrower cancels the hazard insurance before its expiration date or chooses to not renew the insurance. Proposed comment 17(k)(5)–2.ii describes a situation in which the insurance company cancels the hazard insurance before its expiration date or chooses not to renew the insurance because it decides to stop writing insurance for all properties in the community where the borrower's property is located. Proposed comment 17(k)(5)–2.iii describes a situation in which the insurance company cancels or chooses not to renew the borrower's hazard insurance based on its underwriting criteria, which may include, for example, a borrower's claim history, a change in the occupancy status of the property, or a change in the probability of the property being exposed to loss caused by certain hazards (*e.g.,* a change in the property's exposure to loss caused by wind).

Proposed comment 17(k)(5)–3 clarifies 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.

As discussed above, the Bureau's review of issues concerning force-placed insurance has led the Bureau to conclude that it would be appropriate to require servicers to continue paying for a borrower's existing hazard insurance when practicable if the borrower has an escrow account established to pay for hazard insurance. As discussed in greater detail in the discussion of the Bureau's proposed definition of ''force-placed insurance'' in proposed § 1024.37(a)(1), a servicer is already contractually required to obtain alternative hazard insurance to protect the interest that the owner or assignee of a mortgage loan has in the property securing such loan if the servicer is unable to obtain evidence of acceptable borrower-purchased hazard insurance for such property. Additionally, a servicer typically makes payments for force-placed insurance with its own funds.[48] Because the servicer would have to obtain some type of hazard insurance to protect the interest of the mortgage loan owner or assignee (and to advance payment with its own funds, if necessary), requiring servicers to continue paying for an escrowed borrower's existing hazard insurance when practicable would provide borrowers with greater protection than a servicer obtaining force-placed insurance. For reasons discussed in greater detail in the Bureau's proposed definition of force-placed insurance, servicer's purchase of force-placed insurance under certain circumstances could harm borrowers. The Bureau also believes that the approach the Bureau is proposing would be generally more cost-effective for the owner or assignee of the mortgage loan.[49] As discussed above, when servicers obtain force-placed insurance, they typically advance the force-placed insurance premium charges, which are then added to the amount of the loan. If a borrower cannot reimburse a servicer for the advancement of force-placed insurance charges, then when a loan is liquidated, the servicer will mostly likely be paid for the unreimbursed force-placed insurance charges before the owner or assignee of the mortgage loan gets paid.[50]

Additionally, the Bureau understands that servicers currently advance hazard insurance premiums for a borrower with an escrow account established to pay for hazard insurance even if they are not required by Regulation X to do so. The Bureau notes that when it solicited input from small servicers through the Small Business Review Panel, most SERs did not raise specific concerns with the Bureau's proposal to require servicers to advance funds to pay a borrower's hazard insurance. There were two SERs who expressed concern about advancing funds to renew a borrower's hazard insurance because the borrower could cancel the hazard insurance and keep the refund.[51] The Small Business Review Panel recommended that the Bureau reduce the incentives for borrowers to take such action by allowing servicers to advance premium payment in 30-day installments. Proposed comment 17(k)(5)–3, discussed above, reflects the panel's recommendation. The Bureau also notes that to the extent that the servicer is permitted by applicable law to seek reimbursement for advancing a borrower's hazard insurance premium payment, the Bureau's proposal would not prohibit a servicer from seeking such reimbursement.

The Bureau, however, invites comment on an alternative to the requirement in proposed § 1024.17(k)(5) that servicers must advance funds to pay a borrower's hazard insurance premium. The alternative approach would be in § 1024.37 and would simply make it a condition of charging a borrower who has an escrow account established to pay hazard insurance, that the force-placed insurance be less expensive to the borrower than the servicer advancing funds to continue the borrower's hazard insurance policy. The Bureau further requests whether the condition should be adjusted to require that the force-placed insurance policy protect the borrower's interest.

Borrower's insurance canceled for reasons other than nonpayment of premiums. As discussed above, the Bureau understands that for a borrower who has escrowed for hazard insurance, it is practicable for a servicer to pay such borrower's hazard insurance premium unless the borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. In other words, the Bureau recognizes that there could be situations where it would not be practicable for a servicer to continue paying for a borrower's existing hazard insurance even though the borrower has escrowed for hazard insurance because the borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. Accordingly, as discussed above, proposed § 1024.17(k)(5) clarifies that a servicer's obligation to make payments from a borrower's escrow account in a timely manner to pay the premium charge on a borrower's hazard insurance rests on whether 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. If the servicer has such basis,

[48] *See e.g., Force-Placed Insurance Hearings: Testimony of Justin Crowley on Behalf of Select Portfolio Servicing, Inc., et al. Before the New York State Department of Financial Services,* at 3 (May 2012), available at: *http://www.dfs.ny.gov/insurance/hearing/fp_052012_testimony.htm.*

[49] One mortgage analyst has suggested 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.'' *The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Housing, Transportation, and Community Affairs of the Senate Comm. on Banking, Housing and Urban Affairs,* S. Hrg. 112–139, 112th Cong. 126 (2011) (statement of Laurie Goodman).

[50] National Consumer Law Center, *Why Servicers Foreclose When They Should Modify,* at 25.

[51] *See* Small Business Review Panel Report at 22.

then the servicer would not be required to make such payments. The Bureau notes that for such servicer, the servicer is subject to proposed § 1024.37's consumer protections with respect to servicer's purchase of force-placed insurance. The Bureau believes that ''reasonable basis'' rather than actual knowledge should be the standard for determining whether the servicer is required to make timely payments. The Bureau understands that notices of cancellation or non-renewal vary in the level of detail. Hence a servicer may not be able to determine why a borrower's hazard insurance was canceled or not renewed based on information provided in a notice of cancellation or non-renewal. Additionally, the Bureau notes that the new Dodd-Frank requirements, discussed below, only require a servicer to have a ''reasonable basis'' to believe a borrower has failed to maintain hazard insurance pursuant to the terms of the borrower's mortgage loan contract before the servicer obtains force-placed insurance.

Proposed comment 17(k)(5)–1, discussed above, clarifies what constitutes a ''reasonable basis'' for the purposes of proposed § 1024.17(k)(5). The Bureau believes that providing an illustration of what constitutes ''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 facilitates compliance. The Bureau invites comment on whether additional circumstances may provide a servicer with 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. Proposed comment 17(k)(5)–2, discussed above, contains three examples of a borrower's hazard insurance being canceled or not renewed for reasons other than the nonpayment of premium charges.

Legal authority. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. As previously discussed in part V above, RESPA has established a consumer protection paradigm of establishing servicer obligations intended to protect consumers regarding servicer actions. As noted, servicers are contractually required to obtain alternative hazard insurance—advancing their own funds as necessary—if they do not have evidence that the borrower has hazard insurance in place. The Bureau has determined that requiring servicers to continue paying for escrowed borrowers' existing hazard insurance, when practicable, is more protective of the borrower's interest than providing servicers with the opportunity to obtain force-placed insurance. Accordingly, the Bureau proposes § 1024.17(k)(5) pursuant to its authority under RESPA section 6(k)(1)(E) 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 and has authority pursuant to section 19(a) of RESPA to prescribe such rules and regulations, and to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the consumer protection purposes of RESPA.

To the extent proposed § 1024.17(k)(5) would require servicers to make timely payments for a borrower whose mortgage payment is more than 30 days past due, but whose escrow account contains sufficient funds to pay the hazard insurance premium, the Bureau additionally relies on its authority under RESPA section 6(g). RESPA section 6(g) provides that when a borrower is required by the terms of a federally related mortgage loan to pay into an escrow account to assure payment of taxes, insurance premiums, and other charges with respect to the property, the borrower's servicer must make timely payments out of the borrower's escrow account for such taxes, insurance premiums, and other charges. As discussed above, the Bureau recognizes that under certain circumstances, it may not be practicable for a servicer to continue paying a borrower's existing hazard insurance. Pursuant to its interpretive authority under RESPA section 19(a), discussed above, the Bureau believes it is appropriate to clarify that a servicer's obligation to make timely payment from a borrower's escrow account to pay for the borrower's hazard insurance premium does not apply when a servicer has a reasonable basis to believe that the borrower's existing hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. The Bureau notes that for such servicer, the servicer would have to comply with proposed § 1024.37's consumer protections if the servicer obtains force-placed insurance. Additionally, the Bureau notes that RESPA section 19(a) provides the Bureau with authority to grant reasonable exemptions for classes of transactions as may be necessary to achieve the consumer protection purposes of RESPA.

Borrowers not escrowed for hazard insurance. Proposed § 1024.17(k)(5) would apply in situations where a borrower has established an escrow account for the payment of hazard insurance premiums. Where a borrower has not done so, whether because the borrower has not established an escrow account at all, or has established an escrow account to pay for other items but not for hazard insurance premiums, the Bureau is proposing to set forth that hazard insurance obtained by a borrower but renewed at the servicer's discretion is not force-placed insurance under proposed § 1024.37 in proposed § 1024.37(a)(2)(iii) discussed below. The Bureau notes that there is an on-going debate among consumer advocates, servicers, the GSEs, and regulators on whether it is practicable to require servicers to pay insurance premiums for borrowers who have not escrowed for hazard insurance. Consumer advocates have urged the Bureau to require servicers to advance funds to pay insurance premiums for such borrowers.[52] But servicers have testified that requiring servicers to pay insurance premiums for borrowers who have not escrowed for hazard insurance is often not possible.[53]

The National Mortgage Settlement, discussed in part II.C above, requires servicers to ''continue to advance payments for the homeowner's existing policy [for borrowers who have escrowed for hazard insurance], unless the borrower or insurance company cancels the existing policy.''[54] On the other hand, Fannie Mae has revised its servicing guide to require servicers to pay a borrower's hazard insurance premium even if the borrower has not escrowed for hazard insurance, stating:

> When a mortgage loan payment includes escrows, they must advance funds for the timely payment of the borrower's property insurance premiums. Additionally, when the servicer has waived the escrow deposit account for a specific borrower, it remains responsible for the timely payment of the insurance premiums. Therefore, if a borrower fails to pay a premium, the servicer must advance its own funds to pay the past-due premium and reinstate the borrower insurance coverage, revoke the waiver and begin escrow deposit collections to pay further premiums.[55]

[52] *See* The National Consumer Law Center and the Center for Economic Justice, *The Consumer Financial Protection Bureau Should Rein in Mortgage Servicers' Use of Force-Placed Insurance,* at 4 (May 2012), available at: *http://www.nclc.org/images/pdf/regulatory_reform/ib-force-placed-insurance.pdf.*

[53] *See supra* note 42, at 2–3.

[54] *See, e.g., United States of America et al.* v. *Bank of America Corp. et al* (National Mortgage Settlement)., at A–38, available at: *http://nationalmortgagesettlement.com.*

[55] Fannie Mae, Servicing Guide Announcement SVC–2012–04 (Fannie Mae March 2012 Servicing

With respect to a borrower who has not escrowed for hazard insurance, the National Mortgage Settlement only requires a servicer to disclose in the notices it sends to such borrower that the servicer would establish an escrow account for the borrower to pay the borrower's hazard insurance premium with the borrower's consent. Furthermore, the Bureau notes that in contrast to Fannie Mae, Freddie Mac only requires a servicer that services loans for Freddie Mac to obtain insurance if a borrower fails to maintain insurance coverage required by Freddie Mac. Freddie Mac does not require the servicer to advance funds to maintain a borrower's hazard insurance coverage. The guidelines state, ''[if] the borrower does not or cannot obtain such coverage, then the servicer must do so. The servicer must then adjust the Borrower's escrow payment accordingly or bill the borrower to recover the advance if the servicer does not maintain an escrow account for the borrower.'' [56] In light of the existence of competing views about: (1) A servicer's obligation to a borrower who has not escrowed for hazard insurance with respect to paying the borrower's hazard insurance premium on the borrower's behalf; and (2) the practicality of a servicer being able to pay the hazard insurance premium of such a borrower, the Bureau seeks comment on whether it should require servicers to pay the hazard insurance premiums of borrowers who have not escrowed for hazard insurance. The Bureau also seeks comment on whether servicers should be required to ask borrowers who have not escrowed for hazard insurance whether they would consent to servicers renewing the borrower-obtained hazard insurance, and then be required to pay the hazard insurance premiums if the borrowers give consent.

17(l) System of Recordkeeping

The Bureau proposes to remove current § 1024.17(l). Current § 1024.17(l) 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 mandates that the Bureau may request information contained in the servicer's records for an escrow account and 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.

The Bureau believes that, in light of this proposal, and the substantially different authorities available to the Bureau, as opposed to HUD, the obligations set forth in current § 1024.17(l) are no longer required. HUD proposed adding current § 1024.17(l) to Regulation X in 1993 and finalized the rule in 1994.[57] Current § 1024.17(l) reflects requirements relating to HUD's authority to require information from mortgage servicers and compel compliance with the requirements of Regulation X at the time it was implemented.

Proposed § 1024.38(a) would require servicers to establish policies and procedures that include a standard requirement to retain records that document actions taken by a servicer 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. Such documents include those relating to escrow accounts. Further, proposed §§ 1024.35–1024.36 provide tools available to borrowers to require the correction of misapplied escrow account payments or to request information regarding a borrower's escrow account. Moreover, the Bureau has authority to supervise mortgage servicers and determine whether mortgage servicers are complying with their obligations under Regulation X with respect to escrow accounts. For these reasons, the Bureau proposes to remove current § 1024.17(l). The Bureau requests comment regarding whether current § 1024.17(l) should be removed from Regulation X.

Subpart C—Mortgage Servicing

Currently, section 6 of RESPA sets forth protections for borrowers with respect to the servicing of federally related mortgage loans. These protections include disclosures to borrowers about whether servicing for a mortgage loan may be transferred, as well as disclosures regarding the prior and new servicers in the event of a transfer. *See* RESPA section 6(a)—6(c). Section 6 of RESPA further provides protections regarding misdirected payments during a servicing transfer. *See* RESPA section 6(d).

Section 6 of RESPA also currently requires a servicer to respond to qualified written requests asserting errors or requesting information regarding the servicing of a mortgage loan and sets forth obligations on servicers regarding the administration of escrow accounts. *See* RESPA sections 6(e), 6(g). Servicers are liable to borrowers for violations of section 6 of RESPA. *See* RESPA section 6(f).

Section 1463 of the Dodd-Frank Act created new sections 6(k), 6(l), and 6(m) of RESPA, which set forth new obligations on servicers for federally related mortgage loans. Section 6(k) of RESPA prohibits servicers 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 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). Further, section 6(l) of RESPA requires servicers: (i) To provide written notices to a borrower before a charge for a force-placed insurance policy may be imposed on the borrower; (ii) to accept any reasonable form of written confirmation from a borrower of existing insurance coverage; and (iii) 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. *See* RESPA section 6(l).

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, must be bona fide and reasonable. *See* RESPA section 6(m).

Section 1463 of the Dodd-Frank Act also amends sections 6(e) and 6(g) of RESPA with respect to a servicer's obligation to respond to qualified written requests and a servicer's administration of an escrow account. Further, section 1463 of the Dodd-Frank Act amended section 6(f) of RESPA to increase the dollar amounts of damages for which a servicer may be liable for violations of section 6 of RESPA. *See* RESPA section 6(e)–(g); Dodd-Frank Act sections 1463(b)–(d).

Announcement) (March 14, 2012), available at *https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2012/svc1204.pdf*. Fannie Mae originally required that servicers implement the revised requirements no later than June 1, 2012. In May 2012, however, Fannie Mae announced that it is postponing the implementation date. *See* Fannie Mae, Servicing Notice (May 23, 2012), available at: *https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2012/ntce052312.pdf*.

[56] *See* Freddie Mac Single Family Seller/Servicer Guide, Vol. 2 § 58.9 (2007).

[57] *See* 58 FR 64065 (December 3, 1993); 59 FR 53890 (October 26, 1994).

In order to implement these provisions in a consistent and clear manner, the Bureau proposes to reorganize Regulation X to include provisions relating to mortgage servicing within a new subpart C.

Section 1024.21 Mortgage Servicing Transfers

To incorporate mortgage servicing-related provisions within subpart C, the proposed rule would remove § 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. *Compare* § 1024.21 *with* proposed §§ 1024.31–1024.34.

Section 1024.30 Scope

Proposed § 1024.30 sets forth the scope of proposed subpart C. Currently, § 1024.21, which implements section 6 of RESPA, applies to a ''mortgage servicing loan'' as that term is defined in current § 1024.21(a). The term ''mortgage servicing loan'' means a federally related mortgage loan, as that term is defined in § 1024.2, subject to the exemptions in § 1024.5, when the mortgage loan is secured by a first lien. The term ''mortgage servicing loan'' does not include subordinate-lien loans or 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. *See* § 1024.21(a) (defining mortgage servicing loan).

Proposed § 1024.30 would eliminate the term ''mortgage servicing loan'' from Regulation X and would set forth the scope of subpart C. Subpart C would apply to any mortgage loan, as that term is defined in proposed § 1024.31. ''Mortgage loan'' in § 1024.31 would mean a federally related mortgage loan, as that term is defined in § 1024.2, subject to the exemptions in § 1024.5. Unlike the previous term ''mortgage servicing loan,'' the term ''mortgage loan'' would include subordinate-lien closed-end mortgage loans. The term ''mortgage loan'' would 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, currently set forth in the definition of ''mortgage servicing loan.'' As a result, the elimination of the term ''mortgage servicing loan,'' the proposed definition of ''mortgage loan'' in proposed § 1024.31, and the proposed scope of subpart C in proposed § 1024.30 would create new servicer obligations with respect to subordinate-lien closed-end mortgage loans under Regulation X.

The Bureau believes that borrowers of subordinate lien closed-end mortgage loans should be entitled to the protections that would be set forth in subpart C.

The use of subordinate-lien closed-end mortgage loans grew substantially during the housing boom. Subordinate-lien closed-end mortgage loans were commonly originated as ''piggyback loans''—that is, a subordinate-lien mortgage loan originated concurrently with a first-lien mortgage loan to finance a home purchase in excess of an 80% loan-to-value ratio.[58] By taking ''piggyback loans,'' a borrower could avoid a requirement to purchase a mortgage insurance policy. During 2006, subordinate-lien closed-end mortgage loans were used as ''piggyback loans'' for 22% of one-to-four family owner-occupied home purchases, with higher percentages reported in high-cost housing areas.[59] Because borrowers with simultaneously-originated subordinate-lien closed-end mortgage loans are more highly levered, such borrowers are at a greater risk of having negative equity when home prices decline and may be more susceptible to default (depending on the credit quality of the borrower).[60] Further, such loans complicate loss mitigation processes if the first-lien and subordinate-lien loans are owned by separate entities or serviced by separate servicers.

There are no unique characteristics of subordinate-lien closed-end mortgage loans that should require servicers to treat a borrower of such a mortgage loan differently than a first-lien mortgage loan borrower with respect to protections for mortgage servicing transfers, error resolution, information requests, force-placed insurance, reasonable information management policies and procedures, early intervention for delinquent borrowers, continuity of contact, or loss mitigation procedures. To the contrary, because of the difficulty of achieving loss mitigation options when a borrower has a subordinate-lien closed-end mortgage loan, such borrower may be more likely to benefit from certain protections in proposed subpart C.

Accordingly, the Bureau's proposal would remove the exclusion for subordinate-lien closed-end mortgage loans that was previously included in Regulation X but which was not required by RESPA. The Bureau has not identified any countervailing reasons why borrowers of subordinate-lien closed-end mortgage loans should not benefit from the protections afforded by the provisions of proposed subpart C. However, the Bureau requests comment regarding whether subordinate-lien closed-end mortgage loans should be included within the scope of proposed subpart C.

The Bureau proposes 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 servicer requirements of Regulation X. 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.[61] 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.[62]

Open-end lines of credit 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 duplicate the servicer obligations that would be set forth in subpart C, including, for example, billing error resolution procedures. *See* 12 CFR 1026.13.

In addition, the protections proposed in Regulation X may not necessarily be appropriate for open-end lines of credit. 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 that have

[58] Michael LaCour-Little *et al., What Role Did Piggyback Lending Play in the Housing Bubble and Mortgage Collapse?,* at 3 (Oct. 5, 2010), available at: *http://ssrn.com/abstract=1688033*.

[59] *Id.* at 3 (stating that ''piggyback loans'' accounted for 30% of home purchases in New York City and 37.3% of home purchases in California in 2006).

[60] *See id.* at 26–27.

[61] *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.)

[62] *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*.

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.[63] 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 may 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 and servicer processes, such that information management policies and procedures may be better targeted toward different objectives for open-end lines of credit than those set forth in proposed § 1024.38(b) with respect to closed-end mortgage loans. Finally, and as discussed below, the Bureau has learned that servicers generally do not obtain force-placed insurance on behalf of open-end lines of credit because such lines of credit are typically secured by a subordinate lien. Accordingly, the Bureau believes that exempting open-end lines of credit (home-equity plans) from the Bureau's proposed force-placed insurance regulations is appropriate.

Although the Bureau believes that maintaining the current exclusion of open-end lines of credit (home-equity plans) covered by TILA and Regulation Z, from the servicer requirements of Regulation X is consistent with consumer protection purposes of RESPA, the Bureau requests comment regarding whether open-end lines of credit (home-equity plans) should be excluded from any of the provisions of proposed subpart C.

The Bureau proposes to interpret the application of the servicer obligations and prohibitions in section 6 of RESPA pursuant to its authority in section 19(a) of RESPA 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 consumer protection purposes of RESPA. The Bureau further relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA.

[63] *Id.* at 11.

Section 1024.31 Definitions

Proposed § 1024.31 contains definitions for 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.

Consumer reporting agency. The Bureau proposes to define the term ''consumer reporting agency'' to have the same meaning set forth in section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a. This proposed definition is the same as the definition of the term ''consumer reporting agency'' set forth in the relevant provisions of RESPA that would be implemented by this proposed rulemaking. *See* RESPA section 6(e)(3).

Day. The Bureau proposes to define the term ''day'' for purposes of subpart C to mean calendar day. ''Day'' is not defined by RESPA. RESPA generally uses the terms ''day'' and ''day (excluding legal public holidays, Saturdays, and Sundays).'' Because Congress excluded legal public holidays, Saturdays, and Sundays in certain circumstances, the Bureau believes that Congress intended the term ''day'' by itself to include these days, and therefore, believes a definition of ''day'' as a calendar day reflects Congress's intent.

The Dodd-Frank Act, however, amended section 6(g) and added section 6(k)(1)(D) to RESPA and, in these provisions, used the term ''business day.'' The term ''business day'' is not defined by RESPA and does not otherwise appear in section 6 of RESPA.[64] Rather, section 6 of RESPA uses the terms ''day'' and ''day (excluding legal public holidays, Saturdays, and Sundays).'' Accordingly, the Bureau proposes to interpret the term ''business day'' in sections 6(g) and 6(k)(1)(D) of RESPA to mean ''day (excluding legal public holidays, Saturdays, and Sundays)'' consistent with other usage of the term ''day'' within section 6 of RESPA and RESPA generally. The Bureau believes that a consistent interpretation of the definition of the term ''day'' will provide certainty that benefits borrowers by clarifying their rights under subpart C and benefits servicers by easing compliance burden associated with different understandings of the meaning of the term ''day.''

The Bureau relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 19(a) of RESPA to make such interpretations necessary to achieve the consumer protection purposes of RESPA.

[64] The term is used three times elsewhere in RESPA, once in section 4(b) and twice in section 8(c) of RESPA.

Hazard insurance. The Bureau proposes to define ''hazard insurance'' to mean insurance on the property securing a mortgage loan that protects the property against losses 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 believes that defining ''hazard insurance'' is necessary to implement the new Dodd-Frank requirements on force-placed insurance, set forth in new RESPA section 6(k)–(m). Accordingly, the Bureau proposes to define ''hazard insurance'' pursuant to its authority under section 6(j)(3) of RESPA, which authorizes the Bureau to establish any requirements necessary to carry out the purposes of RESPA. The Bureau additionally relies on its authority pursuant to sections 6(k)(1)(E) and 19(a) of RESPA. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and section 19(a) of RESPA gives the Bureau the authority to prescribe such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

As discussed below in the Bureau's discussion of proposed § 1024.37(a)(1), Dodd-Frank Act section 1463 defines ''force-placed insurance'' for the purposes of RESPA section 6(k)–(m) as a type of hazard insurance. Although Dodd-Frank Act section 1463 does not define ''hazard insurance,'' it provides that a servicer of a federally related mortgage must not obtain ''force-placed hazard 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 other words, force-placed ''hazard insurance'' simply refers to ''property insurance'' the borrower has failed to maintain. Under the typical mortgage loan contract, property insurance is defined broadly to mean insurance that protects a mortgaged property against loss by ''fire, hazards included within the term 'extended coverage', and any other hazards including, but not limited to, earthquakes and floods, for which

Lender requires insurance.'' [65] Accordingly, the proposed definition of ''hazard insurance'' in proposed § 1024.31 is equally broad.

The Bureau's proposed definition of ''hazard insurance'' would include, but not be limited to, homeowner's insurance. Virtually all borrowers are required to have homeowner's insurance in place as a condition of obtaining a mortgage loan. Homeowner's insurance policies typically insure mortgaged properties against loss caused by all hazards other than those specifically excluded by the policies. The Bureau understands that borrowers may be required by the terms of the mortgage loan contract to obtain separate insurance policies that protect the property against loss caused by hazards specifically excluded from coverage by homeowner's insurance policies. The Bureau understands that losses caused by earthquake or flood hazards, and in many coastal areas, losses caused by wind, are typically excluded.[66] Insurance written to cover loss caused by specifically-excluded hazards is typically narrowly written to protect a mortgaged property against loss caused by a single, specifically-excluded hazard. A single hazard insurance policy, such as a hazard insurance policy to protect against flood loss, would also be included within the Bureau's proposed definition of ''hazard insurance.'' [67] The Bureau recognizes that a servicer could be required to obtain force-placed hazard insurance to protect against flood loss by the Flood Disaster Protection Act of 1973 (FDPA). As discussed in greater detail below, the Bureau proposes 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'' in proposed § 1024.37. The Bureau, however, invites comment on whether a definition of ''hazard insurance'' that specifically excludes hazard insurance to protect against flood loss would be more appropriate than the Bureau's proposed definition of ''hazard insurance.''

Loss mitigation application. The Bureau proposes to define a ''loss mitigation application'' as an application from a borrower requesting evaluation for a loss mitigation option, as that term is defined in proposed § 1024.31, in accordance with procedures established by the servicer for the submission of such requests. The Bureau has set forth a separate definition of loss mitigation application to indicate that a loss mitigation application is separate from an ''application'' as that term is defined in current § 1024.2(b). Proposed comment 31(loss mitigation application)–1 clarifies that a loss mitigation application may be submitted by a representative of a borrower and that a servicer may undertake reasonable procedures to determine if a purported representative actually represents a borrower.

Loss mitigation options. As defined in proposed § 1024.31, ''loss mitigation options'' are ''alternatives available from the servicer to the borrower to avoid foreclosure.'' Proposed comment 31 (loss mitigation options)—1 clarifies 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. Proposed comment 31 (loss mitigation options)—2 clarifies 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.

The Bureau's proposed definition of ''loss mitigation option'' is broad to account for the wide variety of options that may be available to a borrower. The Bureau believes that borrowers are best served when they are aware of all of their options. Thus, the proposed definition sets forth examples of loss mitigation options ''without limitation.'' The Bureau has not defined each of the examples of loss mitigation options to account for alternatives that 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.

The Bureau recognizes that not every loss mitigation option will be available to each individual borrower. Thus, the Bureau has limited the proposed definition of ''loss mitigation options'' to alternatives ''available to the borrower.'' The Bureau invites comment on the appropriateness of the proposed definition of ''loss mitigation options,'' and whether revision or further clarification is warranted.

Mortgage loan. As set forth in the discussion above on proposed § 1024.30, the term ''mortgage loan'' in proposed § 1024.31 would generally mean a federally related mortgage loan, as that term is defined in § 1024.2, subject to the exemptions in § 1024.5 and an exemption for open-end lines of credit (home equity plans). For the reasons discussed above on proposed § 1024.30, the term ''mortgage loan'' would not exclude subordinate-lien closed-end mortgage loans but would 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, currently set forth in the definition of ''mortgage servicing loan.'' As a result, the elimination of the term ''mortgage servicing loan,'' the proposed definition of ''mortgage loan'' in proposed § 1024.31, and the proposed scope of subpart C in proposed § 1024.30 would create new servicer obligations with respect to subordinate-lien closed-end mortgage loans under Regulation X.

The Bureau proposes to interpret the application of the servicer obligations and prohibitions in section 6 of RESPA pursuant to its authority in section 19(a) to prescribe such rules and regulations, to make such interpretations, and to grants such reasonable exemptions for classes of transactions as may be necessary to achieve the consumer protection purposes of RESPA.

Reverse mortgage transaction. The Bureau proposes to add a definition for the term ''reverse mortgage transaction.'' A ''reverse mortgage transaction'' would have the same definition used in Regulation Z, which implements TILA, to maintain consistency with other Bureau definitions applicable to reverse

[65] *See, e.g.,* California Single Family Fannie Mae/ Freddie Mac Uniform Instrument, Form 3005, (Fannie Mae/Freddie Mac Note), at ¶ 5.

[66] *See* National Association of Insurance Commissioners, *A Consumer Quick Guide to Home Insurance,* at 2–5 (2010), available at: *http:\\www.naic.org/documents/consumer_guide_home_quick.pdf).*).

[67] The Bureau acknowledges that Dodd-Frank Act section 1461, which added a new section 129D to TILA, lists ''hazard insurance'' and ''flood insurance'' as two separate categories of insurance. *See* TILA section 129D(i); however, the Dodd-Frank Act provides that the definitions in TILA section 129D(i) apply only to TILA section 129D. The Bureau does not interpret the definitions to apply to RESPA section 6(k)–(m). The Bureau also acknowledges that in current Regulation X, the provision of settlement services involving hazard insurance is separate from the provision of services involving flood insurance pursuant to the definition of ''settlement service'' in § 1024.2. Further, for purposes of current Regulation X, the Bureau further acknowledges that: (1) In appendix A's instructions on how to prepare a HUD–1 Settlement statement, the settlement agent must list homeowner's insurance premiums separately from flood insurance premiums; and (2) appendix C's instructions on how to prepare a good faith estimate (GFE) form treat hazard insurance separately from flood insurance. The Bureau's proposed definition of ''hazard insurance'' would only apply to proposed subpart C of RESPA and § 1024.17(k)(5). It would not apply to § 1024.2, appendix A, or appendix C.

mortgages. *See* 12 CFR 1026.33(a). The Bureau is proposing to include a definition for a ''reverse mortgage transaction'' in Regulation X to implement the requirements for mortgage servicing disclosure statements in proposed § 1024.33(a).

Proposed § 1024.33(a) sets forth the requirements applicable to disclosures to applicants about assignment, sale, or transfer of loan servicing that must be provided to applicants within three days (excluding legal public holidays, Saturdays, and Sundays). If the 2012 TILA–RESPA Proposal, which was published by the Bureau on July 9, 2012, is adopted as proposed with respect to the implementing of the disclosures required by sections 6(a) of RESPA, the only mortgage loans that would not receive the disclosure through the 2012 TILA–RESPA Proposal would be reverse mortgage transactions. Accordingly, the Bureau proposes to apply the current requirements of § 1024.21(b)–(c) only to reverse mortgage transactions, and proposed § 1024.33(a) would require the disclosure for reverse mortgage transactions.

Service provider. The Bureau proposes to add a definition for the term ''service provider.'' A service provider means 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. Proposed comment 31 (service provider)—1 clarifies 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 property inspections.

Definitions of master servicer, qualified written request, subservicer, transferee servicer, and transferor servicer. Currently, definitions of the terms ''master servicer,'' ''subservicer,'' ''transferee servicer,'' and ''transferor servicer,'' are set forth in § 1024.21(a). The proposed rule would include the definitions of these terms currently set forth in § 1024.21(a), without change, in proposed § 1024.31.

The definition of ''qualified written request'' would be revised to state that a qualified written request is a written correspondence from the borrower to the servicer that enables the servicer to identify the name and account of the borrower, and (1) states the reasons the borrower believes an error relating to the servicing of the loan has occurred, or (2) provides sufficient detail to the servicer regarding information relating to the servicing of the mortgage loan sought by the borrower. The definition further states that a qualified written request (i) must be in writing, (ii) must not be written on a payment coupon or other payment form from a servicer, and (iii) must be delivered less than one year after servicing of a mortgage loan is transferred or a mortgage loan is paid in full, whichever date is applicable. All of the elements of this definition are currently set forth in § 1024.21(e)(2) and the proposed definition of ''qualified written request'' in proposed § 1024.32 is not intended to alter the meaning of the term. Proposed comment 32 (qualified written request)—1 clarifies that a qualified written request may request information without asserting an error with respect to the servicing of a mortgage loan (and vice versa).

A ''qualified written request'' is just one form that a written notice of error or information request may take. As set forth above, although 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, the Bureau's proposal would integrate all error resolution and information request processes, including ''qualified written requests.'' A borrower may still submit a ''qualified written request,'' under the proposed rule, however a ''qualified written request'' would be subject to the same error resolution or information request requirements applicable to any other form of written notice of error or information request to a servicer. Further, a servicer's liability for failure to respond to a qualified written request would be the same as for any other written notice of error or information request. Accordingly, there would be no greater benefit to a borrower, nor additional burden to a servicer, to respond to a ''qualified written request'' than would exist for a written notice of error or written information request pursuant to proposed §§ 1024.35–1024.36.

Section 1024.32 General Disclosure Requirements

Proposed § 1024.32 would set forth requirements applicable to disclosures required by subpart C. Specifically proposed § 1024.32(a)(1) would require 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 permit 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 permit 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 believes this provision is appropriate to enable servicers to integrate disclosures required by subpart C with requirements imposed by other federal regulatory agencies, including through the National Mortgage Settlement, and with applicable State law. The Bureau proposes to exercise its authority under sections 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA. The Bureau further relies on its authority in section 19(a) of RESPA to make such rules and regulations necessary to achieve the consumer protection purposes of RESPA.

Section 1024.33 Mortgage Servicing Transfers

Proposed § 1023.33 implements the mortgage servicing transfer disclosure requirements in section 6(a)–(d) of RESPA. The mortgage servicing transfer disclosure requirements are currently in § 1024.21(b)–(d) of Regulation X.

As a preliminary matter, the Bureau proposes to implement certain provisions currently set forth in § 1024.21(b)–(d) of Regulation X through commentary to proposed § 1024.33 rather than as text of the regulation itself. This change is proposed to conform the organization of proposed § 1024.33 with other proposed provisions of subpart C.

Proposed § 1024.33(a) makes changes to the requirements currently set forth in § 1024.21(b)–(c). Proposed § 1024.33(a) sets forth the requirements applicable to disclosures to applicants about assignment, sale, or transfer of loan servicing that must be provided to applicants within three days (excluding legal public holidays, Saturdays, and Sundays) of application. If the 2012 TILA–RESPA Proposal, which was published by the Bureau on July 9, 2012, is adopted as proposed with respect to the implementing the disclosures required by section 6(a) of RESPA, the only mortgage loans that currently receive mortgage servicing transfer disclosures that would not receive the disclosure through the new integrated TILA/RESPA disclosure form would be closed-end reverse mortgage transactions.[68] Accordingly, the Bureau proposes to apply the current requirements of § 1024.21(b)–(c) only to reverse mortgage transactions, and proposed § 1024.33(a) reflects the limited scope of this provision.

Further, the Bureau proposes to implement through commentary a clarification relating to providing a servicing disclosure statement for co-applicants. Regulation X currently provides that if co-applicants provide the same address on an application, one copy of the servicing disclosure statement delivered to that address is sufficient, but if different addresses are shown by co-applicants, a copy of the servicing disclosure statement should be provided to each of the co-applicants. The Bureau believes this requirement is unduly burdensome, especially in light of the reduced scope of the servicing disclosure statement to closed-end reverse mortgage transactions. The Bureau proposes instead to require that if co-applicants provide different addresses, a servicing disclosure statement need only be provided to the primary applicant. This requirement is consistent with disclosure requirements applicable to other Bureau regulations. *See* 12 CFR 1002.9(f).

The Bureau does not believe this change will have a meaningful impact on consumers. The only situation that would be covered by this commentary is when multiple applicants for a closed-end reverse mortgage transaction indicate separate addresses on an application. Closed-end reverse mortgage transactions typically require funds to be dispersed in a single lump-sum payment and are typically only available for borrower-occupied residences. The servicer of a closed-end reverse mortgage transaction is not responsible for making on-going payments to reverse mortgage borrowers, and borrowers of closed-end reverse mortgage transactions do not have on-going mortgage loan payment obligations during the life of the loan. The Bureau believes that removing the requirement that borrowers with different addresses receive a separate mortgage servicing disclosure statement will remove a burden for reverse mortgage lenders and will not remove any meaningful protection for consumers.

Proposed § 1024.33(b)–(c) sets forth the requirements applicable to notices of transfer of mortgage loan servicing. The Bureau proposes to remove the requirement that the transferor and transferee servicers provide collect-call telephone numbers (but retain the requirement to provide toll-free telephone numbers). The Bureau believes the collect-call telephone number requirement is obsolete. The Bureau also proposes to remove the requirement currently set forth in § 1024.21(d)(3)(vii) for a statement of the borrower's rights in connection with complaint resolution. The expanded error resolution and information request requirements set forth in proposed §§ 1024.35–1024.36 provide tools for borrowers to assert errors and request information in connection with a servicing transfer. A transferee servicer will either identify for borrowers a phone number and address that must be used for asserting errors or requesting information pursuant to the requirements of §§ 1024.35–1024.36 when servicing is transferred or will be required to respond to a notice of error or information request received at any office of the servicer.

Further, the Bureau proposes to conform the requirements that extend the time for the disclosure to treat institutions for which the NCUA has commenced proceedings to appoint a conservator or liquidating agent similarly to those for which the FDIC has commenced proceedings to appoint a conservator or receiver. 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 as opposed to an insured depository institution in the process of conservatorship or receivership by the FDIC.

The Bureau also proposes to conform proposed § 1024.33(c) with the requirements in proposed § 1024.39 by clarifying that a borrower's account may be considered late for purposes of contacting the borrower for early intervention, but may not be considered late for any other purpose, including imposing late fees.

The Bureau proposes 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 understands that many servicers already transfer misdirected payments to the appropriate servicer in connection with a servicing transfer. The Bureau requests comment regarding whether servicers should be required to transfer funds received for a borrower's mortgage loan account to the appropriate servicers. The Bureau also solicits comment on whether the Bureau should implement requirements on the timing and method by which payments are returned to consumers.

The Bureau also proposes to add comment 33(b)(3)–2 to clarify how a notice of servicing transfer should be delivered to a borrower. Proposed comment 33(b)(3)–2 clarifies 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. This requirement is consistent with current law.[69] Proposed comment 33(b)(3)–2 further clarifies 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 also proposes to amend the model form set forth in appendix MS–2 to reflect the proposed requirements in proposed § 1024.33(b)(4) and to streamline the contents of the form. The Bureau believes that borrowers are best served by reducing the content of the form so that borrowers receive a form that clearly sets forth the required content regarding the transfer of servicing and the address to which the next payment should be sent.

The Bureau proposes to exercise its authority under section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA. The Bureau further relies on its authority in section 19(a) of RESPA to make such rules and regulations necessary to achieve the consumer protection purposes of RESPA.

Section 1024.34 Timely Payments by Servicer

Proposed § 1024.34(a) would 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

[68] Currently, mortgage servicing transfer disclosures are required for ''mortgage servicing loans.'' *See* current § 1024.21(b)(1). The only ''mortgage servicing loans'' that would not be covered by the 2012 TILA–RESPA Proposal rulemaking are closed-end reverse mortgage transactions. Open-end reverse mortgage transactions are not ''mortgage servicing loans'' as that term is defined in current § 1024.21(a).

[69] *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.'').

current § 1024.17(k), including the amendments proposed in this rule. Further, proposed § 1024.34(b) would implement the Dodd-Frank Act amendment to section 6(g) of RESPA by requiring a servicer to refund to a borrower any amounts remaining in an escrow account when a mortgage loan is paid in full. Section 6(g) of RESPA also 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. ''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 person to whom the obligation is initially assigned at or after settlement.

The Bureau believes the purpose of the provision allowing a servicer to credit funds in an escrow account to an escrow account for a new mortgage loan is intended to allow the amounts to be smoothly transferred without the need for the borrower to expend funds to fund a new escrow account and wait for a refund of a prior escrow account. Consistent with the Bureau's proposal to clarify that subpart C may relate to secondary market transactions, which is implemented by the amendment to current § 1024.5(b)(7), the Bureau proposes to interpret the language ''account with the same lender'' consistent with secondary market practices. Accordingly, for purposes of section 6(g), the Bureau believes that a servicer should be able to credit an escrow account for a prior mortgage loan to a new mortgage loan where the lender for the new mortgage loan is (i) the same as the lender for the prior mortgage loan, (ii) the same as the current owner or assignee of the prior mortgage loan, or (iii) intends to use as its agent the same servicer that services the prior mortgage loan.

Accordingly, proposed § 1024.34(b) is intended to clarify three points. First, a servicer may credit an escrow account balance to an escrow account for a new mortgage loan if the lender for the new mortgage loan is the owner or assignee of the prior mortgage loan, even if that entity was not the lender for the prior mortgage loan named in the debt obligation and document creating the lien. Second, a servicer may credit an escrow account balance to an escrow account for a new mortgage loan if the servicer for the new mortgage loan is the same as the servicer for the prior mortgage loan. Third, the 20-day allowance for section 6(g) only applies if the servicer refunds the escrow account balance to the borrower. 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.

Proposed comment 34(b)(2)–1 clarifies 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. A servicer may determine, in all circumstances, to return funds in an escrow account to the borrower pursuant to proposed § 1024.34(a).

The Bureau requests comments regarding whether the Bureau has identified proper instances where servicers may credit funds to a new escrow account and how such crediting should occur.

The Bureau is proposing these requirements to implement section 6(g) of RESPA pursuant to its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA. The Bureau further relies on its authority in section 19(a) of RESPA to make 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 consumer protection purposes of RESPA.

Section 1024.35 Error Resolution Procedures

Proposed § 1024.35 states the error resolution requirements that servicers would be required to follow for a notice of error from a borrower. In general, this proposal provides an opportunity to clarify servicer obligations to correct errors and respond to information requests to provide certainty to borrowers regarding their rights and to servicers regarding their obligations.

Currently, section 6(e) of RESPA requires servicers to respond to ''qualified written requests.'' Qualified written requests must be in writing and must relate to the ''servicing'' of the mortgage loan, as that term is defined in RESPA. Although the Bureau believes that qualified written requests may be used to either assert an error or to request information, there has been confusion among courts regarding whether both types of requests are necessary to set forth a qualified written request.[70]

The Dodd-Frank Act adds another layer of complexity. Section 1463(a) of the Dodd-Frank Act amends RESPA to add section 6(k)(1)(C), which states that a servicer shall not fail to take timely action 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.'' Further, section 1463(a) of the Dodd-Frank Act amends 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. Neither section indicates whether the request to correct an error or the request for information must be in the form of a qualified written request.

In light of these disparate obligations, the Bureau believes that both borrowers and servicers would be better served if the Bureau were to clearly define a servicer's obligation to correct errors or respond to information requests. To that end, the Bureau proposes §§ 1024.35 (Error resolution procedures) and 1024.36 (Requests for information) to establish separate but parallel obligations for servicers to respond to notices of error and information requests. Further, the Bureau's intention is to establish servicer procedural requirements for error resolution and information requests that are consistent with the requirements applicable to a qualified written request under RESPA. Through this, the Bureau intends to make the restrictions and circumlocutions inherent in the language of the qualified written request provisions obsolete. Any valid qualified written request is a valid notice of error or information request. An invalid qualified written request may still be a valid notice of error or information request.[71]

Proposed § 1024.35 establishes the rules implementing the servicer prohibitions set forth in section 6(k)(1)(B), (C), and (E) of RESPA. These prohibitions make it unlawful for a servicer to charge a fee for responding to valid qualified written requests, to 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, avoiding foreclosure, or other standard servicer's duties, and to fail to comply with any other obligation found by the Bureau to be appropriate to carry

[70] *See Catalan* v. *GMAC Mortgage Corp.,* 629 F.3d 676 (7th Cir. 2011); *Pettie* v. *Saxon Mortgage Services,* No. C08–5089, 2009 U.S. Dist. LEXIS 41496 (W.D. Wa. May 12, 2009).

[71] 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.

out the consumer protection purposes of RESPA.

35(a) Notice of Error

Proposed § 1024.35(a) states that a notice of error may be made orally or in writing and must include the name of the borrower, information that enables a servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred.

Section 6(k)(1)(C) of RESPA, as added by section 1463(a) of the Dodd-Frank Act, refers generically to servicers' failures to respond to requests of borrowers to correct certain errors. However, unlike section 6(e) of RESPA, which contains the statutory language regarding 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.

Oral notices of error. The Bureau proposes to allow a borrower to make a notice of error either orally or in writing. The Bureau believes this approach is warranted because, based on its discussions with consumers, consumer advocates, servicers, and industry trade associations, it appears that the vast majority of borrower complaints are generated orally instead of in writing. A requirement that a notice of error must be in writing generally serves as a barrier that unduly restricts the ability of a borrower to have errors resolved. The Bureau believes it is important for consumers to receive the benefit of required correction or investigation from servicers of orally asserted errors.

Servicers and servicer representatives stated that allowing a notice of error to be provided orally would create new burdens for servicers regarding tracking the notices of error and monitoring that a borrower receives written acknowledgements and responses. In addition, small entity representatives with whom the Small Business Review Panel conducted outreach reiterated these burdens on behalf of small servicers. The Small Business Review Panel recommended that the CFPB consider requiring small servicers to comply with the error resolution procedures only when borrowers provided error notices in writing.[72] 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.[73]

[72] *See* Small Business Review Panel Report at 30.

[73] *Id.*

The Bureau recognizes the burdens on servicers to ensure compliance with this proposed rule for notices of error received orally. In order to implement this section, servicers may adopt systems to ensure that a borrower's notice of error is tracked and receives the required acknowledgement and response. In light of the concerns express in the Small Business Review Panel Report, the Bureau has declined to specify any particular requirement that a servicer must undertake to track notices of error. Further, ensuring that borrower assertions of errors are investigated, responded to, and, as appropriate, corrected, is an objective of the reasonable information management policies and procedures set forth below in proposed § 1024.38. The Bureau has created that proposal to provide flexibility to servicers, including small servicers, to design policies and procedures that are appropriate to the particular circumstances of each servicer. The Bureau believes this flexibility reflects that Small Business Review Panel recommendation that the Bureau create flexibility in the manner in which small servicers comply with the error resolution requirements.

The Bureau further believes that elements of the proposed rule assist in mitigating burden for all servicers. These elements include, for example, a limitation on the types of errors that servicers would be required to resolve to a finite list, as well as a proposal to allow servicers to designate a specific telephone number for receiving oral notices of error.

The Bureau believes the error resolution (as well as the information management) requirement provides appropriate flexibility for small servicers to implement policies and procedures to comply with this objective that make sense for their organizations and responds to the findings and recommendations in the Small Business Review Panel Report.[74]

The Bureau solicits comments regarding whether servicers should be required to apply the error resolution requirements to notices of error received orally. The Bureau further solicits comments regarding whether small servicers (as that term is defined in the 2012 TILA Servicing Proposal) should be exempt from a requirement to apply the error resolution procedures in proposed § 1024.35 to notices of error received orally.

Qualified written requests. Proposed § 1024.35(a) would require a servicer to treat notices of error, whether oral or written, the same way it treats a qualified written request that asserts an error. The Bureau's intention is to propose servicer obligations applicable to a notice of error that are exactly the same as obligations applicable to a qualified written request. For example, as set forth below, a servicer may not charge a fee for responding to a notice of error, a servicer must acknowledge receipt of a notice of error within five days (excluding legal public holidays, Saturdays, and Sundays) and must respond to the notice of error within 30 days (excluding legal public holidays, Saturdays, and Sundays). Moreover, a servicer's potential liability for failure to respond to a notice of error is the same as the potential liability for failure to respond to a qualified written request. Thus, under proposed § 1024.35(a), there is no reason for a borrower to send a qualified written request as opposed to an oral or written notice of error nor is there a reason for a servicer to reject a qualified written request because it does not meet the requirements for a qualified written request in section 6(e) of RESPA when such request constitutes a valid notice of error. Even if a borrower does not comply with all the requirements of a qualified written request, including, for instance, by asserting an error orally, or by asserting an error that is defined in § 1024.35(b) but does not constitute ''servicing'' as defined in RESPA, the obligations for the servicer to respond to the borrower are the same and the liability for the servicer's failure to respond to the borrower is the same.

[74] *See* Small Business Review Panel Report at 29.

Proposed comment 35(a)–1 would clarify that a notice of error submitted by a person acting on behalf of the borrower is considered a notice of error pursuant to proposed § 1024.35(b). This clarification is substantially the same as the current requirement existing under section 6(e)(1)(A) of RESPA with respect to a qualified written request.[75] 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.

Proposed comment 35(a)–2 would clarify that the substance of the notice of error would determine the servicer's obligation to comply with the error resolution requirements. No particular language (such as ''qualified written request'' or ''notice of error'') is necessary to set forth a notice of error.

Legal authority. The Bureau relies on its authority in section 6(k)(1)(C) and 6(k)(1)(E) of RESPA to implement the

[75] 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).''

notice of error requirements. Further, to the extent the requirements are also applicable to qualified written requests, the Bureau relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

35(b) Scope of Error Resolution

Proposed § 1024.35(b) provides a finite list of errors to which the error resolution provisions would relate (covered errors). A finite list of covered errors provides certainty to both borrowers and servicers regarding the types of errors that are subject to the error resolution process. Further, a finite list of covered errors is intended to ensure that servicer resources can be dedicated to responding to errors that are capable of correction, to the benefit of a borrower. For example, the Bureau 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 untimely disclosure after the deadline, would not actually correct the timeliness 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.

The Bureau further considered the impact of the proposed error resolution requirements if the types of covered errors were not limited. The proposal expands servicer's obligations to respond to error notices and information requests from borrowers. Borrowers may initiate an error resolution process orally, not just in writing. Further, in general, the proposal reduces the time period within which a servicer must respond to a borrower (from 60 days to 30 days), consistent with the Dodd-Frank Act amendments to section 6(e)(2) of RESPA. For certain types of covered errors, the time period to respond to the borrower is even more limited. The Bureau believes that the added costs and burden created by having an open-ended definition of an error could substantially increase the costs to servicers with limited additional benefit to consumers. The Bureau further believes that requiring servicers to respond to potentially any assertion of an error could, as a practical matter, lead to servicers using disproportionate resources to respond to every asserted error. That practice may cause servicers to expend fewer resources to address errors that may be far more significant to borrowers.

The Small Business Review Panel received feedback from SERs regarding whether the error resolution procedures should include a catch-all provision to the enumerated list of errors. In general, the SERs commented favorably on the Bureau's proposal to include a finite list of errors. The SERs indicated that if the Bureau were to consider adding a catch-all provision, then the Bureau should request comment on whether to not include such a provision. Accordingly, for the reasons above, proposed § 1024.35(b) provides a finite list of covered errors to which the error resolution provisions would relate. The Bureau requests comment regarding whether (1) the finite list of covered errors should include any other specific types of errors that are not addressed in the list and (2) whether the list of covered errors should not be finite and should include a catch-all provision for other types of errors not set forth in the rule.

Covered errors. Paragraph 35(b) defines the types of covered errors for which the error resolution procedures apply. As discussed below, the proposed rule sets forth a finite list of nine types of covered errors based on the statutory language prohibiting servicers from failing 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.'' *See* RESPA section 6(k)(1)(C).

Proposed comment 35(b)–1 clarifies that a servicer would not be required to comply with the requirements of proposed § 1024.35(d)–(e) if a notice relates to something other than one of the types of covered errors in proposed § 1024.35(b). The proposed comment provides examples of categories of excluded errors that would not be considered covered errors pursuant to proposed § 1024.35(b). These include 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 sale, assignment, or transfer of the servicing of a mortgage loan other than the transfer of information for a borrower's mortgage loan account. 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. The Bureau requests comment regarding whether any errors that may fall within the examples of excluded errors should instead be included as covered errors.

Paragraph 35(b)(1)

Proposed paragraph 35(b)(1) includes 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.

Section 6(k)(1)(C) of RESPA prohibits a servicer from failing to take timely action to respond to a borrower's request to correct errors relating to the allocation of payments for a borrower's account. Paragraph 35(b)(1) is an example of one type of error that fits within the broad statutory prohibition. A failure to accept a proper payment will necessarily have implications for the correct application of borrower payments. Further, proper acceptance of payments is, by definition, ''servicing,'' as that term is defined in section 6(i)(3) of RESPA 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 further believes that proper acceptance of borrower payments is a standard servicer duty as set forth in section 6(k)(1)(C) of RESPA. Section 6(k)(1)(C) of RESPA states that a servicer shall not fail to take timely action to respond to a borrower's request to correct errors relating three specific categories as well as those relating to ''other standard servicer 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), but also those duties that are defined as ''servicing'' by RESPA, as well as duties customarily undertaken by servicers to investors and consumers in connection with the servicing of a mortgage loan. These include duties that may not be contemplated within the definition of ''servicing'' in RESPA, such as 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. Throughout this proposal, the Bureau refers to these standard servicer duties, in the parlance of section 6(k)(1)(C) of RESPA, as typical servicer duties to reflect the plain language connotation that such duties are those typically performed by servicers in the normal course of business.

As set forth above, the Bureau is proposing § 1024.35(b)(1) to implement section 6(k)(1)(C) of RESPA. The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Paragraph 35(b)(2)

Proposed paragraph 35(b)(2) would include as a covered 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.

Section 6(k)(1)(C) of RESPA prohibits a servicer from failing to take timely action to respond to a borrower's request to correct errors relating to the allocation of payments for a borrower's account. Paragraph 35(b)(2) implements the prohibition in section 6(k)(1)(C) of RESPA. The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Paragraph 35(b)(3)

Proposed paragraph 35(b)(3) includes 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 has resulted in a charge to the consumer or the furnishing of negative information to a consumer reporting agency.

Proper crediting of payments to consumers is required by section 129F of TILA, which was added by section 1464 of the Dodd-Frank Act and would be implemented by proposed § 1026.36(c) in the 2012 TILA Servicing Proposal. 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. 1639(f)(b). Servicers of mortgage loans covered by TILA section 129F have a duty to comply with that provision.

Section 6(k)(1)(C) of RESPA prohibits a servicer from failing to take timely action to respond to a borrower's request to correct errors relating to the allocation of payments for a borrower's account. Paragraph 35(b)(3) implements this prohibition. A failure to credit a payment will necessarily have implications for the correct application of borrower payments. A servicer's failure to properly credit a payment will 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 properly credit borrower payments may generate improper late fees and other charges.

The Bureau also observes that proper crediting of borrower payments is, by definition, ''servicing,'' as that term is defined in section 6(i)(3) of RESPA and, therefore, is subject to the qualified written request procedure set forth in section 6(e) of RESPA and current § 1024.21(e) of Regulation X.

For these reasons, the Bureau proposes to implement section 6(k)(1)(C) of RESPA by prohibiting servicers from failing to correct errors relating to proper crediting of borrower payments. The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Paragraph 35(b)(4)

Proposed paragraph 35(b)(4) includes as an error a servicer's failure to make disbursements from an escrow account for taxes, insurance premiums (including flood insurance), 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), or to refund an escrow account balance in a timely manner as required by proposed § 1024.34(b).

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. The Bureau further observes that proper disbursement of escrow funds is, by definition, ''servicing,'' as that term is defined in section 6(i)(3) of RESPA 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.

Proposed paragraph 35(b)(4) would require a servicer to correct errors relating to a typical servicer duty and implements section 6(k)(1)(C) of RESPA. The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Paragraph 35(b)(5)

Proposed paragraph 35(b)(5) includes as an error a servicer's imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.

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 for services from service providers that were not actually rendered with respect to a borrower's mortgage loan account, and charges for force-placed insurance where a servicer lacks a reasonable basis to impose the charge on the borrower as set forth in proposed § 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. 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.

Proposed paragraph 35(b)(5) would require a servicer to correct errors relating to a typical servicer duty and implements section 6(k)(1)(C) of RESPA. The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Paragraph 35(b)(6)

Proposed paragraph 35(b)(6) includes 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)(1)(iii).

Borrowers require accurate payoff statements to manage their mortgage loan obligations. A payoff statement is necessary anytime a borrower repays a mortgage loan and servicers routinely provide payoff statements for borrowers to refinance or pay in full mortgage loan obligations. However, consumer advocates have indicated 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.[76] Any such conduct has the perverse effect of impeding a borrower's ability to pay a mortgage loan obligation in full.

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. The Bureau believes that, in order to implement the prohibition set forth in section 6(k)(1)(C) of RESPA regarding a servicer's failure to correct errors relating to final balances for purposes of paying off the loan, a servicer should be required to comply with the requirements within a reasonable time frame. Because servicers will be required to comply with the timeframes set forth in 12 CFR 1026.36(c)(1)(iii) with respect to certain mortgage loans they service, the Bureau does not believe that requiring servicers to correct errors for mortgage loans that may not constitute home loans as that term is used in section 129G of TILA within error resolution timeframes imposes additional burden on servicers.

Proposed paragraph 35(b)(6) implements section 6(k)(1)(C) of RESPA with respect to a servicer's obligation to correct errors relating to final balance for purposes of paying of a mortgage loan. The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Paragraph 35(b)(7)

Proposed paragraph 35(b)(7) includes 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 §§ 1024.39–1024.40.

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. Although the Bureau does not generally believe a failure to provide a required disclosure to a borrower should constitute an error requiring compliance with the error resolution procedures in proposed § 1024.35, 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 this error and providing the borrower with accurate information regarding loss mitigation options that may be available to the borrower, a servicer can help a borrower receive an evaluation for the loss mitigation option pursuant to proposed § 1024.41 and may be able to reach agreement with the borrower on a loss mitigation option that is mutually beneficial to the borrower and the owner or assignee of the borrower's mortgage loan.

Proposed paragraph 35(b)(7) implements section 6(k)(1)(C) of the Dodd-Frank Act. Specifically, proposed paragraph 35(b)(7) implements a servicer's obligation to correct errors relating to avoiding foreclosure. 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 service participation in other loss mitigation programs required by Fannie Mae and Freddie Mac demonstrate that servicers typically provide borrowers with information regarding loss mitigation options and foreclosure and

[76] *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 Subcommittee on Financial Institutions and Consumer Credit and Subcommittee on Oversight and Investigations of the House Financial Services Comm.*, No. 112–44, 112th Cong. 76 (July 7, 2011) (statement of Mike Calhoun, President, Center for Responsible Lending).

that providing such information to borrowers is a typical servicer duty.

The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Paragraph 35(b)(8)

Proposed paragraph 35(b)(8) would include 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.

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 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 are required to develop capacity to onboard 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 or current. 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.

Pursuant to proposed § 1024.38(a), servicers would be required to have policies and procedures to achieve the objectives set forth in proposed § 1024.38(b), which includes an objective of facilitating servicing transfers. An objective of the servicer's policies and procedures would be to timely transfer all information and documents 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 requirements of this subpart and the terms of the transferee servicer's contractual obligations to the owner or assignee of the mortgage loan.

The Bureau believes that by defining a servicer's failure to accurately and timely transfer information relating to a borrower's mortgage loan account to a transferee servicer, a borrower will have a remedy to ensure that a transferor servicer will update the information transferred to provide information to a transferee servicer that accurately reflects the borrower's account consistent with the obligations applicable to a servicer's information management policies and procedures.

Proposed paragraph 35(b)(8) implements a servicer's obligation to take timely action to correct errors relating to typical servicer duties pursuant to section 6(k)(1)(C) of RESPA. The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Paragraph 35(b)(9)

Proposed paragraph 35(b)(9) would include as an error a servicer's failure to suspend a scheduled foreclosure sale in the circumstances described in proposed § 1024.41(g). Pursuant to proposed § 1024.41(g), 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 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 an agreement on a loss mitigation option. For further information, see discussion of proposed section § 1024.41 below.

The Bureau continues to consider whether to include as an error a servicer's evaluation of a borrower for a loss mitigation option. The Bureau observes that the manner in which a borrower is evaluated for a loss mitigation option is complex and includes factors that are subjective.[77] Further, the Bureau believes that the appeal process provided in proposed § 1024.41(h) provides an appropriate procedural means for borrowers to address issues relating to a servicer's evaluation of a borrower for a loan modification program.

The Bureau requests comment regarding whether to include as an error a servicer's failure to correctly evaluate a borrower for a loss mitigation option. The Bureau further requests comment regarding standards for determining if a borrower has been correctly evaluated for a loss mitigation option, including whether a servicer should be required to comply with the servicer's own standards, standards promulgated by major investors and guarantors, and standards promulgated in connection with Federal- or State-sponsored loss mitigation options.

Proposed paragraph 35(b)(9) implements section 6(k)(1)(C) of the Dodd-Frank Act. Specifically, proposed paragraph 35(b)(9) implements a servicer's obligation to correct errors relating to avoiding foreclosure. The Bureau also relies on its authority in section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA and in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA. Further, the Bureau relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

35(c) Contact Information for Borrowers To Assert Errors

Proposed § 1024.35(c) permits a servicer to establish a telephone number and address that a borrower must use to assert an error. If a servicer chooses to establish a separate telephone number and address for receiving errors, a servicer must provide the borrower a written 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)–2 would clarify 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.

The purpose of establishing a telephone number and address that a borrower must use to assert an error is

[77] *See, e.g.,* Special Inspector General for the Troubled Asset Relief Program, *The Net Present Value Test's Impact on the Home Affordable Modification Program,* at 7–8 (Jun.. 18, 2012), available at: *http://www.sigtarp.gov/Audit%20Reports/NPV_Report.pdf* (demonstrating that major HAMP servicers differed in their determinations regarding whether to apply a risk premium to the discount rate used to calculate net present value for determining eligibility for HAMP loan modifications).

to allow servicers to direct oral and written errors to appropriate personnel that have been trained to ensure that the servicer responds appropriately. 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 may incorrectly believe that local bank branch staff will be required to comply with error resolution requirements for mortgage servicing errors. 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. Proposed comment 35(c)–1 clarifies, however, that if a servicer has not designated a telephone number and address that a borrower must use to assert an error, then a servicer will be required to comply with the error resolution requirements for any notice of error received by any office of the servicer.

The Bureau believes it is reasonable, especially in light of the expanded burden of requiring compliance with error resolution for oral notices of error, to allow servicers to manage the intake of notices of error to designated telephone numbers and addresses. Further, allowing a servicer to designate a specific telephone number and 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 telephone number and address for receiving errors and information requests will benefit consumers as well. By providing a specific telephone number and address, servicers will identify to consumers the office capable of addressing errors identified by consumers. The Bureau is proposing in the concurrent 2012 TILA Servicing Proposal to require that any telephone number or address identified by a servicer must appear on the periodic statement or other payment form supplied by the servicer. *See* 2012 TILA Servicing Proposal at proposed § 1026.41(d)(6).

Multiple offices. Proposed § 1024.35(c) would require 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. The Bureau believes that if servicers designate separate telephone numbers and addresses for notices of error and information requests, borrower attempts to provide notices of error and information requests to servicers could be impeded. Further, proposed comment 35(c)–3 clarifies 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. This clarifies that a servicer may not determine that a notice of error is invalid if it was received at any telephone number or address designated by the servicer for receipt of notices of error just because it was not received by the specific phone number or address identified to a specific borrower. Proposed comment 35(c)–5 clarifies that a servicer may use automated systems, such as an interactive voice response system, to manage the intake of borrower calls. Prompts for asserting errors must be clear and provide the borrower the option to connect to a live representative.

Internet intake of notices of error. Proposed comment 35(c)–4 would clarify that a servicer is not required to establish a process for receiving notices of error through email, Web site, or other online methods. If a servicer establishes a process for receiving notices of error through online methods, comment 35(c)–4 is intended to clarify that the process established is the only online intake process that a borrower can use to assert an error. Thus, 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 further clarifies that a servicer's decision to accept notices of error through an online intake method shall not have any impact on a servicer's obligation to comply with the requirements of § 1024.35 with respect to notices of error received in writing or orally.

Legal authority. The Bureau relies on its authority in section 6(k)(1)(C) and 6(k)(1)(E) of RESPA to implement the notice of error requirements. Further, to the extent the requirements are also applicable to qualified written requests, the Bureau relies on its authority in section 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

35(d) Acknowledgment of Receipt

Proposed § 1024.35(d) would require a servicer to provide a borrower a written 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 implement 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) further applies the same timeline applicable to a qualified written request to any notice of error.

The Bureau relies on its authority in section 6(k)(1)(C) and 6(k)(1)(E) of RESPA to implement the notice of error requirements. Further, to the extent the requirements are also applicable to qualified written requests, the Bureau relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

35(e) Response to Notice of Error

Proposed § 1024.35(e) would set forth requirements on servicers for responding to notices of error.

35(e)(1) Investigation and Response Requirements

Proposed paragraph 35(e)(1) would require a servicer to correct an error within 30 days unless the servicer concludes after a reasonable investigation that no error occurred.

Notices to borrower. If a servicer corrects the error identified by the borrower, it must provide the borrower with written notification that indicates that the error was corrected, the effective date of the correction, and a telephone number the borrower can use to get further information.

If a servicer determines that no error occurred, it is required to have conducted a reasonable investigation and to provide the borrower a notice 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. A servicer would also be required 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.

Borrower right to request documents. Proposed § 1024.35(e)(4) would require that if a servicer determines no error occurred, the servicer is required to include a statement in its response that the borrower can request documents relied upon by the servicer. A servicer must provide the documents within 15 days of the servicer's receipt of the borrower's request. The Bureau believes that this requirement strikes an appropriate balance that does not subject the servicer to undue paperwork burden while assuring that the borrower can access the underlying documentation if necessary. Further, in certain cases, a borrower may determine that the servicer's response resolves an issue and that reviewing documents would be unnecessary and requiring a servicer to provide documents only upon a borrower's request limits burden. Proposed comment 35(e)(4)–1 clarifies that a servicer 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 states that where a servicer relies upon entries in its collection systems, a servicer should provide print-outs reflecting the information entered into the system.

A servicer would be required to provide information regarding the right to receive documents only if a servicer determines that no error has occurred. Proposed paragraph 35(e)(1)(i) would not require a servicer who determines that an error has occurred, and corrects the error, to provide documents to a borrower that were the basis for that determination or to provide a statement in the notice to the borrower about requesting documents. The Bureau believes that the purpose of the proposed rule is to facilitate the prompt correction of errors and borrowers likely do not need documents and information when errors are corrected per the borrower's request. The Bureau does not believe it is necessary to require servicers to provide documents to a borrower if a servicer corrects an asserted error.

Multiple responses. Proposed comment 35(e)(1)(i)–1 clarifies 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 prompt 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. Further, a servicer's obligation to provide a borrower with documents relied upon by the servicer only relates to any asserted errors that the servicer determines are not errors. A servicer is not required to provide documents with respect to any other errors in a notice of error that the servicer corrects.

Different or additional error. Proposed paragraph 35(e)(1)(ii) would provide that if a servicer, during the course of a reasonable investigation, determines that a different or additional error has occurred, a servicer is required to correct that different or additional error and 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 documents to the borrower regarding the error identified for the reasons discussed above.

Legal authority. The Bureau relies on its authority in section 6(k)(1)(C) and 6(k)(1)(E) of RESPA to implement the notice of error requirements. Further, to the extent the requirements are also applicable to qualified written requests, the Bureau relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

35(e)(2) Requesting Documentation From Borrower

Proposed § 1024.35(e)(2) states that a servicer could request that a borrower provide documentation if needed to investigate an error but may not require the borrower to provide such documentation as a condition of investigating the asserted error. Nor may the servicer determine that no error occurred because the borrower failed to provide the requested documentation. The purpose of this provision is to allow servicers to obtain information that may assist in resolving notices of error. However, the Bureau believes that the process for obtaining that information should not prejudice the ability of the borrower to seek the resolution of the error.

35(e)(3) Time Limits

Paragraph 35(e)(3)(i)

Proposed paragraph 35(e)(3)(i) would require 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 scheduled foreclosure sale where a borrower has submitted a complete application for a loss mitigation option.

Shortened time limit to correct errors relating to payoff balances. Pursuant to proposed paragraph 35(e)(3)(i)(A), 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 paragraph 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 believes that a 30-day deadline for responding to this type of notice of error does not provide adequate protection for a borrower because the servicer's failure to correct the error will prevent a borrower from pursuing options that protect the borrower, including, for example, a refinancing transaction. Based on discussions with servicers, the Bureau believes that a five day timeframe is reasonable for a servicer to correct an error with respect to calculating a payoff balance.

The Bureau relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA with respect to qualified written requests, as well as its authority in sections 6(k)(1)(C) and 6(k)(1)(E) with respect to error resolution requirements to mandate a shorter time period for responding to notices that assert errors with respect to accurate payoff balances. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations, and to make such exemptions for classes of transactions as may be necessary to achieve the consumer protection purposes of RESPA.

The Bureau requests comment regarding whether five days (excluding legal public holidays, Saturdays, and Sundays) is an appropriate timeframe for a servicer to correct an error with respect to a payoff balance.

Shortened time limit to correct certain errors relating to foreclosure. Pursuant to proposed paragraph 35(e)(3)(i)(B), if a borrower submits a notice of error asserting that a servicer has failed to suspend a scheduled 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 scheduled 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 scheduled foreclosure sale would cause irreparable harm to a borrower. Proposed comment 35(e)(3)(i)(B)–1 would clarify that a servicer could maintain a 30-day timeframe to respond to the notice of error if it cancels or postpones the scheduled foreclosure sale and a subsequent sale is not scheduled before the expiration of the 30-day deadline.

Extensions of time limits. Proposed § 1024.35(e)(3)(ii) would permit 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 clarifies 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). Section 1463(c)(3) of the Dodd-Frank Act amended section 6(e) of RESPA to provide a 15-day extension of time and proposed § 1024.35(e)(3)(ii) would implement this provision.

The Bureau proposes not to apply the extension allowance of proposed § 1024.35(e)(3)(ii) to investigate and respond to errors relating to payoff statement or to a servicer's failure to suspend a scheduled foreclosure sale. For the reasons set forth above, the Bureau does not believe that allowing a servicer to extend the time period for investigating and responding to these types of errors will provide timely resolution of errors.

Legal authority. The Bureau relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA with respect to qualified written requests, as well as its authority in sections 6(k)(1)(C) and 6(k)(1)(E) with respect to error resolution requirements to mandate a shorter time period for responding to notices that assert errors for a servicer's failure to suspend a scheduled foreclosure sale. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations, and to make such exemptions for classes of transactions as may be necessary to achieve the consumer protection purposes of RESPA.

35(f) Alternative Compliance

Proposed § 1024.35(f) states that a servicer is not required to comply with 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, is not required to comply with 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 scheduled foreclosure sale, pursuant to paragraph 35(b)(9), seven days or less before a scheduled foreclosure, is not 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.

The Bureau proposes these alternative compliance methods for two reasons. First, feedback from servicers, and especially small servicers, indicates that the majority of errors are addressed promptly after a borrower's communication and generally within five days. SERs 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.[78] The Bureau believes the alternative compliance method is appropriate to reduce unnecessary burden of an acknowledgement 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.

Second, the Bureau believes that reduced requirements are appropriate when servicers receive a notice of error that may impact a scheduled foreclosure scale less than five days before a scheduled foreclosure sale. Only notices of errors identified in proposed paragraph 35(b)(9) implicate this concern. Numerous entities, including other federal agencies and SERs 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.[79] The Bureau believes that reducing the procedural requirements for servicers to follow when a notice asserting an error identified in paragraph (b)(9) is submitted less than 5 days before a scheduled foreclosure sale mitigates this concern 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 SERs' concern that error resolution procedures may be used in unwarranted litigation.[80] Further, the Bureau understands the timing to be consistent with account reviews required by the GSEs to document that all required actions have occurred permitting the servicer to proceed with a scheduled foreclosure sale.[81]

The Bureau relies on its authority in section 6(k)(1)(C) and 6(k)(1)(E) of RESPA to implement the notice of error requirements. Further, to the extent the requirements are also applicable to qualified written requests, the Bureau relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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 requests comment regarding whether the Bureau should consider other alternative compliance methods or should adjust the requirements of the proposed alternative compliance methods.

35(g) Requirements Not Applicable

Proposed § 1024.35(g) would state that the error resolution requirements of proposed § 1024.35 would not apply to

[78] *See* Small Business Review Panel Report at 30.

[79] *See* Small Business Review Panel Report at 30.

[80] *See* Small Business Review Panel Report at 29–30.

[81] *See, e.g.,* Fannie Mae Announcement SVC–2011–08R (September 7, 2011).

certain types of notices of error if the servicer complies with proposed § 1024.35(g)(2). The types of notice of error to which the requirements would not apply would be set forth in § 1024.35(g)(1). The Bureau solicits comments regarding whether additional types of notices of error should be identified in proposed § 1024.35(g)(1).

35(g)(1) In General

Proposed paragraph 35(g)(1) would state that a servicer is not required to comply with the requirements of § 1024.35(d) and (e) if the servicer reasonably makes certain determinations specified in paragraphs (g)(1)(i), (ii), or (iii). A servicer may be liable to the borrower for its unreasonable determination and resulting failure to comply with proposed § 1024.35(d) and (e).

Paragraph 35(g)(1)(i)

Proposed paragraph 35(g)(1)(i) would state 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 where the asserted error is substantially the same as an error previously asserted by or on behalf of the borrower for which the servicer has 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. New and material information means information that was not reviewed by the servicer in connection with investigating the prior notice of error and is reasonably likely to change a servicer's determination with respect to the existence of an error. 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 purpose of this proposed paragraph is 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.

Proposed comment 35(g)(1)(i)–1 clarifies that a dispute regarding a servicer's interpretation of information previously reviewed, including the materiality of that information, does 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.

Paragraph 35(g)(1)(ii)

Proposed paragraph 35(g)(1)(ii) provides 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 rule defines ''overbroad'' and ''unduly burdensome'' for this purpose. 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. 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 paragraph (e)(3)(ii) or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances.

Consumers, consumer advocates, servicers, and servicing industry representatives have indicated to the Bureau that the current qualified written request process is not typically utilized by consumers to resolve errors. Rather, the process is more frequently used strategically to obtain documents and a servicer's responses to claims as a preliminary form of civil litigation discovery. During the Small Business Review Panel outreach, SERs 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.[82] Servicers and servicing industry representatives indicated that these types of qualified written requests are unreasonable and unduly burdensome. SERs in the Small Business Review Panel outreach requested that the Bureau consider an exemption for abusive requests, or requests made with the intent to harass the servicer.[83]

The Bureau is likewise concerned that, in light of the expanded requirements for servicers to respond to notices of error, including adding new categories of covered errors that do not specifically relate to ''servicing'' as defined in RESPA as well as errors asserted orally, a requirement for servicers to respond to notices of error that are overbroad or unduly burdensome may harm consumers and frustrate servicers' ability to comply with the new error resolution requirements. The effect of the proposed rule is to expand a servicer's obligation to undertake the obligations similar to those currently applicable to qualified written requests to a broader universe of potential notices of error, including notices of error made orally to a servicer. Requiring servicers to respond to overbroad or unduly burdensome 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. Further, 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.

Proposed paragraph 35(g)(1)(ii) provides that if a servicer determines that a notice of error is overbroad or unduly burdensome, the servicer is required to notify the borrower, pursuant to proposed § 1024.35(g)(2), that it is not required to comply with the requirements of proposed § 1024.35(d) and (e). Further, the notice must state that the notice of error was overbroad or unduly burdensome, but does not need to state the specific basis for such a determination. Proposed comment 35(g)(1)(ii)–1 sets forth characteristics that may indicate if a notice of error is overbroad or unduly burdensome. 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 would be required to respond to the covered error submissions it can identify.

The Bureau requests 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. The Bureau further requests comment on the appropriate definition of overbroad or unduly burdensome notices of error and on the appropriate indicia for identifying notices of error that should be subject to the exclusion.

Paragraph 35(g)(1)(iii)

Proposed paragraph 35(g)(1)(iii) provides 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

[82] *See* Small Business Review Panel Report at 23.

[83] *Id.*

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 purpose of this proposed paragraph is to set a specific and clear time that a servicer may be responsible for correcting errors for a mortgage loan.

The purpose of the proposed paragraph is 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.''

35(g)(3) Notice to Borrower

Proposed § 1024.35(g)(3) states that if a servicer determines 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 notice must be sent not later than five days (excluding legal public holidays, Saturdays, and Sundays) after the servicer's determination and must set forth the basis upon which the servicer has made the determination and the applicable provision of proposed § 1024.35(g)(1).

The Bureau 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. The Bureau requests comment regarding the requirement that servicers provide a notice to the borrower and the appropriate content for the notice.

Legal authority. The Bureau relies on its authority in section 6(k)(1)(C) and 6(k)(1)(E) of RESPA to implement the notice of error requirements in proposed § 1024.35(g). Further, to the extent the requirements are also applicable to qualified written requests, the Bureau relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA 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 consumer protection purposes of RESPA.

35(h) Payment Requirements Prohibited

Proposed § 1024.35(h) would prohibit 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. The Bureau is implementing this provision 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. 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.

The Bureau relies on its authority in section 6(k)(1)(B), (C), and (E) of RESPA to implement the notice of error requirements. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA 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 consumer protection purposes of RESPA.

35(i) Effect on Servicer Remedies

Adverse Information. Proposed § 1024.35(i)(1) states 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.

The Bureau proposes to maintain the 60-day timeframe set forth in section 6(e)(3) of RESPA. Even though a notice of error may be resolved by no later than 45 days pursuant to proposed § 1024.35(e)(3)(ii), the Bureau believes that the 60-day timeframe is appropriate in the event that there are follow-up inquiries or additional information provided to the borrower.

The Bureau relies on its authority in section 6(e)(3), 6(k)(1)(C), and 6(k)(1)(E) of RESPA to implement the adverse information requirements for qualified written requests and notices of error. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA 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 consumer protection purposes of RESPA.

Ability to pursue foreclosure. Proposed § 1024.35(i)(2) states that 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, with one exception. The purpose of this provision is to clarify that, in general, a notice of error could not be used to require a servicer to suspend a scheduled foreclosure sale. The purpose of requiring prompt correction of errors is not furthered by allowing a notice of error to impede a lender's or servicer's ability to pursue remedies permitted by the applicable mortgage loan instrument.

The Bureau is proposing one exception because it believes it is inappropriate for a servicer to proceed with a scheduled foreclosure sale in the circumstances described in proposed § 1024.41(g). Failure to suspend a potential foreclosure sale during such periods has caused borrower harm, as discussed below.

Defining as an error a servicer's failure to suspend a scheduled foreclosure sale in the circumstances described in proposed § 1024.41(g) is consistent with section 17 of RESPA. The Bureau observes that the requirements of proposed § 1024.41 would not impede a lender's or servicer's ability to pursue a foreclosure action, or maintain a scheduled foreclosure sale. Rather, 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 scheduled 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 scheduled foreclosure sale, a servicer may comply with the requirements of § 1024.35 without suspending the scheduled foreclosure sale.

Legal authority. The Bureau relies on its authority in section 6(k)(1)(C), and 6(k)(1)(E) of RESPA to implement the error resolution requirements. To the extent the error resolution requirements relate to qualified written requests, the Bureau also relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA 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 consumer protection purposes of RESPA.

Section 1024.36 Requests for Information

Proposed § 1024.36 contains requirements servicers would be required to follow for information requests received from borrowers. Proposed § 1024.36 implements the servicer prohibitions set forth in section 6(k)(1)(B) and 6(k)(1)(D) of RESPA, as well as other obligations the Bureau believes to be appropriate to carry out the consumer protection purposes of RESPA pursuant to section 6(k)(1)(E) of RESPA.

36(a) Information Requests

Proposed § 1024.36(a) would require a servicer to comply with the requirements of proposed § 1024.36 for an information request from a borrower that includes the borrowers 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 proposes to allow a borrower to make an information request either orally or in writing. Based on the Bureau's discussions with consumers, consumer advocates, servicers, and industry trade associations, it appears that the vast majority of borrowers orally request information from servicers. As is the case for notices of error, a requirement that an information request must be in writing generally serves as a barrier that unduly restricts the ability of borrower to have errors resolved. Further, as with notices of error, servicers and servicer representatives stated that allowing an information request to be provided orally would create new burdens for servicers. The Bureau recognizes the burdens on servicers to ensure compliance with this proposed rule and incorporates the discussion above with respect to oral notices of error. Responding to oral information requests will impose costs on servicers to ensure that such requests receive responses, but the Bureau believes it is important for consumers to receive the benefit of a requirement that servicers provide information requested by the borrowers.

The Bureau further believes that elements of the proposed rule would assist in mitigating servicer burden. These elements include, for example, a proposal to allow servicers to designate a specific telephone number for receiving oral information requests and 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. The Bureau has learned from discussions with servicers, including the SERs 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.[84] The Bureau believes that allowing servicers to respond to information requests orally significantly reduces burden associated with the proposed information request requirements on servicers. Further, the Bureau believes that this requirement provides flexibility for small servicers consistent with the recommendations of the Small Business Review Panel and mitigates concerns by the SERs regarding compliance costs.[85]

The Bureau requests comment regarding whether servicers should be required to apply the information request requirements to requests received orally from borrowers. The Bureau further requests comment regarding whether small servicers (as that term is defined in the 2012 TILA Servicing Proposal) should be exempt from the information request requirements for information requests received orally.

Qualified written requests. Similar to the proposed requirements for notices of error, proposed § 1024.36(a) would require a servicer to treat information requests, whether oral or written, the same way it treats a qualified written request that requests information. The Bureau's intention is to propose servicer obligations applicable to an information request that are exactly the same as obligations applicable to a qualified written request. Thus, under proposed § 1024.36(a), there is no reason for a borrower to send a qualified written request nor is there a reason for a servicer to reject a qualified written request because it does not meet the requirements for a qualified written request in section 6(e) of RESPA when the request would otherwise constitute an information request pursuant to proposed § 1024.36.

Borrower's representative. Proposed comment 36(a)–1 would clarify that an information request submitted by a person acting as an agent of the borrower is treated the same as a request by the borrower. This requirement is substantially similar as the current requirement existing under section 6(e)(1)(A) of RESPA for a qualified written request. Specifically, 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).

Information subject to information request procedures. In general, any information requested by a borrower is subject to the information request requirements in proposed § 1024.36 unless such information is subject to proposed § 1024.36(f). Proposed comment 36(a)–2 would clarify that if a borrower requests information regarding the owner or assignee of a mortgage loan, a servicer identifies the owner or assignee of the mortgage loan by identifying the entity that holds the legal right to receive payments from a mortgage loan. Proposed comments 36(a)–2.i and 36(a)–2.ii provide 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

[84] *See, e.g.,* Small Business Review Panel Report at 30.

[85] *See* Small Business Review Panel Report at 23–24, 29.

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.

Servicers generally have not expressed 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, SERs 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.[86]

The SERs did express concern regarding the obligation to provide information regarding the owner or assignee of a mortgage loan. The SERs 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.[87] Certain owners, assignees, and guarantors of mortgage loans, including other federal agencies, have expressed similar concerns to the Bureau.

The Bureau understands the concerns asserted by servicers, owners, assignees, guarantors, and other federal agencies that requiring servicers to provide this 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 and is not a discretionary exercise of the Bureau's authority. The Dodd-Frank Act clearly requires that information regarding the owner or assignee of a mortgage loan must be provided to borrowers. The Bureau proposes comment 36(a)–2 to implement this requirement.

Legal authority. The Bureau relies on its authority in section 6(k)(1)(E) of RESPA to implement the information request requirements. To the extent the information request requirements relate to qualified written requests, the Bureau also relies on its authority in sections 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(k)(1)(D) of RESPA to implement information request requirements for requests for the identity of the owner or assignee of a mortgage loan. The Bureau further relies on section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA 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 consumer protection purposes of RESPA.

36(b) Contact Information for Borrowers To Request Information

Proposed § 1024.36(b) permits a servicer to establish a telephone number and address that a borrower must use to request information. If a servicer chooses to establish a separate telephone number and address for receiving information requests, a servicer must provide the borrower a written notice that states that the borrower should only assert an error at the telephone number and address established by the servicer for that purpose. Proposed comment 36(b)–2 would clarify 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.

As discussed above for proposed § 1024.35(c), the purpose of establishing a telephone number and address that a borrower must use to request information is to allow servicers to direct oral and written errors to appropriate personnel that have been trained to ensure that the servicer responds appropriately. Proposed comment 36(b)–1 clarifies that if a servicer has not designated a telephone number and address that a borrower must use to request information then a servicer will be required to comply with the information request requirements for any information request received by any office of the servicer.

The Bureau believes it is reasonable, especially in light of the expanded burden of requiring compliance with error resolution and information requests, to allow servicers to manage the intake of information requests to designated telephone numbers and addresses. Further, allowing a servicer to designate a specific telephone number and 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 telephone number and address for receiving errors and information requests will benefit consumers as well. By providing a specific telephone number and address, servicers will identify to consumers the office capable of responding to information requests. The Bureau is proposing in the concurrent 2012 TILA Servicing Proposal to require that any telephone number or address identified by a servicer must appear on the periodic statement or other payment form supplied by the servicer. *See* 2012 TILA Servicing Proposal at proposed § 1026.41(d)(6).

Internet intake of information requests. Proposed comment 36(b)–4 would clarify that a servicer is not required to establish a process for receiving information requests through email, Web site, or other online methods. In the event a servicer establishes a process for receiving information requests through online methods, comment 36(b)–4 is intended to clarify that the process established is the only online intake process that a borrower can use to make an information request. Thus, 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.

Multiple offices. Proposed § 1024.36(b), similar to proposed § 1024.35(c) for notices of error, would require 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 clarifies that any telephone numbers or address 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. Proposed comment 36(b)–5 clarifies that a servicer may use automated systems, such as an interactive voice response system, to manage the intake of borrower calls. Prompts for requesting information must be clear and provide

[86] *See* Small Business Review Panel Report at 24.

[87] *Id.*

the borrower the option to connect to a live representative.

Legal authority. The Bureau relies on its authority in section 6(k)(1)(E) of RESPA to implement the proposed information request requirements. To the extent the information request requirements relate to qualified written requests, the Bureau also relies on its authority in section 6(e) and 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(k)(1)(D) of RESPA to implement information request requirements for requests for the identity of the owner or assignee of a mortgage loan. The Bureau further relies on section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA 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 consumer protection purposes of RESPA.

36(c) Acknowledgment of Receipt

Proposed § 1024.36(c) would require a servicer to provide a borrower a written 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 implement 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 further apply the same timeline applicable to a qualified written request to any information request.

The Bureau relies on its authority in section 6(k)(1)(E) of RESPA to implement the information request requirements. Further, to the extent the requirements are also applicable to qualified written requests, the Bureau relies on its authority in section 6(e), including the amendment to section 6(e) of RESPA set forth in section 1463(c) of the Dodd-Frank Act, as well as section 6(k)(1)(B) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

36(d) Response to Information Request

Proposed § 1024.36(d) would set forth requirements on servicers for responding to information requests.

36(d)(1) Investigation and Response Requirements

Proposed paragraph 36(d)(1) would require 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. A servicer would only be required 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. A servicer would be able to respond either orally or in writing to the borrower (or electronically with the borrower's consent) if the servicer is providing the information requested by the borrower. The Bureau believes that the goal of providing information to borrowers is furthered by allowing servicers to respond orally. Additionally, allowing oral communication reduces burden on servicers.

A servicer could demonstrate its compliance with this requirement by, for example, retaining a copy of any written correspondence to the borrower that includes the information, retaining tapes of telephone conversations during which the borrower is provided the requested information, or by making a notation in a collector's notes that the information requested was provided to the borrower. The Bureau believes that the flexibility for a servicer to develop systems that are appropriate for that servicer addresses the Small Business Review Panel recommendation that the Bureau consider adopting a more flexible process for small servicers to demonstrate compliance with the information request requirements.[88]

Information not available. Proposed comment 36(d)(1)(ii)–1 clarifies that information should not be considered as available to a servicer if the information is not in the servicer's possession or control and 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. The Bureau believes that burden for information requests will greatly increase, however, 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 additional information available to borrowers is outweighed by the significant burdens that such investigations may incur.

Accordingly, the Bureau believes that servicers should not be required to provide documents in response to an information request that are not in the possession or control of the servicer and cannot be retrieved through reasonable efforts in the ordinary course of business. Proposed comment 36(d)(1)(ii)–1 provides examples of when documents should and should not be considered to be available to a servicer in response to an information request.

The Bureau has authority pursuant to section 6(k)(1)(E) of RESPA to set forth servicer obligations to provide information in response to information requests. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA. The Bureau further relies on its authority in section 19(a) of RESPA to make such rules and regulations necessary to achieve the consumer protection purposes of RESPA.

36(d)(2) Time Limits

Paragraph 36(d)(2)(i)

Proposed paragraph 36(d)(2)(i) would require 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.

Legal authority. 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. Proposed paragraph 36(e)(e)(i) would implement this provision of RESPA

[88] Small Business Review Panel Report at 30.

with respect to qualified written requests.

Shortened time limit to provide information regarding the identity of the owner or assignee. Under proposed paragraph 36(d)(2)(i)(A), 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).

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 an information request with respect to the owner or assignee of a mortgage loan. Proposed paragraph 36(d)(2)(i)(A) implements this provision of RESPA. Proposed § 1024.36(d)(2)(i)(A) would require a servicer to provide the requested information within ten days (excluding legal public holidays, Saturdays, and Sundays) instead of ''10 business days.'' 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). Section 19(a) of RESPA provides the Bureau with authority to make interpretations that are necessary to achieve the consumer protection purposes of RESPA.

Extensions of time limits. Proposed § 1024.36(d)(2)(ii) permits 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. Section 1463(c)(3) of the Dodd-Frank Act amended section 6(e) of RESPA to provide a 15-day extension of time and proposed § 1024.36(d)(2)(ii) would implement this provision with respect to qualified written requests. The Bureau has authority pursuant to section 6(k)(1)(E) and 6(j)(3) of RESPA to apply the extension of time provision to information requests as well. The Bureau further has authority under section 19(a) of RESPA to make such rules and regulations, and to make such interpretations necessary to achieve the consumer protection purposes of RESPA.

The Bureau proposes not 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. The Bureau does not believe that the burden of obtaining this information for any borrower will be significant enough to justify an extension beyond the ten days (excluding legal public holidays, Saturdays, and Sundays) established by Congress. Servicers generally have access to 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 has required, outweighs the costs to servicers of complying within ten days (excluding legal public holidays, Saturdays, and Sundays).

36(e) Alternative Compliance

Proposed § 1024.36(e) would provide 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. A servicer may provide the information requested either orally or in writing (including electronically, with the borrower's consent). A servicer's records should indicate that a servicer has provided the information requested to the borrower. A servicer may demonstrate its compliance with this requirement by, for example, retaining a copy of any written correspondence to the borrower that includes the information, retaining tapes of telephone conversations during which the borrower is provided the requested information, or by making a notation in a collector's notes that the information requested was provided to the borrower. As discussed above, the Bureau believes that the flexibility for a servicer to develop systems that are appropriate for that servicer addresses the Small Business Review Panel recommendation that the Bureau consider adopting a more flexible process for small servicers to demonstrate compliance with the information request requirements.[89]

36(f) Requirements Not Applicable

Proposed § 1024.36(f) would state that the information request requirements of proposed § 1024.36 would not apply to certain types of information requests if the servicer complies with proposed § 1024.36(f)(2). The types of information requests to which the requirements would not apply would be set forth in § 1024.36(f)(1). The Bureau solicits comments regarding whether any forms of information requests should be removed from proposed § 1024.36(f)(1) or whether additional potential forms of information requests should be identified in proposed § 1024.36(f)(1).

36(f)(1) In General

Paragraph 36(f)(1)

Proposed paragraph 36(f)(1) would state that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) if the servicer reasonably makes certain determinations specified in paragraphs (f)(1)(i), (ii), (iii), (iv), or (v). A servicer may be liable to the borrower for its unreasonable determination and resulting failure to comply with proposed § 1024.36(c) and (d).

Paragraph 36(f)(1)(i)

Proposed paragraph 36(f)(1)(i) would state 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. The purpose of this proposed paragraph is to ensure that a servicer is not required to expend resources conducting duplicative searches for documents.

Paragraph 36(f)(1)(ii)

Proposed paragraph 36(f)(1)(ii) provides 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 believes that the purposes of the provision, which is to provide borrowers with a means to request information regarding a borrower's mortgage loan account, are not furthered by permitting borrowers to request confidential, proprietary, or general corporation information of a servicer. Proposed comment 36(f)(1)(ii)–1 provides 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

[89] Small Business Review Panel Report at 30.

servicing program guide; investor instructions or requirements regarding loss mitigation options, examination reports, compliance audits or other investigative materials.

The Bureau believes the protection in proposed paragraph 36(f)(1)(ii) 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. Permitting information requests for confidential, proprietary, or general corporate information does not further the purposes of the proposed rule.

Paragraph 36(f)(1)(iii)

Proposed paragraph 36(f)(1)(iii) would provide that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to a request for information that is not directly related to the borrower's mortgage loan account. The Bureau believes the protection in proposed paragraph 36(f)(1)(iii) 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.

Paragraph 36(f)(1)(iv)

Proposed paragraph 36(f)(1)(iv) provides 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 rule defines ''overbroad'' and ''unduly burdensome'' for this purpose. An information request is overbroad if a borrower requests a servicer provide an unreasonable volume of documents or information to a borrower. A notice of error is unduly burdensome if a diligent servicer could not respond to the information request without either exceeding the maximum timeframe permitted by paragraph (e)(3)(ii) or incurring costs (or dedicating resources) that would be unreasonably in light of the circumstances.

As discussed above for proposed paragraph 35(g)(1)(ii), consumers, consumer advocates, servicers, and servicing industry representatives have indicated to the Bureau that the current qualified written request process is not typically utilized by consumers to request information. During the Small Business Review Panel outreach, SERs 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.[90] Servicers and servicing industry representatives indicated that these types of qualified written requests are unreasonable and unduly burdensome. SERs in the Small Business Review Panel outreach requested that the Bureau consider an exemption for abusive requests, or requests made with the intent to harass the servicer.[91]

The Bureau is concerned that, in light of the expanded requirements for servicers to respond to information requests, 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. The effect of the proposed rule is to expand a servicer's obligation to undertake the obligations similar to those currently applicable to qualified written requests to a broader universe of information requests, including requests made orally to a servicer and requests for information that do not specifically relate to ''servicing'' as defined in RESPA. Requiring servicers to respond to overbroad or unduly burdensome information requests from some borrowers may impose unjustified and unmanageable burdens on servicers. Further, the Bureau does not believe that the request for information requirements should replace or supplant civil litigation document requests and should not be used as a forum for pre-litigation discovery.

Proposed paragraph 36(f)(1)(iv) provides that if a servicer determines that an information request is overbroad or unduly burdensome, the servicer is required to notify the borrower, pursuant to proposed § 1024.36(f)(2), that the servicer is not required to comply with the requirements of proposed § 1024.36(c) and (d). Further, the servicer must identify the specific basis for the servicer's determination so that the borrower is informed that the basis of the servicer's determination was that the information request was overbroad or unduly burdensome. Proposed comment 36(f)(1)(iv)–1 sets forth characteristics that may indicate if an information request is overbroad or unduly burdensome. A servicer bears the risk that its determination that an information request is overbroad or unduly burdensome is found to be unjustified. If a servicer can identify a proper information request from an information request that is otherwise overbroad or unduly burdensome, a servicer would be required to respond to those information requests it could identify.

The Bureau requests 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.

Paragraph 36(f)(1)(v)

Proposed paragraph 36(f)(1)(v) would provide 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 is delivered to a servicer more than one year after either servicing for the mortgage loan that is the subject of the information request was transferred from the servicer to a transferee servicer or the mortgage loan amount was paid in full, whichever date is applicable.

The purpose of this proposed paragraph is to set a bound on the time that a servicer may be responsible for responding to information requests with respect to a mortgage loan. The effect of the proposed paragraph is to achieve the same limitation 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.'' The Bureau requests comment regarding the requirement that servicers provide a notice to the borrower and the appropriate content for the notice.

36(f)(2) Notice to Borrower

Proposed § 1024.36(f)(2) provides that if a servicer determines it is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to an information request because the information requests meets one of the categories in proposed § 1024.36(f)(1), the servicer must provide a notice to the borrower informing the borrower of the servicer's determination. The notice must be sent not later than five days (excluding legal public holidays, Saturdays, and Sundays) after the servicer's determination and must set forth the basis upon which the servicer has made the determination, with a reference to the applicable provision of proposed § 1024.36(f)(1).

The Bureau's intention for proposing this requirement is to ensure that borrowers are notified that a servicer

[90] *See* Small Business Review Panel Report at 23.

[91] *Id.*

does not intend to otherwise respond to the information requests and that borrowers are informed of the basis for the servicer's determination that it is not required to comply with the information request requirements in proposed § 1024.36(c) and (d).

By receiving a notice that sets forth for the servicer's determination, a borrower will have the opportunity to assert any claims the borrower may have with respect to the reasonableness of the servicer's determination that the servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d).

Legal authority. The Bureau relies on its authority pursuant to section 6(k)(1)(E) of RESPA to set forth information requests requirements. Further, to the extent the information request requirements apply to qualified written requests, the Bureau further relies on its authority in section 6(e) and 6(k)(1)(B) of RESPA with respect to qualified written requests. The Bureau has authority pursuant to section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA. The Bureau further relies on its authority in section 19(a) of RESPA to make such rules and regulations necessary to achieve the consumer protection purposes of RESPA.

36(g) Payment Requirement Limitations

Proposed § 1024.36(g) would prohibit 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. The Bureau is implementing this provision 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 implement that provision with respect to qualified written requests that for information relating to the servicing of a mortgage loan. Second, the Bureau does not believe that a servicer practice of charging for responding to an information request facilitates the purpose of the information request requirements, which is to provide a tool for borrowers to obtain information regarding their mortgage loan accounts. Rather, such a practice would improperly impede borrowers from pursuing valid information requests. Third, the Bureau has 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.

Legal authority. The Bureau relies on its authority in section 6(k)(1)(B) and 6(k)(1)(E) of RESPA. The Bureau believes the limitations of fees are appropriate to carry out the consumer protection purposes of RESPA, pursuant to section 6(k)(1)(E) of RESPA.

In addition to the authority, the Bureau also has authority pursuant to section 6(j)(3) and 19(a) of RESPA to establish requirements to carry out section 6 of RESPA or to make such rules and regulations as appropriate to achieve the consumer protection purposes of RESPA.

The Bureau requests comment regarding whether the Bureau should carve out from the prohibition on charging fees for responding to an information request any fees charged in connection with providing payoff statements or State law beneficiary notices. The Bureau further requests comment regarding whether other types of information requests should be excluded from a proposed prohibition on charging fees for responding to an information request.

36(h) Servicer Remedies

Proposed § 1024.36(h) states 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. This proposed requirement is consistent with section 6(e)(3) of RESPA and clarifies that prohibitions on furnishing adverse information only apply to qualified written requests that assert an error with respect to a mortgage loan, not to a qualified written request that requests information. The Bureau relies on its authority in section 6(k)(1)(E) to apply this provision to information request requirements. The Bureau further relies on its authority in section 6(j)(3) to establish any requirement to carry out section 6 of RESPA and its authority in section 19(a) to make such interpretations as may be necessary to carry out the consumer protection purposes of RESPA.

Section 1024.37 Force-Placed Insurance

37(a) Definitions

37(a)(1) Force-Placed Insurance

Section 1463 of the Dodd-Frank Act amended RESPA section 6 by adding a new section 6(k)(2), which sets forth that for purposes of RESPA section 6(k)–(m), ''force-placed insurance'' means ''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.'' The Bureau proposes to implement RESPA section 6(k)(2) by adding new § 1024.37(a)(1) to Regulation X to define ''force-placed insurance'' to mean hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan on a property securing such loan.

The Bureau's definition of force-placed insurance is broader than the statutory definition of force-placed insurance. Virtually all mortgage loan contracts require borrowers to maintain hazard insurance during the term of the loan, and permit lenders to charge borrowers for any hazard insurance lenders obtain if borrowers fail to maintain hazard insurance coverage.[92] The Bureau recognizes that force-placed insurance is hazard insurance that servicers are contractually required to obtain on behalf of the owner or assignee of a mortgage loan when the servicer is unable to obtain evidence that the borrower has complied with the borrower's obligation to maintain hazard insurance.[93] But in its review of issues related to force-placed insurance, the Bureau has learned that in recent years, some servicers might have improperly obtained force-placed insurance when they arguably knew or should have known that the borrower already had hazard insurance.[94] The

[92] *See, e.g.,* Fannie Mae/Freddie Mac Note at ¶ 5.

[93] *See, e.g.,* Fannie Mae Single-Family Servicing Guide, Part II, Ch. 2 (2012) (''Part of a servicer's responsibility for protecting Fannie Mae's interest in the security property is to ensure that hazard insurance (including flood insurance), under the terms specified in Fannie Mae's *Guides,* is in place at all times. If the servicer is unable to obtain evidence of acceptable hazard insurance for a property, the servicer should obtain alternative insurance coverage (so-called ''force-placed'' or ''lender-placed'' insurance) to protect Fannie Mae's interests, available at *https://www.efanniemae.com/sf/guides/ssg/svcg/svc031412.pdf.*

[94] *See, e.g., United States of America* v. *Fairbanks Capital Corp.,* Civ. Action No. 03–12219–DPW, Complaint at ¶ 17 (D. Mass. Nov. 12, 2003) (alleging that Fairbanks improperly obtained force-placed insurance when it knew or should have known that borrowers already had insurance), available at:

Continued

Bureau has met with servicers and insurance companies that write force-placed insurance. They have told the Bureau that when they detect a gap in borrower-obtained hazard insurance coverage, they typically communicate with the borrower to confirm the absence of borrower-obtained hazard insurance before obtaining force-placed insurance. According to industry, force-placed insurance is an uncommon occurrence.[95] It appears that the new Dodd-Frank requirements on force-placed insurance, such as, for example, requiring servicers to provide advance notice over a 45-day notice period before charging borrowers for force-placed insurance, discussed further below, reflect common practice for the majority of the mortgage servicing market.[96] But the Bureau has learned that there does not appear to be an industry standard for providing advance notice before a servicer renews or replaces existing force-placed insurance. As discussed further below, the Bureau proposes to exercise its authority under RESPA sections 6(j)(3), 6(k)(1)(E) and 19(a) to add new § 1024.37(e), which would require servicers to follow an advance notice process before they renew or replace existing force-placed insurance.

The Bureau also believes that obtaining force-placed insurance when servicers arguably knew or should have known that the borrower already had insurance is problematic for individual borrowers, particularly borrowers experiencing financial hardship. Force-placed insurance is generally substantially more expensive than hazard insurance a borrower could purchase.[97] It also generally provides less protection against loss than insurance that a borrower could purchase.[98] Consumer advocates have asserted that the higher cost of force-placed insurance could drive borrowers into default.[99] According to Fannie Mae, ''[force-placed insurance] should only be issued after the servicer has exhausted all means to keep the borrower's insurance policy in force.'' [100] The Bureau also notes that it finds problematic the incentives that have reportedly influenced some servicers' decision to obtain force-placed insurance, such as the receipt of commissions or reinsurance fees by servicers and their insurance affiliates on the force-placed insurance policies they obtain,[101] or that a servicer or an affiliate of the servicer may have an ownership interest in an insurance company that writes force-placed insurance.[102] For similar reasons, the Bureau is proposing to require that servicers continue paying for a borrower's hazard insurance when practicable if the borrower has escrowed for hazard insurance, as discussed previously in the Bureau's discussion of proposed § 1024.17(k)(5).

The statutory definition in RESPA section 6(k)(2), discussed previously, may convey that ''force-placed insurance'' used in RESPA section 6(k)–(m) is limited to hazard insurance obtained when the borrower has in fact failed to maintain or renew hazard insurance. Based on its review of issues concerning force-placed insurance discussed above, the Bureau has concluded that defining force-placed insurance broadly is appropriate to carry out the consumer protection purposes of the new Dodd-Frank requirements on force-placed insurance.

As discussed previously in the Bureau's discussion of proposed § 1024.30, the Bureau's proposed subpart C would maintain Regulation X's current exclusion for all open-end lines of credit (home-equity plans) from the servicer requirements of Regulation X. Although virtually all mortgage loan contracts require borrowers to maintain hazard insurance during the term of the loan, the majority of open-end home-equity plans are subordinate liens.[103] The Bureau has learned that servicers generally obtain force-placed insurance on behalf of first-lien holders, not subordinate-lien holders. Accordingly, the Bureau believes it is appropriate to maintain the exemption in current Regulation X for open-end lines of credit (home-equity plans) from the Bureau's proposed force-placed insurance regulations. The Bureau understands that the one exception to servicers obtaining force-placed insurance for open-end lines of credit (home-equity plans) is when flood insurance is required by the FDPA. As discussed below, however, the Bureau is proposing to exempt hazard insurance to protect against flood loss obtained by a servicer as required by the FDPA from the Bureau's proposed definition of force-placed insurance. The Bureau, however, invites comment on whether the Bureau's proposed force-placed insurance regulations should be extended cover open-end lines of credit (home-equity plans).

Legal authority. As discussed previously, section 1463 of the Dodd-Frank Act amended RESPA section 6 by adding a new section 6(k)(2), which sets forth the definition of ''force-placed insurance'' for purposes of RESPA section 6(k)–(m). The Bureau is proposing to implement section 6(k)(2) of RESPA, pursuant to its authority under section 6(j)(3) of RESPA by adding new § 1024.37(a)(1) to Regulation X to define ''force-placed insurance'' to mean hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan on a property securing such loan. Section 6(j)(3) of RESPA authorizes the Bureau to set forth any requirements necessary to carry out section 6 of RESPA. Section1024.37(a)(1) is additionally

http://ftc.gov/os/2003/11/0323014comp.pdf; see also Ocwen Federal Bank FSB, OTS Docket No. 04592 (April 19, 2004) (requiring the bank to take reasonable actions to determine whether appropriate hazard insurance is already in place before it obtained force-placed insurance, available at *http://files.ots.treas.gov/93606.pdf.*

[95] *See* Assurant Specialty Property, Lender-Placed Insurance (Assurant Specialty Property), available at *http://newsroom.assurant.com/releasedetail.cfm?ReleaseID=645046&ReleaseType=Featured%20News.* According to Assurant, approximately 13% of the loans it monitors are identified as loans with a potential lapse in insurance, but approximately only 2% of that group of loans gets force-placed insurance because Assurant uses an advance notification process that resolves most of the lapses with the borrower renewing or replacing coverage on their own.

[96] *See, e.g.,* Letter from the Financial Services Roundtable re: Outline of Proposals Under Consideration and Alternatives Considered in connection with the Small Business Review Panel for Mortgage Servicing Rulemaking to Peter Carroll, Consumer Financial Protection Bureau (May 31, 2012), at 5. *See also* Small Business Review Panel Report at 21–22.

[97] *See* Assurant Specialty Property (estimating that the force-placed insurance Assurant writes costs, on average, 1.5 to 2 times more than the prior hazard insurance purchased by the borrower.), available at: *http://newsroom.assurant.com/releasedetail.cfm?ReleaseID=645046&ReleaseType=Featured%20News.*

[98] *Id.* (''Lender-placed insurance provides coverage for the structural property. It typically does not extend to liability coverage or a homeowner's personal contents, as the lender has no collateral interest in these items''). In contrast, a homeowner's policy offers a much broader scope of coverage. In addition to insuring the homeowner's personal contents against loss, it also pays a homeowner's additional living expenses while the home is being repaired, and covers a homeowner's personal liability for injuries to other people or their property while they are on the property.

[99] *See* The National Consumer Law Center and Center and the Center for Economic Justice, *The Consumer Financial Protection Bureau Should Rein in Mortgage Servicers' Use of Force-Placed Insurance* (May 2012), available at: *http://www.nclc.org/images/pdf/regulatory_reform/ib-force-placed-insurance.pdf.*

[100] *See* Fannie Mae March 2012 Servicing Guide Announcement, available at: *https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2012/svc1204.pdf.*

[101] *See, e.g.,* Jeff Horowitz, *Ties to Insurers Could Land Mortgage Servicers in More Trouble,* The American Banker (November 10, 2010).

[102] *See The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Housing, Transportation, and Community Affairs of the Senate Comm. on Banking and Urban Affairs,* S. Hrg. 112–139, 112th Cong. 125 (2011) (statement of Laurie Goodman).

[103] Donghoon Lee *et al., A New Look at Second Liens,* n.5 (February 2012).

proposed pursuant to the Bureau's authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to make such rules and regulations, and to make such interpretations, as may be necessary to achieve the consumer protection purpose of RESPA.

37(a)(2) Types of Insurance Not Considered Force-Placed Insurance

Paragraph 37(a)(2)(i)

Proposed § 1024.37(a)(2)(i) would exempt hazard insurance to protect against flood loss obtained by a servicer as required by the FDPA from the definition of force-placed insurance for the purposes of § 1024.37. The Bureau understands that pursuant to section 102(e) of the FDPA, lenders or the servicers acting on the lenders' behalf must obtain force-placed flood insurance under certain circumstances. The Bureau understands that the circumstances are as follows: (1) The lender determines at any time during the life of the loan that the property securing the loan is located in a Special Flood Hazard Area (SFHA); (2) flood insurance under the ''Act'' (referring to both the National Flood Insurance Act of 1968 and the FDPA, as revised by the National Flood Insurance Reform Act of 1994) is available; (3) the lender determines that flood insurance coverage is inadequate or does not exist; and (4) after required notice, the borrower fails to buy the appropriate amount of coverage within 45 days.[104]

Since servicers are already subject to regulations when obtaining force-placed flood insurance as required by the FDPA,[105] the Bureau proposes 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 for purposes of proposed § 1024.37.

As discussed previously, to implement Dodd-Frank Act section 1463, the Bureau's proposed definition of ''hazard insurance'' would include hazard insurance to protect against flood loss. Additionally, the Bureau has proposed to define ''force-placed insurance'' as a type of ''hazard insurance'' to implement RESPA section 6(k)(2). If the Bureau does not propose an exemption for hazard insurance to protect against flood loss obtained by a servicer as required by the FPDA, such insurance would be considered ''force-placed insurance'' under the definition of ''force-placed insurance'' set forth in proposed § 1024.37(a)(1). In turn, servicers who obtain force-placed flood insurance as required by the FDPA would be subject to the Bureau's proposed § 1024.37 as well if the Bureau does not propose the exemption. Without the Bureau's proposed exemption, the Bureau believes the result would be the creation of overlapping servicer obligations. For example, section 6(l) of RESPA, discussed in greater detail below, requires a servicer to provide a borrower with two written notices over a 45-day notice period before charging the borrower for force-placed insurance. The FDPA also provides a 45-day notice period, but only one notice is required. Additionally, the FPDA was recently amended to require the lender or servicer to terminate force-placed flood insurance and refund to the borrower all force-placed flood insurance premiums and related fees paid by the borrower during any period when the borrower had insurance coverage in force within 30 days of receiving confirmation of a borrower's existing flood insurance coverage.[106] In contrast, section 6 of RESPA, as amended by Dodd-Frank Act section 1463, requires a servicer to cancel force-placed insurance and refund any premium and fees paid during the period of overlapping coverage within 15 days of receiving confirmation of a borrower's existing hazard insurance coverage.

The requirements set forth in Dodd-Frank Act section 1463 with respect to servicers' purchase of force-placed insurance represent the establishment of new consumer protections where protection did not exist before. The FDPA, however, has established a separate consumer protection paradigm to protect consumers when servicers are required by the FDPA to obtain force-placed flood insurance. As discussed above, the FDPA requires advance notice to consumers, and provides consumers with 45 days to provide evidence of flood insurance. Also as discussed above, the FDPA now contains termination and refund provisions with respect to force-placed flood insurance obtained by servicers as required by the FDPA. Accordingly, the Bureau believes it is consistent with the consumer protection purposes of RESPA to exempt hazard insurance to protect against flood loss obtained by a servicer as required by the FPDA from the Bureau's proposed definition of ''force-placed insurance.'' For similar reasons, the Bureau proposes to exempt charges authorized by the FDPA from the proposed requirement that charges related to force-placed insurance (other than charges subject to State regulation as the business of insurance) must be bona fide and reasonable for purposes of proposed § 1024.37(h), discussed below.

The Bureau notes that the proposed exemption would only apply to servicers that obtain hazard insurance to protect against flood loss as required by the FDPA. The Bureau understands that the FDPA does not currently apply to a mortgaged property that is not located in a SFHA.[107] The Bureau further understands that the FDPA does not currently apply to mortgage loans made by and kept in the portfolio of a private mortgage lender.[108] The Bureau's proposed § 1024.37 would apply in situations where the FDPA does not apply. The Bureau, however, recognizes that operational complexity may be introduced if a servicer had to continuously monitor its servicing portfolio to identify when it is required to comply with the FDPA and when it is required to comply with proposed § 1024.37. As discussed above, the Bureau invites comment on whether the Bureau's definition of ''hazard insurance'' should exclude hazard insurance to protect against flood loss. An alternative to excluding hazard insurance to protect against flood loss from the definition of ''hazard insurance'' is to exclude hazard insurance to protect against flood loss obtained by a servicer from the definition of ''force-placed insurance.'' The Bureau also seeks comment on this alternative. The Bureau recognizes that another possible alternative exists, and it is to harmonize the force-placed insurance requirements set forth in Dodd-Frank Act section 1463 with the FDPA. Accordingly, the Bureau invites comments on how the force-placed insurance requirements set forth in Dodd-Frank Act section 1463 could be harmonized with the FDPA.

Legal authority. The Bureau proposes to exempt hazard insurance to protect against flood loss obtained by a servicer as required by the FDPA from the

[104] 76 FR 64175, 64181 (October 17, 2011) (addressing the requirement for the force placement of flood insurance the under the Act).

[105] *See* 61 FR 45684 (August 29, 1996) (announcing the regulations originally adopted by the Board, the OCC, the FDIC, the FCA, NCUA, and the Office of Thrift Supervision (OTS) with respect to requirements for lenders and servicers when purchasing force-placed insurance for loans secured by properties located in SHFAs).

[106] Moving Ahead for Progress in the 21st Century Act of 2012, PL 112–141, 126 Stat 405 (2012)

[107] Federal Emergency Management Administration, *Mandatory Purchase of Flood Insurance Guidelines* (2007), at 40 (explaining that a lender or servicer has statutory authority to purchase flood insurance for a property and charge the premium to the borrower if the property is in a SFHA).

[108] *Id.* at 23.

definition of force-placed insurance for purposes of proposed § 1024.37 by adding new § 1024.37(a)(2)(i), pursuant to its authority under section 19(a) of RESPA. Section 19(a) of RESPA provides the Bureau with authority 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. As previously discussed, the FDPA has established a separate consumer protection paradigm to protect consumers when servicers are required by the FDPA to obtain force-placed flood insurance. Furthermore, for reasons discussed above, the exemption will reduce regulatory burden.

Paragraph 37(a)(2)(ii)

Proposed § 1024.37(a)(2)(ii) provides that hazard insurance obtained by a borrower but renewed by the borrower's servicer as required by § 1024.17(k)(1), (k)(2), or (k)(5) is not force-placed insurance for purposes of § 1024.37. A servicer that complies with § 1024.17(k)(1), (k)(2), or proposed § 1024.17(k)(5) would be continuing the borrower's hazard insurance.

Paragraph 37(a)(2)(iii)

Proposed § 1024.37(a)(2)(iii) provides 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), (k)(2), or (k)(5) is not force-placed insurance for purposes of § 1024.37. The Bureau believes that proposed § 1024.37(a)(2)(iii) would provide an incentive for servicers to work with non-escrowed borrowers to renew hazard insurance obtained by these borrowers.

Legal authority. The Bureau proposes to add new § 1024.37(a)(2)(ii)–(iii) pursuant to its authority under section 6(j)(3) of RESPA, which authorizes the Bureau to establish any requirements necessary to carry out the purposes of section 6 of RESPA. As discussed previously, the Bureau is proposing to define ''force-placed insurance'' as hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan on a property securing such loan in proposed § 1024.37(a)(1). The Bureau believes it is necessary and appropriate to clarify that the term does not apply to hazard insurance obtained by a borrower and renewed by a borrower's servicer. It will reduce regulatory burden and may, as discussed above, incentivize servicers to work with non-escrowed borrowers to renew the hazard insurance obtained by such borrowers. Section 1024.37(a)(2)(ii)–(iii) is additionally proposed pursuant to the Bureau's authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

37(b) Basis for Obtaining Force-Placed Insurance

The Bureau is proposing a new § 1024.37(b) to implement new section 6(k)(1)(A) of RESPA, added by section 1463 of the Dodd-Frank Act, which requires a servicer to have a reasonable basis to believe that the borrower has failed to comply with the loan contract's requirement to maintain property insurance before obtaining force-placed insurance. Proposed § 1024.37(b) sets forth 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.

Proposed comment 37(b)–1 provides examples of ''reasonable basis'' for borrowers with escrow. The comment clarifies that a servicer has a reasonable basis to believe that a borrower with an escrow account established for hazard insurance has failed to maintain hazard insurance if, for example, by a reasonable time leading up to the expiration date of the borrower's hazard insurance (*e.g.,* 30 days before the expiration date), the servicer has not received a renewal bill. It also sets forth that the receipt by a servicer of a notice of cancellation or non-renewal from the borrower's insurance company before payment is due for the borrower's hazard insurance provides a servicer with a reasonable basis to believe that the borrower has failed to maintain hazard insurance.

Proposed comment 37(b)–2 provides an example of ''reasonable basis'' for borrowers without escrow. The comment provides that a servicer has a reasonable basis to believe a borrower without an escrow account established for hazard insurance has failed to maintain hazard insurance if, for example, a servicer receives a notice of cancellation or non-renewal from the borrower's insurance company.

The Bureau believes it is appropriate to distinguish situations where the borrower has escrowed for hazard insurance from situations where the borrower has not done so. For a borrower who has escrowed for hazard insurance, a servicer receives a request to pay a borrower's existing hazard insurance before the insurance lapses. When a borrower has not escrowed for hazard insurance, the Bureau understands that a servicer does receive a payment request and thus may not learn of the lapse in insurance until the borrower's coverage has expired.

Legal authority. As discussed above, the Bureau is proposing a new § 1024.37(b) to implement new section 6(k)(1)(A) of RESPA. The Bureau proposes to implement section 6(k)(1)(A) pursuant to its authority under RESPA section 6(j)(3) to establish any requirements necessary to carry out the purposes of section 6 of RESPA. The Bureau has additional authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

37(c) Requirements for Charging Borrower Force-Placed Insurance

37(c)(1) In General

Section 1463 of the Dodd-Frank Act amended section 6 of RESPA by setting forth certain requirements a servicer must follow before imposing any charge on a borrower for force-placed insurance with respect to any property securing a mortgage by adding new section 6(l)(1)(A)–(C) to RESPA. RESPA section 6(l)(1)(A) requires servicers to use first-class mail to send a written notice to the borrower 45 days before charging a borrower for force-placed insurance. 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 the notice required by RESPA section 6(l)(1)(A). RESPA section 6(l)(1)(C) permits a servicer to charge a borrower for force-placed insurance at the end of the 45-day notice period only if the servicer has not received any demonstration of hazard insurance coverage during the 45-day notice period.

Legal authority. The Bureau proposes to implement RESPA section 6(l)(1)(A)–(C), pursuant to its authority under RESPA section 6(j)(3) to establish any requirements necessary to carry out section 6 of RESPA by adding new § 1024.37(c)(1) to Regulation X. The Bureau has additional authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

Proposed § 1024.37(c)(1), in implementing RESPA section 6(l)(1)(A)–(C), states that a servicer may not charge a borrower for force-placed insurance unless: (1) The servicer delivers to the borrower or places in the mail a written notice with the disclosures set forth in proposed § 1024.37(c)(2) at least 45 days before the premium charge or any fee is assessed; (2) the servicer delivers to the borrower or places in the mail a written notice in accordance with § 1024.37(d)(1); and (3) during the 45-day notice period, the servicer has not received verification that the borrower has hazard insurance in place continuously. Determining whether the borrower has hazard insurance in place continuously shall take account of any grace period provided under State or other applicable law.

Proposed 1024.37(c)(1) permits a servicer to choose between delivering the written notice to the borrower or mailing the written notice required by RESPA section 6(l)(1)(A) and 6(l)(1)(B). In some situations, a borrower who receives the written notice via courier may get it faster than a borrower who gets the notice in the mail. The Bureau believes allowing servicers to deliver the notice is appropriate to carry out the consumer protection purposes of RESPA.

Proposed comment 37(c)(1)–1 clarifies that the 45-day 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. 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). As discussed previously, virtually all mortgage loan contracts provide that lenders may charge borrowers for hazard insurance lenders obtain if borrowers fail to maintain hazard insurance coverage, and that the obligation to obtain the coverage typically falls on servicers. Accordingly, proposed comment 37(c)(1)–1 clarifies 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.

The Bureau notes, however, pursuant to proposed § 1024.37(g) discussed below, if a servicer receives verification that the borrower had hazard insurance in place during some or all of the 45-day notice period, then, if the servicer retroactively charged the borrower for force-placed insurance during the notice period, the servicer would have to refund the force-placed insurance premium charges and related fees paid by the borrower for the period of time during the notice period during which the borrower's hazard insurance was in place. The servicer would also have to remove all force-placed insurance premium charges and related fees from the borrower's account for that period of time.

Proposed comment 37(c)(1)(iii)–1 provides examples of borrowers having hazard insurance in place continuously. A borrower's prior hazard insurance might have expired on January 2. But so long as a borrower's current hazard insurance takes effect January 3, then the borrower has hazard insurance in place continuously. When there is a grace period, the servicer must take the grace period into account when determining whether the borrower has hazard insurance in place continuously. For example, a borrower's prior hazard insurance might have an expiration date of June 1, but a grace period extends the effectiveness of the borrower's prior hazard insurance to June 10. Accordingly, so long as the borrower obtains hazard insurance, effective June 11, then the borrower has hazard insurance in place continuously.

37(c)(2) Content of Notice

RESPA section 6(l)(1)(A)(i)–(iv) requires the following disclosures in the notice required pursuant to RESPA section 6(l)(1)(A) and (1)(B): (1) A reminder of the borrower's obligation to maintain hazard insurance on the property securing the federally related mortgage; (2) a statement that the servicer does not have evidence of insurance coverage of such property; (3) a clear and conspicuous statement of the procedures by which the borrower may demonstrate that the borrower already has insurance coverage; and (4) a statement that the servicer may obtain such coverage at the borrower's expense if the borrower does not provide such demonstration of the borrower's existing coverage in a timely manner.

Additionally, RESPA section 6(l)(2) requires a servicer to accept any reasonable form of written confirmation from a borrower of existing force-placed coverage, which ''shall include the existing insurance policy number along with the identity of, and contact information for the insurance company or agent, or as otherwise required by the Bureau of Consumer Financial Protection.'' The Bureau believes that it is the servicer's obligation to verify a borrower's hazard insurance status, and that RESPA section 6(l)(2) means that for purposes of verification, the servicer must accept from the borrower information that contains the borrower's existing insurance policy number, and the name, mailing address, and phone number of the borrower's insurance company or the borrower's insurance agent if the borrower provides the information to the servicer in writing. To implement RESPA section 6(l)(2), the Bureau is requiring a servicer to provide, in the notice required by proposed § 1024.37(c)(1)(i), 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 § 1027.37(c)(2) would require servicers to provide, in the notice required by proposed § 1024.37(c)(1)(i), the following disclosures: (1) The date of the notice; (2) the servicer's name and mailing address; (3) the borrower's name and mailing address; (4) a statement that requests the borrower to provide hazard insurance information for the borrower's property and identifies the property by its address; (5) 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; (6) 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; (7) 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; (8) a description of how the borrower may provide the information requested pursuant to § 1024.37(c)(2)(vii). A servicer that will only accept the requested information in writing must disclose that fact in the notice; (9) the cost of the force-placed insurance, stated as an annual premium. If the cost of the force-placed insurance is not known as of the date of the disclosure, a good faith estimate shall be disclosed and be identified as such; (10) 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; and (11) the servicer's telephone number for borrower questions. Proposed § 1024.37(c)(2) is subject to the general disclosure requirements of proposed § 1024.32, including, for example, proposed § 1024.32's clear and conspicuous requirement. As discussed previously, proposed § 1024.32 also permits servicers to combine disclosures required pursuant to subpart C of Regulation X with disclosures required by applicable law, including state law.

Proposed comment 37(c)(2)(v)–1 explains that if a borrower has purchased a homeowner's insurance policy and a separate hazard insurance policy to insure loss against hazards not covered under his or her homeowner's insurance policy, the servicer must disclose whether it is the borrower's homeowner's insurance policy or the separate hazard insurance policy for which it lacks evidence of coverage to comply with § 1024.37(c)(2)(v). As discussed previously, certain hazards are covered by policies separate from a homeowner's insurance policy. The Bureau believes that it is important to specify the type of hazard insurance that the borrower is required to maintain if the borrower has a hazard insurance policy the borrower uses to protect against loss by hazards excluded from his or her homeowner's insurance policy.

As discussed in part III.B, above, the Bureau tested the force-placed insurance disclosures required by the Dodd-Frank Act in three rounds of consumer testing. Participant response in consumer testing suggests that knowing about the higher cost of force-placed insurance could motivate borrowers to act promptly and thus avoid being charged with force-placed insurance. All participants said that they would immediately contact their insurance provider to find out whether or not their hazard insurance has expired or purchase new hazard insurance because they would not want to pay for the higher cost of force-placed insurance. Accordingly, in proposed § 1024.37(c)(2)(ix) discussed above, the Bureau is proposing to supplement the disclosure requirements of the Dodd-Frank Act by requiring servicers to disclose the cost of the force-placed insurance, stated as an annual premium. If the cost of the force-placed insurance is not known as of the date of the disclosure, a good faith estimate shall be disclosed and be identified as such.

Proposed comment 37(c)(2)(ix)–1 explains 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. 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. 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(c)(2)(ix). The Bureau believes its proposed good faith standard balances the concern that some servicers may underestimate the cost of force-placed insurance and mislead borrowers into believing the cost of the force-placed insurance to be less than it actually is and the fact that the cost may change due to legitimate reasons between the time the disclosure is made and the time the borrower is charged.

The Bureau is also proposing to supplement the disclosure requirements of the Dodd-Frank Act with the requirement, discussed above, that servicers disclose to borrowers that insurance obtained by the servicer may cost significantly more than hazard insurance obtained by the borrower and that such insurance may not provide as much coverage as hazard insurance obtained by the borrower. As discussed previously, the consequences of servicers obtaining force-placed insurance may be significant and negative for borrowers. Accordingly, the Bureau believes it is appropriate to inform borrowers about the fact that force-placed insurance may not provide as much coverage as insurance borrowers could purchase for themselves, even though force-placed insurance may be significantly more expensive.

Legal authority. The Bureau is proposing a new § 1024.37(c)(2) to Regulation X pursuant to its authority under section 6(j)(3) of RESPA to implement new section 6(l)(1)(A)(i)–(iv) and 6(l)(2) of RESPA, added by section 1463 of the Dodd-Frank Act. Section 6(j)(3) of RESPA authorizes the Bureau to establish any requirements necessary to carry out the purposes of section 6 of RESPA. The Bureau has additional authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA. The disclosures in proposed § 1024.37(c)(2) are additionally proposed pursuant to Dodd Frank Act section 1032. Consistent with this provision, the Bureau believes that proposed disclosures will ensure that the costs, benefits, and risks associated with the service that servicers provide in servicing the loan by obtaining force-placed insurance are fully, accurately, and effectively disclosed to borrowers, in light of the facts and circumstances.

37(c)(3) Format

Proposed 1024.37(c)(3) provides the disclosures set forth in § 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 believes the use of highlighting (bold text) to bring attention to important information allows borrowers to find the information quickly and efficiently. The Bureau believes it is important that borrowers can promptly identify the purpose of the notice. Additionally, the Bureau believes it is 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 believes it is 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 are important, the Bureau believes the usefulness of highlighting in focusing a borrower's attention on important information decreases if highlighting is used unsparingly.

Legal authority. As previously discussed, section 6(l)(1) of RESPA requires a servicer to provide a borrower with two notices before charging a borrower for force-placed insurance. The Bureau believes that model forms facilitate compliance with the new Dodd-Frank Act requirements concerning force-placed insurance disclosures and the Bureau's proposed supplemental disclosures. To implement section 6(l)(1) of RESPA, the Bureau is proposing a new § 1024.37(c)(3) to Regulation X pursuant to its authority under section 6(j)(3) of RESPA. Section 6(j)(3) of RESPA authorizes the Bureau to establish any requirements necessary to carry out the purposes of section 6 of RESPA. The Bureau has additional authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA. The model form MS–3(A) in appendix MS–3 is additionally proposed pursuant to Dodd-Frank Act section 1032(b).

37(d) Reminder Notice

37(d)(1) In General

As discussed above, section 6(l) of RESPA, as added by section 1463 of the Dodd-Frank Act, requires that servicers 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 the initial notice required by RESPA section 6(l)(1)(A).

Proposed § 1024.37(d)(1) implements section 6(l)(B) of RESPA by providing 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. The servicer may not deliver or place the written notice required pursuant to § 1024.37(d)(1) in the mail until 30 days after delivering to the borrower or placing in the mail the written notice set forth in § 1024.37(c)(1)(i). A servicer that receives no insurance information after delivering or placing in the mail the written notice set forth in § 1024.37(c)(1)(i) must provide the disclosures set forth in § 1024.37 (d)(2)(i). A servicer that receives insurance information after delivering or placing in the mail the written notice set forth in § 1024.37(c)(1)(i) but does not receive verification that the borrower has hazard insurance coverage continuously must provide the disclosures set forth in § 1024.37(c)(1)(ii).

Proposed comment 37(d)(1)–1 explains that 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, on June 1, the servicer places in the mail the written notice required pursuant to § 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 one written notice, with the content set forth in § 1024.37(d)(2)(i), 15 days before the servicer charges Borrower A for force-placed insurance. Take the example above, except that Borrower A provides the servicer with insurance information on June 18. But the servicer cannot verify that Borrower A has had continuous insurance coverage 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 one reminder notice, with the content set forth in § 1024.37(d)(2)(ii), 15 days before charging Borrower A for force-placed insurance it obtains for the period between June 10 and June 15.

Legal authority. The Bureau proposes to implement RESPA section 6(l)(1)(B) pursuant to its authority under RESPA section 6(j)(3) by adding new § 1024.37(d)(1) to Regulation X. Section 6(j)(3) of RESPA authorizes the Bureau to establish any requirements necessary to carry out the purposes of section 6 of RESPA. The Bureau has additional authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

37(d)(2) Content of Reminder Notice

37(d)(2)(i) Servicer Receiving No Insurance Information

Proposed § 1024.37(d)(2)(i) implements RESPA section 6(l)(1)(B). It provides that 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) must provide a reminder notice that contains the disclosures set 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 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). Because the servicer has not received any insurance information, the Bureau believes it is appropriate to require the servicer to provide the disclosures set forth in § 1024.37(c)(2)(ii) to (c)(2)(xi).

Legal authority. The Bureau proposes to implement section 6(l)(1)(B) of RESPA by adding new § 1024.37(d)(2)(i) pursuant to its authority under section 6(j)(3) of RESPA. Section 6(j)(3) of RESPA authorizes the Bureau to establish any requirements necessary to carry out the purposes of section 6 of RESPA. The Bureau has additional authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA. The disclosures in proposed § 1024.37(d)(2)(i) are additionally proposed pursuant to Dodd-Frank Act section 1032. Consistent with this provision, the Bureau believes that proposed disclosures will ensure that the costs, benefits, and risks associated with the service that servicers provide in servicing the loan by obtaining force-placed insurance are fully, accurately, and effectively disclosed to borrowers, in light of the facts and circumstances.

The Bureau notes that proposed § 1024.37(d)(2)(i) is subject to the general disclosure requirements proposed § 1024.32, including, for example, proposed § 1024.32's clear and conspicuous requirement. As discussed previously, proposed § 1024.32 also permits servicers to combine disclosures required pursuant to subpart C of Regulation X with disclosures required by applicable law, including state law.

37(d)(2)(ii) Servicer Not Receiving Verification of Continuous Coverage

Proposed § 1024.37(d)(2)(ii) provides that a servicer that 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 § 1024.37(c)(1)(i), but not verification that the borrower has hazard insurance in place continuously, 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; and (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 discussed previously, new RESPA section 6(l)(1) requirements added by section 1463 of the Dodd-Frank Act require servicers to provide advance written notice to borrowers 45 days before charging a borrower for force-placed insurance. RESPA section 6(l)(1)(B) provides that the notice required pursuant to RESPA section 6(l)(1)(B) must contain all of the information set forth in the first written notice. The Bureau believes that a borrower that provides his or her servicer with the information requested after receiving the initial written notice might become angry and confused if he or she receives a second notice containing information they previously received. However, if a borrower's servicer cannot verify that the borrower has hazard insurance in place continuously based on the information the borrower provided, the Bureau believes it benefits the borrower to receive the reminder notice required pursuant to proposed § 1024.37(d)(1) because it would be useful in helping borrowers avoid force-placed insurance charges. Accordingly, the Bureau is proposing to require servicers to disclose different information in the notice required pursuant to proposed § 1024.37(d)(1), as set forth in proposed § 1024.37(d)(2)(i) and (d)(2)(ii).

Legal authority. The Bureau proposes to implement section 6(l)(1)(B) of RESPA by adding new § 1024.37(d)(2)(ii) pursuant to its authority under section 6(j)(3) of RESPA. Section 6(j)(3) of RESPA authorizes the Bureau to establish any requirements necessary to carry out the purposes of section 6 of RESPA. The Bureau has additional authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA. The disclosures in proposed § 1024.37(d)(2)(ii) are additionally proposed pursuant to Dodd-Frank Act section 1032. Consistent with this provision, the Bureau believes that proposed disclosures will ensure that the costs, benefits, and risks associated with the service that servicers provide in servicing the mortgage loan by obtaining force-placed insurance are fully, accurately, and effectively disclosed to borrowers, in light of the facts and circumstances.

The Bureau notes that proposed § 1024.37(d)(2)(ii) is subject to the general disclosure requirements proposed § 1024.32, including, for example, proposed § 1024.32's clear and conspicuous requirement. As discussed previously, proposed § 1024.32 also permits servicers to combine disclosures required pursuant to subpart C of Regulation X with disclosures required by applicable law, including state law.

37(d)(3) Format

Proposed § 1024.37(d)(3) provides that the disclosures set forth in paragraph (d)(2)(i) of this section must be in a format substantially similar to form MS–3(B), and the disclosures set forth in paragraph (d)(2)(ii) of this section must be in a format substantially similar to form MS–3(C). The model forms are set forth in appendix MS–3. Disclosures required by § 1024.37(d)(2)(i)(B), (d)(2)(ii)(B), and (d)(2)(ii)(F) of this section must be in bold text. The Bureau discussed the use of highlight (bold text) previously. It is proposing that disclosures required by § 1024.37(d)(2)(i)(B), (d)(2)(ii)(B), and (d)(2)(ii)(F) of this section must be in bold text for reasons previously discussed.

Legal authority. As previously discussed, section 6(l)(1) of RESPA requires a servicer to provide a borrower with two notices before charging a borrower for force-placed insurance, and that the Bureau believes that model forms facilitate compliance with the new Dodd-Frank Act requirements concerning force-placed insurance disclosures and the Bureau's proposed supplemental disclosures. To implement section 6(l)(1) of RESPA, the Bureau is proposing a new § 1024.37(d)(3) to Regulation X pursuant to its authority under section 6(j)(3) of RESPA. Section 6(j)(3) of RESPA authorizes the Bureau to establish any requirements necessary to carry out the purposes of section 6 of RESPA. The Bureau has additional authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA. The forms MS–3(B) and MS–3(C) are additionally proposed under Dodd-Frank Act section 1032(b).

37(d)(4) Updating Notice With Borrower Information

Proposed § 1024.37(d)(4) provides that if a servicer receives hazard insurance information from a borrower after a 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 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. Proposed comment 37(d)(4)–1 provides that a servicer may have to prepare the written notice required pursuant to § 1024.37(d)(1) 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 insurance information received from the borrower after production has started so long as the notice was put into production within a reasonable time prior to the servicer delivering or placing the notice in the mail. The Bureau proposes to provide guidance that 5 days prior is a reasonable time. The Bureau invites comment on whether, in certain circumstances, a longer time frame is reasonable.

Legal authority. The Bureau recognizes that servicers may receive borrower's hazard insurance information after they have put the notices required pursuant to § 1024.37(d)(1) into production, and that it may be impracticable for them to stop production to update the notices. Accordingly, the Bureau is using its authority under RESPA section 6(k)(1)(E) to provide a safe harbor in proposed § 1024.37(d)(4). Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. The Bureau has additional authority under section 6(j)(3) of RESPA to establish any requirements necessary to carry out the purposes of section 6 of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

37(e) Renewal or Replacement of Force-Placed Insurance

37(e)(1) In General

Proposed § 1024.37(e)(1) provides 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. Proposed § 1024.37(e)(1) further provides that notwithstanding § 1024.37(e)(1)(i) and (e)(ii), a servicer that has renewed or replaced the existing force-placed insurance during the 45-day notice period may charge the borrower for the renewal or replacement promptly after the servicer receives verification that hazard insurance obtained by the borrower did not provide the borrower with insurance coverage for any period of time following the expiration of the existing force-placed insurance.

Proposed comment 37(e)(1)(iii)–1 illustrates when a servicer may charge a borrower for the renewal or replacement of the borrower's existing force-placed insurance before the end of the 45-day notice period. In the example, on January 2, the servicer sends the notice required by § 1024.37(e)(1). On January 12, the existing force-placed insurance the servicer had obtained on the borrower's property expires and the servicer replaces the expired force-placed insurance policy with a new force-placed insurance policy effective January 13. On February 5, the servicer receives verification that the borrower obtained hazard insurance effective January 31. The servicer may charge the borrower for force-placed insurance from January 13 to January 30, as early as February 5.

Legal authority. As discussed previously, there does not appear to be an industry standard that applies to renewal procedures for force-placed insurance. Moreover, incentives like commissions paid to servicers or their insurance affiliates may cause servicers to prefer renewing or replacing existing force-placed insurance coverage over providing borrowers with an opportunity to obtain hazard insurance. The Bureau's proposal could help a borrower avoid incurring the cost to the borrower associated his or her servicer renewing or replacing existing force-placed insurance because the proposal provides for advance notice that allows a borrower the time the borrower may need to buy hazard insurance before being charged for the cost of force-placed insurance. The Bureau proposes to add new § 1024.37(e)(1) pursuant to its authority under RESPA section 6(k)(1)(E), which authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. The Bureau has additional authority under section 6(j)(3) of RESPA to establish any requirements necessary to carry out the purposes of section 6 of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

37(e)(2) Content of Renewal Notice

Except as set forth below, proposed § 1024.37(e)(2) would require servicers to provide the disclosures set forth in proposed § 1024.37(c)(2) in the notice required by proposed § 1024.37(e)(1). The main differences between the disclosures set forth in proposed § 1024.37(c)(2) and proposed § 1024.37(e)(2) is 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 § 1024.37(e)(1) from the notice required pursuant to proposed § 1024.37(c)(1).

Paragraph 37(e)(2)(vii)

Proposed § 1024.37(e)(2)(vii) would require a servicer to set forth the cost of the force-placed insurance, stated as an annual premium. If the cost of the force-placed insurance is not known as of the date of the disclosure, a good faith estimate shall be disclosed and be identified as such. Proposed comment 37(e)(2)(vii)–1 provides 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).

Legal authority. The Bureau proposes to add new § 1024.37(e)(2) to Regulation X pursuant to its authority under section 6(k)(1)(E) of RESPA. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. As discussed above, the Bureau's proposal to require servicers to provide a written notice before charging a borrower for the renewal or replacement of existing hazard insurance could help a borrower avoid incurring the cost to the borrower associated his or her servicer renewing or replacing existing force-placed insurance. The Bureau has additional authority under section 6(j)(3) of RESPA to establish any requirements necessary to carry out the purposes of section 6 of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA. The disclosures in proposed § 1024.37(e)(2) are additionally proposed pursuant to Dodd-Frank Act section 1032. Consistent with this provision, the Bureau believes that proposed disclosures will ensure that the costs, benefits, and risks associated with the service that servicers provide in the loan by obtaining force-placed insurance to renew or replace existing force-placed insurance are fully, accurately, and effectively disclosed to borrowers, in light of the facts and circumstances.

The Bureau notes that proposed § 1024.37(e)(2) is subject to the general disclosure requirements proposed § 1024.32, including, for example, proposed § 1024.32's clear and conspicuous requirement. As discussed previously, proposed § 1024.32 also permits servicers to combine disclosures required pursuant to subpart C of Regulation X with disclosures required by applicable law, including state law.

37(e)(3) Format

Proposed § 1024.37(e)(3) provides 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. Disclosures made pursuant to § 1024.37(e)(2)(vi)(B) and 37(e)(2)(vii) must be in bold text. 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. The Bureau discussed the usefulness of highlighting (bold text) important information to borrowers previously, and is proposing that disclosures discussed above be in bold text for similar reasons.

Legal authority. The Bureau proposes to exercise its authority under RESPA section 6(k)(1)(E) to add new § 1024.37(e)(3) to Regulation X. As discussed above, the Bureau believes model forms facilitate compliance. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. The Bureau has additional authority under section 6(j)(3) of RESPA to establish any requirements necessary to carry out the purposes of section 6 of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA. The model form MS–3(D) is additionally proposed under Dodd-Frank Act section 1032(b).

37(e)(4) Compliance

Proposed § 1024.37(e)(4) provides 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). Subsequently, 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 expects borrowers should be able to retain the notice proposed in proposed § 1024.37(e)(1) over the course of a 12-months period. Additionally, the Bureau notes that because it is proposing to require a servicer to state the annual cost of force-placed insurance, the borrower would be informed of the annualized cost of the force-placed insurance. Accordingly, the Bureau does not believe that receiving more than one renewal or replacement notice every 12-month period would significantly benefit borrowers. The Bureau solicits comment on whether providing the renewal or replacement notice once during a 12-month period adequately informs borrowers about the costs, benefits, and risks associated with servicers' renewal or replacement of existing force-placed insurance.

Legal authority. The Bureau proposes to exercise its authority under RESPA sections 6(k)(1)(E) add § 1024.37(e)(4) to Regulation X. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. For reasons discussed above, the Bureau does not believe that receiving more than one renewal or replacement notice every 12-month period would significantly benefit borrowers. Section 1024.37(e)(4) is additionally proposed under section 6(j)(3) of RESPA to establish any requirements necessary to carry out the purposes of section 6 of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

37(f) Mailing the Notices

RESPA section 6(l)(1), discussed previously, requires servicers to send the notices required under RESPA section 6(l)(1)(A) and (B) by first-class mail. The Bureau proposes to implement RESPA section 6(l)(1) by adding new § 1024.37(f) to Regulation X to provide that if a servicer mails a notice required pursuant to § 1024.37(c)(1)(i), (d)(1) and (e)(1) of this section, as applicable, the servicer must use a class of mail not less than first-class mail. Although the notice required proposed § 1024.37(e)(1) is not required by statute, the Bureau believes that proposing that the same mailing requirements to any notice required pursuant to § 1024.37 facilitates compliance by promoting consistency.

Legal authority. The Bureau proposes to implement RESPA section 6(l)(1), pursuant to its authority under RESPA section 6(j)(3) to establish any requirements necessary to carry out section 6 of RESPA by adding new § 1024.37(f) to Regulation X. Section 1024.37(f) is additionally proposed pursuant to the Bureau's authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

37(g) Cancellation of Force-Placed Insurance

Section 1463 amended RESPA by adding new section 6(l)(3) to RESPA. RESPA section 6(l)(3) provides that within 15 days of receipt by a servicer of confirmation of a borrower's existing 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 charged to the borrower during any period in which the borrower's insurance and the force-placed insurance were each in effect.

Proposed § 1024.37(g) provides that within 15 days of receiving verification that the borrower has hazard insurance in place, a servicer must: (1) Cancel force-placed insurance obtained for a borrower's property; and (2) 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 and remove all force-placed insurance charges and related fees from the borrower's account for such period that the servicer has assessed to the borrower. Proposed comment 37(g)–1 provides an example of how to comply with proposed § 1024.37(g). Assume that a servicer obtains force-placed insurance, effective January 1, and the premium and related charges are paid by the borrower in monthly installments, due on the first of each month. After the borrower paid the April installment, the servicer receives insurance information from the borrower, and verifies that the borrower had obtained hazard insurance and that the insurance had been in place since March 15. To comply with § 1024.37(g), within 15 days of receiving such verification, the servicer must: (1) Cancel the force-placed insurance; (2) provide a refund for force-placed insurance premium charges and related fees paid by the borrower for the period between March 15 and April 30; and (3) remove from the borrower's account any force-placed insurance premium charges and related fees for the period after March 15 that the servicer has assessed to the borrower but the borrower has not yet paid.

Legal authority. The Bureau proposes to implement RESPA section 6(l)(3), pursuant to its authority under RESPA section 6(j)(3) to establish any requirements necessary to carry out section 6 of RESPA by adding new § 1024.37(g) to Regulation X. Section 1024.37(g) is additionally proposed pursuant to the Bureau's authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations as may be necessary to achieve the purposes of RESPA.

37(h) Limitation on Force-Placed Insurance Charges

Section 1463 of the Dodd-Frank Act amended RESPA section 6 by adding new section 6(m) to RESPA to require that all charges, apart from charges subject to State regulation as the business of insurance, 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) provides that except for charges subject to State regulation as the business of insurance and charges authorized by the FDPA, 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) provides that 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.

As previously discussed, RESPA section 6(m) provides that charges subject to State regulation as the business of insurance are not subject to RESPA 6(m)'s ''bona fide and reasonable'' requirement. Furthermore, the Bureau believes it is important to clarify that proposed § 1024.37(h) does not regulate charges authorized by the FDPA. As discussed previously in the discussion of proposed § 1024.37(a)(2)(i), certain servicers are required by the FDPA to obtain force-placed flood insurance. The FDPA provides 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 SFHA. *See* 42 U.S.C. 4012a(h). As discussed previously, the Bureau is concerned about issuing regulations that would overlap with regulations issued pursuant to the FDPA. Accordingly, the Bureau proposes to use its exemption authority pursuant to RESPA section 19(a) to exempt charges authorized by the FDPA from proposed § 1024.37(h).

Also as previously discussed, force-placed insurance is substantially more expensive than hazard insurance a borrower could obtain for himself and some servicers may be incentivized to obtain force-placed insurance even though helping a borrower to renew hazard insurance obtained by the borrower when practicable is better for the borrower and the owners and assignees of mortgage loans. The Bureau believes it is important to ensure that these 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, and is prohibited by applicable law. Accordingly, the Bureau believes its proposed definition of bona fide and reasonable charge, discussed above, is appropriate.

Legal authority. The Bureau proposes to implement RESPA section 6(m), pursuant to its authority under RESPA section 6(j)(3), to establish any requirements necessary to carry out section 6 of RESPA by adding § 1024.37(h) to Regulation X. Section 1024.37(h) is additionally proposed pursuant to the Bureau's authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions, as may be necessary to achieve the purposes of RESPA.

37(i) Relationship to Flood Disaster Protection Act of 1973

Section 1463 of the Dodd-Frank Act amended RESPA section 6 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 FDPA. Proposed § 1024.37(i) provides 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.

Legal authority. The Bureau proposes to implement RESPA section 6(l)(4), pursuant to its authority under RESPA section 6(j)(3) to establish any requirements necessary to carry out section 6 of RESPA by adding § 1024.37(i) to Regulation X. Section 1024.37(i) is additionally proposed pursuant to the Bureau's authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions, as may be necessary to achieve the purposes of RESPA.

Section 1024.38 Reasonable Information Management Policies and Procedures

Background. A servicer's obligation to maintain accurate and timely information regarding a mortgage loan account is one of the most basic servicer duties. A servicer cannot comply with its myriad obligations to investors and under applicable law, unless it maintains accurate information regarding a mortgage loan account, including accurate and timely information with respect to borrower payments. Notwithstanding these obligations, recent evaluations of mortgage servicer practices have indicated that borrowers have been harmed as a result of servicer's lacking adequate practices 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.''[109]

Further, and as discussed in detail above, 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.[110] 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.'' [111]

38(a) In General

Proposed § 1024.38(a) would require a servicer to establish reasonable policies and procedures for maintaining and managing information and documents relating to borrower mortgage loan accounts. The proposed rule would provide that a servicer meets this requirement if the servicer's policies and procedures are reasonably designed to achieve the objectives set forth in proposed § 1024.38(b) and are reasonably designed to ensure compliance with the standard requirements in proposed § 1024.38(c).

Proposed comment 38(a)–1 clarifies that a servicer may determine the specific methods by which it will implement reasonable information management policies and procedures to achieve the required objectives. Servicers have flexibility to design the operations that are reasonable in 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. This clarification is intended to provide servicers, including

[109] *Problems in Mortgage Servicing From Modification to Foreclosure: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs,* S. Hrg. 111–987, 111th Cong. 360 (2010) (statement of Daniel K. Tarullo, Board of Governors, Federal Reserve System), available at: *http://www.federalreserve.gov/newsevents/testimony/tarullo20101201a.htm*.

[110] The National Mortgage Settlement is available at: *http://www.nationalmortgagesettlement.com/*.

[111] *Failure to Recover: The State of Housing Markets, Mortgage Servicing Practices and Foreclosures: Hearings Before the House Committee on Oversight and Government Reform,* No. 112–134, 112th Cong. 17 (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.*

small servicers, flexibility to design policies and procedures that are appropriate for their servicing businesses. When this proposal was discussed with SERs during the Small Business Review Panel outreach, the SERs were supportive of a definition that provides inherent flexibility for small servicers to design policies and procedures that reflect the needs of their servicing operations.[112] Consistent with the Small Business Review Panel recommendations,[113] the Bureau requests comment on further guidance that should be included to clarify the types of policies and procedures that would be reasonable for small servicers.

Proposed § 1024.38(a)(2) provides a safe harbor, which states 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 does not engage in a pattern or practice of failing to comply with any of the standard requirements in proposed § 1024.38(c). The purpose of this provision is to establish an objectives-based test for determining if a servicer's policies and procedures are reasonable. Thus, servicers have flexibility to develop policies and procedures that a servicer determines are appropriate so long as those policies and procedures do not result in a pattern or practice of failing to achieve an enumerated objective or comply with a standard requirement. If a servicer demonstrates a pattern or practice of failing to achieve an objective or comply with a standard requirement, a servicer may violate this provision if the policies and procedures are not reasonable. Proposed comment 38(a)(1)–1 provides examples of potential pattern and practice failures by servicers. Proposed comment 38(a)(2)–1 clarifies that in the event a servicer fails to comply with the safe harbor in proposed § 1024.38(a)(2) because the servicer has a pattern or practice of failing to achieve the objectives set forth in proposed § 1024.38(b) or failing to ensure compliance with the standard requirements in proposed § 1024.38(c), a servicer may still comply with the requirements of proposed § 1024.38 if the servicer's policies and procedures were reasonably designed to achieve the objectives set forth in proposed § 1024.38(b) and to ensure compliance with the standard requirements in proposed § 1024.38(c).

A servicer's failure to achieve each of the objectives harms borrowers because such failures create the potential for adverse consequences. These may include, without limitation, imposing improper fees on borrowers, inability to reasonably evaluate loss mitigation applications 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 relies on its authority in section 6(k)(1)(E) of RESPA to establish obligations appropriate to carry out the consumer protection purposes of RESPA to propose § 1024.38(a). The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

38(b) Objectives

38(b)(1) Accessing and Providing Accurate Information

Proposed § 1024.38(b)(1) would mandate that a servicer's policies and procedures for maintaining and managing information and documents must be designed to enable the servicer to (1) provide accurate and timely disclosures to borrowers, (2) investigate, respond to, and, as appropriate, correct errors, (3) provide borrowers with requested information, (4) provide owners or assignees of mortgage loans with accurate and current information about any mortgage loans they own, and (5) submit documents or filings required for a foreclosure process that reflect accurate and current information and comply with applicable law.

For the reasons stated above in the background to proposed § 1024.38, the Bureau believes it is necessary to achieve the consumer protection purposes of RESPA that servicers implement policies and procedures to achieve the objectives set forth in proposed § 1024.38(b)(1). These objectives provide reasonable and appropriate protections for borrowers against harms resulting from actions based on improper or inaccurate servicer documentation or information. Further, the requirement in proposed § 1024.38(b)(4) ensures that owners and assignees of mortgage loans get better information reporting about the mortgage loans they own. Owners and assignees can play an important role in ensuring that servicers comply with requirements of the owner or assignee, which may inure to the benefit of consumers. For example, when a servicer improperly obtains force-placed insurance for a delinquent borrower, the costs of that insurance may push a borrower further into delinquency and ultimately foreclosure, where the costs of the more expensive policy will reduce the ultimate recovery to the owner or assignee.

The Bureau requests comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements.

Legal authority. The Bureau relies on its authority pursuant to section 6(k)(1)(E) of RESPA to require servicers to comply with any obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

38(b)(2) Evaluating Loss Mitigation Options

Proposed § 1024.38(b)(2) would mandate that a servicer's policies and procedures for maintaining and managing information and documents must be designed to enable the servicer to (1) provide accurate information to borrowers regarding loss mitigation options, (2) identify all loss mitigation options for which a borrower may be eligible, (3) provide prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option, (4) identify documents and information that a borrower is required to submit to make a loss mitigation application complete, and (5) evaluate borrower applications, and any appeals, as appropriate.

The Bureau believes that requiring servicers to have reasonable policies and procedures to maintain and manage information and documents that are designed to enable the servicer to evaluate borrower's for loss mitigation options facilitates compliance with proposed § 1024.41. Further, such policies and procedures will lead to processes that are more protective of 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.

[112] *See* Small Business Review Panel Report at 31.

[113] *Id.*

Loss mitigation options for which borrowers may be eligible. In order to meet the objectives, a servicer will have to determine, on a loan by loan basis, which loss mitigation options offered by the servicer are available to borrowers. The Bureau anticipates that for servicers that service mortgage loans held by the servicer or an affiliate in portfolio, this determination 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 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.

Servicers that service mortgage loans that are securitized through private label securities will be required to undertake more burdensome efforts to identify which, if any, loss mitigation programs offered by the servicer are available to mortgage loan borrowers whose mortgage loans are owned by the securitization trust pursuant to the terms of any servicing agreement.

Servicer failures to achieve optimal loss mitigation efforts. The Bureau believes that regulations relating to the evaluation of borrowers for loss mitigation options, including the requirements of proposed § 1024.38(b)(2) and proposed § 1024.41 are necessary in light of the current servicing industry structure.

Servicing industry compensation is not structured to incentivize servicers to engage in loss mitigation efforts. In that regard, ''the servicing industry's combination of two distinct business lines— transaction processing and default management—encourage servicers to underinvest in default management capabilities, leaving them with limited ability to mitigate losses.'' [114] Direct servicing compensation is generally fixed per loan. A servicer of a prime mortgage loan may earn 25 basis points for servicing that loan, whereas a servicer of a subprime mortgage loan may earn 50 basis points for servicing that loan.[115] The increased fee for servicing a loan with a lower credit quality should reflect the increased cost a servicer may incur to service the loans because of the higher default or cash flow advance assumptions related to those loans. However, the Bureau's outreach with consumers, servicers, GSEs, investors, and other federal regulators indicates that servicers have failed to invest in systems and processes necessary to undertake the work necessary to service mortgage loans that are not performing.

Further, mortgage servicing cash flows, including servicer expenses like advances to investors, incentivize servicers to pursue foreclosure. Servicers are required to advance payments to investors so long as a mortgage loan has not been ''charged off.'' When a servicer modifies a mortgage loan on behalf of an investor, it is sometimes unclear how the modified payment amounts should be treated and whether a servicer must continue to advance funds to the investor to make up for any deficiency between a borrower's modified payment and the scheduled payment owed to an investor.

The Bureau observes that servicers have begun to alter the manner in which they invest in infrastructure and are changing their approach to default management. Notwithstanding these developments, reasonable policies and procedures to maintain and manage information and documents that are designed to enable a servicer to evaluate loss mitigation options impose a reasonable burden on servicers that will benefit borrowers in future years as servicers transition from reacting to the current crisis to a more steady market punctuated by regional spikes in delinquencies and foreclosures. Servicers that have not invested in improving loss mitigation functions may find less incentivize 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 requests comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements.

Legal authority. The Bureau relies on its authority pursuant to section 6(k)(1)(E) of RESPA to require servicers to comply with any obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

38(b)(3) Facilitating Oversight of, and Compliance by, Service Providers

Proposed § 1024.38(b)(3) would mandate that a servicer's policies and procedures for maintaining and managing information and documents must be designed to enable the servicer to provide appropriate servicer personnel with accurate and current information reflecting actions performed by service providers, facilitate periodic reviews of service providers, and facilitate the sharing of accurate and current information among servicer personnel and service providers.

Recent evaluations of mortgage servicer practices have found that some major servicers ''did not properly structure, carefully conduct, or prudently manage their third-party vendor relationships[.]'' [116] For example, certain servicers supervised by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency did not monitor third-party vendor foreclosure law firms compliance with the servicer's standards, did not retain copies of documents maintained by third-party law firms, and did not provide formal guidance, policies, or procedures governing the selection, ongoing management, and termination of law firms used to manage foreclosures.[117] Similar failures were present in connection with servicer relationships with default management service providers and Mortgage Electronic Registration Systems, Inc. (MERS).[118] The Federal Reserve Board stated to Congress that federal regulatory agencies identified significant ''shortcomings in staff training, coordination among loan modification and foreclosure staff, and management and oversight of service providers, including legal services.'' [119] These

[114] Levitin and Twomey, 28 Yale J. on Reg. 69 (2011).

[115] Robert W. Lee, Presentation, *MBA's Accounting, Tax and Financial Analysis Conference 2008 Mortgage Servicing Rights Discussion,* available at: *http://www.mortgagebankers.org/files/Conferences/2008/2008Accounting,Tax&FinancialAnalysisConference/2008Accounting,Tax&FinancialAnalysisConferenceR.Lee12-17-08.pdf*

[116] Federal Reserve System, Office of the Comptroller of the Currency, and Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices,* at 5 (April 2011), available at: *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf.*

[117] *Id.* at 9.

[118] *Id.* at 10.

[119] *Problems in Mortgage Servicing From Modification to Foreclosure: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs,* S. Hrg. 111–987, 111th Cong. 360 (2010) (statement of Daniel K. Tarullo, Board of Governors, Federal Reserve System), available at: *http://www.federalreserve.gov/newsevents/testimony/tarullo20101201a.htm.*

failures have manifested 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 requests comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements.

Legal authority. The Bureau relies on its authority pursuant to section 6(k)(1)(E) of RESPA to require servicers to comply with any obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

38(b)(4) Facilitating Servicing Transfers

Proposed § 1024.38(b)(4) would mandate that a servicer's policies and procedures for maintaining and managing information and documents must be designed to ensure 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) provides 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 be a servicer with respect to potential recovery from a non-performing mortgage loan, as appropriate (typically called a final recovery determination).

Servicing transfers give rise to potential harms to consumers. Servicers may experience problems relating to inaccurate transfer of past payment information, failures to transfer documents provided to a transferor servicer, and inaccurate transfer of information relating to loss mitigation discussions with borrowers. Borrowers engaged in loss mitigation efforts may be transferred to transferee servicers who had no knowledge of the existence or status of the loss mitigation efforts.

The Bureau believes 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 mortgage loan borrowers. Servicers generally should expect that servicing may be sold, assigned, or transferred for certain loans they service. Servicers 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 believes it is appropriate for servicers to implement reasonable information management policies and procedures to ensure 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 requests comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements.

Legal authority. The Bureau relies on its authority pursuant to section 6(k)(1)(E) of RESPA to require servicers to comply with any obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

38(c) Standard Requirements

In addition to the objectives set forth in proposed § 1024.38(b), proposed § 1024.38(c) sets forth two standard requirements that servicers must include in the required policies and procedures. These include provisions for record retention and identification of a servicing file. With respect to record retention, proposed § 1024.38(c)(1) would require a servicer 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 was transferred to a successor servicer. The Bureau observes that proposed §§ 1024.35 and 1024.36 require 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 was transferred to a successor servicer and the Bureau believes the record retention requirement is necessary for servicer compliance with obligations set forth in §§ 1024.35 and 1024.36. Further, the Bureau observes that servicers will require accurate information for the life of the mortgage loan in order to provide accurate payoff balances to borrowers or to exercise a right to foreclose for a mortgage loan account.

The Bureau requests 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 was transferred to a successor servicer and the potential burden of this requirement.

Proposed § 1024.38(c)(2) would require a servicer to provide a borrower upon request a servicing file, which shall contain 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; a copy of the borrower's mortgage note; a copy of the borrower's deed of trust; any collection notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account; 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 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.

While document and information management practices vary among servicers, many large servicers maintain documents and information relating to a borrower's mortgage loan account in many different places and forms, including on separate electronic systems. The Bureau understands that in the absence of a required convention for storage of servicing related documents and information, servicers have difficulty identifying a central file containing 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 require servicers, as part of the reasonable information management policies and procedures to adopt practices to provide an accurate, complete, and defined ''servicing file'' to a borrower upon request and would create a commonly understood industry convention.

The Bureau requests comment regarding whether servicers should be required to adopt reasonable information management policies and procedures that facilitate providing a defined servicing file to a borrower upon request. The Bureau requests comment on the burden of adopting this requirement. Further, the Bureau requests comment regarding whether the Bureau has 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.

Legal authority. The Bureau relies on its authority pursuant to section 6(k)(1)(E) of RESPA to require servicers to comply with any obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under 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.

Section 1024.39 Early Intervention Requirements for Certain Borrowers

Background. How a servicer manages a borrower's delinquency plays a significant role in whether the borrower cures the delinquency or ends up in foreclosure.[120] However, for a variety of reasons, servicers have not been consistent in managing delinquent accounts to provide borrowers with an opportunity to avoid foreclosure. At the outset of the recent financial crisis, many servicers had not developed the institutional capacity to manage delinquent accounts.[121] While servicers have gained some experience managing loss mitigation programs, incentives remain that may discourage servicers from addressing a delinquency quickly, and in some cases may even cause them to favor foreclosure.[122]

For their part, delinquent borrowers may not make contact with servicers to discuss their options because they may be unaware that they have options [123] or that their servicer is able to assist them.[124] As a result of these impediments to borrower-servicer communication, many borrowers are not informed of their options to avoid foreclosure at the early stages of a delinquency, when it can be most critical for them to reach out. There is significant risk to consumers as a result of this delay because the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure.[125]

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.[126] However, there are currently no uniform minimum national standards for all servicers of federally related mortgage loans. In order to ensure that servicers are providing delinquent borrowers with information about their options at the early stages of delinquency, the Bureau is proposing to establish minimum early intervention requirements under RESPA.

Proposed section 1024.39 would require servicers to provide delinquent borrowers with two notices. First, proposed § 1024.39(a), would require 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 be required to take this action 30 days after the payment due date, unless the borrower satisfies the payment during that period. Second, proposed § 1024.39(b) would require 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. The servicer would be required to provide the written notice not later than 40 days after the payment due date, unless the borrower satisfies the payment during that period. These two notices are designed primarily to encourage delinquent borrowers to work with their servicer to identify their options for avoiding foreclosure. The Bureau recognizes that not all delinquent borrowers who receive these notices may respond to the servicer and pursue available loss mitigation options. However, the Bureau believes that the notices will ensure, at a minimum, that all borrowers have an opportunity to do so at the early stages of a delinquency.

39(a) Oral Notice

If a borrower is late in making a payment sufficient to cover principal,

[120] *See* Diane Thompson, *Foreclosure 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 (Nov. 2, 2010); Michael A. Stegman *et al., Preventative Servicing is Good for Business and Affordable Homeownership Policy,* 18 Housing Pol'y Debate 243, 274 (2007).

[121] *See, e.g., The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Housing, Transportation, and Community Affairs of the Senate Comm. on Banking and Urban Affairs,* S. Hrg. 112–139, 112th Cong. 122 (2011) (statement of Laurie Goodman).

[122] *See, e.g., The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Housing, Transportation, and Community Affairs of the Senate Comm. on Banking and Urban Affairs,* S. Hrg. 112–139, 112th Cong. 72–73 (2011) (statement of Diane Thompson); *see generally* Thompson, 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/Servicing Guide, Volume 2, Ch. 65.42 (2012); Making Home Affordable Program Handbook, v3.4, at 106 (December 15, 2011). Through this rulemaking, the Bureau is proposing to make early intervention a uniform minimum national standard and part of established servicer practice.

[123] *See, e.g., Are There Government Barriers to the Housing Recovery?: Hearing Before the Subcomm. on Insurance, Housing, and Community Opportunity of the House Comm. on Financial Services,* No. 112–7, 112th Cong. 50–51 (2011) (statement of Phyllis Caldwell, Chief, Homeownership Preservation Office, U.S. Dept. 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.*

[124] *See* Office of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers,* Insights (June 2007), available at: *http://www.occ.gov/topics/community-affairs/publications/insights/insights-foreclosure-prevention.pdf.*

[125] *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*, at 2–3; Laurie S. Goodman *et al., Modification Effectiveness: The Private Label Experience and Their Public Policy Implications,* Amherst Mortgage Insight (Amherst Securities Group LP, June 19, 2012), at 5–6; Stegman *et al., Preventative Servicing,* 18 Housing Pol'y Debate 245; 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, Mar. 2008).

[126] 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); HUD Handbook 4330.1 rev-5, Chapter 7; 38 CFR 36 subpart A (VA). Fannie Mae and 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, Part VII (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/Servicing Guide, Volume 2, Chapters 64–69 (2012).

interest, and, if applicable, escrow, proposed § 1024.39(a) would require the servicer to notify or make good faith efforts to notify the borrower orally of that late payment and that loss mitigation options, if applicable, may be available. The term ''loss mitigation options'' is defined in proposed § 1024.31 and is discussed in more detail above. The Bureau is proposing this requirement because, as discussed above, 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. By notifying borrowers through live contact that loss mitigation options may be available, servicers would be able to begin working with the borrower to develop appropriate relief.

Proposed § 1024.39(a) would require servicers to notify borrowers about loss mitigation options ''if applicable.'' Thus, 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. In addition, proposed comment 39(a)–1.ii explains that the servicer would not be required to describe any particular option, but instead would need only inform the borrower that loss mitigation options may be available. The Bureau is not proposing that servicers provide borrowers detailed information because not all borrowers may benefit from such a conversation at the time of this contact. However, as explained in proposed comment 39(a)–1.ii, nothing would preclude the servicer from providing more detailed information that the servicer believes would assist the borrower.

During the Small Business Panel Review process, small servicer representatives explained that they are able to distinguish between borrowers who had simply forgotten to mail in a payment from borrowers who were actually having trouble making a payment.[127] The Bureau recognizes that not all borrowers may require information about loss mitigation options in order to become current on their payments, but the Bureau also understands that not all borrowers may be forthcoming regarding the reasons for a delinquency. The Bureau is concerned that these borrowers may not learn about loss mitigation options unless the servicer indicates that help may be available at the time of the proposed oral notice. The Bureau invites additional comment on how servicers typically determine whether and at what stage a borrower should be informed that loss mitigation options may be available.

Proposed comment 39(a)–1.i explains that the oral notice would have to be made through 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. The Bureau has included this comment because the Bureau believes that servicers are likely to learn about the circumstances surrounding a borrower's delinquency through an interactive conversation and thus, for example, would be better able to help the borrower identify an appropriate loss mitigation option.

Proposed § 1024.39(a) would also require the servicer to notify or make good faith efforts to provide the oral notice that the borrower is late in making a payment. This oral notice is intended to work in concert with the written periodic statement proposed in the Bureau's 2012 TILA Mortgage Servicing Proposal, which would inform the borrower of any late fees that the borrower faces due to a delinquency. A servicer could, for example, use the oral notice to explain any late charge appearing on the periodic statement the borrower would receive. In addition, by providing this notice through live contact, a servicer could learn about the circumstances of the borrower's delinquency and the borrower's ability to self-cure without the assistance of a loss mitigation option.

Late payment. Proposed § 1024.39(a) would require the servicer to provide the 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 be required to provide the oral notice if a borrower is late only with respect to paying a late fee for a given billing cycle. The Bureau is proposing 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.

Regulation Z § 1026.36(c)(1)(ii) generally prohibits servicers from ''pyramiding'' late fees—*i.e.,* imposing a late fee or delinquency charge in connection with a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment.[128] ''Pyramiding'' late fees can result in future payments being deemed late even if they are paid in full within the required time period, thus permitting the servicer to charge additional late fees. This practice can cause an account to appear to be in default, and thus can give rise to charging excessive or unwarranted fees to borrowers who may be unable to catch up on payments.[129] However, because this practice is prohibited under Regulation Z and other regulations, the Bureau does not expect that borrowers would be likely to be pushed into foreclosure solely because of accumulated late charges if they are otherwise current on their payment. The Bureau has taken the same approach with respect to the written notice that would be required by proposed § 1024.39(b)(1). See the section-by-section analysis below of proposed § 1024.39(b)(1).

Proposed comment 39(a)–3 explains 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. Proposed comment 39(a)–3 contains a cross-reference to proposed comment 39(a)–4, which, as discussed in more detail below, addresses situations in which the borrower satisfies the payment during the 30-day period.

The Bureau recognizes that 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, proposed § 1024.39(a) provides that if the borrower fully satisfies the payment before the end of the 30-day period, the servicer would not be required to provide the notice under proposed § 1024.39(a). Proposed comment 39(a)–4 explains that a servicer would not be required to notify or make good faith efforts to notify a borrower unless the

[127] *See* Small Business Review Panel Report at 25.

[128] The Bureau's 2012 TILA Mortgage Servicing Proposal would redesignate this provision as § 1026.36(c)(2).

[129] *See* 73 FR 44522, 44569 (July 30, 2008).

borrower remains late in making a payment during the 30-day period after the payment due date. To illustrate, proposed comment 39(a)–4 provides an example in which a borrower is initially overdue on a payment due January 1 but satisfies the payment on January 20. In this case, the servicer would not be required to notify or make good faith efforts to notify the borrower by January 31.

Proposed comment 39(a)–6 clarifies that a servicer would not be required under § 1024.39(a) to notify 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 is proposing this clarification because the Bureau believes it would be unnecessary for a servicer to notify a borrower of a previously missed payment if the borrower is performing under a loss mitigation option designed to cure that delinquency.

30-Day period. Proposed § 1024.39(a) would require servicers to provide the oral notice not later than 30 days after a payment due date. In developing the proposed 30-day time period, the Bureau sought to harmonize the timing of the oral notice with the timing of the periodic statement under the Bureau's 2012 TILA Mortgage Servicing Proposal, as noted above. During the Small Business Review Panel process, some small servicer representatives expressed concern that those servicing loans for agencies with more restrictive timeframes and collection requirements would incur costs if they had to meet duplicative requirements.[130] To address this concern, the Bureau is proposing an outer bound timeframe for servicers to comply with the proposed oral notice. In particular, the Bureau sought to harmonize the timing of the oral notice with existing early intervention standards established by the GSEs, FHA, and VA so that servicers already complying with those standards that meet the Bureau's proposed requirements could comply with proposed § 1024.39.

Fannie Mae and Freddie Mac generally recommend that servicers initiate phone calls for borrowers who have missed a payment by the 16th day after a payment due date.[131] Similarly, HUD generally requires that servicers of FHA loans take ''prompt action'' to collect on delinquent loans.[132] Although servicers may satisfy the ''prompt action'' requirement through a variety of means, HUD recommends that servicers that choose to contact borrowers by telephone begin efforts by the 17th day of a borrower's delinquency and complete them by the end of the month.[133] Servicers of VA loans are generally required to commence efforts to contact borrowers by phone concurrent with sending a written delinquency notice by the 20th day of a borrower's delinquency.[134]

In order to provide servicers with flexibility in contacting borrowers who may have different default risk profiles, the Bureau's proposal would provide servicers with discretion to make the contact at any time during the 30-day period. Thus, servicers who are already providing an oral notice with the information required in proposed § 1024.39(a) sooner than 30 days after a missed payment would be in compliance with the Bureau's proposal. Although some servicers may choose to contact borrowers at a high risk of default within several days after a borrower misses a payment due date,[135] there are drawbacks to requiring servicers to contact all borrowers too soon. Borrowers may not think of themselves as being delinquent until after the expiration of a grace period, which may occur on the 10th or the 15th of the month, and they may consider contact by the servicer before the grace period unwarranted. As noted above, 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. The Bureau believes these borrowers frequently would be able to self-cure within 30 days of a missed payment.[136]

At the time the Bureau proposed its early intervention requirements for the Small Business Panel, the Bureau considered requiring servicers to contact a delinquent borrower 45 days after the borrower misses a payment.[137] The Bureau is not proposing a 45-day period as the deadline for the oral notice because the Bureau is concerned that allowing servicers to wait this long after a borrower misses a payment to provide initial notice of loss mitigation options may not afford the borrower sufficient time to consider and pursue loss mitigation options. In addition, by 45 days after a payment due date, a borrower may have become late on a second missed payment. The Bureau is concerned that delaying the time in which a servicer must make initial live contact with the borrower may make it more difficult for borrowers to cure their delinquency.

Moreover, based on feedback received from small servicer representatives during the Small Business Panel Review process, the Bureau does not believe a 30-day deadline for the proposed oral notice will present a significant burden. During the Small Business Panel Review process, small servicer representatives explained that they are often in touch with delinquent borrowers well before the 45-day period initially considered by the Bureau,[138] and often within the first ten days of a delinquency.[139] Based on this feedback, the Bureau believe that, with respect to the timeframe in which the Bureau is proposing for servicers to make initial contact,[140] a 30-day deadline for the oral notice would not require small servicers to change their early intervention practices.

The Bureau invites comment on whether the proposed 30-day time period provides borrowers with adequate notice of loss mitigation options while providing servicers

[130] *See* appendix A of the Small Business Review Panel Report.

[131] Freddie Mac recommends servicers contact borrowers within 3 days of a missed payment, unless the servicers uses a behavior modeling tool that would support an alternate approach. Fannie Mae recommends servicers contact ''high risk'' borrowers within 3 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, Part VII (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.

[132] 24 CFR 203.600.

[133] *See* HUD Handbook 4330.1 rev-5, 7–7(A).

[134] Servicers of VA loans must have collection procedures that include ''An effort, concurrent with the written delinquency notice [mailed no later than the 20th day of delinquency], to establish contact with the borrower(s) by telephone. When talking with the borrower(s), the holder should attempt to determine why payment was not made and emphasize the importance of remitting loan installments as they come due.'' 38 CFR 36.4278(g)(i) and (ii).

[135] For example, the GSEs recommend that servicers begin calling borrowers considered to be at a high risk of default within three days of a missed payment. *See* Fannie Mae Single-Family Servicing Guide, Part VII (2012); Fannie Mae, Outbound Call Attempts Guidelines (Oct. 1, 2011), available at: *https://www.efanniemae.com/home/index.jsp*; Freddie Mac Single-Family Seller/Servicing Guide, Volume 2, Ch. 64.5 (2012).

[136] *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, Mar. 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'').

[137] *See* Small Business Review Panel Report at 12.

[138] *Id.* at 24 and at appendix A.

[139] *Id.* at 25.

[140] Small servicers, however, did express concerns about the written early intervention notice, as discussed more in the section-by-section analysis of proposed § 1024.39(b) below.

sufficient flexibility in managing delinquent borrowers with different risk profiles. The Bureau also invites comment on whether the 30-day requirement would pose a substantial conflict with existing servicer practices. The Bureau invites comment on whether servicers should provide the oral notice by some deadline before or after the proposed 30-day period.

Borrower contacts the servicer about a late payment. To account for situations in which a borrower proactively contacts the servicer about a late payment, proposed comment 39(a)–5 explains 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 recognizes that borrowers may contact the servicer proactively to explain that the borrower expects to become overdue on a payment or to acknowledge an ongoing delinquency. In such cases, it would not be necessary for the servicer to notify the borrower of the delinquency. However, the Bureau believes that borrowers who contact the servicer proactively would benefit from knowing about loss mitigation options for the reasons discussed above.

Proposed comment 39(a)–5.i provides two examples to clarify how servicers would comply with proposed § 1024.39(a) for borrowers who contact the servicer about a late payment. In the example in proposed comment 39(a)–5.i.A, a borrower contacts a servicer on January 25 to explain that he expects to miss a payment due February 1. The borrower satisfies the payment on February 8 and the servicer had not yet notified or made good faith efforts to notify the borrower that loss mitigation options may be available. In this case, the servicer would not be required to notify or make good faith efforts to notify the borrower that loss mitigation options may be available during the 30 days after February 1 because the borrower was able to satisfy the payment within the 30-day period after the payment due date. The proposed comment includes a cross-reference to proposed comment 39(a)–4, which addresses situations in which the borrower satisfies the payment within the 30-day period. The Bureau has included this example because many borrowers are only delinquent for short periods and may be able to self-cure within 30 days after a payment due date. In these cases, the Bureau does not believe it would be necessary to explain that loss mitigation options may be available.

In the example in proposed comment 39(a)–5.i.B, the borrower in the example at proposed comment 39(a)–5.i.A subsequently misses a payment due March 1. However, the borrower does not contact the servicer to explain the March 1 missed payment and the borrower remains late on that payment during the 30 days after March 1. In this case, not later than 30 days after March 1, the servicer would be required to notify or make good faith efforts to notify the borrower orally that he is overdue on the March 1 payment and that loss mitigation options, if applicable, may be available. This comment is intended to clarify that the servicer's obligations to notify a borrower of a late payment is tied to the 30-day period commencing on the date of the late or missed payment. The servicer in the example in proposed comment 39(a)–5.i.B would be required to notify the borrower of the March 1 late payment because the borrower has not contacted the servicer about that payment.

Good faith efforts. The Bureau recognizes that servicers may not always be able to reach a borrower despite the servicer's good faith efforts to make contact. Thus, under proposed § 1024.39(a), if a borrower is late in making a payment, not later than 30 days after the payment due date, the servicer would be required to notify or ''make good faith efforts to notify'' the borrower. Proposed § 1024.39(a) also provides 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. Proposed comment 39(a)–2 clarifies 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 proposed comment also explains that a servicer attempting to reach the borrower by telephone should make the first call not later than the 28 days after the payment due date, in order to make three phone call attempts by the 30th day, because each phone call would be required to occur on a separate day, assuming the first two are unsuccessful. The Bureau believes servicers attempting to contact a borrower by phone should be required to make several attempts because of the importance of making contact. The Bureau is proposing to define good faith efforts as requiring that each attempt by phone occur on a different day because the Bureau does not believe that contacting an absent borrower in quick succession on the same day would constitute good faith efforts.

The Bureau is proposing requirements for good faith efforts by telephone because it understands this is a common method by which servicers attempt to reach delinquent borrowers. However, this is not the only way to notify the borrower under proposed § 1024.39(a). Servicers may also provide the oral notice through a live, in-person meeting. The Bureau is interested in whether there are forms of communication other than oral contact that would promote a dialogue between the borrower and the servicer regarding the borrower's delinquency and any appropriate loss mitigation options. For example, the Bureau invites comment on whether text messages or email are as or more effective in communicating with a delinquent borrower and, if so, whether such communications should be required to meet any particular standards to satisfy a good faith effort.

Legal authority. As discussed above, the Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As set forth above, the Bureau has determined that providing borrowers with timely information about loss mitigation options and encouraging servicers to work with borrowers to identify any appropriate loss mitigation options are necessary to provide borrowers a meaningful opportunity to avoid foreclosure. Proposed § 1024.39(a) would provide borrowers information about their options by requiring servicers to notify or make good faith efforts to notify borrowers that loss mitigation options, if applicable, may be available to assist them. Accordingly, the Bureau proposes to implement proposed § 1024.39(a) pursuant to its authority under section 6(k)(1)(E) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA 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 consumer protection purposes of RESPA.

39(b) Written Notice

39(b)(1) In General

Proposed § 1024.39(b)(1) would require the servicer 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. This notice would be required to be provided not later than 40 days after the payment due date. The proposed content requirements are discussed in more detail below in the discussion of proposed § 1024.39(b)(2).

Proposed comment 39(b)(1)–1 explains 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 proposed § 1024.39(a). The Bureau is proposing to require a written disclosure because borrowers may be unable to adequately assess and recall detailed information provided orally. 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.

Based on feedback received during the Small Business Review Panel outreach, the Bureau understands that some small servicers may not provide a written notice to delinquent borrowers.[141] The Bureau recognizes that not all servicers may provide written information to borrowers because each borrower may present unique situations. However, as discussed in more detail below, the Bureau believes borrowers would benefit from receiving written information about loss mitigation options, if applicable, and the foreclosure process. To address concerns about requiring an overly-prescriptive written notice that may not account for the variety of situations posed by delinquent borrowers, the Bureau has proposed generally applicable minimum content requirements that can be tailored to specific situations, as discussed in more detail in the section-by-section analysis of proposed § 1024.39(b)(2) below.

In addition, during the Small Business Review Panel outreach, some small servicers indicated they may face costs in developing and providing the written notice.[142] To assist servicers in complying with the written notice, the Bureau has developed proposed model clauses, referenced in proposed § 1024.39(b)(3). The model clauses are discussed in the section-by-section analysis of appendix MS–4. The Bureau also notes that under proposed § 1024.32, discussed above, servicers would be permitted to provide the written notice to borrowers in electronic form, subject to compliance with the consent and other provisions of the E-Sign Act.

Late payment. Similar to the oral notice under proposed § 1024.39(a), proposed § 1024.39(b) would require the servicer 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 oral notice, the written notice would be required to be provided not later than 40 days after the payment due date. Proposed comment 39(b)(1)–2 includes a cross-reference to proposed comment 39(a)–3 to clarify that, for purposes of calculating when the written notice must be provided, servicers should consider a payment late in the same manner as would they would for purposes of calculating when the oral notice must be provided. Proposed comment 39(b)(1)–2 also provides an example in which a borrower misses a payment due date of January 1 and the payment remains due during the 40-day period after January 1. In this case, the servicer would be required to provide the written notice not later than 40 days after January 1—*i.e.,* by February 10.

40-Day time period. As with the oral notice, the Bureau is proposing to permit servicers to provide the written notice at any time during the 40-day period. Some servicers may choose to provide the written notice earlier for borrowers who pose a high risk of default. The Bureau is proposing a deadline that occurs after the 30-day deadline for the proposed oral notice under § 1024.39(a) to provide servicers an opportunity to tailor the written notice and other information to the borrower's individual circumstances following the oral notice. Some servicers may choose to provide the written notice prior to the oral notice. The Bureau believes servicers should retain flexibility in determining when to provide the written notice.

In addition, the Bureau has selected a 40-day time period to provide borrowers with a reasonable opportunity to cure the delinquency within ten days after servicers would be required to provide the oral notice under proposed § 1024.39(a). Accordingly, proposed comment 39(b)(1)–3 explains that a servicer would not be required to provide the written notice unless the borrower is late in paying the amount owed in full during the 40 days after the payment due date. Proposed comment 39(b)(1)–3 provides an example in which a borrower who is contacted by a servicer on January 20 regarding a missed January 1 payment later satisfies the payment by January 30. In this case, the servicer would not be required to provide the written notice 40 days after January 1—*i.e.,* by February 10. In addition, proposed comment 39(b)(1)–5 clarifies that a servicer would not be required under § 1024.39(b)(1) to notify a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment. *See* the section-by-section analysis of comment 39(a)–6 (borrower performing under a loss mitigation option) in the discussion of proposed § 1024.39(a) above.

In developing the proposed 40-day time period, the Bureau sought to harmonize the timing of the written notice with the recommended timing for the delivery of similar written notices under standards for servicers of FHA, VA, and GSE loans. 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 60th day of delinquency, although HUD recommends sending the form by the 32nd day of delinquency in order to prevent foreclosures from proceeding where avoidable.[143] 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.[144] 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,[145] although GSE servicers have additional flexibility in providing the solicitation package to certain lower-risk borrowers as late as

[141] *See* appendix A of the Small Business Review Panel Report. Other small SERs, however, that they provide some form of written notice to delinquent borrowers.

[142] *Id.*

[143] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev-5, 7–7(G).

[144] ''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).

[145] *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.

the 65th day of their delinquency.[146] The Bureau also understands that 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). Similar to the information required under section 106(c)(5) of the Housing and Urban Development Act, the written notice in proposed § 1024.39(b)(2)(vi) would include contact information for housing counselors and the borrower's State housing finance authority, although servicers would be required to provide the written notice not later than 40 days after a borrower misses a payment due date.

At the time the Bureau proposed its early intervention requirements for the Small Business Panel, the Bureau considered requiring servicers to provide delinquent borrowers with written information not later than 45 days after the borrower misses a payment.[147] The Bureau is not proposing a 45-day period for the deadline for the written notice in proposed § 1024.39(a) because, as noted above, the Bureau intended to provide borrowers with a reasonable opportunity to cure a delinquency after receiving the oral notice (which, pursuant to proposed § 1024.39(a), would be required by the 30th day of the borrower's delinquency). The Bureau is aware that some borrowers may be able to self-cure even after they become 30 days delinquent. In light of this, the Bureau invites comment on how far the deadline for the written notice could be extended to permit a borrower to self-cure, while still providing delinquent borrowers with adequate notice of loss mitigation options.

Based on feedback provided during the Small Business Review Panel outreach, the Bureau does not believe a 40-day timeframe for providing the written notice would impose a significant burden for small servicers; small servicer representatives explained that they are generally in touch with delinquent borrowers well ahead of the 45-day time period initially considered by the Bureau.[148]

During informal consultation, some commenters expressed concern that servicers may have difficulty complying with the Bureau's proposed 40-day deadline in light of existing servicer requirements. The Bureau understands that a single deadline for sending the written notice may require some servicers to change their practices with respect to certain borrowers, such as GSE servicers servicing loans for borrowers determined to be at lower risk for foreclosure. To the extent requirements proposed by Bureau overlap with standards imposed by Federal agencies, the GSEs, or others parties, the Bureau expects servicers would abide by stricter standard in order to comply with all requirements. The Bureau, however, continues to consider how it may align its requirements with best practices that help borrowers avoid foreclosure.

Some commenters recommended that the Bureau could address a compliance conflict by extending the deadline for sending the notice. The Bureau is concerned that extending the deadline for the written notice too far into a borrower's delinquency may not provide borrowers sufficient time to process loss mitigation applications before the foreclosure process begins. In addition, there is some risk that borrowers could fall further behind on their payments without knowing how to pursue loss mitigation options. The Bureau recognizes that providing the written notice to all delinquent borrowers within a 40-day period may be unnecessary for some borrowers, such as those who present a low risk of default. To mitigate this potential for unnecessary burden, the Bureau is proposing that the written notice be provided to delinquent borrowers only once every 180-day period, as discussed below in the paragraph heading, ''Frequency of the notice.'' The Bureau invites comment on whether extending the 40-day deadline for the written notice to 45 days, 65 days, or longer would provide borrowers with sufficient notice of loss mitigation options before a servicer begins the foreclosure process.

In developing the proposed 40-day deadline, the Bureau also considered whether to require servicers to provide the written notice not later than five days after a borrower contacts the servicer about the borrower's anticipated difficulty with making a payment.[149] The Bureau has not proposed this requirement but instead is proposing a single 40-day deadline in order to balance the need to provide borrowers with assistance at the early stages of a delinquency with the need to provide clear and enforceable standards. The Bureau is concerned that it may be difficult to enforce a requirement to provide the written notice based on borrowers' explaining that they may have difficulty making a payment, particularly because such a communication may be subject to interpretation. A single 40-day deadline would ensure servicers are accountable to a clear standard that avoids the question of whether borrowers had, in fact, communicated that they expect to have difficulty making payment. In addition, as previously noted, the single 40-day deadline is intended to provide servicers with flexibility to determine the most appropriate time to provide the written notice and to provide borrowers with the opportunity to self-cure. Finally, the Bureau believes that proposed § 1024.36, which would require servicers to respond to information requests, will address situations in which borrowers request information about loss mitigation and foreclosure.

Frequency of the notice. Proposed comment 39(b)(1)–4 explains 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 explains that, notwithstanding this limitation, a servicer would still be required to provide the oral notice required under § 1024.39(a) for each payment that is overdue. Proposed comment 39(b)(1)–4 provides an example in which a borrower misses a payment due March 1 and the borrower remains late on that payment during the 40 days after March 1. As would be required under § 1024.39(b)(1), the servicer provides the written disclosure 40 days after March 1—*i.e.,* by April 10. If the borrower subsequently misses another payment due April 1 and remains late on that payment during the 40 days after April 1, the servicer would not be required to provide the written notice again for the 180-day period beginning on April 10, the date the servicer last provided the written notice. However, because the borrower missed payments due on March 1 and April 1, the servicer would be required to provide the oral notice under § 1024.39(a) within the 30-day periods beginning on March 1 and April 1.

During the Small Business Panel Review outreach, a SER expressed concern about sending a written notice each month for borrowers who are consistently behind on their payments.[150] The Bureau does not

[146] The GSEs allow servicers to rely on the results of a behavioral modeling tool to evaluate a borrower's risk profile. *Id.*

[147] *See* Small Business Review Panel Report at 12.

[148] *See* Small Business Review Panel Report at 25 and at appendix A.

[149] *See* Small Business Review Panel Report at 12.

[150] *See* Small Business Review Panel Report at 25.

believe that borrowers who are consistently delinquent would benefit from receiving the same written notice every month. The Bureau expects borrowers would be able to retain the disclosure because, as discussed above, proposed § 1024.32 would require that the disclosure be provided in a form the borrower may keep. However, the Bureau does not believe servicers should only be permitted to provide the written notice once because the content in the written notice may be updated over time. The Bureau notes that providing the written disclosure once during any six-month period is generally consistent with HUD's requirements for servicers of FHA-insured loans. HUD's regulations provide that if an account is brought current and then again becomes delinquent, the ''Avoiding Foreclosure'' pamphlet must be sent again unless the beginning of the new delinquency occurs less than six months after the pamphlet was last mailed.[151] The Bureau solicits comment on whether providing the written disclosure once during any 180-day period is sufficient to provide borrowers with meaningful information.

Legal authority. As discussed above, the Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As set forth above, the Bureau has determined that providing borrowers with timely information about loss mitigation options and the foreclosure process, and encouraging servicers to work with borrowers to identify any appropriate loss mitigation options, are necessary to provide borrowers a meaningful opportunity to avoid foreclosure. Proposed § 1024.39(b)(1) sets forth the general requirement that servicers provide borrowers with a written notice about their options by requiring servicers to provide them with a written notice about loss mitigation options and the foreclosure process. Proposed § 1024.39(b)(1) also sets forth timing requirements for the written notice. Accordingly, the Bureau proposes to implement proposed paragraph 39(b)(1) pursuant to its authority under section 6(k)(1)(E) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority pursuant to section 19(a) of RESPA 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 consumer protection purposes of RESPA.

39(b)(2) Content of the Written Notice

Proposed § 1024.39(b)(2) sets 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, the servicer would be 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, the servicer would be required, if applicable, to include a statement providing a brief description of examples 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 require the servicer 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) would also require servicers to provide an estimate for when the servicer may start the foreclosure process. This estimate would be required to be expressed in a number of days from the date of a missed payment. Finally, proposed § 1024.39(b)(iv) would require 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.

The Bureau recognizes that some of the proposed content may not appear on forms currently used by servicers. For example, the estimated foreclosure timeline in proposed § 1024.39(b)(3)(v), does not appear on the HUD ''Avoiding Foreclosure'' brochure that servicers of FHA loans are required to send by end of the second month of a borrower's delinquency.[152] Additionally, during the Small Business Panel Review outreach, SERs expressed concern that the information contained in the written notice may differ from written information they currently provide to delinquent borrowers.[153] Small servicers representatives were generally concerned that overly-prescriptive early intervention requirements would interfere with ''high-touch'' engagement with delinquent borrowers, which they explained was frequently tailored to borrowers' particular circumstances; thus, the Small Business Review Panel recommended that the Bureau consider flexible early intervention requirements for small servicers in light of their existing practices.[154]

To accommodate existing servicer requirements and practices, proposed comment 39(b)(2)–1 explains that a servicer may provide additional information beyond the proposed content requirements that the servicer determines would be beneficial to the borrower. In addition, proposed comment 39(b)(2)–2 explains 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 has attempted to propose a minimum amount of content in the proposed notice that will provide delinquent borrowers with helpful information. The Bureau solicits comments on whether the content requirements in proposed § 1024.39(b)(2) would pose a substantial conflict with existing disclosure standards established by Federal agencies, the GSEs, or other existing servicer practices. To the extent the proposed the written notice would provide information not currently being provided by the Federal agencies or the GSEs, the Bureau solicits comment on whether such information would be beneficial to delinquent borrowers. The Bureau solicits comment on the proposed content requirements, described below, and whether alternative or additional content would be beneficial to borrowers.

Content requirements. Proposed § 1024.39(b)(2)(i) would require the written notice to include a statement encouraging the borrower to contact the servicer. The Bureau believes that a statement informing borrowers that the servicer can provide assistance with respect to their delinquency is necessary in order to facilitate a discussion between the borrower and the servicer at the early stages of delinquency. As noted above, many borrowers do not know that their servicer can help them avoid foreclosure if they are having trouble make their monthly payments. The Bureau believes a statement encouraging the borrower to call would remove this barrier to borrower-servicer communication. The Bureau recognizes that not every loss mitigation option may be available or appropriate for every borrower. Therefore, the Bureau is not proposing to require servicers to emphasize any particular loss mitigation option over another. Accordingly,

[151] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev–5, 7–7(G).

[152] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev–5, 7–7(G).

[153] *See* Small Business Review Panel Report at 31.

[154] *Id.*

proposed comment 39(b)(2)(i)–1 explains that the servicer would not be required, for example, to specifically request the borrower to contact the servicer regarding any particular loss mitigation option.

Contact information for the servicer. To facilitate a dialogue between the servicer and the borrower, proposed § 1024.39(b)(2)(ii) would require the written notice to include the servicer's mailing address and telephone number. Pursuant to proposed § 1024.40(a), a servicer would be required to make available direct access to servicer personnel for assistance with curing a delinquency or avoiding a delinquency, default, or foreclosure for any borrower whom a servicer is required to notify that loss mitigation options may be available under proposed § 1024.39(a). Thus, proposed comment 39(b)(2)(ii)–1 explains that, if applicable, a servicer should provide contact information that would put a borrower in touch with servicer personnel under proposed § 1024.40.

Brief description of loss mitigation options. Proposed § 1024.39(b)(2)(iii) would require that the written notice include a statement, if applicable, providing a brief description of examples of loss mitigation options that may be available from the servicer. Proposed comment 39(b)(2)(iii)–1 explains that proposed § 1024.39(b)(2)(iii) does not mandate that a specific number of examples be disclosed, but explains 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. The Bureau is not proposing a minimum number of examples because of the difficulty in identifying a minimum number given the variety of loss mitigation options offered by servicers.

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.[155] However, the Bureau is not proposing that servicers list all of the loss mitigation options they offer because the Bureau is concerned that servicers may have difficulty providing an accurate disclosure if the number of loss mitigation options they offer changes over time. In addition, the Bureau is concerned that a lengthy written notice would undermine the intended effect of encouraging borrowers to contact their servicer to discuss their options. To address the limitation of providing borrowers with information about every option, the Bureau is proposing that the written notice contain contact information for housing counselors and the borrower's State housing finance authority. Housing counselors and State housing finance authorities may be able to provide the borrowers with information about other loss mitigation options that may not be listed on the written notice.

Proposed comment 39(b)(2)(iii)–1 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 the listed options. Different loss mitigation options may be available to borrowers depending on the borrower's qualifications or other factors. To avoid confusing borrowers, the Bureau believes servicers should be able to clarify that not all of the enumerated loss mitigation options will necessarily be available.

Proposed comment 39(b)(2)(iii)–2 explains that an example of loss mitigation option may be described in one or more sentences. Proposed comment 39(b)(2)(iii)–2 also explains 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. For example, if a servicer provides several loan modification programs, it may simply provide a generic description of a loan modification. The Bureau recognizes that loss mitigation options are complex and providing comprehensive explanations to borrowers about each option may overwhelm a delinquent borrower with information. Thus, the Bureau does not believe that borrowers would benefit from a disclosure with voluminous detail at the early stage of exploring the options. Instead, the Bureau believes that servicers should provide borrowers with a brief explanation and encourage the borrower to contact the servicer to discuss whether any options may be appropriate. The Bureau solicits comment on whether the level of detail that would be required to describe loss mitigation options would be helpful to delinquent borrowers, and if more detail would be valuable, what specific information should be required.

Explanation of how the borrower may apply for loss mitigation options. Proposed § 1024.39(b)(2)(iv) would require 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 explains 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.''

Proposed comment 39(b)(2)(iv)–1 explains 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 provides that servicers may supplement the written notice with a loss mitigation application form. At the time the Bureau proposed its early intervention requirements for the Small Business 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.[156] However, the Bureau is not proposing to require servicers to provide this level of detail in order to comply with proposed § 1024.39(b)(2)(iv). Each loss mitigation option may have its own specific documentation requirements and deadlines, and servicers may be unable to provide comprehensive application instructions generally applicable to all options. Additionally, because the Bureau is proposing that servicers only provide examples of loss mitigation options in the written notice, detailed instructions for only the listed options may not be useful for all borrowers.

Foreclosure statement. Proposed § 1024.39(b)(2)(v) would require 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) would also require that the notice include an estimate of how many days after a missed payment the servicer makes the referral to foreclosure. Proposed comment 39(b)(2)(v)–1 clarifies 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

[155] *See* appendix C of the Small Business Review Panel Report.

[156] *See* appendix C of the Small Business Review Panel Report.

by the Servicemembers Civil Relief Act (50 U.S.C. App. 501 *et seq.*), and the requirements of the owner or assignee of the borrower's loan. Proposed comment 39(b)(2)(v)–2 clarifies 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 explains that the servicer may provide its estimate as a range of days.

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.[157] The Bureau believes borrowers would benefit from receiving information about the foreclosure process at the same time the borrower receives information about loss mitigation options. In order for borrowers to understand the choices they face at the early stages of delinquency, the Bureau believes they would benefit from understanding what foreclosure is and approximately when it may begin at the same time that they receive information about loss mitigation options. The Bureau invites comment on this expectation and whether borrowers would benefit from receiving information about foreclosure after servicers provide information about loss mitigation options.

In addition, the Bureau is not proposing that servicers provide detailed information about foreclosure because the Bureau recognizes that foreclosure processes are complex and vary by jurisdiction. The Bureau questions whether borrowers are likely to benefit from detailed information, particularly if they are experiencing financial distress. Nonetheless, the Bureau believes that borrowers should be informed about foreclosure to some degree. The Bureau invites comment on whether borrowers would benefit from knowing when the servicer may begin the foreclosure process and whether servicers anticipate difficulty complying with this requirement.

Contact information for housing counselors and State housing finance authorities. Proposed § 1024.39(b)(vi) would require 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.[158] The Bureau is proposing to include information about housing counselors to provide delinquent borrowers with additional resources to understand their loss mitigation options. The Bureau is proposing 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.[159]

The Bureau is proposing to require that servicers include housing counselor contact information because borrowers may be more willing to contact a housing counselor than their servicer to discuss their options.[160] In addition, a housing counselor could also provide a borrower with additional information about loss mitigation options that a servicer may not have listed on the written notice. However, distressed borrowers may be unaware that they can talk to a housing counselor.[161] The Bureau believes that including housing counseling contact information on the written notice will assist borrowers in learning more about their options and, in turn, help them engage in a constructive dialogue with their servicer.

On July 9, 2012, the Bureau released proposed rules to implement Dodd-Frank Act requirements expanding protections for ''high-cost'' mortgage loans under HOEPA, including a requirement that borrowers receive housing counseling (2012 HOEPA Proposal).[162] The 2012 HOEPA Proposal also proposed to implement other homeownership-counseling-related requirements that are not amendments to HOEPA, including a proposed amendment to Regulation X that lenders provide a list of five homeownership counselors or counseling organizations to applicants for a federally related mortgage loan.[163]

In connection with the written notice for delinquent borrowers, however, the Bureau is not proposing to require 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. During informal outreach, some commenters observed that delinquent borrowers may be confused by being directed to contact several different parties in the proposed § 1024.39(b) written notice—the servicer, housing counselors, and the State housing finance authority. As previously noted, the Bureau believes that delinquent borrowers would benefit from knowing how to access housing counselors because they may be more comfortable discussing their options with a third-party. However, the Bureau also understands that there is a benefit to providing distressed borrowers with a clear and concise notice. Providing contact information to access a list of counselors and counseling organizations would reduce the likelihood of information overload while still providing borrowers with access to assistance.

In addition to information about accessing housing counselors, the Bureau is proposing to require that the proposed § 1024.39(b) written notice include contact information for the State housing finance authority located in the State in which the property is located. The Bureau is proposing this because the Bureau believes borrowers are likely to benefit from knowing how to contact their State housing finance authority in the context of receiving information from their servicer about loss mitigation options. The Bureau is proposing that the § 1024.39(b) written notice include contact information for the State

[157] *See* Small Business Review Panel Report at 31.

[158] At the time of publishing, the Bureau list was not yet available and the HUD list was available at *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm* (HUD Approved Housing Counseling Agencies).

[159] *See* proposed Regulation Z §§ 1026.20(d) and 1026.41(d)(7) in the Bureau's 2012 TILA Mortgage Servicing Proposal.

[160] Some servicers have found that borrowers may trust independent counseling agencies more than they trust servicers. *See* OCC, *Foreclosure Prevention: Improving Contact with Borrowers,* at 6 (June 2007).

[161] *See* Freddie Mac, *Foreclosure Avoidance Research* (2005).

[162] *See* 2012 HOEPA Proposal, available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf*, at 29–35.

[163] The list provided by the lender pursuant to proposed requirement in the 2012 HOEPA Proposal would include only homeownership counselors or counseling organizations from either the most current list of homeownership counselors or counseling organizations made available by the Bureau, or the most current list maintained by HUD of homeownership counselors or counseling organizations certified by HUD, or otherwise approved by HUD. The 2012 HOEPA Proposal proposed that the list include five homeownership counselors or counseling organizations located in the zip code of the loan applicant's current address, or, if there are not the requisite five counselors or counseling organizations in that zip code, then counselors or organizations within the zip code or zip codes closest to the loan applicant's current address. To facilitate compliance with the proposed list requirement, the Bureau 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. *See* 2012 HOEPA Proposal at 31–32 (discussing proposed Regulation X § 1024.20(a)).

housing finance authority for the State in which the borrower's property is located. The proposed § 1024.39(b) written notice would be required for delinquent borrowers of federally related mortgages, which are not limited to loans secured by the borrower's principal dwelling. Thus, it is possible that the property securing the federally related mortgage may be located in a different state than the state in which the borrower resides. Accordingly, borrowers who are delinquent with respect to a federally related mortgage secured by a non-residential property may benefit from knowing how to access the State housing finance authority for the State in which the property is located, rather than the State in which the borrower resides.

The Bureau notes that the ARM initial interest rate adjustment notification in the 2012 TILA Mortgage Servicing Proposal would require the contact information for the state housing finance authority for the state *in which the consumer resides* (as opposed to the State in which the property is located).[164] While the Bureau expects the State in which the property is located will most often be the State where the consumer resides, there may be circumstances in which that is not the case. Additionally, the Bureau understands that a difference in requirements for different disclosures may increase compliance costs for servicers. The Bureau invites comment on how the Bureau can best mitigate any compliance difficulties.

More generally, the Bureau solicits 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 notice at § 1024.39(b). The Bureau also solicits 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. In particular, the Bureau solicits comment on whether the proposed notice at § 1024.39(b) 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. The Bureau also invites comment on whether including the State housing finance authority would be a helpful additional resource.

Legal authority. As discussed above, the Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As set forth above, the Bureau has determined that providing borrowers with timely information about housing counselors and State housing finance authorities, information about loss mitigation options and the foreclosure process, and disclosures encouraging servicers to work with borrowers to identify any appropriate loss mitigation options, are necessary to provide borrowers a meaningful opportunity to avoid foreclosure. Proposed § 1024.39(b)(2) would provide borrowers with information about their options by setting forth the content requirements of the written notice about loss mitigation options and the foreclosure process that would be required under proposed § 1024.39(b)(1). Accordingly, the Bureau proposes to implement proposed paragraph 39(b)(2) pursuant to its authority under section 6(k)(1)(E) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority pursuant to section 19(a) of RESPA 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 consumer protection purposes of RESPA.

39(b)(3) Model Clauses

Proposed § 1024.39(b)(3) contains a reference to proposed model clauses that servicers may use to comply with the proposed written notice requirement. The proposed model clauses are contained in appendix MS–4. For more detailed discussion of the proposed model clauses, see the section-by-section analysis of appendix MS below.

Legal authority. As discussed above, the Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As set forth above, the Bureau has determined that providing borrowers with timely information about housing counselors and State housing finance authorities, information about loss mitigation options and the foreclosure process, and disclosures encouraging servicers to work with borrowers to identify any appropriate loss mitigation options, are necessary to provide borrowers a meaningful opportunity to avoid foreclosure. Proposed § 1024.39(b)(3) contains a reference to model clauses that provide borrowers with information about their options as required under paragraphs (b)(1) and (b)(2) of proposed § 1024.39. Accordingly, the Bureau proposes to implement proposed paragraph 39(b)(3) pursuant to its authority under section 6(k)(1)(E) of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority pursuant to section 19(a) of RESPA 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 consumer protection purposes of RESPA.

Small Servicers

As discussed above, through outreach with servicers and servicing industry representatives, small servicers expressed concern that compliance with the information request provisions for oral information requests would require small servicers to invest in systems and processes at substantial costs. However, many small servicers generally explained that they did not expect the Bureau's proposed early intervention requirements would impose significant burden because they were already providing early intervention for delinquent borrowers. Accordingly, the Bureau is not proposing to provide small servicers with an exemption from the proposed notice requirements under proposed § 1024.39. However, in light of the feedback provided by SERs during the Small Business Panel Review outreach, as reflected in the Panel Report of the Small Business Panel, the Bureau solicits comment on whether the Bureau should consider alternative means of compliance with proposed § 1024.39 that would provide small servicers with additional flexibility, such as by permitting small servicers to develop a more streamlined written notice under proposed § 1024.39(b).[165]

Relationship With Other Applicable Laws

The Bureau understands that servicers may be subject to State and Federal laws related to debt collection practices, such

[164] *See* proposed Regulation Z § 1026.20(d) in the Bureau's 2012 TILA Mortgage Servicing Proposal. As noted in the section-by-section analysis of the periodic statement proposed in the Bureau's 2012 TILA Mortgage Servicing Proposal, the periodic statement would require servicers to include contact information for the State housing finance authority for State in which the property is located. *Id.* at proposed § 1026.41(d)(7).

[165] *See* Small Business Review Panel Report at 31 (recommending that the Bureau consider flexible early intervention requirements for small servicers).

as the Fair Debt Collection Practices Act, 15 U.S.C. 1692. In addition, the Bankruptcy Code's automatic stay provisions generally prohibit, among other things, actions to collect, assess, or recover a claim against a debtor that arose before the debtor filed for bankruptcy. The Bureau invites comment on whether servicers may reasonably question how they could comply with Bureau's proposal in light of these laws.

Section 1024.40 Continuity of Contact

Background. As discussed in part II, above, the onset of the mortgage crisis revealed that many servicers did not have the infrastructure needed to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they faced. Reports of servicers confusing delinquent borrowers with conflicting or misleading information, losing or mishandling borrower-provided documents supporting loan modifications requests, failing to respond to borrowers' inquiries about loss mitigation in a timely manner, and transferring borrowers seeking assistance with loss mitigation from department to department made it apparent that many servicers did not provide appropriately-trained staff to assist delinquent borrowers.[166]

Regulators, both Federal and State, and the GSEs have responded by establishing staffing standards for servicers to meet when they assist delinquent borrowers. For example, in May of 2011, Treasury issued Supplemental Directive 11–04 to require qualifying servicers participating in the Making Home Affordable Program to assign potentially eligible borrowers with a member of the servicer's staff to assist such borrowers throughout their delinquency once a servicer has made a successful effort to communicate with such borrowers about resolution of their delinquency. The staff member assigned to the borrower would have primary responsibility for coordinating the servicer's actions to resolve the borrower's delinquency or default and must perform certain functions with respect to the borrower, such as providing information to the borrower about loss mitigation programs available to the borrower, explaining the requirements of the various programs, notifying a borrower of the need for additional or missing information, being knowledgeable about the borrower's mortgage loan account, and communicating the servicer's decision regarding a borrower's loan modification application.[167] The National Mortgage Settlement, discussed in part II.C, above, establishes similar staffing requirements for servicers to follow [168] As part of the GSE Servicing Alignment Initiative, Fannie Mae and Freddie Mac also established guidelines for servicer to follow when responding to delinquent borrowers to promote consistent borrower communications throughout delinquency.[169] In July 2012, the State of California amended its laws to require servicers to designate personnel on their staff to assist borrowers who are potentially eligible for a federal or proprietary loan modification application.[170]

Similar to the early intervention servicing standards discussed previously, however, there are currently no minimum uniform national standards that apply across the mortgage servicing industry. Proposed § 1024.40, discussed in detail below, would establish minimum staffing requirements that would apply to all mortgage servicers. The proposal is built around three obligations. First, servicers would be required to assign personnel to delinquent borrowers. Second, the servicers would be required to provide delinquent borrowers with live, telephonic responses to inquiries and, as applicable, assist the borrower with loss mitigation options. Third, servicers must establish policies and procedures reasonably designed to ensure that servicer personnel available to the borrower can perform an enumerated list of functions where applicable.

40(a)(1) In General

Proposed § 1024.40(a)(1) provides 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 § 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. 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)–(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 reasonable time of the transfer of servicing for the borrower's mortgage loan.

Proposed comment 40(a)–1 explains that for purposes of responding to borrower inquiries and assisting the borrower with loss mitigation options as required pursuant to § 1024.40, the term ''borrower'' includes a person the borrower has authorized to act on behalf of the borrower (a borrower's agent), which may include, for example, a housing counselor or attorney. 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)–2 clarifies 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)–3.i. explains that a servicer has discretion to determine the manner by which continuity of contact is implemented. For purposes of § 1024.40(a)(1), a servicer may assign a single person or a team of personnel to respond to a borrower. Proposed comment 40(a)–3.ii. explains 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 make be late in making a particular payment,

[166] *See, e.g., Are There Government Barriers to the Housing Market Recover?: Hearings Before the Subcomm. on Insurance, Housing, and Community Opportunity of the House Comm. on Financial Services,* No. 112–7, 112th Cong. 51 (February 16, 2011) (statement of Phyllis Caldwell, Chief, Homeownership Preservation Office, U.S. Department of the Treasury), available at *http://financialservices.house.gov/media/pdf/021611caldwell.pdf; see also* Maryland Foreclosure Task Force, Report, at 22 (January 11, 2012) (describing that consumers continue to face problems of lost documentation, expired authorizations and confusing responses to requests for loss mitigation from multiple representatives within a given servicer) (Maryland Foreclosure Task Force Report), available at: *http://www.mdhousing.org/Website/commTaskForce/documents/Foreclosure_Task_Force_Report_2012.pdf; see also,* Peter S. Goodman, *A Plan to Stem Foreclosures, Buried in a Paper Avalanche,* New York Times (June 29, 2009) (reporting on a number of borrower frustrations with the loan modification process, such as getting transferred from call center to call center and, having to repeatedly resubmit loan modification applications because the servicer could not locate them in its system).

[167] Making Home Affordable, Supplemental Directive 11–04 (May 18, 2011), available at: *https://hmpadmin.com/portal/programs/docs/hamp_servicer/sd1104.pdf.*

[168] National Mortgage Settlement, at A–21–23.

[169] *See* Freddie Mac, Servicing Alignment Initiative: Borrower Contact and Delinquency Management Practices (May 16, 2011), available at: *http://www.freddiemac.com/singlefamily/news/2011/0516_servicing.html; see also* Fannie Mae, Servicing Alignment Initiative—Overview for Fannie Mae Servicers (April 28, 2011), available at: *https://www.efanniemae.com/sf/servicing/pdf/saioverview.pdf.*

[170] *See* Cal SB–900, available at: *http://www.leginfo.ca.gov/pub/11–12/bill/sen/sb_0851–0900/sb_900_bill_20120711_chaptered.html.*

the servicer, at its election, may assign personnel to the borrower. Proposed comment 40(a)–4 explains that § 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.

The Bureau intends § 1024.40 to work with proposed § 1024.39 (Early Intervention for Requirement for Certain Borrowers) and, as discussed below, with proposed § 1024.41 (Loss Mitigation Procedures). Proposed § 1024.40(a)(1) builds on proposed § 1024.39(a). As discussed previously, the Bureau believes that the borrowers that servicers are required to provide oral notice pursuant to § 1024.39(a) are at high risk of becoming delinquent. As discussed above, common reported frustrations of delinquent borrowers include having to deal with servicers who would transfer them from department to department, getting confusing responses to loss mitigation requests from multiple representatives within a given servicer, and having to resubmit documents that they have previously submitted. By requiring servicers to assign the responsibility to assist delinquent borrowers to specific individuals, the Bureau believes that proposed § 1024.40(a)(1) would bring a more streamlined approach to how servicers communicate with delinquent borrowers. The streamlined approach would be responsive to the most common problems delinquent borrowers have reportedly faced in recent years.

Proposed § 1024.40(a)(1) allows for five days to pass before a servicer makes the assignment. A servicer may find itself faced with a high number of borrowers who are late with respect to making their mortgage payments. The Bureau believes it is appropriate to provide a servicer with some time to make the personnel assignment. Additionally, there could be situations where the servicer complies with the oral notification requirement with respect to a borrower, even though the servicer is not required to do so. For example, a borrower could miss his or her payment due on February 1. On February 29, the end of the month, payment has not been received. The servicer may choose to orally notify the borrower pursuant to proposed § 1024.39(a) on February 29. But so long as the borrower makes his payment by March 1, then pursuant to § 1024.39(a), the borrower would not be a borrower that the servicer is required to notify or make good faith efforts to notify pursuant to proposed § 1024.39(a). Hence the Bureau believes it is appropriate to provide servicers five days to make the personnel assignment. The Bureau invites comment on whether a longer time frame is appropriate.

Proposed comment 40(a)–1, discussed above, reflects that some delinquent borrowers may authorize third parties to assist them as they pursue alternatives to foreclosure. Accordingly, the Bureau seeks 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)–2, discussed above, 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 believes 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 invites comments on whether a longer time frame is appropriate.

Proposed comment 40(a)–3.i. discussed above, is consistent with the Bureau's recognition that a one-size-fits-all approach to regulating the mortgage servicing industry may not be optimal,[171] and thus servicers should be given flexibility to implement proposed § 1024.40. It also reflects the recommendation of the Small Business Review Panel that the Bureau should provide sufficient discretion such that current, successful practices with respect to assisting delinquent borrowers could continue to exist.[172] Proposed comment 40(a)–3.ii explains that 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 servicer, at its election, may assign personnel to the borrower. As discussed above in the Bureau's discussion of proposed comment 39(a)–5, many borrowers are delinquent for short periods of time and may be able to self-cure. The Bureau believes that servicers would incur significant cost if they were required to assign personnel to every borrower who contacts the servicer about a possible late payment. The Bureau further believes that the cost of assigning personnel to all such borrowers would be unduly burdensome to the servicer, while yielding little benefit to some of these borrowers. If the borrower who contacts the servicer about a possible late payment still has not made the payment within 30 days of the payment due date, then § 1024.39(a) would require the servicer to make oral contact with the borrower. As discussed previously, 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 § 1024.39(a), the servicer must assign personnel to respond to the borrower. For these reasons, the Bureau believes it is appropriate to give servicers discretion when deciding whether or not to assign personnel to a borrower whom a servicer is not required to notify pursuant to § 1024.39(a).

Proposed comment 40(a)(1)–4 explains that § 1024.40(a) does not permit or require a servicer to take any action inconsistent with applicable bankruptcy law or a court order in a bankruptcy case. During outreach, the Bureau learned that once a borrower files for bankruptcy, servicers typically 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 believes a clarification should be provided with respect to the relationship between proposed § 1024.40 and bankruptcy law. The Bureau, however, invites comment on whether servicers should be required to continue providing borrowers with access to personnel assigned to the borrowers to address borrower inquiries and loss mitigation options after borrowers have filed for bankruptcy.

Legal authority. The Bureau proposes to exercise its authority under section 6(k)(1)(E) of RESPA to add new § 1024.40(a)(1) to Regulation X. For reasons previously discussed, the Bureau believes that proposed § 1024.40(a)(1) would bring a more streamlined approach to how servicers communicate with delinquent borrowers. The streamlined approach would be responsive to the most common problems delinquent borrowers have reportedly faced in recent years. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purpose of RESPA. Accordingly, the Bureau proposes to exercise its authority under section 6(k)(1)(E) of RESPA to add new § 1024.40(a)(1) to Regulation X. The Bureau further has authority under to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, and to make such interpretations as may be necessary to

[171] *See* part II, above.

[172] Small Business Review Panel Report, at 31.

achieve the consumer protection purposes of RESPA.

40(a)(2) Access to Assigned Personnel

Proposed § 1024.40(a)(2) would require a servicer to make access to the assigned personnel available via telephone. If a borrower contacts the servicer and does not receive a live response from the assigned personnel, the borrower must be able to record his or her contact information. The servicer must respond to the borrower within a reasonable time. Proposed comment 40(a)(2)–1 provides 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 previously discussed the importance of interactive conversations with delinquent borrowers in the discussion of proposed § 1024.39(a). For similar reasons, the Bureau is requiring servicers to provide telephone access where the borrower can receive live responses. The Bureau understands that some servicers may have the capacity to engage with borrowers in person. But the Bureau believes that in-person interactions are not practicable for the majority of mortgage servicers. Accordingly, the Bureau is proposing to require live, telephonic access instead. The Bureau, however, recognizes that it is possible that when a borrower calls the servicer, the borrower may not always reach a live person. Additionally, the Bureau does not believe it is necessary to require servicers to make access to a live person available 24 hours a day, seven days a week. Accordingly, the Bureau is proposing to provide servicers with a reasonable time to respond to a borrower if the borrower does not receive a live response. As discussed above, proposed comment 40(a)(2)–1 provides 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 invites comments on whether the Bureau should provide for a longer response time.

Legal authority. The Bureau proposes to exercise its authority under section 6(k)(1)(E) of RESPA to add new § 1024.40(a)(2) to Regulation X. The Bureau has previously discussed its belief in the importance of interactive conversations with delinquent borrowers. At the same time, the Bureau recognizes that it is not always possible that when a borrower calls the servicer, the borrower reaches a live person. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purpose of RESPA. Accordingly, the Bureau proposes to exercise its authority under section 6(k)(1)(E) of RESPA to add new § 1024.40(a)(2) to Regulation X. The Bureau further has authority under section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA, and under 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.

40(b) Functions of Servicer Personnel

40(b)(1) In General

Proposed § 1024.40(b)(1) would require servicers to establish policies and procedures reasonably designed to ensure that the servicer personnel it makes available to the borrower pursuant to § 1024.40(a) perform an enumerated list of functions where applicable. The functions include: (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, 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 § 1024.41, and if applicable, what the borrower must do to appeal the servicer's denial of the borrower's application, the status of the borrower's already-submitted loss mitigation option, the circumstances under which a servicer must make a foreclosure referral, and loss mitigation deadlines the servicer has established; (2) accessing 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; (3) providing the documents in § 1024.40(b)(2)(ii)(B)–(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; 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 comment 40(b)(1)(iv) clarifies 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. The Bureau invites comment on whether the Bureau should permit servicer a longer time frame to respond.

Proposed § 1024.40(b)(1) reflects 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 high 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 Bureau believes proposed § 1024.40(b)(1) would require servicers to provide appropriately-trained staff to assist delinquent borrowers. Further, as discussed previously, § 1024.40 is intended to work together with proposed § 1024.41 as well as proposed § 1024.39. For example, under proposed § 1024.41, a servicer is required to notify a borrower if the borrower has submitted an incomplete loss mitigation application. Section § 1024.40(b)(1) addresses this duty by requiring the personnel assigned to the borrower to inform a borrower about the steps the borrower must take to complete his or her loss mitigation application.

Another example of how proposed § 1024.40(b)(1) would work with proposed § 1024.41 is that the assigned personnel must provide a borrower with accurate information about any loss mitigation deadlines established by the servicer in accordance with § 1024.41. Proposed § 1024.41 also requires servicers to evaluate borrowers for loss mitigation options if loss mitigation options is offered in the ordinary course of a servicer's business. Section 1024.40(b)(1)(iii), discussed above, would require assigned personnel to provide borrower-submitted documents in support of loss mitigation to other persons authorized to make loss mitigation evaluations. As discussed above, the Bureau believes it is appropriate to provide servicers with discretion on how they assist delinquent borrowers. The Bureau understands that for some servicers, especially servicers that have a small mortgage servicing portfolio of mortgage loans they originated, the personnel such servicers assign to work with delinquent borrowers typically have authority to evaluate borrowers' loss mitigation applications. But other servicers, especially large servicers or those whose servicing portfolios are made of loans owed by mortgage investors, the process of evaluating borrowers for loss mitigation involves multiple parties. For these servicers, the personnel they assign to a delinquent borrower to provide live, telephonic responses to the borrower's inquiries may not have the authority to evaluate the borrower's loss mitigation application. Pursuant to proposed § 1024.40(b)(1)(iii), the servicer would nonetheless have to ensure that the assigned personnel can provide borrower-submitted documentation to other persons with such authority.

As previously discussed, the Bureau recognizes that mortgage investors and other regulators have responded with requiring servicers to adopt staffing standards. The Bureau proposes the list of functions with an eye to harmonize the various staffing standards that exist. The Bureau believes proposed § 1024.40(b)(1) would complement existing standards. The Bureau also invites comments on whether the Bureau should add additional functions to its proposed list of functions.

Proposed § 1024.40(b)(1)(iv) reflects the Bureau's belief that even if servicers implement policies and procedures that would address staffing failures in mortgage servicing practices, borrowers may seek information that is temporarily unavailable to the servicer. For example, a borrower's most current payment information may not be immediately available because it takes time for the payment to post to the borrower's account. Another example is that documents a borrower has submitted to the servicer in connection with the borrower's loss mitigation application may not be immediately available because it takes the servicer time to process them. Additionally, proposed § 1024.40(b)(1)(iv) indicates the Bureau's belief that the assigned personnel may receive borrower requests that are more appropriately addressed through proposed §§ 1024.35 (Error Resolution Procedures) or 1024.36 (Requests for Information). The Bureau proposes to provide servicers with the discretion to make that determination. But the Bureau notes that even when a borrower request is addressed through proposed §§ 1024.35 or 1024.36, the personnel the servicer assigned to the borrower pursuant to proposed § 1024.40(a) would remain available to the borrower until an event described in § 1024.40(c), discussed below, occurs.

Legal authority. The Bureau proposes to exercise its authority under section (k)(1)(E) of RESPA to add new § 1024.40(b)(1) to Regulation X. As discussed above, proposed § 1024.40(b)(1) reflects 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 high 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 Bureau believes proposed § 1024.40(b)(1) would require servicers to provide appropriately-trained staff to assist delinquent borrowers. The Bureau further has authority under section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA, and under 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.

40(b)(2) Safe Harbor

Proposed § 1024.40(b)(2) provides 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. provides 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. explains 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) where applicable 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.

As discussed above, proposed § 1024.40(b)(1) would establish a new servicer obligation that requires servicers to establish policies and procedures reasonably designed to ensure that the servicer personnel it makes available to a borrower pursuant to § 1024.40(a) perform an enumerated list of functions where applicable. The Bureau recognizes that servicers, after complying with the servicer obligation (*i.e.,* established policies and procedures that are reasonably designed to ensure the personnel they make available borrowers perform the functions listed under proposed § 1024.40(b)(1)), the personnel may occasionally make a mistake and fail to perform an enumerated function. 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 in proposed § 1024.40(b)(1).

Legal authority. The Bureau relies on its authority under section 6(k)(1)(E) of RESPA to add new § 1024.40(b)(2) to Regulation X. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. As discussed above, the Bureau recognizes that even if a servicer has established policies and procedures that are reasonably designed to ensure that the servicer personnel it makes available to borrowers perform the functions listed under proposed § 1024.40(b)(1), such personnel may occasionally make a mistake. The Bureau believes that an occasional mistake is not necessarily indicative of a servicer's failure to comply with proposed § 1024.40(b)(1). The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA, and under 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.

40(c) Duration of Continuity of Contact

Proposed § 1024.40(c) provides that a servicer shall ensure that the personnel it assigns and makes available to a borrower pursuant to § 1024.40(a) remains assigned and available to the borrower until any of the following occurs: (1) The borrower refinances the mortgage loan; (2) the borrower pays off the mortgage loan; (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;

(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; or (5) if applicable, a reasonable time has passed since servicing for the borrower's mortgage loan was transferred to a transferee servicer.

Proposed comment 40(c)(3)–1 provides 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 notes the ability of a borrower to make on-time mortgage payments for three consecutive months has gained wide acceptance as an appropriate indicator of whether a previously-delinquent borrower could 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.[173] The Bureau seeks 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). Proposed comment 40(c)(5)–1 provides that for purposes of § 1024.40(c)(5), a reasonable time has passed when servicing for the borrower's mortgage loan was transferred to a transferee servicer 30 days ago. As discussed above in the discussion of proposed comment 40(a)–2, the Bureau believes 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. Accordingly, the Bureau believes that it is appropriate to require the transferor servicer to continue providing such borrower with continuity of contact for 30 days following the transfer of servicing. The Bureau, however, seeks comment on whether a longer time period is reasonable.

Legal authority. As discussed above, the Bureau is proposing to establish minimum staffing requirements with respect to how servicers assist delinquent borrowers. The Bureau believes that servicers should be required to provide delinquent borrowers with access to assigned personnel until events occur that indicate assistance is no longer needed or practicable. The events listed in proposed § 1024.40(c)(1)–(4) reflects the Bureau's belief of when assistance is no longer needed. The events listed in proposed § 1024.40(c)(5) indicates when assistance is no longer practicable. As discussed above, section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. The Bureau proposes to add new § 1024.40(c) to Regulation X pursuant to its authority under section 6(k)(1)(E) of RESPA. The Bureau further has authority under to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA. The Bureau has additional authority under 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.

40(d) Conditions Beyond a Servicer's Control

Proposed § 1024.40(d) provides 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 explains that ''conditions beyond a 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. Proposed § 1024.40(d) reflects the Bureau's belief that even if servicers implement processes that would address staffing failures that had a significant adverse impact on borrowers seeking alternatives to foreclosure, circumstances beyond a servicer's control may occasionally occur that could adversely affect a servicer's ability to provide adequate and appropriate staff to assist delinquent borrowers.

Legal authority. The Bureau proposes to use its authority under RESPA section 6(k)(1)(E) to add new § 1024.40(d) to Regulation X. Section 6(k)(1)(E) of RESPA authorizes the Bureau to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA. As discussed above, proposed § 1024.40(d) reflects the Bureau's belief that even if servicers implement processes that would address staffing failures that had a significant adverse impact on borrowers seeking alternatives to foreclosure, circumstances beyond a servicer's control may occasionally occur that could adversely affect a servicer's ability to provide adequate and appropriate staff to assist delinquent borrowers. The Bureau additionally relies on its authority under section 6(j)(3) of RESPA to establish any requirements necessary to carry out the purposes of REPSA, and under section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the purposes of RESPA.

Section 1024.41 Loss Mitigation

Background. As discussed above, there has been widespread concern among mortgage market participants, consumer advocates, and policymakers regarding servicers' performance of loss mitigation activity in connection with the mortgage market crisis. 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. For example:

• Treasury and HUD sponsored the Making Home Affordable program, which established guidelines for Federal government sponsored loss mitigation programs such as HAMP[174];

• 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[175];

• Prudential regulators, including the Board and the OCC undertook enforcement actions against major servicers, resulting in consent orders imposing requirements on servicing practices[176];

• The recent national mortgage settlement agreement imposes obligations on servicers, including on the conduct of loss mitigation evaluations[177];

• States have begun to adopt regulations relating to mortgage servicing and foreclosure processing,

[173] Making Home Affordable Program Handbook, v3.4, at 89 (December 15, 2011); *see also* Fannie Mae Single Family Servicing Guide, Ch. 6, § 602 (2012).

[174] *www.makinghomeaffordable.gov.*

[175] Federal Housing Finance Agency, Press Release: Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages (April 28, 2011), available at *http://www.fhfa.gov/webfiles/21190/SAI42811.pdf.*

[176] OCC Press Release, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (April 13, 2011), available at *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html*; Federal Reserve Board of Governors Press Release (April 13, 2011), available at *http://federalreserve.gov/newsevents/press/enforcement/20110413a.htm.*

[177] *www.nationalmortgagesettlement.com.*

including requiring evaluation of loss mitigation options.[178]

Many of these requirements have coalesced around a common set of best practices for servicing. For example, the FHFA servicing alignment initiative, the National Mortgage Settlement, and HAMP all require servicers to review loss mitigation applications within 30 days.[179] While these various initiatives are starting to bring standardization to significant portions of the market, none of them to date have set a consistent national set of procedures and expectations regarding loss mitigation procedures. The Bureau believes that because so much loss mitigation activity is ongoing, and because that activity has such potentially significant impacts on both individual consumers and the health of the larger housing market and economy, consistent uniform minimum regulations would be appropriate and useful to set borrower and servicer expectations and provide necessary consumer protections.

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 compliance by market participants; (2) mandating outcomes of loss mitigation process (implicitly raising costs to market participants of pursuing actions in violation of the mandated outcomes); or (3) providing subsidies to incentivize the desired outcomes.[180] Only options (1) and (2) were considered by the Bureau in light of the authorities available to the Bureau. Options (1) and (2) 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 example, a requirement that a servicer review a completed loss mitigation application establishes process requirements but does not impose requirements on the substance of the servicers review. 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 be net present value positive would impose an outcome on the process.

At the outset, it is worth noting that the Bureau's goal is not to achieve any particular target with respect to the number or speed of foreclosures. The Bureau's goal rather 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. For instance, a borrower should not be misled about the options available to the borrower or the steps necessary to seek evaluation for those options. Further, servicers should review complete loss mitigation applications and make appropriate decisions with respect to those submissions.

Evaluating the options available to the Bureau requires comparison across multiple dynamics, including, among others, whether the Bureau has properly identified consumer harm, whether the proposed solutions will effectively address the identified consumer harm, the risk of unintended market consequences and costs, and the appropriate scope of authorities available to the Bureau. By establishing appropriate loss mitigation procedures, the Bureau can ensure that borrowers receive information about loss mitigation options available to them and the process for applying for those options. Further, borrowers should be protected by ensuring that borrowers receive an evaluation for all options for which they may be eligible, have an opportunity to appeal decisions by the servicer regarding loan modification options, and are protected from foreclosure until the process of evaluating the borrower's complete loss mitigation application has ended.

At the same time, the Bureau is concerned that going beyond process rights to give borrowers the ability to file suit over the merits of individual loss mitigation options could have negative effects on the availability and structure of loss mitigation programs and, indeed, of mortgage credit generally. The Bureau is concerned that investors and guarantors could either eliminate loss mitigation efforts altogether or structure them as vague, formless discretionary activities rather than risk significant delays in foreclosure or incur potential liability over the structure and administration of the programs.[181] Alternatively, the prospect of delays and litigation risk might cause in a certain investors and guarantors to significantly reduce mortgage market activity, thus potentially curtailing general access to credit. The Bureau acknowledges the deep frustration and desperate circumstances that record numbers of borrowers face as they struggle to keep their loans current in this difficult economy, and believes that a solution that eliminates or severely restricts the recent increase in loss mitigation initiatives and current access to credit may not be in consumers' best interest or the best interest of the broader market and economy.

Accordingly, proposed § 1024.41 requires servicers that make loss mitigation options available to borrowers in the ordinary course of business to undertake certain duties in connection with the evaluation of borrower applications for loss mitigation options. Proposed § 1024.41 is designed to achieve three main goals: First, proposed § 1024.41 provides protections to borrowers to ensure that, to the extent a servicer offers loss mitigation options, borrowers will receive timely information about how to apply and that a complete application will be evaluated in a timely manner. Second, proposed § 1024.41 prohibits a servicer from proceeding with the end of the foreclosure process—that is, the scheduled foreclosure sale—until a borrower and a servicer have terminated discussions regarding loss mitigation options.[182] Third, proposed § 1024.41

[178] *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.

[179] *See e.g.,* National Mortgage Settlement at Appendix A, at A–26, available at *http://nationalmortgagesettlement.com*; 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).

[180] *See* Patricia A. McCoy, Barriers to Home Mortgage Modifications During the Financial Crisis, at 4 (May 31, 2012).

[181] Evidence exists that for certain investors and servicers loss mitigation activities may not actually mitigate losses from an investor's perspective when the impact across an entire portfolio is considered. Actions that impose additional costs on loss mitigation activities further incentives not to offer such programs. *See* Christopher Foote, *et al., Reducing Foreclosures: No Easy Answers* (Federal Reserve Bank of Atlanta Working Paper No. 2009–15 (May 2009), available at *http://www.frbatlanta.org/filelegacydocs/wp0915.pdf.*

[182] Although efforts to gather reliable data about the prevalence of problems resulting from proceeding with a foreclosure sale while loss mitigation discussion are ongoing, the Federal Reserve identified anecdotal evidence of these problems as far back as 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.* 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% of surveyed consumer attorneys surveyed reported an

sets timelines that are designed to be completed without requiring a suspension of the foreclosure sale date to avoid strategic use of these procedures to extend foreclosure timelines and delay investor recovery through foreclosure.

Although the proposed rule would prohibit a servicer from proceeding with a foreclosure sale while a complete and timely application for loss mitigation is pending, the proposal would not prohibit a servicer from taking other steps in the foreclosure process. The Bureau believes that addressing the problems associated with concurrent loss mitigation application and evaluation and foreclosure proceedings requires a balanced approach that considers the needs of consumers, servicers, and mortgage loan investors. This balance considers the interest of consumers in having servicers provide good faith evaluations and implementation of loss mitigation options as well as the interests of investors in obtaining timely recovery on assets for which losses cannot be mitigated consistent with investor requirements.

The Bureau believes that the proposed rule will require servicers to invest in processes to accomplish the regulatory requirements.

The Bureau notes that the steps prior to the scheduled foreclosure sale can vary by servicer, by jurisdiction, by type of proceeding, including judicial and non-judicial foreclosure. Some steps may be internal to an individual servicer, such as referring a case to a foreclosure department. The timing for other steps may be controlled by State law or court rules, which vary among jurisdictions. In some instances, there may be filing deadlines established for a particular matter. The Bureau recognizes that concerns can arise when a servicer proceeds on loss mitigation and foreclosure proceeding tracks simultaneously. At the same time, the Bureau believes that by creating obligations on servicers to provide prompt notice of what is needed to complete a loss mitigation application and prompt decisions on completed applications—and by prohibiting servicers from proceeding to a foreclosure sale while a complete and timely loss mitigation application is pending the proposed rule will address the most problematic issues posed by concurrent evaluation of loss mitigation options and foreclosure proceedings.

The Bureau notes that the protections provided in proposed § 1024.41 will be further augmented by protections in other parts of the servicing proposals that address loss mitigation issues. In proposed § 1024.39, for instance, the Bureau proposes to implement obligations on 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 proposes to require servicers to provide borrowers with contact personnel to assist the borrower with the process of applying for a loss mitigation option. Such personnel must 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 proposes to require that servicers implement policies and procedures that achieve the objective of reviewing borrowers for loss mitigation options. Finally, in proposed § 1024.35, the Bureau proposes 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 pursuant to proposed § 1024.41(g). All of these protections should be considered together and these protections, when implemented together, will have a substantial impact on reducing consumer harm.

In order to reduce burden to servicers and costs to borrowers, the Bureau has sought to maintain consistency among proposed § 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 proposed § 1024.41. That is intentional. Proposed § 1024.41 establishes a floor of minimum 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.

The Bureau requests comment on all aspects of the proposal, and, in particular, whether focusing on the provision of procedural rights would be sufficient to significantly improve the efficiency and fairness of loss mitigation processing. The Bureau seeks comment on whether there are additional appropriate measures within the authority of the Bureau, or the Federal agencies collectively, that could be taken to improve loss mitigation outcomes for all parties. The Bureau seeks comment on whether the proposed requirements strike the appropriate balance between ensuring that consumers' timely and complete applications receive fair and full consideration and ensuring predictability of outcomes for investors and guarantors. Finally, and as discussed further below, the Bureau seeks comment on whether the requirements of proposed § 1024.41 would require servicers to undertake practices that conflict with other Federal regulatory agency requirements or State law or may cause servicers to undertake practices that may reduce the value to investors or guarantors of offering loss mitigation options.[183]

41(a) Scope

Proposed § 1024.41(a) provides that the requirements in proposed § 1024.41 apply to any servicer that offers loss mitigation options in the ordinary course of business. The purpose of this provision is 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. These include servicers that participate in the HAMP program sponsored by HUD and Treasury, as well as servicers subject to investor or guarantor requirements, including requirements imposed by Fannie Mae, Freddie Mac, Ginnie Mae, private investors, or government or private guarantors of mortgage loans to evaluate loss mitigation options for non-performing mortgage loans.

Proposed comment 41(a)–1 clarifies that nothing in proposed § 1024.41 is intended to impose a duty on a servicer to offer loss mitigation options to borrowers generally or to offer or

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.*

[183] With respect to investor or guarantor requirements that do not constitute Federal or State law, such as requirements of Fannie Mae, Freddie Mac, or Ginnie Mae requirements, or requirements of federal or state agencies that serve as guarantors of mortgage loans, the Bureau observes that such entities may need to review and adjust their requirements in light of the consumer protections set forth in the proposed rules.

approve any particular borrower for a loss mitigation option. As set forth above, the Bureau does not intend to create a right for borrowers to enforce in private litigation requirements that are imposed by investors or guarantors on servicers to take steps to protect the investors or guarantors from losses that can be avoided. The Bureau believes it is appropriate to clarify in proposed comment 41(a)–1 that the rules do not impose a duty on a servicer to offer loss mitigation or to approve any particular borrower for a loss mitigation option and that the rules should not be construed to impose liability on a servicer, or any other party, for any failure to offer a loss mitigation option, so long as the servicer complies with the procedural requirements of proposed § 1024.41.

Certain servicers that do not evaluate borrowers for loss mitigation options in the ordinary course of business would not be subject to proposed § 1024.41. In proposed comment 41(a)–2, the Bureau sets forth examples of practices that should not be considered, by themselves, considered indicia that a servicer had opted to offer loss mitigation options in the ordinary course of business. For example, it is not the Bureau's intention to impose the requirements in proposed § 1024.41 on servicers that agree to limit adverse consequences to borrowers for making late payments, including by waiving late fees or declining to furnish negative information to a consumer reporting agency or on servicers that have decided to engage in a temporary or pilot program to explore the feasibility of offering certain loss mitigation options. Proposed comment 41(a)–2 clarifies that such practices, which may be the economic equivalent of a loss mitigation option, such as a forbearance plan, should not indicate by themselves that a servicer offers loss mitigation options to borrowers in the ordinary course of business.

41(b) Loss Mitigation Application

Proposed § 1024.41(b)(1) provides that a complete loss mitigation application includes all the information the servicer regularly obtains and considers in evaluating loss mitigation applications. This provision provides each servicer with flexibility to establish requirements regarding the type of information that the servicer deems necessary to determine whether a borrower is eligible for a loss mitigation option based on differing investor or guarantor guidelines.

Upon receipt of an incomplete loss mitigation application, proposed § 1024.41(b)(2) requires servicers to exercise reasonable diligence to obtain the additional information required to make a loss mitigation application complete. To that end, a servicer that receives an incomplete loss mitigation application earlier than 5 days before the timeline established for proposed § 1024.41(f) shall within a reasonable time, but in no event later than 5 days (excluding legal public holidays, Saturdays, or Sundays) provide a notice to a borrower. The notice must state that the application is incomplete, identify the additional information or documents necessary to make the application complete, and provide a deadline by which the borrower must submit the additional information or documents.

The Bureau believes it is appropriate to require that servicers provide the notice within a reasonable time, but in no event later than 5 days (excluding legal public holidays, Saturdays, or Sundays) after receiving the incomplete 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 application.[184] When a servicer receives an application more than 5 days before the deadline the servicer has established for submitting a complete application, the servicer has sufficient opportunity to review the loss mitigation application, determine the information or documents that have not been provided and provide that information to the borrower. Further, even when a loss mitigation application is submitted less than 5 days (excluding legal public holidays, Saturdays, or Sundays) before the applicable deadline, a servicer must undertake reasonable diligence to obtain the information even if the servicer is not required to provide the notice contemplated by proposed § 1024.41(b)(2).

Proposed § 1024.41(b) does not require a servicer to stop foreclosure proceedings when a borrower submits an incomplete loss mitigation application. Further, unless an incomplete loss mitigation application is made complete by the deadline established by the servicer pursuant to proposed § 1024.41(f), a servicer is not required to comply with the loss mitigation procedures for an incomplete loss mitigation application. The Bureau requests comment regarding whether servicers should be required to undertake any further obligations in connection with an incomplete or substantially complete loss mitigation application and what any further obligations should be.

41(c) Review of Loss Mitigation Applications

Proposed § 1024.41(c) states that, within 30 days of receiving a complete loss mitigation application, a servicer must evaluate the borrower for all loss mitigation options available from the servicer for which the borrower may qualify and provide the borrower with a written notice stating the servicer's determination of whether it will offer the borrower a loss mitigation option. The Bureau believes that it is appropriate to require servicers to evaluate complete loss mitigation applications within 30 days, which is an industry standard, as discussed above.

The Bureau further believes it is appropriate to require a servicer to evaluate a borrower for all loss mitigation options available from the servicer for which the borrower may qualify rather than to require 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. Currently, many investors and guarantors have established set priority orders for evaluating and offering loss mitigation options rather than requiring borrowers to select loss mitigation programs. While borrowers should not be required to select loss mitigation programs themselves for an evaluation, a consequence of ordering loss mitigation programs based on least cost to an investor is that a borrower that may qualify for a program farther down on the priority list may believe that the first option offered is the only option available to the borrower. This may lead to less effective programs, disparate outcomes for similarly situated borrowers, and longer timelines for effectuating loss mitigation options.

The Bureau has proposed that a servicer evaluate a borrower for all loss mitigation programs offered by the servicer for which the borrower may be eligible. The Bureau believes that this will ensure that all borrowers receive fair evaluations for all options available to them and will be able to identify options. Further, servicers will not be required to evaluate borrowers for any programs for which a borrower does not qualify based on eligibility criteria established by investors or guarantors. In sum, investors, guarantors, and

[184] *See United States of America et al.* v. *Bank of America Corp. et al.,* at Appendix A, at A–26, available at *http://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).

servicers retain the ability to manage loss mitigation programs to ensure that borrower eligibility and program administration is consistent with investor and guarantor requirements, while borrowers will be able to understand all potential options that may be available.

The Bureau has received feedback that a requirement that servicers evaluate borrowers for all loss mitigation programs offered by the servicer will impact servicers' ability to manage programs through priority ordering of loss mitigation options. The Bureau agrees that the proposed rules would impact the ability to manage programs through the use of a loss mitigation option priority order, as a servicer will be required to evaluate a borrower for all programs and provide a notice of the results of the evaluation for all programs. However, the Bureau believes that servicers will be able to achieve the similar controls through the use of more detailed and comprehensive evaluation criteria and that the requirement will not ultimately impair a servicer's, investor's, or guarantor's ability to manage loss mitigation programs. The requirement that a servicer consider a borrower's application for all loss mitigation programs for which a borrower may qualify is consistent with the national mortgage settlement, which 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 * * * .''[185] Further, the Bureau's proposed requirement eliminates the need for borrowers to submit multiple applications for different loss mitigation options and, thus, provides for more efficient compliance by servicers with the requirements of the rules.

Proposed comment 41(c)(1)–1 clarifies that the servicer's evaluation of a borrower for a loss mitigation option is subject to the eligibility criteria for each loss mitigation option. For example, 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, as a threshold matter is ineligible 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 just as if the eligibility criteria did not exist. Because the requirements of proposed § 1024.41 are not intended to require that a borrower have a right to a loss mitigation option, nothing in proposed § 1024.41 should be construed to prohibit a servicer from imposing any eligibility criteria the servicer (or the investor or guarantor of a mortgage loan) determines is appropriate for a loss mitigation option.

Proposed § 1024.41(c) requires servicers to notify borrowers of the outcome of the servicer's evaluation of the borrower for a loss mitigation option. Notice from the servicer provides certainty to the borrower regarding the outcome and serves as a basis for a borrower to accept, reject, or, where permitted, appeal, the servicer's determination.

The Bureau requests comment regarding whether a servicer should be required to review a borrower for all loss mitigation options for which the borrower may be eligible. The Bureau further requests comment regarding what a servicer's obligation to review a borrower's complete application for a loss mitigation option should be if the obligation is not to review for all loss mitigation options for which the borrower may be eligible.

41(d) Denial of Loan Modification Options

Proposed § 1024.41(d) imposes additional obligations on servicers that deny borrower loss mitigation applications with respect to trial or permanent loan modifications. When a servicer determines that a borrower is not eligible for a loan modification as a loss mitigation option, the written notice provided by the servicer to the borrower must state 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 must include the deadline for filing the appeal and any requirements, such as, for example, forms or documents the borrower must file in connection with the appeal process.

Because the determination that a borrower does not qualify for a loan modification option has significant consequences, the Bureau believes that borrowers should receive accurate information regarding the basis for the servicer's determination. In that regard, proposed comments 41(d)(1)–1 and 41(d)(1)–2 provide 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 believes this information can assist borrowers in providing appropriate and relevant information to servicers in connection with the appeal process. Further, these requirements are consistent with the national mortgage settlement.[186]

The Bureau requests comment regarding whether servicers should provide the basis for the servicer's determination that a borrower does not qualify for each loan modification program. The Bureau further requests comment on whether servicers should be required to provide the information set forth in proposed comments 41(d)(1)–1 and 41(d)(1)–2 regarding investor requirements and net present value tests. In addition, the Bureau requests comment regarding whether servicers should be required to provide the basis for the servicer's determination that a borrower does not qualify for each loss mitigation program, including non-loan modification programs.

41(e) Borrower Response and Performance

Proposed § 1024.41(e) sets forth standards for when a borrower is considered to have accepted or rejected a loss mitigation option offered by a servicer. Proposed § 1024.41(e) provides 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 provides 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 shall be deemed to have accepted the offer of a loss mitigation option. This presumption is consistent with the terms of the National Mortgage Settlement. The Bureau recognizes that this proposed standard would set forth a presumption with respect to the parties' intent to enter into an agreement on a loss mitigation option and requests comment regarding whether the Bureau should implement a presumption to establish when parties should be considered to have entered into an agreement on a loss mitigation option.

The Bureau further believes it is appropriate to allow a servicer that has

[185] *See* National Mortgage Settlement at Appendix A, at A–16, available at *http://nationalmortgagesettlement.com*.

[186] *See United States of America et al.* v. *Bank of America Corp. et al.,* at Appendix A, at A–27, available at *http://nationalmortgagesettlement.com*.

not received a response from a borrower to an offer of loss mitigation after 14 days to 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, State law, and Federal regulatory agency requirements.[187]

The Bureau requests comment on whether servicers should be required to allow borrowers to accept or reject offers of loss mitigation options orally, including any compliance burdens imposed as a result of any such requirement.

41(f) Deadline for Loss Mitigation Applications

Proposed § 1024.41(f) states that a servicer may set a deadline by which a borrower must submit a complete loss mitigation application, so long as any such deadline is no earlier than 90 days before a scheduled foreclosure sale. A 90-day threshold appears to set an appropriate balance. A servicer that sets a deadline for complete loss mitigation applications of 90 days before a scheduled foreclosure sale will have 30 days to review a borrower's application for a loss mitigation option, will 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, will be able to consider any timely appeal during a subsequent 30 day period, and will be able to provide the borrower with an additional 14 days to respond to any offer of a loss mitigation option after an appeal. A servicer's decision on an appeal is not itself subject to appeal and a servicer is not required to consider any further appeals after the initial appeal. Thus, with the timeline set forth, a servicer must complete the entire process within 88 days. Because a servicer has the flexibility to establish a deadline that is no earlier than 90 days before foreclosure sale, the process can be completed without rescheduling the foreclosure sale.

Comment 41(f)–1 clarifies that where a foreclosure sale has not been scheduled, or where a foreclosure sale may 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.

41(g) Prohibition on Foreclosure Sale

Proposed § 1024.41(g) provides that if a servicer receives a complete loss mitigation application by the deadline established pursuant to proposed § 1024.41(f), 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 believes it is appropriate to require that if a servicer offers loss mitigation options to borrowers in the ordinary course of business, and the borrower submits a complete application for a loss mitigation application by the deadline established by the servicer, a servicer should not proceed with a scheduled foreclosure sale until the servicer and borrower have terminated discussions regarding the loss mitigation option. The Bureau believes this point occurs when a borrower is denied for a loss mitigation option (and any appeal process has ended) or where a borrower rejects a servicer's offer of a loss mitigation option.

Further, the Bureau believes it is appropriate to suspend a scheduled 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 scheduled 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 scheduled foreclosure sale during any period where a borrower is making payments pursuant to the terms of the trial loan modification.

In terms of workflow, when a servicer receives a complete loss mitigation application, it will either offer the borrower a loss mitigation option or deny the borrower's request for a loss mitigation option. If the borrower's request is denied, the borrower may file an appeal if the denial concerns a trial or permanent loan modification. Upon reviewing the appeal, a servicer will determine to either offer the borrower a loss mitigation option or, again, to deny the borrower's request for a loss mitigation option. If the request is denied, then the servicer may proceed to a foreclosure sale. If a loss mitigation option is offered, either after the initial evaluation or after appeal, a borrower may either accept or reject the offer of the loss mitigation option. If the borrower rejects the loss mitigation option, the servicer may proceed to a foreclosure sale. If the borrower accepts the loss mitigation option, the borrower will either perform or fail to perform pursuant to the terms of the agreement on the loss mitigation option. If a borrower fails to perform pursuant to the terms of the agreement on the loss mitigation option, the servicer may proceed with the foreclosure sale.

Proposed comments 41(g)–1 and 41(g)–2 clarify the application of the borrower performance definitions with respect to short sales. Typically, a short sale 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 clarify that a borrower is 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 terms 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.

Further, a servicer's failure to suspend a scheduled foreclosure sale when a servicer has failed to comply with the requirements of proposed § 1024.41(g) is defined as a covered error in proposed § 1024.35(b)(9). A borrower will be able to assert this error and require a servicer to engage in the error resolution procedures to address this error. In order to avoid the use of this requirements, and the error resolution procedures, as a strategic tool to delay foreclosure, the Bureau has proposed § 1024.35(f)(2), which provides that if an error relating to a servicer's failure to suspend a foreclosure sale is asserted seven days or less before a scheduled

[187] *See, e.g.,* National Mortgage Settlement, at Appendix A, at A–17, available at *http://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).

foreclosure sale, the servicer is not required to comply with the full error resolution procedures and may, alternatively, respond to the borrower orally or in writing in response to the notice of error. Because the requirements of proposed § 1024.41 are procedural in nature, the Bureau believes that servicers will be able to resolve and respond to any assertions of error on a very expedited basis by confirming that the appropriate procedure was followed.

By prohibiting a servicer from proceeding with a scheduled foreclosure sale until termination of loss mitigation discussion, the Bureau proposes to eliminate the clearest harms on borrowers resulting from servicers pursuing loss mitigation and foreclosure proceedings concurrently.

41(h) Appeal Process

Proposed § 1024.41(h) would require servicers to establish an appeals process to review denials of complete loss mitigation applications for loan modifications. Limiting the appeals process only to denials of loan modifications reduces burdens on servicers and maintains consistency with existing appeals and escalation processes established under State law or Federal regulatory agency requirements. For example, the appeal process established by the national mortgage settlement relates to denials of first lien loan modification denials.[188] Further, the recent California Homeowner Bill of Rights provides for an appeal process for denials of first lien loan modification.[189] Moreover, loan modifications are some of the most complex loss mitigation programs with respect to the evaluation of borrowers, and the Bureau believes that loan modification provides an appropriate scope for an appeal process.

Pursuant to proposed § 1024.41(h), if a servicer reviews an appeal and determines to offer a loss mitigation option, the servicer shall not foreclose on a borrower 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 denies a borrower's appeal of a loss mitigation option, the servicer may proceed with a foreclosure sale.

Proposed § 1024.41(h) would provide that an appeal must be reviewed by servicer personnel that were not directly involved in the initial evaluation. The Bureau believes that this basic safeguard would help to reduce the risk of bias in the appeals process, since the person who made the initial decision may have a particularly strong interest in upholding that decision. Proposed comment 41(h)(3)–1 clarifies that supervisory personnel that supervised the personnel that conducted the initial evaluation may conduct the appeal evaluation if they were not directly involved in the initial evaluation. Proposed § 1024.41(h)(4) provides for the servicer to provide a written notice to the borrower stating the servicer's determination.

The Bureau requests comment on whether to require servicers to engage in an appeals process. Further, the Bureau requests comment on whether the appeals process should be limited to denials of loan modifications and other similar loss mitigation options. Further, the Bureau requests comment regarding the impact on small servicers (as that term is defined in the 2012 TILA Servicing Proposal) of the requirement that the appeal must be evaluated by servicer personnel that were not directly involved in the initial loss mitigation application evaluation, and where such requirement should be modified or eliminated for small servicers.

41(i) Duplicative Requests

Proposed § 1024.41(i) provides that a servicer is only required to comply with the requirements of proposed § 1024.41 if a borrower has not previously been evaluated for loss mitigation options for the borrower's mortgage loan account by that servicer. Thus, a servicer is not required to apply the requirements of § 1024.41 to a subsequent complete application for a loss mitigation option. In situations where servicing has transferred after the borrower received an evaluation on a complete loss mitigation application from the transferor servicer, the transferee servicer may be required to comply with the requirements of proposed § 1024.41. The Bureau believes that when an investor is transferring servicing to a new servicer, which may have been driven by owner or assignee'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 requests 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. If so, the Bureau requests comment on what should constitute appropriate time periods and requirements applicable to such reviews.

41(j) Other Liens

Proposed § 1024.41(j) provides that any servicer that receives a complete loss mitigation application shall (1) within 5 days, 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, and (2) provide the loss mitigation application received from the borrower to the other servicer.

Loss mitigation applications for properties encumbered by multiple liens present some of the most difficult loss mitigation situations for investors and borrowers. The Bureau believes it is appropriate to impose on servicers the obligation (1) to identify other servicers that may be impacted by loss mitigation evaluation for a property and (2) to provide the loss mitigation application from the borrower to the other servicers. When the other servicer receives the loss mitigation application, that servicer shall be required to comply with the requirements of proposed § 1024.41 if the servicer offers loss mitigation options to borrowers in the ordinary course as required by proposed § 1024.41(a). Further, the servicer that receives the loss mitigation application from another servicer shall be required to comply as if the servicer received the application from the borrower. For example, if the initial servicer passes an application to the other servicer that is incomplete under the other servicer's guidelines, the other servicer would be required pursuant to proposed § 1024.41(b)(2)(ii) to provide the borrower with the incomplete loss mitigation application notice.

The Bureau notes that the Gramm-Leach-Bliley Act as implemented by Regulation P does not require provision of an initial notice and opt-out in connection with providing the loss mitigation application submitted by a borrow to another servicer under the exception set forth in 12 CFR 1016.15(a)(7).

Small servicers. The Bureau is conscious of the potential impacts of the loss mitigation requirements on small servicers. In order to gain feedback on small servicer impacts, the Bureau participated in a Small Business Review Panel and conducted outreach with SERs. At the time the Small Business Review Panel outreach was conducted, the Bureau had not decided to include a separate provision concerning loss

[188] *See* National Mortgage Settlement, at Appendix A, at A–27, available at *http://nationalmortgagesettlement.com.*

[189] *See* 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923.6.

mitigation procedures. Rather, the Bureau solicited feedback from the SERs 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.[190]

The SERs 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 receiving significant foreclosure related information, and 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 SERs explained that they were willing to communicate with borrowers about loss mitigation contemporaneously with the foreclosure process, and one small entity representative indicated that it would be willing to bring a mortgage file back to the servicer for consideration of a modification and halt the foreclosure process, if appropriate.[191]

Based in part on the outreach with the SERs on April 24, 2012, as well as other feedback obtained by the Bureau after that outreach meeting, the Bureau considered proposing clearer and more detailed requirements relating to loss mitigation practices. The Bureau determined, for the sake of clarity and consistency, to include loss mitigation obligations as a separate section, rather than embedding the requirements within the provisions relating to error resolution, reasonable information management policies and procedures, early intervention for troubled or delinquent borrowers, and continuity of contact.

The Bureau believes that adding a separate section to address loss mitigation builds upon the feedback received by the Bureau as set forth in the Small Business Review Panel Report, although that report and the outreach meeting with SERs were not structured around the discussion of regulations relating to loss mitigation obligations as a separate section and did not focus in significant detail on some of the specific measures proposed here such as, for example, appeals of loss mitigation determinations. The Bureau also believes that adding a separate section to address loss mitigation provides greater regulatory clarity to servicers, including small servicers. Therefore, the Bureau specifically requests comment from small servicers (as that term is defined in the 2012 TILA Servicing Proposal) regarding the potential impacts of the loss mitigation requirements in proposed § 1024.41 on small servicers. Specifically, as set forth above, the Bureau requests comment of the requirement that an appeal must be evaluated by servicer personnel that were not directly involved in the initial loss mitigation application evaluation.

Legal authority. In proposing § 1024.41, the Bureau relies on its authority in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA and section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA. Further, proposed § 1024.41 implements, in part, a servicer's obligation to take timely action to correct errors relating to avoiding foreclosure in section 6(k)(1)(C) of RESPA by establishing servicer duties to avoid foreclosure that are the subject of the error resolution provisions in proposed § 1024.35.

The Bureau further relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

Appendix MS

Appendix MS to part 1024 sets forth model forms, model clauses that servicers may use to comply with the mortgage servicing requirements of Regulation X. As discussed in detail below, the Bureau proposes to modify the model form applicable to servicing transfer disclosure requirements, to add a new model for force-placed insurance disclosure requirements, and to add new model clauses for early intervention notice requirements. The Bureau is proposing official commentary that would apply to existing model forms MS–1 and MS–2, as well as a proposed model form MS–3 for the proposed force-placed insurance disclosure and proposed model clauses at MS–4 for the proposed early intervention written notice. The Bureau is proposing these comments to provide guidance that would be generally applicable for the mortgage servicing model forms and clauses. The Bureau solicits comment on the appropriateness of this guidance for the mortgage servicing disclosures.

Proposed comment MS–1 explains that appendix MS contains model forms and clauses for mortgage servicing disclosures. Each of the model forms is designated for use 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 properly will be deemed to be in compliance with the regulations with regard to those disclosures. To use the forms appropriately, information required by regulation must be set forth in the disclosures.

Proposed comment MS–2 explains that 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: (1) Use of ''borrower'' and ''servicer'' instead of pronouns; (2) substitution of the words ''lender'' and ''servicer''; and (3) addition of graphics or icons, such as the servicer's corporate logo.

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 proposes to revise the model form in appendix MS–2 to significantly reduce the length of the require disclosure to borrowers in connection with mortgage servicing transfers.

As a preliminary matter, the Bureau observes that unless a transferor and transferee servicer coordinate to provide a consolidated disclosure, a borrower

[190] *See* Small Business Review Panel Report, appendix C at 19, 22, 24–26.

[191] *See* Small Business Review Panel Report at 26.

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.

The Bureau proposes 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 proposes to remove significant discussion in the model form regarding the availability of the qualified written request process and the borrower's rights pursuant to RESPA. Information regarding the qualified written request process is likely to confuse borrowers in light of the proposed error resolution and information requirements set forth in this proposal. Further, the Bureau believes that error resolution and information request requirements are more effective by requiring servicers to respond to the notices of error and inquiries they receive as a result of having provided the appropriate contact information on the form. Further, the Bureau observes that this additional content is not required by section 6(a)(3) of RESPA. In light of these obligations, the Bureau does not believe the added discussion of the qualified written request process and RESPA provided additional practical value to consumers and detract from other important content of the form.

The Bureau relies on its authority in sections 6(a)(3), 6(j)(3), and 19(a) of RESPA to set forth requirements on servicers with respect to providing the mortgage servicing transfer notices required by section 6(a)(3) of RESPA.

Appendix MS–3—Model Force-Placed Insurance Notice Forms

Appendix MS–3 to part 1024 sets forth model forms that mortgage servicers may use to comply with the Bureau's force-placed insurance disclosure requirements. As discussed previously in the Bureau's discussion of proposed appendix MS, servicers are not required to use model forms to comply with the mortgage servicing disclosures of Regulation X, including the disclosures set forth in proposed § 1024.37. Using the model forms properly, however, will be deemed to be in compliance with regulation with regard to those disclosures.

Proposed comment MS–3–1 provides that the model form MS–3(A) illustrates how a servicer may comply with § 1024.37(c)(2). Proposed comment MS–3–2 provides that the model form MS–3(B) illustrates how a servicer may comply with § 1024.37(d)(2)(i). Proposed comment MS–3 provides that the model form MS–3(C) illustrates how a servicer may comply with § 1024.37(d)(2)(ii). Proposed comment MS–3–4 provides that model MS–3(D) illustrates how a servicer may comply with § 1024.37(e)(2). Proposed comment MS–3–5 provides 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, ''homeowner's insurance'' or ''property insurance.'' The Bureau, however, notes that proposed MS–3–5 does not permit the servicer to use the term ''homeowner's insurance'' to describe force-placed insurance.

As discussed previously, the Bureau believes that it is necessary and appropriate to carry out and achieve the purposes of RESPA section 6, and the consumer protections of RESPA, to facilitate compliance with the new Dodd-Frank Act requirements about advance notification before servicers charge borrowers for force-placed insurance. The Bureau's proposed force-placed insurance notice requirements are set forth in the model forms in proposed appendix MS–3. The Bureau proposes to exercise its authority under RESPA sections 6(j)(3), 6(k)(1)(E), and 19(a) to add new appendix MS–3 to Regulation X. Also as discussed previously, the Bureau has additional authority pursuant to Dodd-Frank Act section 1032 to provide model forms by adding new appendix MS–3.

Appendix MS–4—Model Clauses for the Written Early Intervention Notice

Model clauses in proposed appendix MS–4 illustrate the disclosures that would be required under proposed § 1024.39(b)(1). They encourage the borrower to contact the servicer and provide information about loss mitigation options, foreclosure, and housing counselors. Clauses in Model MS–4(A) illustrate how a servicer may provide its contact information and how a servicer may request that the borrower contact the servicer, as would be required under proposed § 1024.39(b)(2)(i) and (ii).

Clauses in Model MS–4(B) illustrate how the servicer may inform the borrower of loss mitigation options that may be available, as would be required under proposed § 1024.39(b)(2)(iii). Model MS–4(B) does not contain sample clauses for all loss mitigation options that may be available; they illustrate only four commonly offered examples: (1) Forbearance, (2) mortgage modification, (3) short-sale, and (4) deed-in-lieu of foreclosure. These examples of loss mitigation options may not necessarily accurately reflect the servicer's loss mitigation programs. Thus, proposed comment MS–4–2 explains that the language in proposed 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. Clauses in Model MS–4(C) illustrate how the servicer may inform the borrower how to obtain additional information about loss mitigation options, as would be required under proposed § 1024.39(b)(2)(iv). If the servicer offers 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 solicits comment on the examples of loss mitigation options and the descriptions of those examples in Model MS–4(B). The Bureau also solicits comment on whether alternate or additional model clauses would be helpful to borrowers and servicers.

Clauses in Model MS–4(D) illustrate how a servicer may explain foreclosure and provide the estimated number of days in which the servicer may begin the foreclosure process, as would be required under proposed § 1024.39(b)(2)(v). Clauses in Model MS–4(E) illustrate how the servicer may provide contact information for the State housing finance authority and housing counselors, as would be required under proposed § 1024.39(b)(2)(vi).

As discussed above, proposed comment MS–2 is intended to affirm that the servicer has flexibility in complying with the proposed disclosure requirement in proposed paragraphs (b)(1) and (b)(2) of § 1024.39. The servicer may comply by using language substantially similar to the language in the model clauses or by substituting applicable loss mitigation options not represented in the model clauses, as long as the information required to be disclosed is clear and conspicuous, as would be required by proposed § 1024.32, discussed above.

The Bureau developed the clauses in proposed MS–4(C), MS–4(D), and MS–4(E) based on its analysis and review of existing notices for delinquent borrowers, such as the HUD ''Avoiding Foreclosure'' pamphlet.[192] The Bureau has not yet tested the clauses in proposed Models MS–4(A), MS–4(B), MS–4(C), MS–4(D), and MS–4(E) with borrowers. The Bureau requests comment on whether consumer testing of these clauses is necessary and whether the Bureau should consider modifying, deleting, or adding any proposed clauses for these models. The Bureau is also considering integrating these model clauses into a model form, and the Bureau requests comment on what format would most effectively convey the proposed content in proposed § 1024.39(b)(2).

Legal authority. The Bureau proposes to exercise its authority under RESPA sections 6(j)(3), 6(k)(1)(E), and 19(a) to add new appendix MS–4 to Regulation X.

VII. Section 1022(b)(2) Analysis

In developing the proposed rule, the Bureau has considered potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators, HUD, the Federal Emergency Management Agency, FHFA, and the Federal Trade Commission, with respect to consistency with any prudential, market, or systemic objectives administered by such agencies.[193] The Bureau also held discussions with or solicited feedback from the United States Department of Agriculture Rural Housing Service, the Farm Credit Administration, the Federal Housing Administration, Ginnie Mae, and the Department of Veterans Affairs regarding the potential impacts of the proposed rule on those entities' loan or securitization programs.

As discussed in greater detail elsewhere throughout this **SUPPLEMENTARY INFORMATION**, in this rulemaking, the Bureau proposes to amend Regulation X, which implements RESPA, as part of the Bureau's implementation of the Dodd-Frank Act amendments to RESPA regarding mortgage loan servicing. The proposed amendments to Regulation X implement section 1463 of the Dodd-Frank Act, which imposes obligations on servicers with respect to resolving errors and responding to requests for information from mortgage loan borrowers, and to ensure that a reasonable basis exists to obtain force-placed insurance.

In addition, the proposal includes additional amendments to Regulation X to impose servicer obligations the Bureau has found, pursuant to authority under RESPA section 6, as amended by the Dodd-Frank Act, to be appropriate to carry out the consumer protection purposes of RESPA. These additional amendments are not specifically required by the Dodd-Frank Act and consist of obligations to: Establish reasonable information management policies and procedures; 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.

The proposal would also reorganize and amend the mortgage servicing related provisions of Regulation X, currently published in 12 CFR 1024.21. Such amendments relate to, for example, disclosures of mortgage servicing transfers and servicer obligations to borrowers, and a servicer's obligation to manage escrow accounts, including the obligation to advance funds to an escrow account to maintain a borrower's hazard insurance coverage and to return escrow balances when a mortgage loan is paid off in full. Further, the Bureau also proposes to set forth a commentary that includes official Bureau interpretations of Regulation X.

Elsewhere in today's **Federal Register**, the Bureau is also publishing a proposed rule under TILA to amend Regulation Z (12 CFR part 1026). The proposed 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 section1464 (prompt crediting of mortgage payments and response to requests for payoff amounts). The proposed rule would also revise certain existing regulatory requirements in Regulation Z for disclosing rate and payment changes to ARMs in current § 1026.20(c).

As discussed in greater detail elsewhere in this **SUPPLEMENTARY INFORMATION**, the recent financial crisis exposed pervasive consumer protection problems across major segments of the mortgage servicing industry. As a result of these problems, Congress included in the Dodd-Frank Act the provisions that specifically address mortgage servicing. The new protections in the rules proposed under RESPA and TILA would significantly improve the transparency of mortgage loans after origination, provide substantive protections to consumers, enhance the ability of consumers to obtain information from and dispute errors with servicers, and provide consumers, particularly delinquent consumers, with better customer service when dealing with servicers.

A. Provisions To Be Analyzed

The analysis below considers the potential benefits, costs, and impacts of the following major proposed provisions:

1. Requirements regarding obtaining force-placed insurance policies, including disclosures to borrowers.
2. Procedures regarding error resolution and requests for information.
3. Requirements to establish reasonable information management policies and procedures.
4. Procedures for early intervention with delinquent borrowers.
5. Procedures for continuity of contact with delinquent borrowers.
6. Requirements regarding loss mitigation procedures.

With respect to each major proposed provision, the analysis considers the benefits and costs to consumers and covered persons. The analysis also addresses certain alternative provisions that were considered by the Bureau in the development of the rule. The Bureau requests comment on the analysis of the potential benefits, costs, and impacts of the proposal.

B. Baseline for Analysis

The amendments to RESPA in section 1463 of the Dodd-Frank Act take effect automatically on January 21, 2013, unless final rules are issued on or before that date. However, no additional obligations are imposed under section 6(k)(1)(E) of RESPA, as amended by the Dodd-Frank Act, unless the Bureau adopts implementing regulations. Specifically, the provisions of the proposed rule that impose obligations on servicers to correct errors asserted by mortgage loan borrowers, to provide information requested by such borrowers, and to ensure that a reasonable basis exists to obtain force-placed insurance implement statutory amendments to RESPA that take effect automatically. Thus, many costs and benefits of the provisions of the proposed rule with respect to these self-executing provisions would arise largely

[192] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev–5, 7–7(G).

[193] 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.

or entirely from the statute, and not from the Bureau's proposed provisions. These provisions of the proposed rule would provide substantial benefits compared to allowing the RESPA amendments to take effect automatically by clarifying parts of the statute that are ambiguous. Greater clarity on these issues 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. Moreover, the costs that these provisions would impose beyond those imposed by the statute itself are likely to be minimal.

Section 1022 of the Dodd-Frank Act permits the Bureau to consider the benefits, costs and impacts of the proposed 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 proposed rule (*i.e.,* the benefits, costs, and impacts of the relevant provisions of the Dodd-Frank Act and the regulation combined) against a pre-statutory baseline.

As discussed above, the Dodd-Frank Act also gives the Bureau discretionary authority to develop additional mortgage servicing rules in Regulation X, which the Bureau is relying on to propose to require servicers to: Establish reasonable information management policies and procedures; 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. Since section 1463 of the Dodd-Frank Act does not specifically impose these obligations on servicers, the pre-statute and post-statute baseline are the same. The Bureau has discretion in future rulemakings to choose the most appropriate baseline for that particular rulemaking.

C. Coverage of the Proposal

Each proposed provision covers certain closed-end mortgages, as described further in each section below.

D. Data Limitations and Quantification of Benefits, Costs and Impacts

The analysis relies on data that the Bureau has obtained from industry, other regulatory agencies, and publicly available sources. However, as discussed further below, the data are generally limited with which to quantify the potential costs, benefits, and impacts of the proposed rule.

Regarding the costs to covered persons, the proposed rule generally establishes certain standards for servicer operations. In order to quantify the costs to covered persons, the Bureau would need representative data on the extent to which servicer operations currently do not comply with the proposed rule. The Bureau has little data on this issue, and does not believe that it is feasible to initiate a substantial collection of representative data in the time available for this rulemaking. However, the Bureau continues to seek data regarding the extent to which servicer operations currently do not comply with the proposed rule. Furthermore, even with this data, the Bureau would need information on the cost of changing current servicer practices in order to quantify the cost of closing any gaps between current practices and those mandated by the proposed rule. The Bureau has obtained some information about the cost of improving servicer operations, and the discussion below uses this information to quantify certain costs of the proposed rule, but these calculations do not fully quantify the costs to covered persons of the proposed rule. The Bureau continues to seek data from available sources regarding the costs of improving servicer operations, as specified by the proposed rule, in order to quantify the costs to covered persons of the proposed rule.

The lack of data on the extent to which servicer operations currently do not comply with the proposed rule also makes it difficult to quantify the benefits of the proposed rule to consumers. However, quantifying benefits presents additional challenges. As discussed further below, certain proposed provisions may directly save consumers time and money but others may benefit consumers in a more indirect way, by, for example, facilitating household budgeting, supporting the consumer's ability to obtain credit, and reducing default and avoidable foreclosure. Quantifying these benefits and monetizing them would require a wide range of data that cannot be collected in the time frame for this rulemaking. The Bureau continues to seek data from available sources regarding the benefits to consumers of the proposed rule.

Similar issues to those just described arise in quantifying the benefits to covered persons of the proposed rule and in quantifying the costs to consumers. Certain benefits to covered persons are difficult to quantify. For example, as discussed in greater detail below in the discussion about force-placed insurance, it is difficult to quantify the benefit servicers receive from reduced interest expenses when they advance their own funds to pay for force-placed insurance. Certain costs to consumers are difficult to quantify, such as the extent to which costs imposed on servicers may be passed through to consumers.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the proposed 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.

E. Potential Benefits and Costs to Consumers and Covered Persons

1. Requirements Regarding Obtaining Force-Placed Insurance Policies

Dodd-Frank Act section 1463 amends RESPA to prohibit a servicer of a federally related mortgage 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 when they force-place insurance. The process includes sending the borrower two written notices before imposing any charge on a borrower for force-placed insurance. The statute also provides process requirements for terminating force-placed insurance and refunding 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 each in effect.

The Bureau is proposing model forms for the force-placed insurance notices to be sent to borrowers. The Bureau is also proposing requirements concerning: Charges related to force-placed insurance, payment of the borrower's hazard insurance premiums from escrow, and notice requirements when servicers renew existing force-placed insurance policies.

Benefits and costs to consumers. Borrowers pay for force-placed insurance but do not select the insurance provider. 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. In particular, the proposed force-placed insurance disclosures and procedures may reduce borrowers paying for unnecessary force-placed insurance or the length of time during which borrowers pay for such insurance.

The Bureau does not have representative data with which to quantify the extent to which industry currently complies with the proposed force-placed insurance provisions or the extent to which additional compliance would reduce the need for force placement or the duration of force placement; however, as discussed in greater detail below, the Bureau understands that many servicers already comply with the proposed procedures with respect to sending borrowers notices before charging borrowers for force-placed insurance and canceling force-placed insurance after verifying that borrower has obtained hazard insurance coverage. Moreover, even a small reduction in force placement may provide consumers with substantial benefits. In 2009, the average premium for homeowner's insurance was $880 while force-placed insurance cost about twice this amount.[194] Thus, a homeowner who pays force-placed insurance for one to six months pays an additional $73 to $440 dollars.[195] If the provisions of the proposed rule reduced force-placement by just 10%, approximately 171,000 homeowners would save between $7.6 million and $45.8 million in unnecessary premiums each year.[196]

The following discussion provides a qualitative analysis of the benefits to borrowers of the proposed force-placed insurance disclosures and procedures. In each case, as discussed previously, the Bureau understands that certain servicers may already comply with some of the proposed procedures. The Bureau believes that for a borrower in the specified situation and with a servicer that does not comply with some of the proposed procedures, full compliance would provide important additional consumer benefits.

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 three additional groups: those with hazard insurance that is not about to lapse; 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 proposed force-placed insurance disclosures and procedures may provide different benefits to borrowers depending on the group to which they belong.

Borrowers with force-placed insurance would likely benefit from the proposed requirements regarding renewal of force-placed insurance, evidence of hazard insurance, cancellation of force-placed insurance, and limitations on charges related to force-placed insurance. The proposed rule would require servicers to send a renewal notice once every 12 months, accept insurance information provided by the borrower to verify whether or not the borrower has hazard insurance in place, cancel force-placed insurance and refund the borrower for any period of overlapping coverage within 15 days of receiving verification that the borrower has obtained hazard insurance. For a borrower in the situation described and with a servicer that does not currently comply with some of the proposed procedures, full compliance may reduce both the amount of time the borrower has force-placed insurance and the cost to the borrower of paying for force-placed insurance.

Consider next a borrower who has hazard insurance that is not about to lapse, but the servicer for some reason believes it is about to lapse and begins the process of force-placing insurance. The proposed rule would require the servicer to send the borrower two notices before charging the borrower for force-placed insurance. The proposed disclosures may prompt the borrower to contact the servicer with their insurance information. By possibly prompting the borrower to communicate with the servicer and provide the servicer with information to verify that the borrower has hazard insurance in place, the proposed rule may reduce the chance that a borrower in the situation described would pay for force-placed insurance.

Consider next a borrower who has a hazard insurance policy that is about to lapse and 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 proposed 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 would have to provide the two proposed notices before charging such borrower for force-placed insurance. The Bureau undertook three rounds of qualitative testing of the proposed notices, and participants said that if they received force-placed insurance notices like the ones the Bureau is proposing, they would immediately contact their insurance provider to find out whether or not their hazard insurance was still in force. For a borrower in this situation and for whom the mortgage loan is serviced by a servicer that does not currently provide notices that meet the proposed content and form requirements, full compliance with the proposed requirements may reduce the chance that the borrower would pay for unnecessary force-placed insurance. If the borrower's insurance does lapse, full compliance with the proposed requirements regarding renewal of force-placed insurance, evidence of hazard insurance and cancellation of force-placed insurance may reduce both the amount of time the borrower has force-placed insurance and the cost to the borrower of paying for force-placed insurance.

Finally, consider a borrower who has hazard insurance that is about to lapse and does not have the funds to renew the insurance. If this borrower has an escrow account with 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 a borrower in the situation described and with a servicer that is not complying with the proposed procedure, full compliance would greatly reduce the possibility that the borrower's hazard insurance was canceled for nonpayment and accordingly, the chance that the borrower would pay for force-placed 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, full

[194] 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).

[195] That is to say, the homeowner pays one-twelfth to one-half of the additional $880.

[196] Discussions with industry suggest that 2% of mortgages incur force-placement each year and 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).

compliance with the proposed requirement to cancel force-placed insurance within 15 days of receiving verification that the borrower has obtained hazard insurance may reduce the amount of time force-placed insurance is in effect.

The proposed rule also provides requirements on the renewal or replacement of force-placed insurance, including a disclosure to consumers. Specifically, a servicer may not charge a borrower for renewing or replacing pre-existing force-placed insurance unless: (1) The servicer delivers or places in the mail a written notice to the borrower with specified disclosures 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 proposed disclosure includes the cost of the insurance (or a good faith estimate) and statements to the effect that the servicer has previously obtained the insurance, charged the borrower for the insurance, and has the right to maintain the insurance. The proposed rule also provides certain formatting requirements on the disclosure.

The Bureau's proposal may help borrowers avoid the cost associated with the renewal or replacement of pre-existing force-placed insurance by both alerting borrowers to the impending charge and conditioning the ability of servicers to charge borrowers for renewal or replacement of pre-existing force-placed insurance on properly providing the specified disclosures. The disclosures may benefit certain borrowers by providing them with the information they need to purchase hazard insurance before being charged for renewal or replacement of force-placed insurance. Conditioning the ability of servicers to charge borrowers for renewal or replacement on the provision of the disclosures facilitates compliance with the disclosure requirement. As discussed previously, incentives like commissions paid to servicers or their insurance affiliates may cause servicers to prefer renewing or replacing pre-existing force-placed insurance coverage over providing borrowers with an opportunity to obtain hazard insurance.

The Bureau does not believe that the requirements with respect to force-placed insurance will impose any significant costs to borrowers for the following reasons: (1) As discussed above, the Bureau understands that only approximately two percent of mortgages incur force-placed insurance annually; and (2) as discussed below, many servicers already comply with the proposed disclosures with respect to sending borrowers notices before charging borrowers for force-placed insurance and the proposed requirement that the they cancel force-placed insurance after verifying that the borrower has obtained hazard insurance coverage.

Benefits and costs to covered persons. The Bureau believes that the proposed force-placed insurance disclosures and procedures may provide certain benefits to servicers. For example, the model forms the Bureau is providing servicers may reduce servicers' compliance cost. Servicers may also benefit from any reduction in the need to obtain force-placed insurance. Servicers advance their own funds to pay for force-placed insurance. 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, like the advances for the force-placed insurance premium charge.[197]

The Bureau notes that the owners or assignees of mortgage loans may also benefit from the proposed force-placed insurance disclosures and procedures. As discussed in part VI, above, force-placed insurance is often significantly more expensive than hazard insurance obtained by the borrower. If the property ultimately goes to foreclosure and the loan is liquidated, servicers get compensated for advancing charges related to force-placed insurance before owner or assignee of the mortgage loan is paid.[198] Thus, the additional cost of force-placed insurance produces an additional expense to such persons, who benefit when this additional expense is minimized. To the extent the proposed rule reduces the frequency and duration of lapses in hazard insurance obtained by the borrower, owners or assignees of mortgage loans benefit along with borrowers.

Based on discussions with industry, the Bureau understands that servicers generally provide borrowers with multiple notices before charging a borrower for force-placed insurance. Thus, the additional cost of the proposed force-placed insurance disclosures notice would most likely be the one-time cost of developing the form to conform with the Bureau's proposed regulations. The force-placed insurance disclosure would require minimal customization to each loan, but there may be some additional cost associated with providing the borrower with the cost or a good faith estimate of the cost of force-placed insurance, stated as an annual premium. The Bureau requests additional information about the force-placed insurance disclosures that servicers currently provide and the incremental cost of complying with the proposed force-placed insurance disclosure requirement.

The Bureau understands that many servicers generally terminate force-placed insurance coverage and refund to borrowers any premiums charged during any period when the borrower had borrower-obtained insurance coverage in place. The Bureau does not believe that complying with the remaining proposed procedures—including the provision of the force-placed insurance renewal notice—would impose substantial incremental costs on servicers. However, the Bureau continues to examine this issue and to collect data and other relevant information.[199]

Finally, the Bureau recognizes that the proposed force-placed insurance provisions may produce a number of changes in how force-placed insurance is provided and paid for. The Bureau understands 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. For other servicers, the Bureau understands that the force-placed insurance provider handles these activities and absorbs the costs or passes them on to the borrower. The proposed force-placed insurance provisions may reduce the frequency with which servicers obtain force-placed insurance. This would most likely reduce total payments by borrowers to servicers and force-placed insurers, even if the cost to insure the remaining borrowers increased, since there would be fewer transactions and fees. On the other hand, a reduction in the frequency with which force-placed insurance is provided may also reduce commission income that in some cases is paid by insurers to servicers or their insurance affiliates, and a reduction in payments to force-placed insurance providers may

[197] *See e.g.,* Levitin and Twomey, 28 Yale J. on Reg. 48 (2011) (explaining that servicing advances, which include advances for taxes and insurance, are costly to servicers because they are do not recover interest on the advances) .

[198] *See* Diane Thompson, *Foreclosure Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755, 816–20 (2011).

[199] Furthermore, as discussed in greater detail in part VI, 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 proposed procedures for force-placed insurance, since systems are in place that could be adapted outside the force-placed flood insurance context.

reduce providers' willingness to perform the tracking and other activities stated above as part of the service. The Bureau continues to examine how the proposed force-placed insurance provisions may affect covered persons. The Bureau asks interested parties to provide general information, data, and research results that are relevant to this issue.

2. Procedures Regarding Error Resolution and Requests for Information

Section 1463 of the Dodd-Frank Act amends section 6 of RESPA by adopting a number of servicer prohibitions with respect to handling asserted errors and inquiries. These include (1) servicer obligations to respond to certain types of errors, (2) amendments to the timeframe for responding to qualified written requests and associated penalties for failure to comply, and (3) a prohibition on servicers charging fees in connection with valid qualified written requests.

The Bureau is using its authority in RESPA to propose a comprehensive set of requirements for investigating and correcting errors and for responding to borrower inquiries that incorporates the amendments to RESPA in the Dodd-Frank Act. In addition to the current requirements to address errors relating to servicing through Qualified Written Requests, servicers would be required to correct errors relating to, among other things, allocating payments, providing an accurate payoff balance, failure to suspend a scheduled foreclosure sale while, for example, the borrower is performing under an agreement on a loss mitigation options. Servicers also would be required to respond to inquiries about a borrower's mortgage loan account, whether or not a borrower has complied with the requirements for submitting a Qualified Written Request.

Servicers would have to provide borrowers with a written acknowledgement of receiving a notice of error within five days (excluding legal public holidays, Saturdays and Sundays) of receipt of the notice of error, unless the servicer corrects the error within such time and the borrower is notified of the correction in writing. Servicers would have to correct the error and notify the borrower of such correction, or conduct a reasonable investigation and provide the borrower with written notification regarding the investigation and the documents relied upon by the servicer. Generally, with the exception of certain types of errors, the investigation would have to be completed and a response provided within 30 days (excluding legal public holidays, Saturdays and Sundays) after receipt of the notice of error.

The Bureau is proposing substantially similar requirements to apply to inquiries. For example, servicers would have to provide borrowers with written acknowledgement of receiving an information request, unless the servicer provides the borrower with the information requested and with contact information for further assistance within five days (excluding legal public holidays, Saturdays and Sundays). Servicers would have to provide the borrower with the requested information or conduct a reasonable search for the information and provide the borrower with a written notification regarding the search. Generally, with the exception of certain types of information requests, the information or a notification stating that the servicer has determined the requested information is not available to the servicer would have to be provided within 30 days after receipt of the information request.

Benefits and costs to consumers-error resolution. As explained in part VI, above, each of the nine proposed enumerated errors would results from a failure by the servicer to perform a typical servicer duty. The proposed error resolution procedures would require that servicers, in a timely manner, correct these errors or investigate and explain to the borrower why no error has occurred.

The Bureau has conducted outreach with servicers regarding alleged errors. One servicer estimates that it receives 1,850 allegations of error per month on a portfolio of about 300,000 loans; another estimates about the same number on a portfolio of about 1 million loans. However, the Bureau currently does not have data on the nature of the alleged errors, the extent to which servicers already comply with the proposed error resolution procedures, or the benefit to borrowers from full compliance. Thus, the Bureau does not have the data necessary to quantify the benefits to borrowers of the proposed error resolution procedures.[200]

Although the Bureau does not have the data necessary to quantify the benefits to borrowers of the proposed error resolution procedures, the Bureau believes that the benefits may be substantial. Some of the enumerated errors concern basic duties that servicers should generally perform every month for every borrower (*e.g.,* accept conforming payments, properly apply payments as required under the terms of the mortgage loan, pay taxes and insurance, *etc.*). The Bureau understands that servicers currently perform them. Other enumerated errors, however, concern duties regarding delinquent borrowers and the transfer of mortgage loan account information to other servicers. Under the proposed rule, it would be an 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 scheduled foreclosure sale when, for example, the borrower is performing under a loss mitigation agreement. It also would be an error for a servicer to fail to transfer information to a transferee servicer relating to the servicing of a borrower's mortgage loan account in an accurate and timely manner. Servicers may not have uniformly investigated and corrected these errors, as the proposal would require them to. These errors have the potential to impose substantial financial and other costs on consumers. Thus, the proposed requirements to investigate allegations that servicers have committed these errors and to correct these errors (when found) may provide substantial benefits to certain consumers.

More generally, the Bureau notes that borrowers do not choose their servicer, except indirectly by choosing their lender. Even if borrowers choose their servicer at origination, perhaps by seeking a lender that services the loans it originates, the borrower cannot subsequently choose a different servicer if the quality of servicing is unsatisfactory. Thus, the market for servicing may not fully reflect the interests of borrowers in having robust error resolution procedures. While certain servicers may nonetheless reliably perform their duties, the recent financial crisis suggests that for some, the incentives to do so were lacking.

Benefits and costs to consumers—requests for information. The Bureau has conducted outreach with servicers regarding requests for information. One servicer estimates that it receives 70,000 phone calls a month on portfolio of 300,000 loans; another estimates 160,000 phone calls per month on a portfolio of about 1 million loans. The vast majority of these calls are inquiries and the most common inquiry is whether the servicer has received the borrower's payment. The Bureau currently does not have data on the nature of the other inquiries, the extent to which servicers already comply with the proposed procedures regarding inquiries, or the benefit to borrowers

[200] See, however, the general discussion of servicing operations and avoidable foreclosure in the analysis of the proposed provisions on reasonable information management, *infra.*

from full compliance. Thus, the Bureau does not have the data necessary to quantify the benefits to borrowers of the proposed procedures regarding inquiries.[201] The Bureau requests interested parties to provide data, research, and other information that may inform the further consideration of this issue.

The Bureau understands that the servicer is a convenient source of certain information (*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). This information provides many benefits to borrowers, both by facilitating household budgeting in the near term and over time and by allowing borrowers to forestall or correct problems (*e.g.,* by verifying that payments were received or taxes and insurance were paid from escrow). The fact that borrowers go to the trouble of requesting information from servicers indicates that they recognize some benefit from having the information.

More generally, as discussed above, the Bureau notes that borrowers do not choose their servicer, except indirectly, by choosing their lender. Even if borrowers choose their servicer at origination, perhaps by seeking a lender that services the loans it originates, the borrower cannot subsequently choose a different servicer if the quality of servicing is unsatisfactory. Thus, the market for servicing may not fully reflect the interests of borrowers in having robust procedures for responding to inquiries. While certain servicers may nonetheless reliably perform their duties, the recent crisis suggests that for some, the incentives to do so were lacking.

Benefits and costs to covered persons. The Bureau understands that certain servicers may already comply with many of the proposed procedures regarding error resolution and response to inquiries.[202] Further, certain proposed provisions are intended to mitigate the costs of complying with the proposed procedures. The Bureau proposes that errors and information requests that are resolved within five days do not require written acknowledgement of receipt of a notice of error or information request. The Bureau believes that the proposed provisions, including the proposed finite list of errors, provide clarity regarding servicer duties. Clarity mitigates one-time compliance costs for servicers that would otherwise pay for additional legal advice regarding compliance with the rule or would perform activities that were not in fact required by the rule.

As discussed in part VI, above, the Bureau considered the impact of the proposed error resolution requirements if the types of errors were not limited. The Bureau believes that the added costs and burden created by having an open-ended definition of an error could substantially increase the costs to servicers with limited additional benefit to consumers. The Bureau further believes that requiring servicers to respond to potentially any assertion of an error could, as a practical matter, lead to servicers using disproportionate resources to respond to every asserted error. That practice may cause servicers to expend fewer resources to address errors that may be far more significant to borrowers.

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.

Although certain servicers may already comply with many of the proposed procedures, the Bureau understands that some of these proposed procedures may impose one-time and ongoing compliance costs on servicers. The Bureau asks interested parties to provide specific information about the proposed requirements for error resolution and requests for information with which servicers are not already in compliance and the costs of coming into compliance.

3. Reasonable Information Management Policies and Procedures

The Bureau is using its authority in RESPA to propose requirements on the information management practices of servicers. The proposed rule specifies that a servicer's information management practices need to address objectives broadly categorized as: Accessing and providing accurate information relating to a borrower's account; evaluating borrowers for loss mitigation options; facilitating oversight of, and compliance by, service providers; and facilitating servicing transfers. The reasonableness of a servicer's policies and procedures would be determined in part by the nature and scope of the servicer's operations, characteristics of the servicing portfolio, and the servicer's history of consumer complaints.

Benefits and cost to consumers. The Bureau recognizes that borrowers who make timely and conforming payments every period and whose payments are correctly and timely posted by the servicer and disbursed to third parties as appropriate may rarely need any new information from the servicer. The servicer of these loans generally requires only enough information about the loan to properly credit the payment to principal, interest, taxes and insurance; or in the case of adjustable rate mortgages, to change the amount due and change the crediting to principal and interest. However, a substantial number of borrowers do not make timely and conforming payments. One large database of first-lien residential mortgages shows that in each of the five quarters ending with the last quarter of 2011, between 10% and 15% of mortgages failed to be current and performing.[203] This represents between 3.1 million and 4.7 million loans.[204] The borrowers with these mortgages likely face difficult decisions about budgeting limited household resources and may require detailed and accurate information about what they owe, their loss mitigation options, and the consequences of different choices.

For reasons discussed above, the Bureau does not have representative

[201] See, however, the general discussion of servicing operations and avoidable foreclosure in the analysis of the proposed provisions on reasonable information management.

[202] For example, erroneous information furnished by servicers to a consumer reporting agency are a type of covered error specifically included in the proposed rule. *See* proposed § 1024.35(b)(iii). Servicers who furnish erroneous information to a consumer reporting agency are already required to handle disputes about this information under the Fair Credit Reporting Act. These preexisting obligations under the Fair Credit Reporting Act 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 outside the context of errors about information furnished to consumer reporting agencies.

[203] *See* Office of the Comptroller of Currency, *OCC Mortgage Metrics Report, Fourth Quarter 2011,* at 12 (Table 1) (2012).

[204] There are 31.4 million loans in the database, which is 60% of all first-lien residential mortgages outstanding. *Id.,* at 8.

data with which to quantify the extent to which industry currently complies with the proposed reasonable information management procedures, the extent to which additional compliance would provide additional benefits to consumers, or the monetary value of those additional benefits to consumers. However, it is possible to provide a rough estimate of a key consumer benefit—a reduction in avoidable default (*i.e.,* 90 day delinquency)—that may be attributed collectively to the proposed provisions regarding error resolution and requests for information, reasonable information management, early intervention, and continuity of contact.

These benefits are discussed as part of reasonable information management for two reasons. First, the proposed provisions on reasonable information management include a requirement that a borrower must be able to receive an accurate and timely evaluation for a loss mitigation option. Thus, reasonable information management may reduce avoidable or unnecessary foreclosures. Second, reasonable information management facilitates compliance with the other proposed provisions listed above, all of which could help delinquent borrowers. A servicer that could not access accurate and timely information relating to a borrower's account would likely have difficulty providing accurate information with respect to loss mitigation options and foreclosure (consistent with the proposed provisions on error resolution), notifying a borrower that he or she is late with a payment (as would be required by the proposed provisions on early intervention), and accessing a complete record of the borrower's payment history (as required by the proposed provisions on continuity of contact).

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).[205] 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 use regression analysis 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 services in the probability a loan defaults, even after controlling for borrower credit score and income, certain characteristics of the property, and other factors.[206] The best servicing (servicing performed by servicers with the highest cure rates with respect to loans that have become 30 days delinquent) achieves approximately a 41% 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 with respect to loans that have become 30 days delinquent).[207]

To translate this figure into an estimate of avoidable default, suppose that over 1 million mortgages become 30–60 days late each year. If they all receive the worst servicing and about 20% default, then a switch to the best servicing would reduce the default rate to about 12% (a reduction of 41%).[208] Thus, 80,000 mortgages would no longer default if they had the best servicing. If 30% default, then about 120,000 would no longer default if they had the best servicing. These defaults are avoidable with better servicing. Furthermore, a substantial number of these defaults will ultimately go to foreclosure, perhaps 70%.[209]

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.[210] Other work establishes substantial negative effects that foreclosed homes have on nearby homes.[211] The Bureau continues to examine how reasonable information management policies and procedures and other provisions of the proposed rule may affect default and foreclosure and the costs of these outcomes on borrowers and other consumers. The Bureau asks interested parties to provide general information, data, and research results that address these issues.

More generally, as noted above, servicers may not have sufficient incentives to provide reasonable information management policies and procedures absent the proposed rule. As discussed in the Background section, mortgage servicing is to a large extent a high-volume, low-margin business that encourages servicers to provide minimal levels of service to borrowers. While certain servicers may nonetheless have reasonable information management policies and procedures, the mortgage crisis demonstrated that for some servicers the incentives to have these practices were lacking.

Benefits and costs to covered persons. The Bureau understands that certain servicers already comply with many of the proposed procedures.[212] 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. Further, the Bureau is proposing to mitigate the cost of the proposed procedures by providing that the reasonableness of a servicer's policies and procedures would be determined in part by the nature and scope of the servicer's operations, characteristics of the servicing portfolio, and the

[205] *See* Michael A. Stegman *et al., Preventative Servicing is Good for Business* and *Affordable Homeownership Policy,* 18 Housing Policy Debate 243, 257 (2007).

[206] 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,* Federal Reserve Bank of Chicago, (2010) (Agarwal *et al.*).

[207] 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% reduction.

[208] The 20% default rate is consistent with the data in Stegman *et al.* but may underestimate the default rate in more recent data.

[209] In one study, only 30% 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 and Table 2 (Freddie Mac, Working Paper No. 08–01, Mar. 2008).

[210] *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.*

[211] Foreclosure itself may lead to a 27% reduction in the value of a house (possibly due to losses associated with abandonment) and a 1% reduction in the value of every other house within 5 tenths of a mile. *See* John Y. Campbell, Stefano Giglio, & Parag Pathak, *Forced Sales and House Prices, American Economic Review* 101(5) (2011), abstract available at: *http://www.aeaweb.org/articles.php?doi=10.1257/aer.101.5.2108.*

[212] For example, servicers are already 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.

servicer's history of consumer complaints. The Bureau believes that the performance-based approach of the proposed information management provisions coupled with the flexible requirement for reasonableness will allow each servicer to comply with the proposed provisions in ways that best suit its particular circumstances.

4. Procedures for Early Intervention With Delinquent Borrowers

As discussed in greater detail elsewhere in this **SUPPLEMENTARY INFORMATION**, Dodd-Frank Act section 1463 amends RESPA to authorize the Bureau to impose on servicers obligations the Bureau finds appropriate to carry out the consumer protection purposes of RESPA. The Bureau is using this authority to propose early intervention provisions regarding delinquent borrowers. The Bureau proposes to require servicers to provide two notices (one oral and one written) to delinquent borrowers. Generally, the Bureau proposes to require servicers to make a good faith effort to contact delinquent borrowers no later than 30 days after the payment due date. Additionally, not later than 40 days after a missed payment, the proposed rule would require servicers to provide the delinquent borrower a written notice about loss mitigation and the foreclosure process.

Benefits and costs to consumers. The proposed provisions on early intervention with delinquent borrowers are intended to spur the engagement between servicers and borrowers that is necessary for avoiding foreclosure. In one study using data from September 2005 through August 2007, Freddie Mac servicers reported that for 53.3% of the total number of loans that went into foreclosure, the borrower never responded to the servicer.[213] Of course, this means that 47% of borrowers did respond to the servicer. The proposed provisions may benefit borrowers, possibly by reducing the number of borrowers who never respond to the servicer, but in any case ensuring that those who would respond have the opportunity to do so.

The Bureau also understands that borrowers may benefit from the proposed provisions by taking corrective action more quickly. In one study using data from 2000 through 2006, the re-default rate was about 27% (15 percentage points) lower on repayment plans established when a loan was 30 days late instead of 60 days late.[214] Early intervention may generally benefit borrowers by reducing avoidable interest costs, limiting the impact on borrowers' credit reports, and facilitating household budgeting and planning.

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.[215] Furthermore, the eligibility criteria for these programs change regularly.[216] 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 proposed provisions for early intervention benefit borrowers by providing them with information they probably do not have.

Benefits and costs to covered persons. Through industry outreach, the Bureau understands that many servicers already comply with the proposed early intervention procedures. As stated above, most servicers should be familiar with the early intervention standards for delinquent borrowers issued by private mortgage investors, the GSEs, Ginnie Mae, 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. The Bureau understands, however, that some GSE servicers may not provide written notifications to certain lower-risk delinquent borrowers until the 65th day of delinquency. In addition, Federal agencies and the GSEs have established requirements and recommended practices with respect to written notifications that are similar to the Bureau's proposal under proposed § 1024.39(b).

Furthermore, the Bureau is proposing to mitigate the cost of the written notice provision by providing servicers with model clauses and by limiting the written notice to be sent once every 180 days. The model clauses provide servicers with examples of language explaining the foreclosure process 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.

5. Procedures for Continuity of Contact With Delinquent Borrowers

Dodd-Frank Act section 1463 requires servicers to comply with any obligation the Bureau finds appropriate to carry out the consumer protection purposes of RESPA. The Bureau is using this authority to propose continuity of contact provisions regarding delinquent borrowers.

The Bureau proposes to require servicers to assign personnel to delinquent borrowers for whom servicers are required to notify pursuant to the proposed oral notification requirement under its early intervention proposal, discussed above. Additionally, the servicers would be required to provide such borrowers with live, telephonic response to inquiries and, as applicable, assist the borrower with loss mitigation options. Servicers would be 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, for example, providing the borrower with accurate information about loss mitigation options available to the borrower and actions the borrower must take to be evaluated for such options.

[213] *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, Mar. 2008).

[214] *Id.,* Table 2. 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.

[215] *See* General Accounting Office, Actions Needed by Treasury to Address Challenges in Implementing Making Home Affordable Programs, Table 1 (2011).

[216] For a discussion of recent changes, including the implementation of the new ''HAMP Tier 2'' alternative, see Making Home Affordable Supplemental Directive 12–02, March 9, 2012, available at *https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1202.pdf.*

Benefits and costs to consumers. As discussed above in greater detail in part VI, above, the onset of the mortgage crisis revealed that many servicers did not have the infrastructure, trained staff, controls, and procedures needed to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they were required to process. One study of complaints to the HOPE Hotline reported that over half were from borrowers who could not reach their servicers and obtain information about the status of their applications for HAMP modification.[217] Other complaints concerned lost documentation and that borrowers were not able 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 proposed 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.

As discussed in part VI, above, the Bureau believes that these problems may have had a significant adverse impact on borrowers seeking alternatives to foreclosure. 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 foreclosure.[218]

Benefits and costs to covered persons. The Bureau understands that many servicers are already in compliance with the proposed requirements. As discussed in part VI, above, in response to reported problems with respect to how servicers to respond to delinquent borrowers, other regulators and the GSEs have responded by establishing staffing standards for servicers to meet when they assist delinquent borrowers. Accordingly, the Bureau believes that any additional costs of the proposed continuity of contact provisions would be minimal.

6. Loss Mitigation Procedures

Dodd-Frank Act section 1463 requires servicers to comply with any obligation the Bureau finds appropriate to carry out the consumer protection purposes of RESPA. The Bureau is using this authority to propose provisions regarding loss mitigation.

The proposed provisions on loss mitigation would require servicers that make loss mitigation options available to borrowers in the ordinary course of business to undertake certain duties in connection with the evaluation of borrower applications for loss mitigation options. These servicers would have a duty to evaluate borrowers that apply for loss mitigation within specific timeframes and to inform borrowers about the status of their applications and the servicer's decision. These servicers would also be prohibited from completing a foreclosure sale unless certain conditions held.[219]

Benefits and costs to consumers. The proposed procedures in 1024.41 provide a minimal structure to the process and decision-making around loss mitigation. Borrowers who submit complete applications may benefit from the proposed requirement on servicers to review and respond within a fixed period of time (30 days). Those who are denied loan modifications may benefit from the proposed requirement to disclose the reasons for the denial and the consumer's rights to appeal the decision, and from the appeal itself.

The Bureau is aware that a mandatory timeline may have unintended consequences for borrowers in certain circumstances. For example, one study of the loan-level data from the OCC–OTS Mortgage Metrics database studied 1.8 million mortgages that were current in the last quarter of 2007 and became ''troubled'' at some point between January 2008 and May 2009.[220] About 300,000 loans became troubled in each quarter of 2008. The researchers found that servicers made decisions very slowly and did not take any action, even after 6 months, in about half the cases.[221] The timeline in the proposed provisions would have been binding on a large number of loans during this period, and it is difficult to predict how the servicers would have responded.

One feature of the proposed provisions mitigates concerns about unintended consequences for borrowers. Servicers would be required to make a decision about whether to grant a loss mitigation option within 30 days. They would not, however, have to move to foreclosure just because they decline to provide a loss mitigation option. Servicers would be required to make a decision, but they would not be required to take any action that they would not have taken absent the proposed loss mitigation provisions, and through continuity of contact they could alert borrowers to the possibility of a different decision at a later date. Servicers would, however, be required to produce a record of decisions and, in the case of loss mitigation the reasons for denial, that record may provide greater accountability to both borrowers and investors. This argument also mitigates concerns that borrowers who may benefit from a long foreclosure timeline would necessarily need to leave their homes sooner than they otherwise would.

More generally, borrowers applying for a loss mitigation option are in a high-stakes and unfamiliar situation. They may have no clear understanding of what to expect and what is expected of them. Federal rules on loss mitigation may make key decision points more salient and credible to borrowers and motivate them, for example, to provide

[217] *See* General Accounting Office, *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs,* at 15 (2010).

[218] See also the general discussion of servicing operations and avoidable foreclosure in the analysis of the proposed provisions on reasonable information management.

[219] Specifically, as specified in proposed § 1024.41(g), if a servicer received a timely and complete loss mitigation application, a servicer could not proceed to foreclosure sale unless: (1) The servicer denied 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 denied the borrower's appeal; (3) the borrower rejected a servicer's offer of a loss mitigation option; or (4) a borrower failed to perform pursuant to the terms of a loss mitigation option.

[220] Mortgages were troubled if they were ever 60+ days past due or the borrower contacted the lender asking to renegotiate the loan.

[221] *See* Sumit Agarwal, *et al., Market-Based Loss Mitigation Practices for Troubled Mortgages Following the Financial Crisis,* at 7–10, Table 2, Federal Reserve Bank of Chicago (2010).

complete applications to servicers in a timely manner. Borrowers may also be able to draw more directly on the experiences of other borrowers who were successful in loss mitigation since all would have been through a similar process.

Borrowers may also benefit from the proposed restrictions on the timing of foreclosure sales. As discussed above, there is substantial anecdotal evidence that borrowers have been foreclosed upon despite working in good faith for a loss mitigation option. The proposed restrictions would not prevent foreclosures that occur from the failure of servicers to comply with basic servicer duties, like maintaining proper records of payments and agreements. However, the proposed restrictions would define a clear set of circumstances under which discussions regarding loss mitigation options have ended. This certainty and clarity should make it less likely that borrowers will be foreclosed upon unexpectedly and makes clear to borrowers what is expected from them to avoid foreclosure.

Benefits and costs to covered persons. The proposed provisions on loss mitigation may impose some costs on servicers. For example, servicers who make loss mitigation options available in the ordinary course of business may need to employ additional staffing in order to meet the proposed 30-day timeline for evaluation when large numbers of borrowers submit applications. Servicers would also need to allow 90 days between the time a borrower submits a complete loss mitigation application and the servicer conducts a foreclosure sale. This builds in time for consideration of the application and an appeal, but it also may delay foreclosures that servicers, based on their experience, recognize as inevitable. Any lengthening of time until foreclosure sale will also increase the time during which servicers will have the expense of providing borrowers with continuity of contact. On the other hand, the amount of time required for a successful modification may be shorter, and the cost to servicers lower, if the timelines and other proposed provisions for loss mitigation encourage borrowers to work more effectively with servicers.

The costs to covered person of the proposed loss mitigation provisions depend on the extent to which servicers already comply with the proposed provisions and, for those not in compliance, the cost of making necessary changes. The Bureau asks interested parties to provide data and other information about current compliance with the proposed provisions, the challenges of coming into compliance, and the benefits and costs to covered persons from any interactions between these provisions and other provisions of this proposed rule.

E. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets

Regarding the provisions for force-placed insurance, the Bureau understands within the group of depository institutions and credit unions with $10 billion or less in total assets, as described in section 1026 of the Dodd-Frank Act, the larger depositories and credit unions generally have contracts with force-placed insurance providers under which the providers would absorb the costs of the proposed provisions. Thus, the Bureau believes there would be little impact of the proposed provisions on these institutions. But for smaller depository institutions or credit unions, the Bureau understands 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 SERs in the SBREFA process, is discussed in further detail in the Regulatory Flexibility Analysis in part VIII, below. Based on feedback received from the SERs, The Bureau understands that small mortgage servicers engage in relatively little force-placement. The Bureau asks interested parties to provide general information, data, and research results that are relevant to understanding the impact of the proposed provisions for force-placed insurance on depository institutions and credit unions considered in this section.

Regarding the other proposed provisions, 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 proposed rule on depository institutions and credit unions with $10 billion or less in total assets. About 90% of all servicers are depository institutions and the vast majority of these institutions adhere to the servicing guidelines established by the GSEs. There is substantial overlap between these guidelines and provisions of the proposed rule, especially in regards to early intervention with delinquent borrowers and loss mitigation. Thus, the Bureau believes that the consideration of benefits and costs to covered persons given above provides a general description of the impacts to depository institutions and credit unions considered in this section. However, the Bureau seeks comment on this conclusion and asks interested parties to provide general information, data, and research results that are relevant to understanding the impact of the proposed provisions on depository institutions and credit unions considered in this section.

2. Impact of the Proposed Provisions on Consumers in Rural Areas

Consumers in rural areas may experience benefits from the proposed 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 proposed rule is designed to provide, including, for example, getting errors corrected promptly or getting access to personnel to assist them with their application for loss mitigation options. On the other hand, it is also possible that a lack of alternatives in some rural areas among lenders who also service may make it possible for the proposed rule to provide rural consumers with greater benefits.

The Bureau will further consider the impact of the proposed rule on consumers in rural areas. The Bureau therefore asks interested parties to provide data, research results and other factual information on the impact of the proposed rule on consumers in rural areas.

F. Additional Analysis Being Considered and Request for Information

The Bureau will further consider the benefits, costs, and impacts of the proposed provisions before finalizing the proposal. At various points in the analysis above, the Bureau asks interested parties to provide data, research results and other information relating to particular issues. The Bureau is generally interested in the impact of the proposed provisions on consumers, covered persons and markets in order to further understand and quantify the benefits and costs to consumers and covered persons. The Bureau generally requests interested parties to provide data, research, and other information that may inform the further consideration of benefits, costs and impacts of the proposed provisions.

To supplement the information discussed in this **SUPPLEMENTARY**

INFORMATION and any information that the Bureau may receive from commenters, the Bureau is currently working to gather additional data that may be relevant to this and other mortgage related rulemakings. These data may include 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. The Bureau expects that each of these datasets will be confidential. This section now describes each dataset in turn.

First, as the sole system supporting licensure/registration of mortgage companies for 53 regulatory agencies for states and territories and mortgage loan originators under the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act), NMLS contains basic identifying information for non-depository mortgage loan origination companies. Firms that hold a State license or State registration through NMLS are required to complete either a standard or expanded Mortgage Call Report (MCR). The Standard MCR includes data on each firm's residential mortgage loan activity including applications, closed loans, individual mortgage loan originator (MLO) activity, line of credit, and other data repurchase information by State. It also includes financial information at the company level. The expanded report collects more detailed information in each of these areas for those firms that sell to Fannie Mae or Freddie Mac.[222] To date, the Bureau has received basic data on the firms in the NMLS and de-identified data and tabulations of data from the MCR. These data were used, along with HMDA data, to help estimate the number and characteristics of non-depository institutions active in various mortgage activities. In the near future, the Bureau may receive additional data on loan activity and financial information from the NMLS including loan activity and financial information for identified lenders. The Bureau anticipates that these data will provide additional information about the number, size, type, and level of activity for non-depository lenders engaging in various mortgage origination and servicing activities. As such, it supplements the Bureau's current data for non-depository institutions reported in HMDA and the data already received from NMLS. For example, these new data will include information about the number and size of closed-end first and second loans originated, fees earned from origination activity, levels of servicing, revenue estimates for each firm, and other information. The Bureau may compile some simple counts and tabulations and conduct some basic statistical modeling to better model the levels of various activities at various types of firms. In particular, the information from the NMLS and the MCR may help the Bureau refine its estimates of benefits, costs, and impacts for the proposed new servicing requirements in this proposed rule and the companion 2012 TILA Servicing Proposal, as well as other proposed rules to make revisions to the RESPA Good Faith Estimate and settlement statement forms, changes to the HOEPA thresholds, changes to requirements for appraisals, updates to loan originator compensation rules, and impose new ability-to-repay standards.

Second, the Bureau is working to obtain a random selection of loan-level data from several lenders. The Bureau intends to request loan file data from lenders of various sizes and geographic locations to construct a representative dataset. In particular, the Bureau will request a random sample of RESPA GFE and RESPA settlement statement forms from loan files for closed-end loans. These forms include data on some or all loan characteristics including settlement charges, origination charges, appraisal fees, flood certifications, mortgage insurance premiums, homeowner's insurance, title charges, balloon payments, prepayment penalties, origination charges, and credit charges or points. Through conversations with industry, the Bureau believes that such loan files exist in standard electronic formats allowing for the creation of a representative sample for analysis. The Bureau may use these data to further measure the impacts of certain proposed changes. Calculations of various categories of settlement and origination charges may help the Bureau calculate the various impacts of proposed changes in other proposals to the definition of finance charge, including proposed changes in the number and characteristics of loans that exceed the HOEPA thresholds, loans that would meet the high-rate or high-risk definitions mandating additional consumer protections, and loans that meet the points and fees thresholds contained in the ability-to-repay provisions of the Dodd-Frank Act.

Third, the Bureau may also use data from the pilot phases of the National Mortgage Database (NMDB) to refine its proposals and/or its assessments of the benefits, costs, and impacts of these proposals. The NMDB is a comprehensive database, currently under development, of loan-level information on first lien single-family mortgages. It is designed to be a nationally representative sample (1%) and contains data derived from credit reporting agency data and other administrative sources along with data from surveys of mortgage borrowers. The first two pilot phases, conducted over the past two years, vetted the data development process, successfully pre-tested the survey component and produced a prototype dataset. The initial pilot phases validated that sampled credit repository data are both accurate and comprehensive and that the survey component yields a representative sample and a sufficient response rate. A third pilot is currently being conducted with the survey being mailed to holders of 5,000 newly originated mortgages sampled from the prototype NMDB. Based on the 2011 pilot, a response rate of 50% or higher is expected. These survey data will be combined with the credit repository information of non-respondents, and then de-identified. Credit repository data will be used to minimize non-response bias, and attempts will be made to impute missing values. The data from the third pilot will not be made public. However, to the extent possible, the data may be analyzed to assist the Bureau in its regulatory activities and these analyses will be made publically available.

The survey data from the pilots may be used by the Bureau to analyze consumers' shopping behavior regarding mortgages. For instance, the Bureau may calculate the number of consumers who use brokers, the number of lenders contacted by borrowers, how often and with what patterns potential borrowers switch lenders, and other behaviors. Questions may also assess borrowers' understanding of their loan terms and the various charges involved with origination. Tabulations of the survey data for various populations and simple regression techniques may be used to help the Bureau with its analysis.

The Bureau requests commenters to submit data and to provide suggestions for additional data to assess the issues discussed above and other potential benefits, costs, and impacts of the proposed rule. The Bureau also requests comment on the use of the data described above.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by SBREFA and the Dodd-Frank Act, requires each agency to

[222] More information about the Mortgage Call Report can be found at: *http://mortgage.nationwidelicensingsystem.org/slr/common/mcr/Pages/default.aspx*.

consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations. 5 U.S.C. 601 *et seq.* The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. The Bureau also is subject to certain additional procedures under the RFA involving the convening of the Small Business Review Panel to consult with SERs prior to proposing a rule for which an IRFA is required. 5 U.S.C. 609.

The Bureau has not certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the Bureau convened and chaired the Small Business Review Panel to consider the impact of the proposed rule on small entities that would be subject to that rule and to obtain feedback from representatives of such small entities. The Small Business Review Panel for this rulemaking is discussed below in part VIII.A.

The Bureau is publishing an IRFA. Among other things, the IRFA estimates the number of small entities that will be subject to the proposed rule and describe the impact of that rule on those entities. The IRFA for this rulemaking is set forth below in part VIII.A.

A. Small Business Review Panel

Under section 609(b) of the RFA, as amended by SBREFA and the Dodd-Frank Act, the Bureau seeks, prior to conducting the IRFA, information from representatives of small entities that may potentially be affected by its proposed rules to assess the potential impacts of that rule on such small entities. 5 U.S.C. 609(b). Section 609(b) sets forth a series of procedural steps with regard to obtaining this information. The Bureau first notifies the Chief Counsel for Advocacy of the SBA and provides the Chief Counsel for Advocacy of the SBA with information on the potential impacts of the proposed rule on small entities and the types of small entities that might be affected. 5 U.S.C. 609(b)(1). Not later than 15 days after receipt of the formal notification and other information described in section 609(b)(1) of the RFA, the Chief Counsel for Advocacy of the SBA then identifies individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule (referred to previously as SERs). 5 U.S.C. 609(b)(2). The Bureau convenes a review panel for such rule consisting wholly of fulltime Federal employees of the office within the Bureau responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within OMB, and the Chief Counsel for Advocacy of the SBA, which constitutes the Small Business Review Panel. 5 U.S.C. 609(b)(3). The Panel reviews any material the Bureau has prepared in connection with the SBREFA process and collects advice and recommendations of each individual SER identified by the Bureau after consultation with the Chief Counsel for Advocacy of the SBA on issues related to sections 603(b)(3) through (b)(5) and 603(c) of the RFA.[223] 5 U.S.C. 609(b)(4). Not later than 60 days after the date the Bureau convenes the Small Business Review Panel, the Panel reports on the comments of the SERs and its findings as to the issues on which the Panel consulted with the SERs, and the report is made public as part of the rulemaking record. 5 U.S.C. 609(b)(5). Where appropriate, the Bureau modifies the rule or the IRFA in light of the foregoing process. 5 U.S.C. 609(b)(6).

On April 9, 2012, the Bureau provided the Chief Counsel for Advocacy of the SBA with the formal notification and other information required under section 609(b)(1) of the RFA. To obtain feedback from SERs to inform the Panel pursuant to section 609(b)(2) and 609(b)(4) of the RFA, the Bureau, in consultation with the Chief Counsel for Advocacy of the SBA, identified five categories of small entities that may be subject to the proposed rule for purposes of the IRFA: commercial banks/savings institutions, credit unions, non-depositories engaged primarily in lending funds with real estate as collateral (included in NAICS 522292), non-depositories primarily engaged in loan servicing (included in NAICS 522390), and certain non-profit organizations. Section 3 of the IRFA, in Part VIII.B.3, below, describes in greater detail the Bureau's analysis of the number and types of entities that may be affected by the proposed rule. Having identified the categories of small entities that may be subject to the proposed rule for purposes of an IRFA, the Bureau, in consultation with the Chief Counsel for Advocacy of the SBA, selected 16 SERs to participate in the SBREFA process. As described in chapter 7 of the Small Business Review Panel Report (described below), the SERs selected by the Bureau in consultation with the Chief Counsel for Advocacy of the SBA 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).

On April 10, 2012, the Bureau convened the Small Business Review Panel pursuant to section 609(b)(3) of the RFA. To collect the advice and recommendations of the SERs under section 609(b)(4) of the RFA, the Panel held an outreach meeting/teleconference with the SERs on April 24, 2012 (''Panel Outreach Meeting''). To help the SERs prepare for the Panel Outreach Meeting, the Panel circulated briefing materials prepared in connection with section 609(b)(4) of the RFA that summarized the proposals under consideration at that time, posed discussion issues, and provided information about the SBREFA process generally.[224] All 16 SERs participated in the Panel Outreach Meeting either in person or by telephone. The Small Business Review Panel also provided the SERs 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.[225]

On June 11, 2012, the Small Business Review Panel submitted to the Director of the Bureau, Richard Cordray, 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 SERs who were

[223] As described in the IRFA in part VIII.B, below, sections 603(b)(3) through (b)(5) and section 603(c) of the RFA, respectively, require a description of and, where feasible, provision of an estimate of the number of small entities to which the proposed rule will apply; a description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. 603(b)(3), 603(b)(4), 603(b)(5), 603(c).

[224] The Bureau posted these materials on its Web site and invited the public to email remarks on the materials, available at: *http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-outlines-borrower-friendly-approach-to-mortgage-servicing/.*

[225] This written feedback is attached as appendix A to the Small Business Review Panel Report.

selected to advise the Small Business Review Panel; a summary of the Panel's outreach to obtain the advice and recommendations of those SERs; a discussion of the comments and recommendations of the SERs; 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 preparing this proposed rule and the IRFA, the Bureau has carefully considered the feedback from the SERs participating in the SBREFA process and the findings and recommendations in the Small Business Review Panel Report. The section-by-section analysis of the proposed rule in Part VI, above, and the IRFA 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. Also, 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. The proposed rule and the IRFA reflect further consideration, analysis, and data collection by the Bureau.

B. Initial Regulatory Flexibility Analysis

Under section 603(a) of the RFA, an IRFA "shall describe the impact of the proposed rule on small entities." 5 U.S.C. 603(a). Section 603(b) of the RFA sets forth the required elements of the IRFA. An IRFA shall contain (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and the legal basis for, the proposed rule; (3) a description of and, where feasible, provision of an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record; and (5) identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule. The Bureau, further, must describe any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Finally, as amended by the Dodd-Frank Act, section 603(d) of the RFA requires that the IRFA include a description of any projected increase in the cost of credit for small entities, a description of 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 (if such an increase in the cost of credit is projected), and a description of the advice and recommendations of representatives of small entities relating to the cost of credit issues. 5 U.S.C. 603(d)(1); Dodd-Frank Act section 1100G(d)(1).

1. Description of the Reasons Why Agency Action Is Being Considered

As discussed in the part I, above, mortgage servicing has been marked by pervasive and profound consumer protection problems. As a result of these problems, Congress included a number of provisions in the Dodd-Frank Act specifically to address mortgage servicing. One of these provisions is section 1463 of the Dodd-Frank Act, which amends RESPA. This provision puts new disclosure requirements and limitations on servicers obtaining force-placed insurance, and it establishes obligations for servicers to respond to requests from borrower to correct errors or provide certain information. Section 1463 of the Dodd-Frank Act also authorizes the Bureau, by regulation, to impose other obligations on servicers that it finds appropriate to carry out the purposes of the statute.

These new statutory requirements take effect automatically on January 21, 2013, as written in the statute, unless final rules are issued prior to that date. If the Bureau adopts implementing regulations no later than January 21, 2013, the Bureau may establish an effective date for the rules. The statutory requirements implemented by the rules then take effect on the same date. The Bureau intends to exercise its authority to adopt regulations to clarify new consumer protection obligations under the statute, to adopt additional consumer protections not required by the statute, and to give servicers sufficient time to come into compliance. The Bureau is also considering adjusting servicers' legal obligations, including the obligations of small servicers, in certain circumstances to ease burden without sacrificing adequate protection of consumers.

The Bureau is proposing additional standards to improve the way servicers treat borrowers, particularly delinquent borrowers. Some servicers have made it very difficult for delinquent borrowers to understand, and take advantage of, potential alternatives to foreclosure. For example, servicers have frequently neglected to reach out or respond to such borrowers to discuss alternatives to foreclosure, lost or misplaced the documents of borrowers who have sought loan modifications or other options offered by servicers, and forced borrowers who have invested substantial time communicating with an employee of the servicer to repeat the process with different employees that lack information about the substance of prior communications. The Bureau is proposing new servicing regulations to address these concerns.

When finalized, the Bureau's rules will constitute the first truly national mortgage servicing standards. Other Federal regulatory agencies have issued guidance on mortgage servicing and loan modifications and taken enforcement actions against mortgage servicers. The State attorneys general, joined by numerous Federal agencies including the Bureau, entered into the National Mortgage Settlement with the nation's five largest servicers in February 2012. The National Mortgage Settlement applies to portfolio loans serviced by the five largest servicers. Borrowers of mortgage loans owned by GSEs or private investors may not necessarily gain the benefit of the protections set forth in that settlement.

These varied regulatory responses are understandable when viewed as a response to an unprecedented mortgage crisis and significant problems in the servicing of mortgage loans. Ultimately, however, both borrowers and mortgage servicers will be better served by having uniform minimum national standards that govern mortgage servicing. When adopted in final form, the Bureau's rules will apply to all mortgage servicers, whether depository institutions or non-depository institutions, and to all segments of the mortgage market, regardless of the ownership of the loan—except to the extent the Bureau adopts exemptions for smaller servicers.

2. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

This rulemaking has multiple objectives. The proposed provisions on force-placed insurance should reduce the likelihood that servicers purchase force placed insurance without a reasonable basis. This will reduce instances of servicers charging borrowers for force-placed insurance they do not need or charge more than is bona fide and reasonable. The proposed provisions on error resolution and requests for information would require servicers to promptly investigate alleged errors and, as appropriate, correct them. Servicers would also be required to conduct reasonable and timely searches for certain types of information.

The proposed provisions on maintaining reasonable information management policies and procedures address wide-spread problems reported across the mortgage servicing industry with regard to management of borrower documents and information. Compliance with the rule will require providing accurate information to borrowers, correcting errors where they occur, evaluating borrowers for loss mitigation options, facilitating oversight of, and compliance by, service providers, and facilitating servicing transfers.

The proposed provisions on early intervention with delinquent borrowers are intended to spur the engagement between servicers and borrowers that is necessary for avoiding foreclosure. Early intervention may also generally benefit borrowers by reducing avoidable interest costs, limiting the impact on borrowers' credit reports, and facilitating household budgeting and planning.

The proposed provisions on continuity of contact ensure that servicer personnel have access to information about delinquent borrowers so that the servicer can appropriately assist the borrower in exploring loss mitigation options.

Finally, the proposed provisions on loss mitigation would require servicers that make loss mitigation options available to borrowers in the ordinary course of business to undertake certain duties in connection with the evaluation of borrower applications for loss mitigation options. These servicers would have a duty to evaluate borrowers that apply for loss mitigation within specific timeframes and to inform borrowers about the status of their application and the servicer's decision. These servicers would also be prohibited from completing a foreclosure sale unless certain conditions held.[226]

3. Description and, Where Feasible, Provision of an Estimate of the Number of Small Entities to Which the Proposed 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 standards.[227] 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 most other financial businesses, the threshold is average annual receipts (*i.e.,* annual revenues) that do not exceed $7 million.[228]

During the Small Business Review Panel outreach, 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[229] (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 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.[230]

The following table provides the Bureau's estimate of the number and types of entities that may be affected by the proposals under consideration:

ESTIMATED NUMBER OF AFFECTED ENTITIES AND SMALL ENTITIES BY NAICS CODE AND ENGAGEMENT IN CLOSED-END MORTGAGE LOAN SERVICING

Category	NAICS	Small entity threshold	Total entities	Small entities	Entities engaged in mortgage loan servicing	Small entities engaged in mortgage loan servicing
Commercial banks & savings institutions	522110, 522120	$175,000,000 assets	7,724	4,250	7,502	4,098
Credit unions	522130	$175,000,000 assets	7,491	6,568	5,190	4,270

[226] As specified in proposed § 1024.41(g), if a servicer receives a timely and complete loss mitigation application, a 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.

[227] The current SBA size standards are found on SBA's Web site, available at: *http://www.sba.gov/content/table-small-business-size-standards.*

[228] *Id.*

[229] Savings institutions include thrifts, savings banks, mutual banks, and similar institutions.

[230] The Bureau is continuing to refine its description of small non-profit organizations engaged in mortgage loan servicing and working to estimate the number of these entities, but it is not possible to estimate the number of these entities at this time. 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.

ESTIMATED NUMBER OF AFFECTED ENTITIES AND SMALL ENTITIES BY NAICS CODE AND ENGAGEMENT IN CLOSED-END MORTGAGE LOAN SERVICING—Continued

Category	NAICS	Small entity threshold	Total entities	Small entities	Entities engaged in mortgage loan servicing	Small entities engaged in mortgage loan servicing
Real estate credit	522292	$7,000,000 revenues	5,791	5,152		
Other activities related to credit intermediation (includes loan servicing).	522390	$7,000,000 revenues	5,494	5,319	1,388	800

For commercial banks, savings institutions and credit unions, the number of entities and asset sizes were obtained from December 2010 Call Report data as compiled by SNL Financial. Banks and savings institutions are counted as engaging in mortgage loan servicing if they hold closed-end loans secured by 1-to-4 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 1-to-4 family mortgages on 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 and is 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.[231]

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report

The proposed rule does not impose new reporting requirements.

The possible recordkeeping and compliance costs for small entities from each major component of the proposed rule are presented below. The Bureau presents these costs against a pre-statute baseline. This baseline includes the costs of complying with the Federal rules that overlap with the proposed rule, as described in section 5 of this part, below. The Bureau expects that the costs of complying with the proposed rule relative to the pre-statute baseline are lower than these costs would be if not for the costs of complying with the existing Federal rules. In particular, certain one-time and ongoing costs regarding error resolution, early intervention and loss mitigation will have generally been incurred and budgeted for by servicers. These expenses will facilitate and thereby reduce the cost of compliance with the proposed rule.

Benefits to consumers from the proposed rule have been previously discussed in the section 1022 analysis in part VII, above.

(a) Force-Placed Insurance

Dodd-Frank Act section 1463 amends RESPA to prohibit a servicer of a federally related mortgage from obtaining force-placed hazard 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 statute sets forth a mandatory process servicers must follow, which includes sending two notices to the borrower, before imposing any charge on a borrower for force-placed insurance. The statute also provides process requirements about 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 Bureau is proposing forms for the force-placed insurance notices to be sent to borrowers. The Bureau is also proposing requirements concerning: charges related to force-placed insurance, payment of insurance from escrow, and notice requirements when servicers renew existing insurance policies.

Based on discussions with industry and the SERs, the Bureau understands that the proposed 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.

Based on discussions with the SERs, the Bureau currently understands that many small servicers already comply with most of the force-placed insurance provisions of the proposed rule. Two SERs stated that they already provide two or more notices of pending force-placed insurance and others stated that they already refund premiums back to borrowers for periods of overlapping coverage. Other SERs noted that they already provide refunds for overlapping coverage.

If small servicers in general already comply with the force-placed insurance provisions of the proposed rule, then the impact of the proposed 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. For example, one SER stated that their current notice does not include an estimate of force-placed insurance costs. In addition, some small servicers who very rarely

[231] The Bureau is continuing to refine its estimate of the number of firms providing real estate credit and engaging in other activities related to credit intermediation that are small and which engage in mortgage loan servicing.

need to force-place insurance and therefore use informal procedures 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.

When the Bureau convened its Small Business Review Panel on mortgage servicing, the Bureau learned that several of the small servicers that participated on the panel obtained force-placed insurance policies that must be renewed monthly. The Bureau proposes to mitigate the cost of these disclosures by providing that a servicer is not required to send more than one renewal notice during any 12-month period.

One SER raised a different concern regarding notice and process costs associated with borrowers who have chronic lapses in hazard insurance coverage. This SER said that there would be labor costs associated with managing a process in which notices must be delivered at required intervals, setting up escrows for the premium, refunding premiums, and repeating the process when insurance lapses again. The Bureau believes that most small servicers already incur most of these costs. However, the Bureau is interested in data and other factual information about the likely compliance costs associated with borrowers who have chronic lapses in hazard insurance coverage and requests comment on this issue.

Finally, most SERs did not raise specific concerns with the proposal to expand existing requirements, in regards to disbursements from a borrower's escrow account to pay the borrower's hazard insurance premium, to borrower's whose mortgage payments are more than 30 days past due. Two SERs that expressed concern about advancing funds to renew a borrower's hazard insurance because the borrower could cancel the insurance and keep the refund.[232] The Small Business Review Panel recommended that the Bureau reduce the incentives for borrowers to take such action by allowing servicers to advance premium payments in 30-day installments. Proposed comment 17(k)(5)–3 reflects the panel's recommendation, and the Bureau believes that small servicers would not be unduly burdened by the Bureau's proposal.

(b) Error Resolution and Response to Inquiries

Dodd-Frank Act section 1463 amends section 6 of RESPA by adopting a number of servicer prohibitions with respect to handling alleged errors and inquiries, including revising the timeframe to respond to qualified written requests, and prohibiting the charging of fees in connection with qualified written requests.

The Bureau is proposing a comprehensive set of requirements for investigating and correcting errors and for responding to borrower inquiries. Servicers would be required to correct errors relating to allocation of payments, provision of final balances for purposes of paying off the loan, avoiding foreclosures, or other standard servicer duties. Servicers also would be required to respond to inquiries about certain topics.

Servicers would have to provide borrowers with a written acknowledgement of receiving a notice of error, unless the servicer resolves the error within five days and the borrower is notified of the resolution in writing. Servicers would have to correct the error and provide the borrower with written notification of the correction or conduct a reasonable investigation and provide the borrower with written notification regarding the investigation and the documents relied upon by the servicer. Generally, the investigation would have to be completed and a response provided within 30 days after receipt of the notice of error.

Substantially similar requirements apply to inquiries. Servicers would have to provide borrowers with written acknowledgement of receiving an information request, unless the servicer provides the borrower with the information requested and with contact information for further assistance within five days, which can be provided orally or in writing. Servicers would have to provide the borrower with the requested information, either orally or in writing, or conduct a reasonable search for the information and provide the borrower with a written notification regarding the search. Generally, with the exception of requests for certain types of information, the information or the notice would have to be provided within 30 days after receipt of the information request.

Aside from the requirement to respond in writing to notices of error and inquiries, servicers not in compliance with the other provisions would 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. However, the Bureau understands that most small servicers already comply with these proposed provisions. SERs had no objection to the proposed response timeframes. SERs 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.

SERs did generally object to the proposed written response requirements. Several SERs stated that having to respond in writing to every notice of error would be burdensome. Further, SERs argued that there would be no consumer benefit, since errors are generally asserted orally and resolved quickly, if not immediately, and orally. The Bureau notes that the proposed provision regarding inquiries does not require a written response if the servicer provides the information requested to the borrower within five days. Nevertheless, the Bureau understands that small servicers, as defined above, have an incentive to provide protections to consumers that may not exist for other servicers.

(c) Reasonable Information Management Policies and Procedures

Section 1463 of the Dodd-Frank Act requires servicers to comply with any obligation the Bureau finds appropriate to carry out the consumer protection purposes of RESPA. The Bureau is using this authority to propose a requirement that servicers establish reasonable information management policies and procedures. This provision would impose a recordkeeping burden on small servicers.

The proposed provisions specify certain objectives for servicers' information management practices. These practices should facilitate: Accessing and providing accurate information; investigating and correcting errors and providing requested information; evaluating loss mitigation options; oversight of, and compliance by, service providers; facilitating servicing transfers; and providing access to information about actions taken by the servicer.

Servicers that maintain reasonable information management policies and procedures 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. The proposal mitigates all of these costs for small servicers 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

[232] Small Business Review Panel Report, at 22.

relating to safeguarding the institution's safety and soundness that facilitate reasonable information management for purposes of mortgage servicing.

The SERs appreciated the flexibility of the proposal and thought it was good that ''reasonable'' depends on the size, nature, and scope of the entity. The SERs emphasized that small firms do not necessarily use automated or online systems to record and track all borrower communications. They urged the Bureau to avoid structuring the requirement in such a way as to require expensive system upgrades.

(d) Early Intervention for Delinquent Borrowers

Section 1463 of the Dodd-Frank Act requires servicers to comply with any obligation the Bureau finds appropriate to carry out the consumer protection purposes of RESPA. The Bureau is using this authority, among others, to propose early intervention and continuity of contact provisions regarding delinquent borrowers.

The Bureau is generally proposing to require servicers to make two contacts with delinquent borrowers. The Bureau proposes to require servicers to make a good faith effort to contact delinquent borrowers orally no later than 30 days after the payment due date. The Bureau also proposes to require servicers to provide delinquent borrowers with a written notice with information about loss mitigation options and foreclosure. This second contact must be provided no later than 40 days after the payment date that the borrower missed.

The Bureau is proposing to mitigate the cost of the written notice provision by providing servicers with model clauses and by limiting the written notice to be provided once every 180-day period. The Bureau's model clauses provide servicers with examples of language explaining the foreclosure process 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 SERs explained that they generally contact delinquent borrowers well before the 45th day of a borrower's delinquency. One SER mentioned that the GSEs require contact with delinquent borrowers at day 16. The SERs stated that they had relatively low numbers of delinquent borrowers; however, one SER expressed concern about borrowers who were frequently delinquent. This SER did not want to have to send information every month. The Bureau notes that under the proposal, a servicer is not required to provide the written notice to a borrower more than once during any 180-day period.

Some SERs did object to the proposed written notice requirement. The SERs generally stated that they tailor the information they provide to the specific situation of the borrower. One SER objected to a process that the SER regarded as unnecessary and which would require sending yet another notice to the borrower.

(e) Continuity of Contact

Section 1463 of the Dodd-Frank Act requires servicers to comply with any obligation the Bureau finds appropriate to carry out the consumer protection purposes of RESPA. The Bureau is using this authority, among others, to propose requiring servicers to assign personnel to respond to inquiries of certain delinquent borrowers and, as applicable, assist them with loss mitigation options.

The Bureau is proposing that borrowers who meet the requirements for the proposed oral notification under the Bureau's proposed early invention provision must be provided with live phone access to the assigned personnel. The proposal would require that servicers maintain reasonable policies and procedures designed to ensure that the assigned personnel perform an enumerated list of functions, such as having access to certain information about the borrowers (*e.g.,* a complete record of the borrower's payment history in the servicer's possession). The proposal provides conditions that define the duration of continuity of contact, and the proposal provides that certain delays and failures that disrupt continuity of contact do not violate the rule.

The Bureau believes that small servicers generally meet the proposed provisions for continuity of contact. SERs generally stated that with their small staffs, everyone had access to files and would be able to assist borrowers in delinquency. One SER noted that originating officials handle the collections for the loans they originated. This SER noted that borrowers have ready access to the originator and the originator has full access to all loan documents and payment history.

(f) Loss Mitigation

Section 1463 of the Dodd-Frank Act requires servicers to comply with any obligation the Bureau finds appropriate to carry out the consumer protection purposes of RESPA. The Bureau is using this authority, among others, to propose requirements on servicers that offer loss mitigation options to borrowers in the ordinary course of business.

As discussed above, the Bureau is aware of the potential impacts of the loss mitigation requirements on small servicers. As discussed above for proposed § 1024.41, while the Small Business Review Panel Report and the outreach meeting did not focus in significant detail on some of the specific measures proposed here such as, for example, appeals of loss mitigation determinations, the SERs provided feedback on many elements of the loss mitigation process. 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.[233]

The SERs said that they generally engaged in individualized contact with borrowers early in the foreclosure process, completed discussions of loss mitigation options with borrowers prior to a point in time when borrowers should have significant foreclosure related information, and generally worked closely with foreclosure counsel so that foreclosure processes and loss mitigation could be easily conducted simultaneously without prejudice to the loss mitigation process. Further, the SERs explained that they were willing to communicate with borrowers about loss mitigation contemporaneously with the foreclosure process, and one SER indicated that it would be willing to bring a mortgage file back to consider a modification, if appropriate.[234]

Based in part on the outreach with the SERs on April 24, 2012, as well as other feedback obtained by the Bureau after that outreach meeting, the Bureau considered proposing clearer and more detailed requirements relating to loss mitigation practices. The Bureau determined, for the sake of clarity and consistency, to include loss mitigation obligations as a separate regulation, rather than embedding the requirements within the provisions relating to error

[233] *See* Small Business Review Panel for Mortgage Servicing Rulemaking, Outline of Proposals Under Consideration and Alternatives Considered, at 19, 22, 24–26.

[234] Small Business Review Panel Report at 26.

resolution, reasonable information management policies and procedures, early intervention for delinquent borrowers, and continuity of contact.

(g) Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report or Record

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.3.

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.

5. Identification, to the Extent Practicable, All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

The Dodd-Frank Act codified certain requirements contained in existing regulations and in some cases imposed new requirements that expand or vary the scope of existing regulations. The Bureau is working to eliminate conflicts and to harmonize the earlier rules with the new statutory requirements.

RESPA section 6(e) contains procedures for qualified written requests that overlap with section 1463 of the Dodd-Frank Act to provide additional procedures for resolving errors and responding to inquiries. The Bureau is proposing broader, more consumer-friendly error resolution and information request procedures that cover wider topics than the current qualified written request procedures and will subsume the qualified written request procedures. The Bureau believes that a common minimum set of procedures applicable to all assertions of errors or information requests, whether in the form of a qualified written request or not, will benefit both borrowers and servicers. Further, as noted elsewhere in, this **SUPPLEMENTARY INFORMATION**, depending on the circumstances, the error resolution procedures in this rule may overlap with the direct dispute procedures under FCRA where the dispute involves erroneously furnishing negative information to a consumer reporting agency. *See* 15 U.S.C. 1681s–2(a)(8); 12 CFR 1022.43.

As noted, elsewhere in this **SUPPLEMENTARY INFORMATION**, the early intervention and loss mitigation procedures in this proposed rule may overlap with existing Federal law codifying requirements of FHA, VA, and the Rural Housing Service with respect to mortgages insured by those agencies. The Bureau also understands that 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). Similar to the information required under section 106(c)(5) of the Housing and Urban Development Act, the written notice in proposed § 1024.39(b)(2)(vi) would include contact information for housing counselors and the borrower's State housing finance authority, although servicers would be required to provide the written notice not later than 40 days after a borrower misses a payment due date. To the extent requirements proposed by Bureau overlap with existing Federal rules, the Bureau expects servicers would abide by the stricter standard in order to comply with all requirements.

Apart from this overlap, the Bureau is not aware of any other Federal regulations that currently duplicate, overlap, or conflict with the proposals under consideration.[235] The Bureau requests comment to identify any additional such Federal rules that impose duplicative, overlapping, or conflicting requirements on servicers and potential changes to the proposed rules in light of duplicative, overlapping, or conflicting requirements.

[235] The RFA requires identification of duplicative, overlapping, or conflicting Federal regulation. Consent orders, settlement agreements with Federal agencies, and investor requirements of Fannie Mae and Freddie Mac do not constitute Federal regulations for purposes of the IRFA.

6. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The SERs expressed general concern about the costs to small entities of regulation, but the SERs also stated that they were already in compliance with most of the provisions of the proposed rule. Where the SERs expressed concern about the costs of complying with a proposed provision, the Bureau considered alternatives that might impose lower costs on small servicers, but does not believe that these alternatives would accomplish the stated objectives of the applicable statute.

Regarding the proposed disclosures for force-placed insurance, the Bureau understands that small servicers may incur costs for providing these disclosures that large servicers do not. Providers may be more likely to charge small servicers for new or changed disclosures than they are to charge large servicers. Small servicers are also more likely to produce the disclosures in-house. The Bureau believes that the proposed force-placed insurance disclosures would be an effective and important component of a statutory regime intended to reduce or prevent unnecessary force-placement of hazard insurance. The Bureau does not believe that less costly alternatives to the proposed rule for small servicers would accomplish this objective. The Bureau notes that most SERs did not raise concerns with the proposal. The Bureau proposes to mitigate the cost of the disclosures to all servicers by providing that a servicer is not required to send more than one renewal notice during any 12-month period.

Regarding the proposed provisions for reasonable information management policies and procedures, the Bureau provides flexibility for small servicers by providing for servicers to design policies and procedures that are appropriate for their servicing businesses 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. As noted above, the SERs appreciated the flexibility of the proposal and thought it was good that reasonableness would depends on the size, nature, and scope of the entity.

The SERs did express concern in regards to the error resolution procedures. In particular, several SERs stated that having to respond in writing to every notice of error would be burdensome. The Bureau notes that the proposal includes a provision that minimize the burden on servicers from the error resolution requirements if a notice of error is overbroad or unduly burdensome.

The Bureau considered providing small servicers with an alternative method of compliance with two of the proposed provisions for error resolution. Under the alternative considered, small servicers would not have needed to comply with the proposed acknowledgement of receipt requirement or the proposed response to notice of error requirement if (a) the small servicer provided notification of the correction orally if the error was asserted orally by the borrower, and (b) the small servicer indicated in its records both the error asserted by the borrower and the action taken by the servicer to correct the error. The Bureau believes, however, that there is substantial consumer protection in the acknowledgement of receipt and response to notice of error requirements and that the alternative may diminish these protections for borrowers with mortgages that happen to be serviced by small servicers. The Bureau solicits comment on whether the Bureau should further consider alternative means of compliance with the proposed error resolutions procedures.

Small servicers generally explained that they did not expect the Bureau's proposed early intervention requirements would impose significant burden because they were already providing early intervention for delinquent borrowers. Based on this information, the Bureau has not proposed to provide small servicers an exemption from the proposed notification requirements under proposed § 1024.39(a) and (b). However, the Bureau solicits comment on whether the Bureau should consider alternative means of compliance with proposed § 1024.39(a) and (b), such as by permitting small servicers to develop a more streamlined written notice under proposed § 1024.39(b).

7. Discussion of Impact on 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 for Advocacy of the SBA on April 9, 2012 that the Bureau would collect the advice and recommendations of the same SERs identified in consultation with the Chief Counsel for Advocacy of the SBA through the Small Business Review Panel outreach 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.[236] The Bureau sought to collect the advice and recommendations of the SERs during the Panel Outreach meeting regarding these issues because, as small financial service providers, the SERs could provide valuable input on any such impact related to the proposed rule.[237]

At the time the Bureau circulated the Small Business Review Panel outreach materials to the SERs in advance of the PanelOutreach 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.[238]

At the Panel Outreach Meeting, the Bureau asked the SERs a series of questions regarding cost of business credit issues.[239] The questions were focused on two areas. First, the SERs 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 SERs 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 SERs' cost of credit.

The SERs 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 SER mentioned that at times people may use a home-secured loan to finance a business, which was corroborated by a different SER based on his personal experience with starting a business. The Bureau is generally interested in the use of personal credit to finance a business and invites interested parties to provide data and other factual information on this issue.

Based on the feedback obtained from SERs at the Panel Outreach Meeting, the Bureau currently does not anticipate that the proposed rule will result in an increase in the cost of credit for small business entities. To further evaluate this question, the Bureau solicits comment on whether the proposed rule will have any impact on the cost of credit for small entities.

IX. Paperwork Reduction Act

The collection of information contained in this proposal, 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). 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.

This proposed rule would amend 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. As described below, the proposal would amend the collections of information currently in Regulation X.

The title of this information collection is 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing. The frequency of response is on-occasion. These information collection requirements would be required to provide benefits for 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

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[236] *See* 5 U.S.C. 603(d)(2). The Bureau provided this notification as part of the notification and other information provided to the Chief Counsel for Advocacy of the SBA with respect to the Small Business Review Panel outreach pursuant to RFA section 609(b)(1).

[237] *See* 5 U.S.C. 603(d)(2)(B).

[238] *See* TILA § 104(1); RESPA § 7(a)(1).

[239] Small Business Review Panel Report, appendix D, at 154–155 (PowerPoint slides from the Panel Outreach Meeting, ''Topic 7: Impact on the Cost of Business Credit'').

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.[240]

Under the proposal, the Bureau would account 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 12,813 respondents subject to the proposed rule would be approximately 570,000 hours for one time changes and 2.4 million hours annually.[241] 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 proposed 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 11,425 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 depository respondents except for one large entity and 95% of non-depository respondents (and 100% 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 proposing six changes to the information collection requirements in Regulation X:

1. Provisions regarding mortgage servicing transfer notices: The Bureau's proposal would substantially reduce the length and complexity of the mortgage servicing transfer notice but would expand coverage from closed-end first-lien mortgages to closed-end subordinate-lien mortgages as well.

2. Provisions regarding the placement and termination of force-placed insurance, including three notices: The Bureau's proposal for force-placed insurance would require servicers to provide two notices to a borrower at least 45 days and 15 days before charging the borrower for force-placed insurance. In addition to the two notices, the Bureau is proposing to require 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 proposals for error resolution would include 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. The Bureau's proposal for response to information requests would require servicers to provide a written response acknowledging receipt of an information request. Servicers would also be required to provide the borrower with the requested information either orally or in writing, 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 proposals would require servicers to provide oral and written notices upon a borrower's reaching certain stages of delinquency.

5. Requirements regarding loss mitigation: Under the Bureau's proposals, servicers that offer loss mitigation options in the ordinary course of business would be required to follow certain procedures when evaluating loss mitigation applications, including (1) providing a notice telling the borrower if the loss mitigation is incomplete, approved, or denied (and, for denials of loan modification requests, a more detailed notice of the specific reason for denial and appeal rights), (2) providing a notice of the appeal determination, and (3) providing servicers of senior or subordinate liens encumbering the property that is the subject of the loss mitigation application copies of the loss mitigation application.

B. Analysis of Proposed Information Collection Requirements[242]

1. Mortgage Servicing Transfers

The Bureau's proposal would substantially reduce the length and complexity of the mortgage servicing transfer notice but would expand coverage to closed-end second lien mortgages, in addition to closed-end first-lien mortgages.

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 servicer the borrower's mortgage. The Bureau's proposed provision would substantially reduce 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 would have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents would 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.[243]

Certain Bureau respondents would have ongoing burden in hours or vendor costs associated with the information technology used in producing the disclosure. All Bureau respondents would have ongoing vendor costs associated with distributing (*e.g.,* mailing) the disclosure. The Bureau estimates this ongoing burden to be 2 hours and $215, on average, for each respondent.

2. Force-Placed Insurance Disclosures

The Bureau's proposal for force-placed insurance would require servicers to provide two notices to a borrower at least 45 days and 15 days before charging the borrow for force-placed insurance. In addition to the two notices, the Bureau is proposing to

[240] 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.

[241] For proposes of this PRA analysis, references to ''creditors'' or ''lenders'' shall be deemed to refer collectively commerical 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.

[242] 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 proposal. The Supporting Statement is available at *www.reginfo.gov.*

[243] Dollar figures are vendor costs and do not include the dollar value of burden hours.

require 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 the proposed 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 proposed 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.

All respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents would have one-time burden in hours or vendor costs from creating software and information technology capability to produce the new renewal disclosure. Furthermore, 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.[244]

Certain respondents would have ongoing burden in hours or vendor costs associated with the information technology used in producing the disclosure. All respondents would have ongoing vendor costs associated with distributing (*e.g.,* mailing) the renewal disclosure. The Bureau estimates this ongoing burden to be 15 minutes and $23, on average, for each respondent.

3. Error Resolution and Requests for Information

The Bureau's proposals for error resolution and requests for information would require written acknowledgement of receiving a 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.

The Bureau estimates that one-time hourly burden to provide training for relevant staff to comply with the proposed disclosure requirements to be 43 hours, on average, per respondent.

Respondents would have ongoing burden in hours and/or vendor costs associated with the information technology used in producing the disclosure. All respondents would 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 50 hours and $87, on average, for each respondent.

4. Early Intervention With Delinquent Borrowers

An information collection would be created by the Bureau's proposal to require servicers to provide an oral and written notice upon a borrower's reaching certain stages of 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 to perform duties similar to those set forth in the Bureau's proposed provisions regarding early intervention with delinquent borrowers; the Bureau estimates that 80% of outstanding mortgages are guaranteed by one of these institutions. The Bureau estimates that 75% 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 3 hours and $3, on average for each respondent.

5. Loss Mitigation

Under the Bureau's proposals, servicers that offer loss mitigation options in the ordinary course of business would be required to follow certain procedures when evaluating loss mitigation applications, including (1) providing a notice telling the borrower if the loss mitigation is incomplete, approved, or denied (and, for denials of loan modification requests, a more detailed notice of the specific reason for denial and appeal rights), (2) providing a notice of the appeal determination, and (3) providing servicers of senior or subordinate liens encumbering the property that is subject of the loss mitigation application copies of the loss mitigation application.

The loss mitigation provision would create an information collection by requiring servicers to notify borrowers who submit loss mitigation applications and any servicers of senior or second liens encumbering the property that is the subject of the loss mitigation application where an applications has been submitted. Servicers may be required to send up to three notices per loss mitigation application. For incomplete applications, servicers would be required to notify the borrower that their application is incomplete and explain the steps needed to complete. For complete applications, the servicer is required to notify the borrower of their decision and provide a copy of the application to any servicers of senior or subordinate liens encumbering the property that is the subject of the loss mitigation application. For incomplete applications that are resubmitted, and possess second-lien loan on their property, the provision would require three notices.

All respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents would 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 20 minutes and $90, on average, for each respondent. The Bureau estimates the ongoing burden to be 135 hours and $229, on average, for each respondent.

B. Summary of Burden Hours

[244] Dollar figures are vendor costs and do not include the dollar value of burden hours.

	Respondents	Disclosures per respondent	Hours burden per disclosure	Total burden hours	Total vendor costs
Ongoing:					
Notice of Mortgage Service Transfer	12,813	726	0.003	26,000	$2,760,000
Force-Placed Insurance	12,813	77	0.003	3,000	290,000
Error Resolution & Response to Inquiries	12,813	300	0.167	642,000	1,110,000
Early Intervention for Delinquent Borrowers	12,813	12	0.250	37,000	40,000
Loss Mitigation	12,813	810	0.161	1,670,000	2,930,000
One-Time:					
Notice of Mortgage Service Transfer	12,813	1	0.495	6,000	1,160,000
Force-Placed Insurance	12,813	1	0.740	9,000	1,160,000
Error Resolution & Response to Inquiries	12,813	1	43	547,000	0
Early Intervention for Delinquent Borrowers	12,813	1	0.400	5,000	0
Loss Mitigation	12,813	1	0.295	4,000	1,160,000

Totals may not be exact due to rounding.

C. Comments

Comments are specifically requested concerning: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (2) the accuracy of the estimated burden associated with the proposed collections of information; (3) how to enhance the quality, utility, and clarity of the information to be collected; and (4) how to minimize the burden of complying with the proposed collections of information, including the application of automated collection techniques or other forms of information technology. All comments will become a matter of public record. Comments on the collection of information requirements should be sent to the Office of Management and Budget (OMB), Attention: Desk Officer for the Consumer Financial Protection Bureau, Office of Information and Regulatory Affairs, Washington, DC, 20503, or by the Internet to *http://oira_submission@omb.eop.gov*, with copies to the Bureau at the Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, or by the Internet to *CFPB_Public_PRA@cfpb.gov*.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation. New language is shown inside ►bold-faced arrows◄, while language that would be removed is set off with **[**bold-faced brackets**]**. In certain cases deemed appropriate by the Bureau to aid understanding, redesignated text, such as text moved from one paragraph to another, is also shown inside arrows and brackets.

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 above, the Bureau proposes to amend part 1024 of Chapter X in Title 1 of the Code of Federal Regulations 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.

2. Redesignate §§ 1024.1 through 1024.5 as Subpart A to part 1024 .

3. In part 1024, add the heading ''Subpart A—General'' above § 1024.1.

4. In § 1024.2, revise the definitions for ''Federally related mortgage loan,'' ''Mortgage broker,'' ''Origination service,'' ''Public Guidance Documents,'' ''Servicer,'' and ''Servicing,'' to read as follows:

§ 1024.2 Definitions.

* * * * *

(b) * * *

Federally related mortgage loan **[**or *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 (not an employee of a lender) or entity 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 or entity that closes the loan in its own name in a table funded transaction. ⟦A loan correspondent approved under HUD regulation 24 CFR 202.8 for Federal Housing Administration programs is a mortgage broker for purposes of this part.⟧

* * * * *

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 ⟦at the address indicated in § 1024.3⟧. ► 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 the 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; ⟦and⟧

►(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◄

(⟦2⟧►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 ⟦National Credit Union Administration (⟧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, ⟦or⟧ 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.

* * * * *

5. Revise § 1024.3 to read as follows:

§ 1024.3 ⟦Questions or suggestions from public and copies of public guidance documents⟧ ►E-Sign applicability◄.

⟦Any questions or suggestions from the public regarding RESPA, or 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 20006. Legal questions concerning the interpretation of this part may be directed to the same address.⟧ ►The disclosures required by this part may be provided to a borrower 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.*).◄

6. In § 1024.4, revise paragraph (a)(1), remove paragraph (b), and redesignate paragraph (c) as paragraph (b) to 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. ⟦Such documents will be prepared by Bureau staff and counsel. Such documents may be revoked or amended by a subsequent document published in the **Federal Register** by the Bureau.⟧ ►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.◄

7. In § 1024.5, revise paragraph (b)(7) 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 as set forth in section 6 of RESPA (12 U.S.C. 2605)

and [§ 1024.21] ►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).

8. In § 1024.7, revise paragraph (f)(3) 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 3 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. Amend § 1024.17 by:

a. Revising paragraph (c)(8).
b. Revising paragraph (f)(2)(ii).
c. Revising paragraph (f)(4)(iii).
d. Revising paragraph (i)(2).
e. Revising paragraph (i)(4)(iii).
f. Adding paragraph (k)(5).
g. Removing paragraph (l) and redesignating paragraph (m) as paragraph (l).

The revisions and additions 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 the ►federally related◄ mortgage loan documents provide for lower cushion limits, then the terms of the loan documents apply. Where the terms of any [mortgage loan] ►such◄ document allow greater payments to an escrow account than allowed by this section, then this section controls the applicable limits. Where [the mortgage loan] ►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 [the mortgage loan] ►such◄ document►s are◄ [is] 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 [the loan] ►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.

* * * * *

(f) * * *

(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 pay-off funds.

* * * * *

(k) * * *

►(5) Notwithstanding paragraphs (k)(1) and (k)(2) of this section, 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 the borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. If the borrower's escrow account does not contain sufficient funds to pay the premium charge, the servicer must advance funds to make such payment.◄

10. Redesignate §§ 1024.6 through 1024.21 as Subpart B to part 1024.

11. Add the heading ''Subpart B—Mortgage Settlement and Escrow Accounts'' above § 1024.6.

§ 1024.21 [Removed and reserved]

12. Remove and reserve § 1024.21.

§ 1024.22 [Removed]

13. Remove § 1024.22.

§ 1024.23 [Removed]

14. Remove § 1024.23.

15. Add Subpart C to part 1024 to read as follows:

Subpart C—Mortgage Servicing

Sec.

►Subpart C—Mortgage Servicing

§ 1024.30 Scope.

This subpart applies to any mortgage loan, as that term is defined in § 1024.31.

§ 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, except where legal public holidays, Saturdays, and Sundays are expressly excluded.

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 a submission from a borrower requesting evaluation for a loss mitigation option, as that term is defined in this section, in accordance with procedures established by the servicer for the submission of such requests.

Loss mitigation options means alternatives available from the servicer to the borrower to avoid foreclosure.

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 enables the servicer to identify the name and account of the borrower, and either:

(1) States the reasons the borrower believes an error relating to the servicing of the loan has occurred; 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 a servicer for which a borrower may incur a fee.

Subservicer means a servicer who does not own the right to perform servicing, but who performs servicing on behalf of the master servicer.

Transferee servicer means a servicer who obtains or who will obtain the right to perform servicing pursuant to an agreement or understanding with the owner or assignee of a mortgage loan.

Transferor servicer means a servicer, including a table funding mortgage broker or dealer on a first lien dealer loan, who transfers or will transfer the right to perform servicing pursuant to an agreement or understanding with the owner or assignee of a mortgage loan.

§ 1024.32 General disclosure requirements.

(a) *Disclosure requirements.* (1) *Form of disclosures.* Disclosures and notices required under this subpart must be clear and conspicuous, in writing, and in a form the consumer may keep, except as otherwise provided in this subpart. 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 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 the borrower's request.

(b) *Additional information; disclosures required by other laws.* Nothing in this subpart shall be construed as prohibiting a servicer from including additional information with a disclosure required by applicable law. Nothing in this subpart shall be construed as prohibiting a servicer from combining disclosures required by other laws (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 the terms of an agreement with a Federal or State regulatory agency with the disclosures required by this subpart, unless such prohibition is expressly set forth in this subpart, applicable law, or the terms of an agreement with a Federal or State regulatory agency.

§ 1024.33 Mortgage servicing transfers.

(a) *Servicing disclosure statement.* Within 3 days (excluding legal public holidays, Saturdays, and Sundays) after a person applies for a reverse mortgage transaction, the lender, table funding mortgage broker, or dealer in a first lien dealer loan shall provide to the person a servicing disclosure statement that states whether the servicing of the reverse mortgage transaction 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. If an application is denied credit within the 3-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 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.

(2) *Certain transfers excluded.* (i) The following transfers are not considered an assignment, sale, or transfer 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 payment due:

(A) A transfer between affiliates;

(B) A transfer that results from mergers or acquisitions of servicers or subservicers; or

(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 paragraph (b)(2)(ii) 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.

(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 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 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 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, except with respect to calculating the period of delinquency for purposes of § 1024.39.

(2) *Treatment of payments.* A transferor servicer shall promptly either:

(i) Transfer a payment it has received incorrectly 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 to the transferor servicer.

(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 payments by servicer.

(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.* 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.

(2) *Servicer may credit funds to a new escrow account.* 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.

§ 1024.35 Error resolution procedures.

(a) *Notice of error.* A servicer shall comply with the requirements of this section for any oral or written notice from the borrower that asserts a covered 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 a covered error relating to the servicing of the mortgage loan is considered a notice of error and must comply with all requirements applicable to a notice of error.

(b) *Scope of error resolution.* For purposes of this section, the term ''error'' means 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, where such failure has resulted in a charge to the consumer or the furnishing of negative information to a consumer reporting agency.

(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 balanced 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 pursuant to 12 CFR 1026.36(c)(1)(iii).

(7) Failure to provide accurate information to a borrower for loss mitigation options and foreclosure, as required by §§ 1024.39 and 1024.40.

(8) Failure to accurately and timely transfer information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.

(9) Failure to suspend a scheduled foreclosure sale in the circumstances described in § 1024.41(g).

(c) *Contact information for borrowers to assert errors.* A servicer may, by notice provided to a borrower, establish a telephone number and 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 may assert an error by contacting the servicer through the telephone number or address established for that purpose. If a servicer designates a specific telephone number and address for receiving errors, a servicer shall designate the same telephone number and address for receiving information requests pursuant to § 1024.36(b) of this part. A servicer shall provide a notice to a borrower before any change in the telephone number or address used for receiving a notice of error.

(d) *Acknowledgment of receipt.* Within five days (excluding legal public holidays, Saturdays, and Sundays) of a servicer receiving a notice of an error from a borrower, the servicer shall provide to the borrower a response acknowledging receipt of the borrower's notice of the asserted error.

(e) *Response to notice of error.* (1) *Investigation and response requirements.* (i) *In general.* A servicer must respond to a notice of error by either:

(A) Correcting the error identified by the borrower and providing the borrower with notification of the correction, the date of the correction, and contact information for further assistance; or

(B) Conducting a reasonable investigation and providing the borrower with a 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 for further assistance.

(ii) *Different or additional error.* If during a reasonable investigation of a notice of error, a servicer concludes that an error occurred other than, or in addition to, the error alleged by the borrower, the servicer shall correct the error and provide the borrower with a notification that describes the error the servicer identified, the action taken to correct the error, the applicable date for the correction, and contact information for further assistance.

(2) *Requesting information from borrower.* A servicer may request supporting documentation from a borrower, but may not:

(i) Require a borrower to provide such information as a condition of investigating the alleged 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 five days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the asserted error, if a notice of error identifies an error in paragraph (b)(6) of this section.

(B) Prior to the date of a scheduled foreclosure sale or within 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the asserted error, whichever is earlier, if a notice of error identifies an error in paragraph (b)(9) of this section.

(C) For all other errors, not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the asserted error.

(ii) *Extension of time limits.* The servicer may extend the time period for completing its investigation of a notice of error by an additional 15 days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the 30-day period set forth in paragraph (e)(3)(i)(C) of this section, the servicer notifies the borrower of the extension and the reasons for the extension. A servicer may not extend the time period for completing its investigation of an error identified in paragraphs (b)(6) or (b)(9) 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 within 15 days (excluding legal public holidays, Saturdays, and Sundays) of receiving 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 identified by the borrower within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving the notice of error, and the borrower is notified of that correction in writing.

(2) *Error asserted before foreclosure sale.* A servicer is not required to comply with the requirements of paragraphs (d) and (e) of this section if the servicer receives a notice of an error in paragraph (b)(9) of this section seven days or less before a scheduled foreclosure sale, so long as prior to the scheduled foreclosure sale, 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.

(g) *Requirements not applicable.* (1) *In general.* A servicer is not required to comply with the requirements of paragraphs (d) and (e) of this section if the servicer reasonably determines that any of the following applies:

(i) *Duplicative notice of error.* An 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 paragraph (e)(1) 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 error and is reasonably likely to change a servicer's prior determination about the error.

(ii) *Overbroad or unduly burdensome notice of error.* A notice of error is overbroad or unduly burdensome. 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. 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 paragraph (e)(3)(ii) of this section or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances. To the extent a servicer can identify a valid assertion of an error in a submission that is otherwise overbroad or unduly burdensome, the servicer shall comply with the requirements of paragraphs (d) and (e) of this section with respect to that asserted error.

(iii) *Untimely notice of error.* An error is untimely if the error is asserted more than one year after:

(A) Servicing for the mortgage loan that is the subject of asserted error was transferred from the servicer receiving the notice of error to a transferee servicer; or

(B) The mortgage loan amount was paid in full.

(2) *Notice to borrower.* A servicer shall notify the borrower of its determination that the servicer is not required to comply with the requirements of paragraphs (d) and (e) of this section in writing not later than five days (excluding legal public holidays, Saturdays, and Sundays) after making its determination. The notice to the borrower shall set forth the basis that is permitted 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 investigating and 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 error identified in paragraph (b)(9) 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 scheduled foreclosure sale.

§ 1024.36 Requests for information.

(a) *Information request.* A servicer shall comply with the requirements of this section for any oral or written request for information (including a qualified written request for information related to the servicing of the mortgage loan) 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 qualified written request that requests information relating to the servicing of the mortgage loan is considered a request for information and must comply with all requirements applicable to a request for information.

(b) *Contact information for borrowers to request information.* A servicer may, by notice provided to a borrower, establish a telephone number and address that a borrower must use to request information in accordance with the procedures in this section. The notice shall include a statement that a borrower should request information by contacting the servicer through the telephone number or address established for that purpose. If a servicer designates a specific telephone number and address for receiving information requests, a servicer shall designate the same telephone number and address for receiving notices of error pursuant to § 1024.35(c) of this part. A servicer shall provide notice to a borrower before any change in the telephone number or address used for receiving an information request.

(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 response acknowledging receipt of the information request.

(d) *Response to information request.* (1) *Investigation and response requirements.* A servicer must respond to an information request by either:

(i) Providing the borrower with the requested information and contact information for further assistance either orally or in writing; or

(ii) Conducting a reasonable search for the requested information and providing the borrower with a 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 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 information requests, not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives an information request.

(ii) *Extension of time limit.* For information requests governed by the time limit set forth in paragraph (d)(2)(i)(B) of this section, the servicer may extend the time period for completing its search for information 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.

(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 for further assistance within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving an information request. A servicer may provide the borrower such information orally or in writing.

(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 applies:

(i) *Duplicative information.* A borrower requests information that is substantially the same as information previously requested by the borrower for which the servicer has previously complied with its obligation pursuant to paragraph (d)(1) of this section.

(ii) *Confidential, proprietary, or general corporate information.* The borrower requests confidential, proprietary, or general corporate information.

(iii) *Irrelevant information.* The borrower requests information that is not directly related to the borrower's mortgage loan account.

(iv) *Overbroad or unduly burdensome information request.* An information request is overbroad or unduly burdensome. An information request is overbroad if a borrower requests a 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 maximum timeframe permitted by paragraph (d)(2)(ii) of this section or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances. To the extent a servicer can 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.* An 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 amount was paid in full.

(2) *Notice to borrower.* A servicer shall notify the borrower of its determination that the servicer is not required to comply with the requirements of paragraphs (c) and (d) of this section in writing not later than five days (excluding legal public holidays, Saturdays, and Sundays) after making its determination. The notice to the borrower shall set forth the basis that is permitted under paragraph (f)(1) 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 may 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 valid information request.

(2) *Fees permitted.* Nothing in this section shall prohibit a servicer from charging a fee for providing a payoff statement or a beneficiary notice under

applicable State law, if such fees are 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 scheduled 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 on a 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 to protect against flood loss obtained by a servicer as required by the Flood Disaster Protection Act of 1973.

(ii) Hazard insurance obtained by a borrower but renewed by the borrower's servicer as required by § 1024.17(k)(1), (k)(2), or (k)(5).

(iii) Hazard insurance obtained by the borrower but 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), (k)(2), or (k)(5).

(b) *Basis for obtaining force-placed insurance.* 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.

(c) *Requirements for charging borrower for force-placed insurance.* (1) *In general.* A servicer may not charge a borrower for force-placed insurance unless:

(i) The servicer delivers to the borrower or places in the mail a written notice with the disclosures set forth in paragraph (c)(2) of this section at least 45 days before the premium charge or any fee is assessed;

(ii) The servicer delivers to the borrower or places in the mail a written notice in accordance with paragraph (d)(1) of this section; and

(iii) During the 45-day notice period, the servicer has not received verification that the borrower has hazard insurance in place continuously. Determining whether the borrower has hazard insurance in place continuously shall take account of any grace period provided under State or other applicable law.

(2) *Content of notice.* The notice required under paragraph (c)(1)(i) of this section shall include the following:

(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 address;

(v) 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 who has obtained 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;

(vi) A statement that:

(A) Hazard insurance is required on the borrower's property; and

(B) The servicer has obtained or will obtain, as applicable, insurance at the borrower's expense;

(vii) 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;

(viii) A description of how the borrower may provide the information requested pursuant to paragraph (c)(2)(vii) of this section. A servicer that will only accept the requested information in writing must disclose that fact in the notice;

(ix) The cost of the force-placed insurance, stated as an annual premium. If the cost of the force-placed insurance is not known as of the date of the disclosure, a good faith estimate shall be disclosed and be identified as such;

(x) A statement that insurance the servicer obtains may:

(A) Cost significantly more than hazard insurance obtained by the borrower; and

(B) Not provide as much coverage as hazard insurance obtained by the borrower; and

(xi) The servicer's telephone number for borrower questions.

(3) *Format.* The disclosures set forth in paragraph (c)(2) of this section must be in a format substantially similar to form MS–3(A), set forth in Appendix MS–3 of this part. Disclosures made pursuant to paragraphs (c)(2)(vi) and (c)(2)(ix) of this section must be in bold text. Disclosure made pursuant to paragraph (c)(2)(iv) of this section must be in bold text, except that the physical address of the borrower's property may be in regular text.

(d) *Reminder notice.* (1) *In general.* One written notice in addition to the written notice required pursuant to paragraph (c)(1)(i) of this section must be delivered to the borrower or placed in the mail prior to the servicer charging a borrower for force-placed insurance. The servicer may not deliver to the borrower or place the written notice required pursuant to this paragraph (d)(1) in the mail until 30 days after delivering to the borrower or placing in the mail the written notice set forth in paragraph (c)(1)(i) of this section. A servicer that receives no insurance information after delivering to the borrower or placing in the mail the written notice set forth in paragraph (c)(1)(i) of this section must provide the disclosures set forth in paragraph (d)(2)(i) of this section. A servicer that receives insurance information after delivering to the borrower or placing in the mail the written notice set forth in paragraph (c)(1)(i) of this section but does not receive verification that the borrower has hazard insurance in place continuously must provide the disclosures set forth in paragraph (d)(2)(ii) of this section.

(2) *Content of the reminder notice.* (i) *Servicer receiving no insurance information.* A servicer that has not received any insurance information after delivering to the borrower or placing in the mail the written notice set forth paragraph (c)(1)(i) of this section must provide a written notice that shall include the following:

(A) The date of the notice;

(B) A statement that the notice is the second and final notice; and

(C) The disclosures set forth in paragraphs (c)(2)(ii) to (c)(2)(xi) of this section.

(ii) *Servicer not receiving verification of continuous coverage.* A servicer that has received insurance information after delivering to the borrower or placing in the mail the written notice required pursuant to paragraph (c)(1)(i) of this section, but not verification that the borrower has hazard insurance in place continuously, must deliver or place in the mail a written notice that shall include the following:

(A) The date of the notice;

(B) A statement that the notice is the second and final notice;

(C) The disclosures set forth in paragraphs (c)(2)(ii), (c)(2)(iii), (c)(2)(iv), and (c)(2)(xi) of this section;

(D) A statement that the servicer has received the hazard insurance information that the borrower provided;

(E) A statement that indicates to the borrower that the servicer is unable to verify that the borrower has hazard insurance in place continuously; and

(F) 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.

(3) *Format.* The disclosures set forth in paragraph (d)(2)(i) of this section must be in a format substantially similar to form MS–3(B), and the disclosures set forth in paragraph (d)(2)(ii) of this section must be in a format substantially similar to form MS–3(C). Both MS–3(B) and MS–3(C) are set forth in Appendix MS–3 of this part. Disclosures required by paragraphs (d)(2)(i)(B), (d)(2)(ii)(B), and (d)(2)(ii)(F) of this section must be in bold text.

(4) *Updating notice with borrower information.* If a servicer receives hazard insurance information from a borrower after a written notice required pursuant to paragraph (d)(1) of this section 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.

(e) *Renewal or replacing force-placed insurance.* (1) *In general.* A servicer may not charge a borrower for renewing or replacing existing force-placed insurance unless:

(i) The servicer delivers or places in the mail a written notice to the borrower with the disclosures set forth in paragraph (e)(2) of this section at least 45 days before the premium charge or any fee is assessed; and

(ii) During the 45-day notice period, the servicer has not received evidence that the borrower has obtained hazard insurance.

(iii) *Charging a borrower before end of notice period.* Notwithstanding paragraphs (e)(1)(i) and (e)(1)(ii) of this section, a servicer that has renewed or replaced existing force-placed insurance during the 45-day notice period may charge the borrower for the renewal or replacement promptly after the servicer receives verification that hazard insurance obtained by the borrower did not provide the borrower with insurance coverage for any period of time following the expiration of the existing force-placed insurance.

(2) *Content of renewal notice.* A servicer must provide the following information in the notice required under paragraph (e)(1) of this section:

(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 address;

(v) A statement that 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;

(vi) A statement that:

(A) The insurance the servicer obtained previously has expired or is expiring, as applicable; and

(B) Because hazard insurance is required on the borrower's property, the servicer has the right to maintain insurance on the property by renewing or replacing the insurance it previously obtained;

(vii) The cost of the force-placed insurance, stated as an annual premium. If the cost of the force-placed insurance is not known as of the date of the disclosure, a good faith estimate shall be disclosed and be identified as such;

(viii) A statement reminding the borrower that insurance the servicer obtains may:

(A) Cost significantly more than hazard insurance obtained by the borrower; and

(B) Not provide as much coverage as hazard insurance obtained by the borrower.

(ix) A statement that if the borrower obtains hazard insurance, the borrower should 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.

(x) A description of how the borrower may provide the information requested pursuant to paragraph (e)(2)(ix) of this section. A servicer that will only accept the requested information in writing must disclose that fact in the notice; and

(xi) The servicer's telephone number for borrower questions.

(3) *Format.* The disclosures set forth in paragraph (e)(2) of this section must be in a format substantially similar to form MS–3(D), set forth in Appendix MS–3 to this part. Disclosures made pursuant to paragraphs (e)(2)(vi)(B) and (e)(2)(vii) of this section must be in bold text. Disclosures made pursuant to paragraph (e)(2)(iv) of this section must be in bold text, except that the physical address of the property may be in regular text.

(4) *Compliance.* 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 paragraph (e)(1) of this section. Subsequently, a servicer is not required to comply with paragraph (e)(1) of this section before charging a borrower for renewing or replacing existing force-placed insurance more than once every 12 months.

(f) *Mailing the notices.* If a servicer mails a notice required pursuant to paragraphs (c)(1)(i), (d)(1) and (e)(1) of this section, as applicable, 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 verification that the borrower has hazard insurance in place, a servicer must:

(1) Cancel force-placed insurance obtained for a borrower's property; and

(2) 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 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 together with the notice required by section 102(e) of the Flood Disaster Protection Act of 1973.

§ 1024.38 Reasonable information management policies and procedures.

(a) *In general.* (1) *Reasonable policies and procedures.* A servicer shall establish reasonable policies and procedures for maintaining and managing information and documents related to borrower mortgage loan accounts. A servicer meets this requirement if:

(i) The servicer's policies and procedures are reasonably designed to achieve the objectives set forth in paragraph (b) of this section; and

(ii) The servicer's policies and procedures are reasonably designed to ensure compliance with the standard requirements in paragraph (c) of this section.

(2) *Safe harbor.* A servicer satisfies the requirements in this section if it does not engage in a pattern or practice of failing to achieve any of the objectives set forth in paragraph (b) of this section and does not engage in a pattern or practice of failing to comply with any of the standard requirements in paragraph (c) of this section.

(b) *Objectives.* (1) *Accessing and providing accurate information.*

(i) Provide accurate and timely disclosures to borrowers as required by this subpart or other applicable law;

(ii) Investigate, respond to, and, as appropriate, correct errors asserted by borrowers in accordance with the procedures set forth in § 1024.35, including asserted errors resulting from actions of service providers;

(iii) Provide borrowers with accurate and timely information and documents in response to borrower requests made in accordance with the procedures set forth in § 1024.36;

(iv) Provide owners or assignees of mortgage loans with accurate and current information and documents about any mortgage loans they own; and

(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.

(2) *Evaluating loss mitigation options.* (i) Provide accurate information regarding loss mitigation options available to borrowers pursuant to §§ 1024.39 and 1024.40;

(ii) Identify all loss mitigation options for which a borrower may be eligible pursuant to any requirements imposed by an owner or assignee of a 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 make a loss mitigation application complete so that prompt notice of such requirements can be provided to the borrower pursuant to § 1024.41(b)(2); and

(v) Evaluate loss mitigation applications, and any appeals, pursuant to the requirements in § 1024.41.

(3) *Facilitating oversight of, and compliance by, service providers.* (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 an evaluation of a borrower's completed loss mitigation application and the status of any foreclosure proceeding among servicer personnel assigned to a borrower pursuant to § 1024.40 and service providers responsible for handling foreclosure proceedings.

(4) *Facilitating servicing transfers.* Timely transfer all information and documents 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 requirements of this subpart and the terms of the transferee servicer's contractual obligation to the owner or assignee of the mortgage loan. Such information and documents shall include 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.

(c) *Standard requirements.* (1) *Record retention.* A servicer shall retain records that document actions taken by the servicer 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 provide a borrower with a servicing file upon request in accordance with the procedures set forth in § 1024.36. The servicing file shall contain:

(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 mortgage note;

(iii) A copy of the borrower's deed of trust;

(iv) Any collection notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account;

(v) 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

(vi) 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.

§ 1024.39 Early intervention requirements for certain borrowers.

(a) *Oral notice.* If a borrower is late in making a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle, a servicer shall notify or make good faith efforts to notify the borrower orally not later than 30 days after the payment due date that the borrower is late and that loss mitigation options, if applicable, may be available. If the servicer attempts to notify the borrower by telephone, good faith efforts require calling the borrower on at least three separate days in order to reach the borrower. A servicer is not required to notify or make good faith efforts to notify the borrower under this paragraph if the borrower makes the payment within 30 days after the payment due date.

(b) *Written notice.* (1) *In general.* If a borrower is late in making a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle, a servicer shall provide to the borrower a written notice that complies with paragraph (b)(2) of this section not later than 40 days after the payment due date. A servicer is not required to provide the written notice if the borrower makes the payment within 40 days after the payment due date. 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 servicer's mailing address and telephone number;

(iii) A statement, if applicable, providing a brief description of loss mitigation options that may be available from the servicer;

(iv) A statement, if applicable, informing the borrower how to obtain more information about loss mitigation options from the servicer;

(v) A statement explaining that foreclosure is a legal process to end the borrower's ownership of the property and an estimate, expressed in a number of days from the date of a missed payment, of when the servicer makes the referral to foreclosure; and

(vi) The Web site address, if applicable, and telephone number to access:

(A) Any State housing finance authority (as defined in section 1301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989) for the State in which the borrower's property is located; and

(B) Either the Bureau list of homeownership counselors or counseling organizations or the HUD list of homeownership counselors or counseling organizations.

(3) *Model clauses.* Model Clauses MS–4(A), MS–4(B), MS–4(C), MS–4(D), and MS–4(E) in Appendix MS–4 to this part may be used to comply with the requirements of paragraphs (b)(1) and (b)(2) of this section.

§ 1024.40 Continuity of contact.

(a) *Continuity of contact requirements.* (1) *In general.* No later than five days after a servicer has notified or made a good faith effort to notify a borrower as required by § 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. If a borrower has been assigned personnel as required by this paragraph and the assignment has not ended when servicing for borrower's mortgage loan has transferred to a transferee servicer, subject to paragraphs (c)(1)–(c)(4) of this section, the transferee servicer must assign personnel to respond to the borrower's inquiries, and as applicable, assist the borrower with loss mitigation options, within reasonable time of the transfer of servicing for the borrower's mortgage loan.

(2) *Access to assigned personnel.* A servicer shall make access to the assigned personnel available via telephone. If a borrower contacts the servicer and does not receive a live response from the assigned personnel, the borrower must be able to record his or her contact information. The servicer must respond to the borrower within a reasonable time.

(b) *Functions of servicer personnel.* (1) *Reasonable policies and procedures.* A servicer shall establish policies and procedures reasonably designed to ensure the servicer personnel it makes available to the borrower pursuant to paragraph (a) of this section perform the following functions where applicable:

(i) Provide the borrower with accurate information about:

(A) Loss mitigation options offered by the servicer and available to the borrower, based on information in the servicer's possession;

(B) 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 § 1024.41, and if applicable, actions the borrower must take to appeal the servicer's denial of the borrower's loss mitigation application;

(C) The status of any loss mitigation application that the borrower has submitted to the servicer;

(D) The circumstances under which the servicer may make a referral to foreclosure; and

(E) Any loss mitigation deadlines established by the servicer that the borrower must meet.

(ii) Access:

(A) A complete record of the borrower's payment history in the servicer's possession;

(B) 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

(C) 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;

(iii) Provide the documents in paragraphs (b)(2)(ii)(B) and (b)(2)(ii)(C) of this section to persons authorized to evaluate a borrower for loss mitigation options offered by the servicer if the servicer personnel assigned to the borrower are not authorized to evaluate a borrower for loss mitigation options; and

(iv) Within a reasonable time after a borrower request, as applicable, 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.

(2) *Safe harbor.* A servicer's policies and procedures satisfy the requirements in paragraph (b)(1) of this section if servicer personnel do not engage in a pattern or practice of failing to perform the functions set forth in paragraph (b)(1) of this section where applicable.

(c) *Duration of continuity of contact.* A servicer shall ensure that the personnel it assigns and makes available to a borrower pursuant to paragraph (a) of this section remain assigned and available to the borrower until any of the following occurs:

(1) The borrower refinances the mortgage loan;

(2) The borrower pays off the mortgage loan;

(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; or

(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; or

(5) If applicable, a reasonable time has passed since servicing for the borrower's mortgage loan was transferred to transferee servicer.

(d) *Conditions beyond a servicer's control.* A servicer has not violated this section if the servicer's failure to comply with this section is caused by conditions beyond a servicer's control.

§ 1024.41 Loss mitigation procedures.

(a) *Scope.* This section applies to any servicer that makes loss mitigation options available to borrowers in the ordinary course of business with respect to the procedures for reviewing and responding to a loss mitigation application. Nothing in this section shall be construed to impose an obligation on an owner, assignee, guarantor, or insurer of a mortgage loan, unless such entity is also a servicer of a mortgage loan.

(b) *Loss mitigation application.* (1) *Complete loss mitigation application.* 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 loss mitigation applications by the deadline established by the servicer pursuant to paragraph (f) of this section.

(2) *Incomplete loss mitigation application.* (i) Upon receipt of an incomplete loss mitigation application, a servicer shall exercise reasonable diligence in obtaining information from a borrower to make the loss mitigation application complete.

(ii) If a servicer receives an incomplete loss mitigation application earlier than 5 days (excluding legal public holidays, Saturdays, or Sundays) before the deadline established pursuant to paragraph (f) of this section, the servicer shall notify the borrower orally or in writing within 5 days (excluding legal public holidays, Saturdays, or Sundays) after receiving the incomplete loss mitigation application, of the following:

(A) That the loss mitigation application is incomplete;

(B) The additional documents and information the borrower must submit to make the loss mitigation application complete; and

(C) The date by which the borrower must submit the additional documents and information.

(c) *Review of loss mitigation applications.* Within 30 days of receiving a borrower's complete loss mitigation application that is submitted prior to the deadline established pursuant to paragraph (f) of this section, a servicer shall:

(1) Evaluate the borrower for all loss mitigation options available from the servicer for which the borrower may qualify; and

(2) Provide the borrower with a notice stating the servicer's determination of whether it will offer the borrower a loss mitigation option.

(d) *Denial of loan modification options.* A servicer that denies a borrower's loss mitigation application for any trial or permanent loan modification program offered by the servicer shall state in the notice provided to the borrower pursuant to paragraph (c)(2) of this section:

(1) The specific reasons for the servicer's determination for each such trial or permanent loan modification program; and

(2) The fact that the borrower may appeal the servicer's determination, the deadline for the borrower to make an appeal, and any requirements for making an appeal.

(e) *Borrower response.* (1) *In general.* A servicer may require that a borrower accept or reject an offer of a loss mitigation option by a deadline established by the servicer that is no earlier than 14 days after the servicer communicates the loss mitigation option to the borrower.

(2) *Acceptance.* A borrower that 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, shall be deemed to have accepted the offer of a loss mitigation option.

(3) *Rejection.* A servicer may deem a borrower that has not accepted an offer of a loss mitigation option within 14 days after the servicer offers the loss mitigation option to the borrower to have rejected the offer of a loss mitigation option.

(4) *Interaction with appeal process.* A servicer shall permit a borrower to accept or reject a loss mitigation option concurrently with making an appeal pursuant to paragraph (h) of this section.

(f) *Deadline for loss mitigation applications.* A servicer may establish a deadline for a borrower to provide a complete loss mitigation application, which shall be no earlier than 90 days before a scheduled foreclosure sale.

(g) *Prohibition on foreclosure sale.* A servicer shall not conduct a foreclosure sale if a borrower has provided a complete loss mitigation application to the servicer for a loss mitigation option within the deadline established by the servicer pursuant to paragraph (e) of this section, unless:

(1) The servicer has provided the borrower a notice pursuant to paragraph (c)(2) of this section that the borrower is not eligible for a loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal, or the time for requesting an appeal has expired;

(2) The servicer denies the borrower's appeal, as applicable;

(3) The borrower rejects the servicer's offer of a loss mitigation option;

(4) The borrower fails to perform under an agreement on a loss mitigation option.

(h) *Appeal process.* (1) *Appeal process required for loan modification denials.* A servicer that denies a borrower's loss mitigation application for any trial or permanent loan modification program offered by the servicer shall permit a borrower to appeal the servicer's determination.

(2) *Deadlines.* A servicer shall permit a borrower to make an appeal within at least 14 days after providing the notice required pursuant to paragraph (c)(2) 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. A servicer's offer of a loss mitigation option after appeal shall be subject to paragraph (e) of this section. A servicer's decision under this paragraph is not subject to another appeal.

(i) *Duplicative requests.* A servicer is only required to comply with the requirements of this provision for a single complete loss mitigation application for a borrower's mortgage loan account.

(j) *Other liens.* (1) *Duty to identify other servicers.* Any servicer that receives a loss mitigation application shall:

(i) Within 5 days, determine if any other servicers service mortgage loans that have senior or subordinate liens encumbering the property that is the subject of the loss mitigation application; and

(ii) Provide any other servicers identified pursuant to paragraph (j)(1)(i) with a copy of the loss mitigation application.

(2) *Receipt of loss mitigation application.* A servicer that offers loss mitigation options in the ordinary course of business shall comply with the requirements of this section with respect to any loss mitigation application received pursuant to paragraph (j)(1)(ii) of this section as if such loss mitigation application was provided by a borrower.◄

16. Revise Appendix MS–2 to Part 1024 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 your present servicer, [Name of present servicer], about your mortgage loan or this transfer, please contact [Individual or Department] at [Telephone Number]. You may also write to your present servicer at the following address: [Address].

If you have any questions for your new servicer, [Name of new servicer], about your mortgage loan or this transfer, please contact [Individual or Department] at [Telephone Number]. You may also write to your new servicer at the following 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:

____

____

____

[NAME OF PRESENT SERVICER]

____

Date
[and]

____

[NAME OF NEW SERVICER]

____

Date◀

17. Add Appendix MS–3 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 Required Pursuant to § 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 policy number and the name, mailing address and phone number of your insurance company or insurance agent. [Describe how the borrower may provide the insurance information]. [The information must be provided in writing.]

The insurance we [bought] [buy]:

- [Costs **$[premium charge]**] [Will cost an estimated **$[premium charge]**] annually, which is probably more expensive than insurance you can buy yourself.
- May not provide as much coverage as insurance policy you buy yourself.

If you have any questions, please contact us at [telephone number].

MS–3(B)—Model Form for Force-Placed Insurance Notice Pursuant to § 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 policy number and the name, mailing address and phone number of your insurance company or insurance agent. [Describe how the borrower may provide the insurance information]. [The information must be provided in writing.]

The insurance we [bought] [buy]:

- [Costs **$[premium charge]**] [Will cost an estimated **$[premium charge]**] annually, which is probably more expensive than insurance you can buy yourself.
- May not provide as much coverage as insurance policy you buy yourself.

If you have any questions, please contact us at [telephone number].

MS–3(C)—Model Form for Force-Placed Insurance Notice Pursuant to §§ 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].

If you have any questions, please contact us at [telephone number].

MS–3(D)—Model Form for Renewal or Replacement of Force-Placed Insurance Notice Pursuant 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 have the right 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]**], which is probably 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 policy number and the name, mailing address and phone number of your insurance company or insurance agent. [Describe how the borrower may provide the insurance information]. [The information must be provided in writing.]

If you have any questions, please contact us at [telephone number].◀

18. Add Appendix MS–4 to part 1024 to read as follows:

▶MS–4—Model Clauses for the Written Early Intervention Notice Pursuant to § 1024.39(b)(2)

MS–4(A)—Statement Encouraging the Borrower To Contact the Servicer (§ 1024.39(b)(2)(i) and (ii))

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.]

[Servicer Name]

[Servicer Address]

[Servicer Telephone Number]

[For more information, visit [Servicer Web Site or Email Address]].

MS–4(B)—Available Loss Mitigation Options (§ 1024.39(b)(2)(iii))

[You may have options that could help make your mortgage more affordable, including:]

[*Forbearance.* This is a temporary reduction or suspension of your mortgage payments. Forbearance might be available if recent events have made it difficult for you to make your payments—for example, if you recently lost your job, suffered from a disaster, or had an illness or injury that increased your health care costs. If this option is available, your lender could create a payment plan to make up any missed payments over a period of time.]

[*Mortgage modification.* Your lender may be able to change your loan terms, such as your interest rate, the amount of principal you owe, or the number of years you have to repay the loan.]

[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 might be able to transfer ownership of your home without having to pay off the full amount of your mortgage, although you would be required to leave your home. For example, you may be eligible for the following option[s]:]

• [*Short-sale.* With your lender's permission, you might be able to sell your home and pay off your mortgage even if the sale price is less than your remaining balance. You might also be eligible to receive money to help you move.]

• [*Deed-in-lieu of foreclosure.* Your lender may release you from your mortgage if you transfer ownership of your home to your lender. As with a short sale, you might also be eligible to receive money to help you move.]

MS–4(C)—Additional Information About Loss Mitigation Options (§ 1024.39(b)(2)(iv))

[Call us today to learn more about your options and for instructions on how to apply.]

MS–4(D)—Foreclosure Statement (§ 1024.39(b)(2)(v))

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. The foreclosure process usually begins approximately [__] days after you miss a mortgage payment, although it may begin earlier or later. The foreclosure process depends on the laws of the state where your home is located, the terms of your loan, whether you are covered by the Servicemembers Civil Relief Act, and other factors.

MS–4(E)—State Housing Finance Authorities and Housing Counselors (§ 1024.39(b)(2)(vi))

For help exploring your options, Federal government agencies provide contact information for housing counselors, which you can access by contacting [the Consumer Financial Protection Bureau at [Bureau Housing Counselor List Telephone Number] or [Bureau Housing Counselor List Web Site]] [the Department of Housing and Urban Development at [HUD Housing Counselor List Telephone Number] or [HUD Housing Counselor List Web Site]].

Your State housing finance authority may also be able to help. You can reach them at [State Housing Finance Authority Telephone Number] or [State Housing Finance Authority Web Site].◄

19. In part 1024, add Supplement I 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. 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.

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.

Section 1024.17—Escrow Accounts

17(k) Timely payments.

Paragraph 17(k)(5).

1. *Reasonable basis.* 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 servicer with 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.

2. *Reasons other than nonpayment of premium charges.* A borrower's hazard insurance may be canceled or not renewed for a number of reasons other than the nonpayment of premium charges, to the extent permitted by State or other applicable law. Such reasons may include, for example:

i. The borrower cancels the hazard insurance before its expiration date or chooses to not renew the insurance.

ii. The insurance company cancels the hazard insurance before its expiration date or chooses to not renew the insurance because it decides to stop writing insurance for all properties in the community where the borrower's property is located.

iii. The insurance company cancels or chooses not to renew the borrower's hazard insurance based on its underwriting criteria, which may include, for example, borrower's claim history, or a change in the occupancy status of the property (*e.g.,* changing from occupied to non-occupied), or a change in the probability of the property being exposed to loss caused certain hazards (*e.g.,* a change in the property's exposure to loss by windstorm).

3. *Advancement of premium.* 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.

Section 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 options.

1. *Types of loss mitigation options.* 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.

2. *Available from the servicer.* 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.

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 loan or to request information relating to the servicing of the 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.

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.

Section 1024.33—Mortgage Servicing Transfers

33(a) Servicing disclosure statement.

Paragraph 33(a)(1).

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 address for co-applicants.* When an application involves more than one applicant, notification need only be given to one applicant but must be given to the primary applicant where one is readily apparent.

Paragraph 33(a)(2).

1. *Lender servicing.* If the lender, table funding mortgage broker, or dealer in a first lien dealer loan will service the mortgage loan for which the applicant has applied, the disclosure should state that such entity will service such loan and does not intend to sell, transfer, or assign the servicing of the loan.

2. *Lender not servicing.* If the lender, table funding mortgage broker, or dealer in a first lien dealer loan will not service the mortgage loan for which the applicant has applied, the disclosure should state that such entity intends to assign, sell, or transfer servicing of such mortgage loan before the first payment is due.

3. *Other circumstances.* 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. *Notice given 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.

2. Delivery. A servicer should 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 of address. 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 where one is readily apparent.

Section 1024.34—Timely Payments by Servicer

34(b)(2) Servicer may credit funds to a new escrow account.

1. 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(a).

Section 1024.35—Error Resolution Procedures

35(a) Notice of error.

1. *Borrower's representative.* A notice of error is deemed to be submitted by a borrower if the notice of error 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.

2. *Information request.* A servicer should not solely rely on the borrower's description of a request to determine whether the notice constitutes a notice of error, an information request 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. Although the servicer's failure to provide the borrower an annual escrow statement is not defined as an error pursuant to § 1024.35(b), 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 should evaluate whether the letter fulfills the substantive requirements of a notice of error or an information request.

35(b) Scope of error resolution.

1. *Excluded errors.* A servicer is not required to comply with sections 1024.35(d) and (e) with respect to a borrower's assertion of an error that is not defined as a covered error in section 1024.35(b). For example, the following are not covered errors:

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.

35(c) Contact information for borrowers to assert errors.

1. *Exclusive telephone number and address not required.* A servicer is not required to designate a specific telephone number and address that a borrower must use to assert an error. If a servicer does not designate a specific telephone number and 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 telephone number and address.* A notice establishing a telephone number and 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 a telephone number and address that a borrower must use to assert an error, a servicer should provide that telephone number and 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.* The purpose of the designation of an exclusive telephone number and address is to distinguish offices that are capable of receiving errors from other offices maintained by a servicer. A servicer may designate multiple office addresses and phone numbers for receiving 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 address and phone number regardless of whether that specific address or phone number was provided to a specific borrower asserting an error. For example, a servicer may designate a phone number and address to receive errors for borrowers located in California and a separate phone number and address to receive errors for borrowers located in Texas. If a borrower located in California asserts an error through the phone number or address used by the servicer for borrowers located in Texas, a servicer is still considered to have received a notice of error and must comply with the requirements of § 1024.35.

4. *Internet intake of information requests.* A servicer may, but is not required to, establish a process for receiving error notices through email, Web site form, or other online intake method. Any such process shall be in addition to, and not in lieu of, any process for receiving error notices by phone or mail. The process established by the servicer for receiving errors through an online intake method shall be considered the exclusive online intake process for receiving errors. A servicer is not required to provide a separate notice to a borrower to establish a specific online intake process as an exclusive process for receiving such errors.

5. *Automated systems.* Servicers may use toll-free telephone numbers that connect borrowers to automated systems, such as an interactive voice response system, through which consumers may assert errors by inputting information using a touch-tone telephone or similar device. The prompts for asserting errors must be clear and provide the borrower the option to connect to a live representative.

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 for § 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.

35(e)(3) Time limits.

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 scheduled foreclosure sale or 30 days, a servicer may cancel or postpone a scheduled foreclosure sale, in which case, the servicer meets the time limits in § 1024.35(i)(B) by complying with the requirements of § 1024.35(e) before the earlier of 30 days or the date of the rescheduled foreclosure sale.

35(e)(3)(ii) Extension of time limits.

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 errors for which an extension is permissible.

35(e)(4) Copies of documentation.

1. *Types of documents to be provided.* A servicer is only required to provide 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.

Paragraph 35(g)(1)(i).

1. *New and material information.* A dispute between a borrower and a servicer with respect to (i) whether information was previously reviewed by a servicer or (ii) 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. *Indicia of overbroad or unduly burdensome notices of error.* The following are indicia of notices of error that are overbroad or unduly burdensome:

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 covered error asserted by a borrower.

35(h) Payment requirements prohibited.

1. *Borrower obligation to make payments.* Section 1024.35(g) prohibits a servicer from requiring a borrower to make a payment that may be owed on a borrower's account as a prerequisite for complying with its obligations regarding 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(g) 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.

Section 1024.36—Requests for Information

36(a) Information request.

1. *Borrower's representative.* An information request is deemed to be submitted by a borrower if the information request 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.

2. *Owner or assignee of a mortgage loan.* A servicer responds to an information request for the owner or assignee of a mortgage loan by identifying the entity that holds the legal obligation to receive payments from the borrower. For example:

i. A servicer services a mortgage loan that is owned by the servicer, or an affiliate of the servicer, in portfolio. A servicer responds to the borrower's information request 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. 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 responds by providing the borrower with the name of the trust and the name, address, and appropriate contract information for the trustee. Assume a mortgage loan is owned by Mortgage Loan Trust, Series ABC–1, for which XYZ Trust Company is the trustee. The servicer responds 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.

Although investors or guarantors, including, among others, 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 the trust either in connection with an investment in securities issued by the trust or the issuance of a guaranty agreement to the trust, entities that act as investors or guarantors should not be considered the owner or assignee of the mortgage loans solely as a result of their roles as investors or guarantors. 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 Federal National Mortgage Association is the trustee of the trust that owns the mortgage loan, a servicer responds 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 Federal National Mortgage Association as the trustee.

36(b) Contact information for borrowers to request information.

1. *Exclusive telephone number and address not required.* A servicer is not required to designate a specific telephone number and address that a borrower must use to request information. If a servicer does not designate a specific telephone number and 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 telephone number and address.* A notice establishing a telephone number and 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 a telephone number and address that a borrower must use to request information, a servicer should provide that telephone number and 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.* The purpose of the designation of an exclusive telephone number and address is to distinguish offices that are capable of receiving information requests from other offices maintained by a servicer. A servicer may designate multiple office addresses and phone numbers for receiving information requests. However, a servicer is required to comply with the requirements of § 1024.36 with respect to a notice of error received at any such address and phone number regardless of whether that specific address or phone number was provided to a specific borrower that is requesting information. For example, a servicer may designate a phone number and address to receive information requests for borrowers located in California and a separate phone number and address to receive information requests for borrowers located in Texas. If a borrower located in California requests information through the phone number or address used by the servicer for borrowers located in Texas, a servicer is still considered to have received an information request and must comply with the requirements of § 1024.35.

4. *Internet intake of information requests.* A servicer may, but is not required to, establish a process for receiving information requests through email, Web site form, or other online method. Any such process shall be in addition to, and not in lieu of, any process for receiving information requests by phone or mail. The process established by the servicer for receiving information requests through an online intake method shall be considered the exclusive online intake process 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 process for receiving information requests.

5. *Automated systems.* Servicers may use toll-free telephone numbers that connect borrowers to automated systems, such as an interactive voice response system, through which consumers may request information by using a touch-tone telephone or similar device, so long as the prompts for requesting information are clear and the borrower has the option to connect to a live representative.

36(d) Response to information request notice.

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:

i. A borrower requests a copy of a telephonic communication from a servicer. Assume 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 should be considered readily accessible.

ii. A borrower requests information stored on electronic back-up media. Access to information on electronic back-up media is not available to that 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 should not be considered readily accessible.

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 should be considered readily accessible.

36(e) Alternative compliance.

1. A servicer may provide the information requested either orally or in writing. If a servicer provides the information requested orally, a servicer may demonstrate that it has complied with its requirements by, among others, setting forth a notation in a servicer file that information requested by a borrower was provided, or maintaining a copy of a recorded telephone conversation in which the information requested by the borrower was provided to the borrower.

36(f) Requirements not applicable.

Paragraph 36(f)(1)(i).

1. A borrower's request for a type of information that can change over time should not be considered as substantially the same as a previous information request for the same type of information.

Paragraph 36(f)(1)(ii).

1. *Confidential, proprietary, or general corporate information.* A request for confidential, proprietary or general corporate 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 general corporate information includes information requests relating to, for example:

i. Information regarding management or profitability of a servicer, including information provided to investors of the servicer.

ii. 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.

iii. Compensation, bonuses, or personnel actions relating to servicer personnel, including personnel responsible for servicing a borrower's mortgage loan account;

iv. The servicer's training program for servicing personnel;

v. The terms of any agreement relating to the sale of a mortgage loan, including, an indenture, purchase agreement, or pooling and servicing agreement;

vi. The evaluation or exercise of any remedy of the owner of a mortgage loan including a foreclosure action, a mortgage insurance payment claim, or a claim relating to mortgage loan's compliance with a seller's representations and warranties;

vii. The servicer's servicing program guide;

viii. Investor instructions or requirements for servicers regarding criteria for negotiating or approving any program with a borrower, including any loss mitigation option; or

ix. Records of examination reports, compliance audits, consumer complaints, and internal investigations or external investigations.

Paragraph 36(f)(1)(iv).

1. *Indicia of overbroad or unduly burdensome requests for information.* The following are indicia 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 substitute for discovery in a judicial action, such as information requests in the form of a discovery request that purports to require a servicer to respond to each numbered paragraph;

iii. Requests for information that are not reasonably understandable or are included with voluminous tangential discussion or assertions of errors;

iv. 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; or

v. Requests for information that are not reasonably likely to assist a mortgage loan borrower with the mortgage loan borrower's account, including, for example, a request for copies of the front and back 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.

Section 1024.37—Force-Placed Insurance

37(b) Basis for obtaining force-placed insurance.

1. *Borrowers with escrow.* A servicer has a reasonable basis to believe that a borrower with an escrow account established for hazard insurance has failed to maintain hazard insurance if, for example, by a reasonable time prior to the expiration date of the borrower's hazard insurance (*e.g.,* 30 days before the expiration date), the servicer has not received a renewal bill. The receipt by a servicer of a notice of cancellation or non-renewal from the borrower's insurance company before payment is due on the borrower's hazard insurance premium also provides a servicer with a reasonable basis to believe that the borrower has failed to maintain hazard insurance.

2. *Borrowers without escrow.* A servicer has a reasonable basis to believe the borrower without an escrow account established for hazard insurance has failed to maintain hazard insurance if, for example, a servicer receives a notice of cancellation or non-renewal from the borrower's insurance company.

37(c) Requirements for charging borrower for force-placed insurance.

37(c)(1) In general.

1. The notice period begins on the day that the servicer delivers or mails the notice to the borrower and expires 45 days later. The servicer may charge a borrower for force-placed insurance beginning on the 46th day if the servicer has fulfilled the requirements of § 1024.37(c) and (d). 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.

Paragraph 37(c)(1)(iii).

1. *Examples of continuous insurance coverage.* A borrower's prior hazard insurance might have expired on January 2. But so long as a borrower's current hazard insurance takes effect January 3, then the borrower has hazard insurance in place continuously. When there is a grace period, § 1024.37(c)(1)(iii) requires the servicer to take the grace period into account when determining whether the borrower has hazard insurance in place continuously. For example, a borrower's prior hazard insurance might have an expiration date of June 1, but a grace period extends the effectiveness of the borrower's prior hazard insurance to June 10. Accordingly, so long as the borrower obtains hazard insurance, effective June 11, then the borrower has hazard insurance in place continuously.

Paragraph 37(c)(2)(v).

1. *Identifying of type hazard insurance.* If a borrower has purchased a homeowner's insurance policy and a separate hazard insurance policy to insure loss against hazards not covered under his or her homeowner's insurance policy, the servicer must disclose whether it is the borrower's homeowner's insurance policy or the separate hazard insurance policy for which it lacks evidence of coverage to comply with § 1024.37(c)(2)(v).

Paragraph 37(c)(2)(ix).

1. *Good faith estimate of the cost of force-placed insurance.* 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. Differences between the amount of the estimated cost disclosed

under § 1024.37(c)(2)(ix) and the actual cost later assessed to the borrower 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. 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(c)(2)(ix).

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, on June 1, the servicer places in the mail the written notice required pursuant to § 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 one written notice, with the content set forth in § 1024.37(d)(2)(i), 15 days before the servicer charges Borrower A for force-placed insurance. Take the example above, 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 one reminder notice, with the content set forth in § 1024.37(d)(2)(ii), 15 days before charging Borrower A for force-placed insurance it obtains for the period between June 10 and June 15.

37(d)(4) Updating notice with borrower information.

1. *Reasonable time.* A servicer may have to prepare the written notice required pursuant to § 1024.37(d)(1) 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 insurance information received from the borrower after production has started so long as the 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 is a reasonable time.

37(e) Renewal or replacing force-placed insurance.

37(e)(1)(iii) Charging before end of notice period.

1. *Example illustrating charging before end of notice period.* On January 2, the servicer sends the notice required by § 1024.37(e)(1)(i). On January 12, the existing force-placed insurance the servicer had obtained on the borrower's property expires and the servicer replaces the expired force-placed insurance policy with a new force-placed insurance policy effective January 13. On February 5, the servicer receives verification that the borrower obtained hazard insurance effective January 31. The servicer may charge the borrower for force-placed insurance from January 13 to January 30, as early as February 5.

Paragraph 37(e)(2)(vii).

1. *Good faith estimate of the cost of force-placed insurance.* 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). *See* commentary to § 1024.37(c)(2)(ix) regarding the good faith requirement.

37(g) Cancellation of force-placed insurance.

1. *Example of providing a refund and removing charges.* Assume that a servicer obtains force-placed insurance, effective January 1, and the premium charge and related fees are paid by the borrower in monthly installments, due on the first of each month. After the borrower paid the April installment, the servicer receives insurance information from the borrower, and verifies that the borrower had obtained hazard insurance and that the insurance had been in place since March 15. To comply with § 1024.37(g), within 15 days of receiving such verification, the servicer must: (1) Cancel the force-placed insurance; (2) provide a refund for force-placed insurance premium charges and related fees paid by the borrower for the period between March 15 and April 30; and (3) remove from the borrower's account any force-placed insurance premium charges and related fees for the period after March 15 that the servicer has assessed to the borrower but the borrower has not yet paid.

Section 1024.38—Reasonable Information Management Policies and Procedures

38(a) In general.

1. *Policies and procedures.* A servicer may determine the specific methods by which it will implement information management policies and procedures that are reasonably designed to achieve the objectives set forth in § 1024.38(b) and are reasonably designed to ensure compliance with the standard requirements in § 1024.38(c). Servicers have flexibility to do so 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.

Paragraph 38(a)(1).

1. *Examples of pattern or practice failures.* A servicer may exhibit a pattern or practice of failing to achieve the objectives in § 1024.38(b) in the following circumstances:

i. Disclosures provided to borrowers regularly contain inaccurate information or are not provided by required deadlines;

ii. Multiple covered errors as defined in § 1024.35(b) are documented with respect to the same or similar types of processes and a servicer does not modify its policies and procedures to seek to reduce the frequency or severity of such errors over a reasonable timeframe;

iii. Documents provided by borrowers are lost or misplaced on a regular basis and borrowers are requested to provide the same documents on multiple occasions;

iv. Servicer personnel regularly do not have access to accurate account information (such as information about credited payments, current balances, and reasons for fees) when responding to borrower inquiries, and thus provide borrowers with inaccurate information; or

v. Servicer personnel regularly do not have access to information regarding the substance of prior communications with borrowers.

38(a)(2) Safe harbor.

1. Impact of the safe harbor. A servicer is not liable for a violation under § 1024.38 if the servicer is in compliance with the safe harbor set forth in § 1024.38(a)(2). If a servicer is not in compliance with § 1024.38(a)(2), a servicer may be liable for a violation under § 1024.38. The servicer's liability in the event of a pattern or practice of failing to achieve the objectives in § 1024.38(b) or to ensure compliance with the standard requirements in § 1024.38(c) is based on whether the servicer's policies and procedures were reasonably designed to achieve the objectives in § 1024.38(b) and to ensure compliance with the standard requirements in § 1024.38(c), as appropriate.

Section 1024.39—Early Intervention Requirements for Certain Borrowers

39(a) Oral notice.

1. *In general.*

i. *Live contact.* The notice required under § 1024.39(a) must 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 by leaving a recorded phone message.

ii. A servicer is not required to describe specific loss mitigation options; the servicer need only inform the borrower that loss mitigation options may be available, if applicable. The servicer may provide more detailed information that the servicer believes would be helpful.

2. *Good faith efforts to notify—telephone calls.* In order to make a good faith effort by telephone, the servicer must have made the phone calls to the borrower on three separate days by the end of the 30-day period after the payment due date. Thus, if the servicer attempts to reach the borrower by telephone, the servicer should make the first call not later than the 28th day after the payment due date in order to make a good faith effort by the 30th day, assuming the first two calls are unsuccessful.

3. *Timing requirements.* Under § 1024.39(a), a servicer must notify or make good faith efforts to notify the borrower if the borrower is late in making the payment during the 30-day period after the payment due date, unless the borrower satisfies the payment during that time. *See* comment 39(a)–4. For purposes of § 1024.39, a payment is considered late the day after the payment due date, even if the borrower is afforded a grace period before the servicer assesses a late fee. For example, if a payment due date is January 1 and the full payment remains due during the 30-day period after

January 1, the servicer is 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.

4. *Borrower makes the payment.* A servicer is not required to notify the borrower unless the borrower is late in paying the amount owed in full during the 30 days after the payment due date. If the borrower satisfies the payment in full before the end of the 30-day period, the servicer is not required to notify or make good faith efforts to notify the borrower. For example, if a borrower misses a January 1 due date but makes that payment on January 20, a servicer would not be required to provide the oral notice by January 31.

5. *Borrower contacts the servicer about a late payment.* If the borrower contacts the servicer at any time prior to the end of the 30-day period in § 1024.39(a) to explain that the borrower is or expects to be late in making a particular payment, the servicer may satisfy the notification requirement in § 1024.39(a) by informing the borrower orally at that time that loss mitigation options, if applicable, may be available.

i. *Examples.*

A. A borrower contacts a servicer on January 25 to explain that he expects to miss a payment due February 1. The borrower makes the required payment on February 8 and the servicer did not notify or make good faith efforts to notify the borrower that loss mitigation may be available on January 25 or by February 8. The servicer is not required to provide the oral notice about loss mitigation options because the borrower made the required payment within the 30-day period after February 1. *See* comment 39(a)–4.

B. The borrower in comment 39(a)–5.i.A subsequently misses a payment due March 1 but does not contact the servicer to explain that he expects to become or acknowledges that he is late on that payment. The borrower remains late on that payment during the 30 days after March 1. Not later than 30 days after March 1, the servicer is required to notify or make good faith efforts to notify the borrower orally that he has missed the March 1 payment and that loss mitigation options, if applicable, may be available to assist him.

6. *Borrower performing under a loss mitigation option.* A servicer is not required under § 1024.39(a) to notify a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment.

39(b) Written notice.

39(b)(1) In general.

1. *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).

2. *Timing requirements.* As noted in comment 39(a)–3, a payment is considered late the day after the payment due date, even if the borrower is afforded a grace period before the servicer assesses a late fee. For example, if a payment due date is January 1 and the payment remains due during the 40-day period after January 1, the servicer is required to provide the written notice not later than 40 days after January 1—*i.e.,* by February 10.

3. *Borrower satisfies the payment.* A servicer is not required to provide the written notice unless the borrower has not made the payment during the 40 days after the payment due date. For example, a servicer contacts a borrower on January 20 to notify him that he has missed a January 1 payment and that loss mitigation options may be available. The borrower explains that he forgot to send payment and will send the payment to the servicer. The servicer receives the full payment on January 30 and has not yet provided the written notice. Because the borrower has satisfied the January 1 payment within the 40-day time period, the servicer is not required to provide the written notice by February 10.

4. *Frequency of the written notice.* A servicer is not required to provide the written notice more than once during a 180-day period beginning on the date on which the written notice is provided. Notwithstanding this limitation, a servicer must still provide the oral notice required under § 1024.39(a) for each payment that is overdue. For example, a borrower is late in making a payment due March 1. The borrower remains late on that payment during the 40 days after March 1 and the servicer provides the written disclosure 40 days after March 1—*i.e.,* by April 10. If the borrower subsequently fails to make a payment due April 1 and remains late on that payment during the 40 days after April 1, the servicer is not required to provide the written notice again for the 180-day period beginning on April 10. However, the servicer is required to provide the oral notice under § 1024.39(a) for each of the 30-day periods beginning on March 1 and April 1.

5. *Borrower performing under a loss mitigation option.* A servicer is not required to provide the written 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.

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.

2. *Format.* Any color, number of pages, size and quality of paper, size and type of print, and method of reproduction may be used, so long as the disclosure is clearly legible.

Paragraph 39(b)(2)(i).

1. *Statement encouraging the borrower to contact the servicer.* The servicer is not required to specifically request the borrower to contact the servicer about any particular loss mitigation option.

Paragraph 39(b)(2)(ii).

1. *Servicer's mailing address and telephone number.* If applicable, the servicer should provide contact information for the personnel assigned to the borrower pursuant to § 1024.40.

Paragraph 39(b)(2)(iii).

1. *Number of examples.* The regulation does not mandate 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 may require the borrower to end their ownership in order 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 loss mitigation programs, the servicer may provide a generic description of each 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 this requirement 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 § 1024.39(b)(2)(iv). 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 for 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.

Paragraph 39(b)(2)(v).

1. *Foreclosure statement.* The servicer may explain that a foreclosure may proceed in different ways 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 (50 U.S.C. App. 501 *et seq.*), and the requirements of the owner or assignee of the borrower's loan.

2. *Estimated foreclosure timelines.* The servicer may qualify its estimate with a statement that different timelines may vary depending on the circumstances, such as those listed in comment 39(b)(2)(v)–1. The servicer may provide its estimate as a range of days.

Section 1024.40—Continuity of Contact

40(a)(1) In general.

1. For purposes of responding to borrower inquiries and assisting the borrower with loss mitigation options as required pursuant to § 1024.40, the term ''borrower'' includes a person the borrower has authorized to act on behalf of the borrower (a borrower's agent), which may include, for example, a housing counselor or attorney. Servicers may undertake reasonable procedures to determine if such person has authority from the borrower to act on the borrower's behalf.

2. 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.

3. Implementation of continuity of contact.

i. A servicer has discretion to determine the manner by which continuity of contact is implemented. For purposes of § 1024.40(a)(1), a servicer may assign a single person or a team of personnel to respond to a borrower.

ii. Section 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 make be late in making a particular payment, the servicer, at its election, may assign personnel to the borrower.

4. Section 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.

40(a)(2) Access to assigned personnel.

1. For purposes of § 1024.40(a)(2), three days (excluding legal public holidays, Saturdays, and Sundays) is a reasonable time to respond.

40(b) Functions of servicer personnel.

40(b)(1) Reasonable policies and procedures.

Paragraph 40(b)(1)(iv).

1. 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.

40(b)(2) Safe harbor.

1. For purposes of § 1024.40(b)(2), a servicer may exhibit a pattern or practice:

i. With respect to a single borrower, if servicer personnel assigned to the borrower pursuant to § 1024.40(a) 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.

ii. With respect to a large number of borrowers, if servicer personnel assigned to the borrowers pursuant to § 1024.40(a) fail to perform any of the functions listed in § 1024.40(b)(1) where applicable 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.

40(c) Duration of continuity of contact.

Paragraph 40(c)(3).

1. 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.

Paragraph (40)(c)(5).

1. For purposes of § 1024.40(c)(5), a reasonable time has passed when servicing for the borrower's mortgage loan was transferred to a transferee borrower 30 days ago.

40(d) Conditions beyond a servicer's control.

1. The term ''conditions beyond a servicer's control'' include natural disasters, wars, riots or other major upheaval, delays or failures caused by persons other than the servicer, disruptions in telephone service, computer system malfunctions, and labor disputes, such as strikes.

Section 1024.41—Loss Mitigation Options

41(a) Scope

1. *Loss mitigation not required.* Nothing in section 1024.41 imposes a duty on a servicer to offer loss mitigation options to borrowers in the ordinary course of business or to provide any borrower with a right to a loss mitigation option. Nothing in section 1024.41 should be construed to permit a borrower to enforce the terms of any agreement between a servicer and any owner, assignee, guarantor, or insurer of a mortgage loan, including any agreement with respect to the evaluation for, or provision of, any loss mitigation option.

2. *Ordinary course of business.* A servicer that does not engage in a practice of offering loss mitigation to borrowers in the ordinary course of business is not covered by this section 1024.41. A servicer offers loss mitigation options in the ordinary course of business if the servicer either (1) has a duty to an owner or assignee of a mortgage loan to engage in loss mitigation to improve the recovery to the owner or assignee of the mortgage loan, or (2) engages in a practice of evaluating borrowers for loss mitigation options. A servicer that (1) does not have policies or procedures for evaluating borrowers for loss mitigation options, or (2) engages only in temporary or pilot programs designed to evaluate the impact of implementing loss mitigation options is not considered to offer loss mitigation options in the ordinary course of business. For example, the following practices should not be considered offering loss mitigation in the ordinary course of business:

a. A servicer waives adverse consequences to individual borrowers for missed payments, such as by providing a waiver of late fees.

b. A servicer participates in a targeted pilot program for which only a relatively small percentage of mortgage loans serviced by the servicer are potentially eligible.

3. *Eligibility requirements.* A servicer that engages in evaluations of borrowers for loss mitigation options for some mortgage loans it services offers loss mitigation in the ordinary course of business even though the servicer's loss mitigation programs are not available to other borrowers, including borrowers subject to different investor or guarantor requirements. Any such servicer that receives a complete loss mitigation application is required to comply with its obligations pursuant to section 1024.41(c) and (d). Such compliance may include informing the borrower that the borrower is not eligible for loss mitigation options, including loan modifications, as a result of investor requirements, as set forth in sections 1024.41(c) and (d).

41(b) Loss mitigation application.

41(b)(2) Incomplete loss mitigation application.

Paragraph 41(b)(2)(i)

1. *Obtain additional documents and information before submitted information becomes stale. A* servicer should undertake reasonable diligence to obtain information to constitute a complete loss mitigation application by the earlier of (i) the deadline established by the servicer pursuant to section 1024.41(f) or (ii) the earliest time any documents or information submitted by the borrower will no longer be considered current or valid for evaluation for a loss mitigation option pursuant to applicable loss mitigation program guidelines. For example, if a servicer's guidelines require that income information must be no older than 90 days, the servicer should undertake reasonable diligence to obtain information that constitutes a complete loss mitigation application earlier than the date when the income information would be considered stale where such deadline is earlier than the deadline established by the servicer pursuant to section 1024.41(f).

41(c) Review of loss mitigation applications.

Paragraph 41(c)(1).

1. *Evaluation for all loss mitigation options offered.* 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 servicer, guarantor, owner, or assignee of a mortgage loan. A servicer is not required to evaluate a borrower for a loss mitigation option for which the borrower does not meet threshold eligibility criteria, including any pilot program, temporary program, or loss mitigation program that is limited to a certain percentage or number of participants.

41(d) Denial of loan modification options.

Paragraph 41(d)(1).

1. *Investor requirements.* If a trial or permanent loan modification 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 should identify the owner or assignee of the mortgage loan and the requirement that is the basis of the denial.

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 should include the monthly gross income and property value used in the net present value calculation.

41(e) Borrower response and performance.

Paragraph 41(e)(4).

1. *Acceptance pending appeal.* A borrower may accept an offer of a different loan modification or other loss mitigation option pending appeal of a denial of any loan modification program for which a borrower was denied.

41(f) Deadline for loss mitigation applications.

1. *No scheduled foreclosure sale.* If a foreclosure sale has not been scheduled, or where a foreclosure sale may occur less than 90 days after the foreclosure sale is scheduled, a servicer should set a deadline that is no earlier than 90 days before the day a servicer reasonably anticipates that a foreclosure sale may occur.

2. *Servicing transfers.* If servicing for a mortgage loan is transferred, the transferee servicer is subject to the requirements of § 1024.41 unless the effective date of the servicing transfer occurs after the deadline that the transferee servicer establishes pursuant to section 1024.41(f).

41(g) Prohibition on foreclosure sale.

Paragraph 41(g)(4).

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.* A borrower is deemed to be performing under an agreement on a loss mitigation option 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.

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.

41(j) Other liens.

Paragraph 41(j)(1)(i).

1. *Reasonable diligence to identify other servicers.* A servicer should undertake reasonable diligence to determine if a property is encumbered by liens as a result of other senior or subordinate mortgage loans serviced by other servicers. Servicers may obtain this information by, among other things, requesting that the borrower provide information in a loss mitigation application regarding any other mortgage loans with liens encumbering the property, conducting a search of the land records, reviewing a consumer report from a consumer reporting agency, or consulting a database designed to match senior and subordinate lien records.

Appendix MS—Mortgage Servicing Model Forms and Clauses

1. *In general.* This appendix contains model forms and clauses for mortgage servicing disclosures. 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 deemed to be in compliance with disclosure requirements of the regulation. 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.''

iii. Addition of graphics or icons, such as the servicer's corporate logo.

Appendix MS–3—Model Force-Placed Insurance Notice Forms

1. *Model MS–3(A).* The model form MS–3(A) illustrates how a servicer may comply with § 1024.37(c)(2).

2. *Model MS–3(B).* The model form MS–3(B) illustrates how a servicer may comply with § 1024.37(d)(2)(i).

3. *Model MS–3(C).* The model form MS–3(C) illustrates how a servicer may comply with § 1024.37(d)(2)(ii).

4. *Model MS–3(D).* The model form MS–3(D) illustrates how a servicer may comply with § 1024.37(e)(2).

5. 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 ''homeowner's 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 and how a servicer may request that the borrower contact the servicer, as required by paragraphs (b)(2)(i) and (b)(2)(ii) of § 1024.39.

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. 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 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.

3. *Model MS–4(C).* These model clauses illustrate how the servicer may inform the borrower how to obtain additional information about loss mitigation options, required by § 1024.39(b)(2)(iv), if applicable. A servicer that offers no loss mitigation options may not include the model clauses in MS–4(C).

4. *Model MS–4(D).* These model clauses illustrate the foreclosure statement, as required by § 1024.39(b)(2)(v). To use the model clauses, the servicer must fill in the estimated number of days following a missed payment in which the servicer may refer the borrower to foreclosure.

5. *Model MS–4(E).* These model clauses illustrate how a servicer may provide contact information for housing counselors and State housing finance authorities, as required by § 1024.39(b)(2)(vi). 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 (b)(2)(vi)(A) and (b)(2)(vi)(B) of § 1024.39. A servicer would be required to provide the telephone number and, if applicable, the Web site, for the appropriate State housing finance authority, as required by § 1024.39(b)(2)(vi).◀

Dated: August 9, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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Part III

Bureau of Consumer Financial Protection

12 CFR Part 1026
2012 Truth in Lending Act (Regulation Z) Mortgage Servicing;
Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2012–0033]

RIN 3170–AA14

2012 Truth in Lending Act (Regulation Z) Mortgage Servicing

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (the Bureau or CFPB) is proposing to amend Regulation Z, which implements the Truth in Lending Act (TILA), and the official interpretation of the regulation. The proposed amendments implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or DFA) provisions regarding mortgage loan servicing. Specifically, this proposal implements Dodd-Frank Act sections addressing initial rate adjustment notices for adjustable-rate mortgages (ARMs), periodic statements for residential mortgage loans, and prompt crediting of mortgage payments and response to requests for payoff amounts. The proposed revisions also amend current rules governing the scope, timing, content, and format of current disclosures to consumers occasioned by the interest rate adjustments of their variable-rate transactions.

Published elsewhere in today's **Federal Register**, the Bureau proposes companion regulations regarding mortgage servicing through amendments to Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA).

DATES: Comments must be received on or before October 9, 2012, except that comments on the Paperwork Reduction Act analysis in part IX of the Federal Register notice must be received on or before November 16, 2012.

ADDRESSES: You may submit comments identified by Docket No. CFPB–2012–0033 or RIN 3170–AA14, by any of the following methods:

- *Electronic: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552.

Instructions: All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov*. In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552 on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

e-Rulemaking Initiative

The Bureau is working with the Cornell e-Rulemaking Initiative (CeRI) on a pilot project, Regulation Room, 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. The TILA and RESPA proposed rulemakings on mortgage servicing are the subject of the project. The Bureau has undertaken this project to increase effective public involvement in the rulemaking process and strongly encourages all parties interested in this rulemaking to visit the Regulation Room Web site, *http://www.regulationroom.org*, to learn about the Bureau's proposed mortgage servicing rules and the rulemaking process, to discuss the issues in the rules with other persons and groups, and to participate in drafting a summary of that discussion that CeRI will submit to the Bureau.

Note that Regulation Room is sponsored by CeRI, and is not an official United States Government Web site. Participating in the discussion on that site will not result in individual formal comments that will be included in the Bureau's rulemaking record. If you would like to add a formal comment, please do so through the means identified above. The Bureau anticipates that CeRI will submit to the Bureau's rulemaking docket a summary of the discussion that occurs on the Regulation Room site and that participants will have a chance to review a draft and suggest changes before the summary is submitted. For questions about this project, please contact Whitney Patross, Attorney, Office of Regulations, at (202) 435–7700.

FOR FURTHER INFORMATION CONTACT:

Regulation Z (TILA): Whitney Patross, Attorney and Marta Tanenhaus, Senior Counsel at (202) 435–7700; Office of Regulations; Division of Research, Markets, and Regulations; Bureau of Consumer Financial Protection; 1700 G Street NW., Washington, DC 20552.

Regulation X (RESPA): Jane Gao, Mitchell E. Hochberg, and Michael Scherzer, Counsels at (202) 435–7700; Office of Regulations; Division of Research, Markets, and Regulations; Bureau of Consumer Financial Protection; 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Overview

A. Background

The recent financial crisis exposed pervasive consumer protection problems across major segments of the mortgage servicing industry. As millions of borrowers fell behind on their loans, many servicers failed to provide the level of service necessary to serve the needs of those borrowers. Many servicers simply had not made the investments in resources and infrastructure necessary to service large numbers of delinquent loans. Existing weaknesses in servicer practices, including inadequate recordkeeping and document management and lack of oversight of service providers, made it harder to sort out borrower problems to achieve optimal results. In addition, many servicers took short cuts that made things even worse. As one review of fourteen major servicers found, companies ''emphasize[d] speed and cost efficiency over quality and accuracy'' in their foreclosure processes.[1]

The Dodd-Frank Act (Pub. L. 111–203, July 21, 2010) adopts several new servicing protections.[2] The Bureau has the authority to promulgate regulations to implement the new servicing protections. These changes will significantly improve disclosures to make it easier for consumers to monitor their mortgage loans and servicers' activities. The changes also address critical servicer practices, including error resolution, prompt crediting of payments, and ''force-placing'' insurance where borrowers have

[1] Federal Reserve System, Office of the Comptroller of the Currency, & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices,* at 5 (Apr. 2011) (Interagency Foreclosure Report), available at *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf*.

[2] *See* Dodd-Frank Act sections 1418, 1420, 1463, and 1464.

allowed their hazard insurance policies to lapse.

The Dodd-Frank Act also gives the Bureau discretionary authority to develop additional servicing rules. The Bureau proposes to use this authority to adopt requirements relating to reasonable information management policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications when the servicer makes loss mitigation options available in the ordinary course of business. These proposals address fundamental problems that underlie many consumer complaints and recent regulatory and enforcement actions. The Bureau believes these changes will reduce avoidable foreclosures and improve general customer service. The proposals cover nine major topics, as summarized below.

The Bureau's proposal is split into two parts because Congress imposed some requirements under TILA and some under RESPA.[3] This proposed rule would amend Regulation Z, which implements TILA, to implement provisions concerning adjustable-rate mortgage (ARM) disclosures, payoff statements, and payment crediting under sections 1418, 1420, and 1464 of the Dodd-Frank Act and to harmonize similar existing requirements.

B. Scope of Coverage

The proposed rules generally apply to closed-end mortgage loans, with certain exceptions. Under the proposed amendments to Regulation X, open-end lines of credit and certain other loans, such as construction loans and business-purpose loans, are excluded. Under the proposed amendments to Regulation Z, the periodic statement and ARMs disclosure provisions apply only to closed-end mortgage loans, but the prompt crediting and payoff statement provisions apply both to open-end and closed-end mortgage loans. In addition, reverse mortgages and timeshares are excluded from the periodic statement requirement, and certain construction loans are excluded from the ARM disclosure requirements. As discussed below, the Bureau is seeking comment on whether to exempt small servicers from certain requirements or modify certain requirements for small servicers.

[3] Note that TILA and RESPA differ in their terminology. Consumers and creditors are the defined terms used in Regulation Z. Borrowers and lenders are the defined terms used in Regulation X.

C. Summary

The proposals cover nine major topics, summarized below. More details can be found in the proposed rules, which are split into two notices issued under TILA and RESPA, respectively.

1. *Periodic billing statements.* The Dodd-Frank Act generally mandates that servicers of closed-end residential mortgage loans (other than reverse mortgages) must send a periodic statement for each billing cycle. These statements must meet the timing, form, and content requirements provided for in the rule. The proposal contains sample forms that servicers could use. The periodic statement requirement generally would not apply for 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 is made available to the consumer. The proposal also includes an exception for small servicers that service 1,000 or fewer mortgage loans and service only mortgage loans that they originated or own.

2. *Adjustable-rate mortgage interest-rate adjustment notices.* Servicers would have to provide a consumer whose mortgage has an adjustable rate with a notice 60 to 120 days before an adjustment which causes the payment to change. The servicer would also have to provide an earlier notice 210 to 240 days prior to the first rate adjustment. This first notice may contain an estimate of the rate and payment change. Other than this initial notice, servicers would no longer be required to provide an annual notice if a rate adjustment does not result in an increase in the monthly payment. The proposal contains model and sample forms that servicers could use.

3. *Prompt payment crediting and payoff payments.* As required by the Dodd-Frank Act, servicers must promptly credit payments from borrowers, generally on the day of receipt. If a servicer receives a payment that is less than a full contractual payment, the payment may be held in a suspense account. When the amount in the suspense account covers a full installment of principal, interest, and escrow (if applicable), the proposal would require the servicer to apply the funds to the oldest outstanding payment owed. A servicer also would be required to send 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.* As required by the Dodd-Frank Act, servicers would not be permitted to charge a borrower for force-placed insurance coverage unless the servicer has a reasonable basis to believe the borrower has failed to maintain hazard insurance and has provided required notices. One notice to the borrower would be required at least 45 days before charging for forced-place insurance coverage, and a second notice would be required no earlier than 30 days after the first notice. The proposal contains model forms that servicers could use. If a borrower provides proof of hazard insurance coverage, then the servicer would be required to cancel any force-placed insurance policy and refund any premiums paid for periods in which the borrower's policy was in place. In addition, if a servicer makes payments for hazard insurance from a borrower's escrow account, a servicer would be required to continue those payments rather than force-placing a separate policy, even if there is insufficient money in the escrow account. The rule would also provide that charges related to forced place insurance (other than those subject to State regulation as the business of insurance or authorized by federal law for flood insurance) must relate to a service that was actually performed. Additionally, such charges would have to bear a reasonable relationship to the servicer's cost of providing the service.

5. *Error resolution and information requests.* Pursuant to the Dodd-Frank Act, servicers would be required to meet certain procedural requirements for responding to information requests or complaints of errors. The proposal defines specific types of claims which constitute an error, such as a claim that the servicer misapplied a payment or assessed an improper fee. A borrower could assert an error either orally or in writing. Servicers could designate a specific phone number and address for borrowers to use. Servicers would be required to acknowledge the request or complaint within five days. Servicers would have to correct or respond to the borrower with the results of the investigation, generally within 30 to 45 days. Further, servicers generally would be required to acknowledge borrower requests for information and either provide the information or explain why the information is not available within a similar amount of time. A servicer would not be required to delay a scheduled foreclosure sale to consider a notice of error unless the error relates to the servicer's improperly proceeding with a foreclosure sale during a borrower's evaluation for alternatives to foreclosure.

6. *Information management policies and procedures.* Servicers would be

required to establish reasonable information management policies and procedures. The reasonableness of a servicer's policies and procedures would take into account the servicer's size, scope, and nature of its operations. A servicer's policies and procedures would satisfy the rule if the servicer regularly achieves the document retention and servicing file requirements, as well as certain objectives specified in the rule. Examples of such objectives include providing accurate and timely information to borrowers and the courts or enabling servicer personnel to have prompt access to documents and information submitted in connection with loss mitigation applications. In addition, a servicer must retain records relating to each mortgage until one year after the mortgage is discharged or servicing is transferred, and must create a mortgage servicing file for each loan containing certain specified documents and information.

7. Early intervention with delinquent borrowers. Servicers would be required to make good faith efforts to notify delinquent borrowers of loss mitigation options. If a borrower is 30 days late, the proposal would require servicers to make a good faith effort to notify the borrower orally and to let the borrower know that loss mitigations options may be available. If the borrower is 40 days late, the servicer would be required to provide the borrower with a written notice with certain specific information, including examples of loss mitigation options available, if applicable, and information on how to obtain more information about loss mitigation options. The notice would also provide information to the borrower about the foreclosure process. The rule contains model language servicers could use for these notices.

8. Continuity of contact with delinquent borrowers. Servicers would be required to provide delinquent borrowers with access to personnel to assist them with loss mitigation options where applicable. The proposal would require servicers to assign dedicated contact personnel for a borrower no later than five days after providing the early intervention notice. Servicers would be required to establish reasonable policies and procedures designed to ensure that the servicer personnel perform certain specified functions where applicable, such as access the borrower's records and provide the borrower with information about how and when to apply for a loss mitigation option and about the status of the application.

9. Loss mitigation procedures. Servicers that offer loss mitigation options to borrowers would be required to implement procedures to ensure that complete loss mitigation applications are reasonably evaluated before proceeding with a scheduled foreclosure sale. The proposal would require servicers to exercise reasonable diligence to secure information or documents required to make an incomplete loss mitigation application complete. In certain circumstances, this could include notifying the borrower within five days of receiving an incomplete application. Within 30 days of receiving a borrower's complete application, the servicer would be required to evaluate the borrower for all available options, and, if the denial pertains to a requested loan modification, notify the borrower of the reasons for the servicer's decision, and provide the borrower with at least a 14-day period within which to appeal the decision. The proposal would require that appeals be decided within 30 days by different personnel than those responsible for the initial decision. A servicer that receives a complete application for a loss mitigation option could not proceed with a foreclosure sale unless (i) the servicer had denied the borrower's application and the time for any appeal had expired; (ii) the servicer had offered a loss mitigation option which the borrower declined or failed to accept within 14 days of the offer; or (iii) the borrower failed to comply with the terms of a loss mitigation agreement. The proposal would require that deadlines for submitting an application for a loss mitigation option be no earlier than 90 days before a scheduled foreclosure sale.

D. Small Servicers

As discussed below, the Bureau convened a Small Business Regulatory Enforcement Fairness Act (SBREFA) 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. Informed by this process, this proposal contains an exemption from the periodic statement requirement for certain small servicers. The Bureau seeks comment on whether other exemptions might be appropriate for small servicers.

E. Effective Date

As discussed below, the Bureau is seeking comment on when this final rule should be effective. Because the final rule will provide important benefits to consumers, the Bureau seeks to make it effective as soon as possible. However, the Bureau understands that the final rules will require servicers to make revisions to their software and to retrain their staff. In addition, some entities will be required to implement other Dodd-Frank Act provisions, which are subject to separate rulemaking deadlines under the statute and will have separate effective dates. Therefore, the Bureau is seeking comment on how much time industry needs to make these changes.

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.[4] 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.[5] Over 60% 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

[4] Inside Mortgage Finance, Outstanding 1–4 Family Mortgage Securities, Mortgage Market Statistical Annual (2012). For general background on the market and the recent mortgage crisis, *see* the 2012 TILA–RESPA Proposal available at *http://www.consumerfinance.gov/knowbeforeyouowe/*.

[5] As of the end of 2011, approximately 33% of outstanding mortgage loans were held in portfolio, 57% of mortgage loans were owned through mortgage-backed securities issued by government sponsored enterprises (GSEs), and 11% of loans were owned through private label mortgage-backed securities. Inside Mortgage Finance, Issue 2012:13, at 11 (March 30, 2012). 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).

questionable whether a secondary market for mortgage-backed securities would exist in this country.[6]

Several aspects of the mortgage servicing business make it uniquely challenging for consumer protection purposes. Given the nature of their activities, servicers can have a direct and profound impact on borrowers. However, industry compensation practices and the structure of the mortgage servicing industry create wide variations in servicers' incentives to provide effective customer service to borrowers. Also, because borrowers cannot choose their own servicers, it is particularly difficult for them to protect themselves from shoddy service or harmful practices.

Mortgage servicing is performed by banks, thrifts, credit unions, and non-bank servicers 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.[7]

These different servicing structures can create difficulties for borrowers if the servicer makes mistakes, fails to invest sufficient resources in its servicing operations, or does not properly service the borrower's loan. Although the mortgage servicing industry has numerous participants, the industry is highly concentrated, with the five largest servicers servicing approximately 55% percent of outstanding mortgage loans in this country.[8] 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.[9]

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 investors can transfer servicing rights to a different servicer.

Compensation structures vary somewhat for loans held in portfolio and securitized loans,[10] but have tended to make pure mortgage servicing (where the servicer has no role in origination) a high-volume, low-margin business in which servicers have little incentive to invest in customer service. A servicer will expect to recoup its investment in purchasing mortgage servicing rights and earn a profit through a net servicing fee (which is expressed as a constant rate assessed on unpaid mortgage balances),[11] fees assessed on borrowers, 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 provide minimal customer service to ensure profitability. Servicers also have an incentive to look for opportunities to impose fees on borrowers to enhance revenues and are generally not subject to market discipline because consumers have no opportunity to switch providers. Additionally, servicers may have financial incentives to foreclose rather than engage in loss mitigation.[12]

These attributes of the servicing market created problems for certain borrowers even prior to the national mortgage crisis. For example, borrowers experienced problems with mortgage servicers even during regional mortgage market downturns that preceded the mortgage crisis.[13] Borrowers were subjected to improper fees that servicers had no reasonable basis to impose on borrowers, improper force-placed insurance practices, and improper foreclosure and bankruptcy practices.[14]

When the mortgage crisis erupted, many servicers were ill-equipped to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they were required to process. These servicers lacked the infrastructure, trained staff, controls, and procedures needed to manage effectively the flood of delinquent mortgages they were forced to handle. 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 Federal Reserve Board (the Board) undertook formal enforcement actions against several major servicers for unsafe and unsound residential mortgage loan servicing practices.[15]

[6] *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.'').

[7] *See, e.g.,* Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755, 763 (2011) (Thompson), available at: *http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1074/86WLR755.pdf.*

[8] *See, e.g, Top Mortgage Servicers in 2011* (Inside Mortg. Fin., Bethesda, Md.), Mar. 30, 2012, at 12. As of the end of the fourth quarter of 2011, the top 5 largest servicers serviced $5.66 trillion of mortgage loans. *See id.*

[9] *See, e.g.,* Fitch Ratings, *U.S. Residential and Small Balance Commercial Mortgage Servicer Rating Criteria,* at 14–15 (Jan. 31, 2011), available at *www.fitchratings.com.*

[10] 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. PowerPoint Presentation, Keefe, Bruyette & Woods, Inc., *KBW Mortgage Matters: Mortgage Servicing Primer,* 3 (April 17, 2012).

[11] *See, e.g.,* Thompson, 86 Wash. L. Rev. 755, 767.

[12] *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior,* NCLC p.v (October 2009), (''Servicers, unlike investors or homeowners, do not generally lose money on foreclosure. Servicers may even make money on a foreclosure.''), Diane Thompson, The Need for National Mortgage Servicing Standards (May 12, 2011), at 15 (''* * * modification will also likely reduce future income, cost more in the present in staffing, and delay recovery of expenses. Moreover, the foreclosure process itself generates significant income for servicers.'')

[13] *See Problems in Mortgage Servicing from Modification to Foreclosure: Hearings Before the Comm. on Banking, Housing and Urban Affairs,* S. Hrg. 111–987, 111th Cong. 53–54 (2010) (statement of Thomas J. Miller, Iowa Attorney General) (Miller Testimony). *See also,* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers 15:3 Housing Policy Debate* (2004), available at *http://ssrn.com/abstract=992095.*

[14] *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers 15:3 Housing Policy Debate* (2004), available at *http://ssrn.com/abstract=992095* (collecting cases).

[15] OCC Press Release, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (April 13, 2011), available at *http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html*, and Federal Reserve Board Press Release, Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan

Continued

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 sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.[16] Congress has held significant detailed hearings on the issue of servicer ''robo-signing'' of foreclosure related documentation.[17]

Servicers have also 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. These problems became pervasive in broad segments of the mortgage servicing industry and had profound impacts on borrowers, particularly delinquent borrowers.[18]

The Bureau further understands from mortgage investors that there is a pervasive belief that servicers are making discretionary decisions based on the best interests of the servicer rather than to achieve results that will benefit owners or assignees of mortgages loans. 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.[19] Specifically, ''liquidation and modification of securitized first mortgages are 60% [to] 70% less likely respectively and no action is 13% more likely when the servicer of that securitized first mortgage holds on its portfolio the second lien attached to the first mortgage.'' [20] These failures to take actions that may benefit both consumers and owners or assignees of first lien mortgage loans harm consumers.

The mortgage servicing industry, however, is not monolithic. Some servicers provide high levels of customer service. Some of these servicers may be compensated by investors in a way that incentivizes them to provide high levels of customer service in order to optimize investor outcomes. Other servicers provide high levels of customer service because they rely on providing other products and services to consumers 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 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.[21]

B. Mortgage Servicing Consumer Protection Regulation Before the Recent Crisis

Prior to the adoption of the Dodd-Frank Act, the mortgage servicing industry was subject to limited Federal consumer financial protection regulation. RESPA set forth basic protections with respect to mortgage servicing that were implemented by the U.S. Department of Housing and Urban Development (HUD). 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.[22] RESPA 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 a restricted definition of the ''servicing'' of the borrower's mortgage loan.[23]

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 include certain limited requirements directly on servicers, such as requirements to timely credit payments, provide payoff balances and prohibit pyramiding of late fees.[24] Servicers also had some obligations under other Federal laws, including, for example, the Servicemembers Civil Relief Act.[25]

Although TILA and RESPA did not impose many requirements on servicers, servicers were still required to navigate overlapping requirements governing their servicing responsibilities. In addition to Federal law, servicers were required to consider the impact of State and even local regulation on mortgage servicing. Servicers also had to comply with investor requirements to the extent they serviced loans owned or guaranteed by various types of entities. These include (1) servicing guidelines required by Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), together known as the government-sponsored enterprises (GSEs), as well as servicing guidelines required by the Government National Mortgage Association (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. All those requirements remain in effect today and going forward.

C. The National Mortgage Settlement and Other Regulatory Actions

In response to the unprecedented mortgage 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.

Servicing (April 13, 2011), available at *http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm*, and accompanying documents. In addition to enforcement actions against major servicers, Federal agencies have also undertaken formal enforcement actions against major service providers to mortgage servicers. See id.

[16] See id. None of the servicers admitted or denied the OCC's or Federal Reserve Board's findings.

[17] *See, e.g., Problems in Mortgage Servicing from Modification to Foreclosure: Hearings Before the Comm. on Banking, Housing and Urban Affairs,* S. Hrg. 111–987, 111th Cong. 53–54 (2010) (statement of Diane E. Thompson, NCLC) (Thompson Testimony).

[18] *See* U.S. Government Accountability Office, *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Actions,* at 14–16 (June 2010); Miller Testimony at 54.

[19] Sumit Agarwal et. Al, Second Liens and the Holdup Problem in First Mortgage Renegotiation (December 2011), available at *http://ssrn.com/abstract=2022501*.

[20] *Id.*

[21] *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*.

[22] *See* 12 U.S.C. 2605(a)–(e).

[23] *See* 12 U.S.C. 2605(e) and 2609.

[24] *See* 12 CFR 1026.36(c).

[25] *See* 50 U.S.C. App. 501 *et seq.*

For example, 49 State attorneys general,[26] joined by numerous Federal agencies including the Bureau, entered into a National Mortgage Settlement (National Mortgage Settlement) with the nation's five largest servicers in February 2012.[27] The National Mortgage Settlement applies to loans held in portfolio and serviced by the five largest servicers. Loans owned by GSEs, private investors, or smaller servicers are not covered by the settlement.

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.

In addition to the settlement, other Federal regulatory agencies have 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] The Bureau and other Federal agencies have also engaged since spring 2011 in informal discussions about the potential development of national mortgage servicing standards through regulations and guidance.

The Bureau's proposed rules under Regulation Z and X represent another important step towards establishing uniform minimum national standards. When adopted in final form, the Bureau's rules will apply to all mortgage servicers, whether depository institutions or non-depository institutions, and to all segments of the mortgage market, regardless of the ownership of the loan. The proposals focus both on implementing the specific mortgage servicing requirements of the Dodd-Frank Act and on addressing broader systemic problems that the Bureau believes are critical to ensure that the mortgage servicing market functions to serve consumer needs. To that end, the proposed TILA and RESPA mortgage servicing rules incorporate elements from four categories of the National Mortgage Settlement—(1) Foreclosure and bankruptcy information and documentation, (4) loss mitigation, (6) restrictions on servicing fees, and (7) force-placed insurance. In addition, the proposed requirement to maintain reasonable information management policies and procedures addresses oversight of service providers, which impacts category (2) of the settlement.

The Bureau continues to consider whether to incorporate other settlement standards into rules or guidance, either alone or in conjunction with other Federal regulatory agencies; certain requests for comment in this proposal reflect these considerations. The Bureau is also continuing ongoing discussions with other regulators to ensure appropriate coordination of rulemaking and other initiatives relating to mortgage servicing issues.

D. The Statutory Requirements and Additional Proposals

The Dodd-Frank Act mandates several protections for homeowners in the servicing of their loans. The Act requires new disclosures, specifically periodic statements (unless coupon books are provided in certain circumstances), notices prior to the reset of adjustable-rate mortgages, and force-placed insurance notices. These disclosures are designed to provide consumers with comprehensive and comprehensible information when they need it and in a form they can use, so they can better manage their obligations and avoid unnecessary problems.

The Dodd-Frank Act also imposes new requirements on servicers to respond in a timely way to borrowers who assert that their servicer made an error. The statute also requires servicers to respond in a timely way to borrower requests for information.

The Dodd-Frank Act contains requirements relating to the prompt crediting of payments, so that consumers are not wrongly penalized with late fees or other fees because servicers did not credit their payments quickly. The statute also requires servicers to provide timely responses to consumer requests for payoff amounts, so consumers can get this information when they need it, such as when refinancing.

The Bureau is proposing additional standards to improve the way servicers treat all borrowers, including delinquent borrowers. Some servicers have made it very difficult for delinquent borrowers to explore and take advantage of potential alternatives to foreclosure. For example, servicers have frequently neglected to reach out or respond to such borrowers to discuss alternatives to foreclosure, lost or misplaced the documents of borrowers who have sought modifications or other relief, failed to keep track of borrower communications, and forced borrowers who have invested substantial time communicating with an employee of the servicer to repeat the process with a different employee.[32]

To address these concerns, the Bureau is proposing new servicing standards in four areas. First, servicers would have to establish and maintain reasonable information management policies and procedures. These policies and procedures would have to be reasonably designed to achieve certain objectives and address certain obligations, including accessing and providing accurate information, evaluating borrowers for loss mitigation options, facilitating oversight of, and compliance by, service providers, and facilitating servicing transfers.

Second, servicers would have to intervene early with delinquent borrowers to provide them with information about, and encourage them to explore, available alternatives to foreclosure.

Third, servicers would have to provide delinquent borrowers with a point of contact that provides continuity

[26] Oklahoma elected not to join the settlement.

[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 http://www.nationalmortgagesettlement.com/*.

[29] Office of the Comptroller of the Currency, Bulletin 2011–29 (June 30, 2011), available at: *http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-29.html*; Letter from Edward J. DeMarco, Acting Director of FHFA, to Hon. Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform, U.S. House of Representatives (Jan. 20, 2012), available at *http://www.fhfa.gov/webfiles/23056/PrincipalForgivenessltr12312.pdf*; Guidance, Home Affordable Modification Program, available at: *https://www.hmpadmin.com/portal/programs/guidance.jsp.* FHFA, Frequently Asked Questions—Servicing Alignment Initiative, available at: *http://www.fhfa.gov/webfiles/21191/FAQs42811Final.pdf*.

[30] *See* 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.

[31] *See* Interagency Foreclosure Report at 5; Federal Reserve Board, Press Release (May 24, 2012), available at: *http://www.federalreserve.gov/newsevents/press/enforcement/20120524a.htm*; Federal Reserve Board, Press Release (February 27, 2012), available at: *http://www.federalreserve.gov/newsevents/press/enforcement/20120227a.htm*; Office of the Comptroller of the Currency, News Release 2011–47 (April 13, 2011), available at: *http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html*.

[32] *See, e.g.,* Larry Cordell *et al., The Incentives of Mortgage Servicers: Myths and Realities,* at 9 (Federal Reserve Board, Working Paper No. 2008–46, Sept. 2008).

in the borrowers' dealings with the servicer. At such point of contact, staff must have access to complete records about that borrower, including records of prior communications with the borrower, and be able to assist the borrower in pursuing loss mitigation options.

Fourth, servicers that offer loss mitigation options in the ordinary course of business would be required to follow certain procedures to ensure that borrowers' completed loss mitigation applications are evaluated in a timely manner, that borrowers are notified of the results, and that borrowers have a right to appeal the denial of a loan modification option. Servicers would also be required to provide borrowers who submit incomplete loss mitigation applications with timely notice about the additional documents or information needed to make a loss mitigation application complete.

The Bureau recognizes that a one-size-fits-all approach may not be optimal with regard to either the mandated or additional requirements. As discussed below, the Bureau seeks comment on to what extent it may be appropriate to adjust these standards for small servicers.

III. Summary of Statute and Rulemaking Process

A. Overview of the Statute

The Dodd-Frank Act imposes certain new requirements related to mortgage servicing. Some of these new requirements are amendments to TILA addressed in this proposal and others are amendments to RESPA, addressed in the 2012 RESPA Servicing Proposal.

TILA amendments. 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. TILA section 128A states that, for hybrid ARMs with a fixed interest rate for an introductory period that adjusts or resets to a variable 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 borrower, for each billing cycle, a periodic statement that sets forth certain specified information in a conspicuous and prominent manner. The statute also gives the Bureau the authority 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 where the borrower 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 codify 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. The statute also generally codifies the Regulation Z requirement on accurate and timely responses to borrower requests for payoff amounts.

RESPA amendments. Section 1463 of the Dodd-Frank Act imposes a number of new servicing related requirements under RESPA that broadly relate to force-placed insurance and error resolution/responses to requests for information. First, the statute prohibits a servicer from obtaining force-placed hazard insurance, unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirement to maintain property insurance. A servicer may not impose any charge on any borrower for force-placed insurance with respect to any property secured by a federally related mortgage, unless the servicer sends, by first-class mail, two written notices to the borrower, at least 30 days apart. 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 demonstrate that they have coverage, and state that the servicer may obtain coverage at the borrower's expense if the borrower fails to provide evidence of coverage. Servicers must terminate force-placed insurance coverage and refund to borrowers any premiums charged during any period when the borrower had private insurance coverage. The statute also provides 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.

Second, the statute prohibits certain acts and practices by servicers of federally related mortgages with regard to resolving errors and responding to requests for information. Specifically, the statute prohibits servicers of federally related mortgages from charging fees for responding to valid qualified written requests. The statute also provides that a servicer of a federally related mortgage must 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, avoiding foreclosure, or other standard servicer duties.

Finally, the statue requires a servicer of a federally related mortgage to 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. The statue also reduces the amount of time that servicers of federally related mortgages have to correct errors and respond to inquiries generally, as well as refund escrow accounts upon payoff.[33]

In addition, the statute provides that a servicer of a federally related mortgage must ''comply with any other obligation found by the Consumer Financial Protection Bureau, by regulation, to be appropriate to carry out the consumer protection purposes of this Act.'' [34] This provision gives the Bureau broad authority to adopt additional regulations to govern the conduct of servicers of federally related mortgage loans. In light of the systemic problems in the mortgage servicing industry, the Bureau is proposing to exercise this authority to require servicers of federally related mortgages to: Establish reasonable information management policies and procedures; undertake early intervention with delinquent borrowers; provide delinquent borrowers with continuity of contact with staff equipped to assist them; and require servicers that offer loss mitigation options in the ordinary course of business to follow certain procedures when evaluating loss mitigation applications.

The statute also requires a creditor or servicer to send accurate and timely responses to borrower requests for payoff amounts for home loans.

The statutory provisions with enumerated mortgage servicing requirements become effective on January 21, 2013, unless final rules are issued on or before that date.

B. Outreach and Consumer Testing

The Bureau has conducted extensive outreach in developing the mortgage servicing proposals. Bureau staff met

[33] Other changes in section 1463 of the Dodd-Frank Act relate to increases in penalties for violations. These provisions are not addressed in this rulemaking.

[34] 12 U.S.C. 2605(k)(1)(E).

with mortgage servicers, force-placed insurance carriers, industry trade associations, consumer advocates, other Federal regulatory agencies, and other interested parties to discuss various aspects of the statute and the servicing industry.

In preparing this proposed rule, the Bureau solicited input from small servicers through a Small Business Review Panel (SBREFA Panel) with the Chief Counsel for Advocacy of the Small Business Administration (SBA) and the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).[35] The Small Business Review Panel's findings and recommendations are contained in the Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking (SBREFA Final Report).[36]

The Bureau also engaged in other meetings and roundtables with a variety of other stakeholders to gather factual information about the servicing industry and to discuss various elements of the Bureau's proposals as they were being developed. 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 proposals and the need for and potential contents of national mortgage servicing standards in general. As it considers public comment and works to develop final rules on mortgage servicing, the Bureau will continue to seek input from all interested parties.

In addition, 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 ARM notices, the force-placed insurance notices, and the periodic statements. 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 for the new disclosures required by Dodd-Frank Act section 1418, 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, as well as to learn about how they would use the information presented in each of the disclosures. The disclosures were revised after each round of testing. Specific findings from the consumer testing are discussed in detail throughout the **SUPPLEMENTARY INFORMATION** where relevant.[37]

C. Other Dodd-Frank Act Mortgage-Related Rulemakings

Including this proposal, the Bureau currently is engaged in seven rulemakings relating to mortgage credit to implement requirements of the Dodd-Frank Act:

- *TILA–RESPA Integration:* On July 9, 2012, the Bureau released proposed rules and forms combining the TILA mortgage loan disclosures with the Good Faith Estimate (GFE) and settlement statement required under RESPA, pursuant to DFA section 1032(f) as well as sections 4(a) of RESPA and 105(b) of TILA, as amended by DFA sections 1098 and 1100A, respectively. 12 U.S.C. 2603(a); 15 U.S.C. 1604(b) (the 2012 TILA–RESPA Proposal).[38]
- *HOEPA:* On July 9, 2012, the Bureau released proposed rules to implement Dodd-Frank Act requirements expanding protections for ''high-cost'' mortgage loans under HOEPA, pursuant to TILA sections 103(bb) and 129, as amended by DFA sections 1431 through 1433. 15 U.S.C. 1602(bb) and 1639.[39] Such loans have requirements on servicers related to payoff statements, late fees, prepayment penalties, and fees for loan modifications or deferrals.
- *Loan Originator Compensation:* The Bureau is in the process of developing a proposal to implement provisions of the Dodd-Frank Act requiring certain creditors and mortgage loan originators to meet duty of care qualifications and prohibiting mortgage 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, pursuant to TILA section 129B as established by DFA sections 1402 through 1405. 15 U.S.C. 1639b.
- *Appraisals:* The Bureau, jointly with Federal prudential regulators and other Federal agencies, is in the process of developing a proposal to implement Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, appraisal management companies, and automated valuation models, pursuant to TILA section 129H as established by DFA section 1471, 15 U.S.C. 1639h, and sections 1124 and 1125 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) as established by Dodd-Frank Act sections 1473(f), 12 U.S.C. 3353, and 1473(q), 12 U.S.C. 3354, respectively. In addition, the Bureau is developing rules to implement section 701(e) of the Equal Credit Opportunity Act (ECOA), as amended by DFA section 1474, to require 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. 15 U.S.C. 1691(e).
- *Ability to Repay:* The Bureau is in the process of finalizing a proposal issued by the Board to implement provisions of the Dodd-Frank Act requiring creditors to determine that a consumer can repay a mortgage loan and establishing standards for compliance, such as by making a ''qualified mortgage,'' pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411 and 1412 (ATR Rulemaking). 15 U.S.C. 1639c.
- *Escrows:* The Bureau is in the process of finalizing a proposal issued by the Board to implement provisions of the Dodd-Frank Act requiring certain escrow account disclosures and exempting from the higher-priced mortgage loan escrow requirement loans made by certain small creditors, among

[35] The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the Bureau to convene a Small Business Review Panel before proposing a rule that may have a substantial economic impact on a significant 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)).

[36] *See* SBREFA Final Report, *supra* note 22.

[37] ICF Macro International, Inc., *Summary of Findings: Design and Testing of Mortgage Servicing Disclosures* (Aug. 2012), available at: *http://www.consumerfinance.gov/notice-and-comment/* (report on consumer testing submitted to the U.S. Consumer Fin. Prot. Bureau).

[38] Available at *http://www.consumerfinance.gov/notice-and-comment/*.

[39] *Id.*

other provisions, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461 and 1462. 15 U.S.C. 1639d.

With the exception of the requirements being implemented in the 2012 TILA–RESPA Proposal, the Dodd-Frank Act requirements referenced above 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. To provide an orderly, coordinated, and efficient comment process, the Bureau is generally setting the deadlines for comments on this and other proposed mortgage rules based on the date the proposal is issued, instead of the date this notice is published in the **Federal Register**. Therefore, the Bureau is providing 60 days for comment on those proposals, which will ensure that the Bureau receives comments with sufficient time remaining to issue final rules by January 21, 2013. Because the precise date this notice will be published cannot be predicted in advance, setting the deadlines based on the date of issuance will allow interested parties that intend to comment on multiple proposals to plan accordingly.

The Bureau regards the foregoing rulemakings as components of a larger undertaking; many of them intersect with one or more of the others. Accordingly, the Bureau is coordinating carefully the development of the proposals and final rules identified above. Each rulemaking will adopt new regulatory provisions to implement the various Dodd-Frank Act mandates described above. In addition, each of them may include other provisions the Bureau considers necessary or appropriate to ensure that the overall undertaking is accomplished efficiently and that it ultimately yields a regulatory scheme for mortgage credit that achieves the statutory purposes set forth by Congress, while avoiding unnecessary burdens on industry.

Thus, many of the rulemakings listed above involve issues that extend across two or more rulemakings. In this context, each rulemaking may raise concerns that might appear unaddressed if that rulemaking were viewed in isolation. For efficiency's sake, however, the Bureau is publishing and soliciting comment on a proposed approach to certain issues raised by two or more of its mortgage rulemakings in whichever rulemaking is most appropriate, in the Bureau's judgment, for addressing each specific issue. Accordingly, the Bureau urges the public to review this and the other mortgage proposals identified above, including those previously published by the Board, together. Such a review will ensure a more complete understanding of the Bureau's overall approach and will foster more comprehensive and informed public comment on the Bureau's several proposals, including provisions that may have some relation to more than one rulemaking but are being proposed for comment in only one of them.

D. Small Servicers

The small entity representatives (SERs) who provided feedback to the SBREFA panel generally emphasized that their business models required a ''high touch'' approach to customer service and that they did not engage in many of the practices that contributed to the mortgage market process. The SERs indicated that they take a proactive approach to providing consumer information, resolving errors and working with delinquent borrowers to find alternatives to foreclosure. Nevertheless, they indicated that some elements of the proposals under consideration were not consistent with their current business practices and expressed concern about the need to begin providing extensive documentation to prove compliance with the proposed standards. The SERs urged the Bureau to adopt standards that would allow small servicers to stay in the market and provide choices to consumers with the new compliance burdens.[40] The SERs were particularly concerned about the costs and burdens of complying with the periodic statement requirements, as well as certain aspects of the process for resolving errors and responding to inquiries.[41]

Informed by this process, the Bureau is proposing to exempt certain small servicers from the periodic statement requirement. The Bureau is also proposing that certain requirements, such as the requirement to maintain reasonable information management policies and procedures under Regulation X, should be applied in light of the scale of the servicer's operations as well as other contextual factors. The Bureau does not believe that these provisions, described more fully below in the section-by-section analysis of the applicable proposal, would impair consumer protection. The Bureau is also seeking comment more broadly on whether other exemptions or adjustments for small servicers would be warranted to reduce regulatory burden while appropriately balancing consumer protections.

E. Request for Comment on Effective Date

The Bureau specifically requests comment on the appropriate effective date for each of the servicing-related rules contained in this proposal and the 2012 RESPA Servicing Proposal. As discussed above, the Dodd-Frank Act servicing requirements take effect automatically on January 21, 2013, unless final rules are issued on or before that date.[42] Where rules are required to be issued, the Dodd-Frank Act permits the Bureau to provide up to 12 months for implementation. For all other rules, the implementation period is left to the discretion of the Bureau.

Given the significant consumer benefits offered by the proposals and the challenges faced by delinquent borrowers in dealing with their servicers, the Bureau generally believes that the final rules should be made effective as soon as possible. However, the Bureau understands that various elements of the final rules would require servicers to adopt or revise existing software to generate compliant disclosures, retrain staff, assess and revise policies and procedures, and/or take other implementation measures. The Bureau therefore seeks detailed comment on the nature and length of implementation process for each individual servicing rule and in light of interactions between the rules. The Bureau is particularly interested in analyzing the impacts on both consumers and servicers of a staggered implementation sequence as compared to imposing a single date by which all rules must be implemented.

The Bureau also notes that some companies may also need to implement other new requirements under other parts of the Dodd-Frank Act, as described above. The Bureau believes based on conversations and analysis to date that there is more overlap and interaction among the various proposals relating to mortgage origination than there is between the servicing proposals and the origination proposals. However, the Bureau seeks comment specifically on this issue and on whether the general cumulative burden on entities that are subject to both sets of rules will complicate implementation.

Finally, the Bureau seeks comment on any particular implementation challenges faced by small servicers, and on whether an extended implementation period would be

[40] SBREFA Final Report, *supra* note 22, at 16, 21.

[41] SBREFA Final Report, *supra* note 22, at 16–19, 21, and 23–24.

[42] Public Law 111–203, 124 Stat. 1376, section 1400(c) (2010).

appropriate or useful. For instance, to the extent that small servicers rely heavily on outside software vendors, the Bureau seeks comment on whether a delayed effective date would provide significant relief if the vendors will have to develop software solutions for larger servicers on a shorter timeline anyway. The Bureau also seeks comment on the impacts of delayed implementation on consumers and on other market participants.

IV. Discussion of Major Proposed Revisions

The proposed amendments to Regulation Z implement sections 1418 (initial ARM interest rate adjustment notice), 1420 (periodic statements) and 1464 (prompt crediting and provision of payoff statements) of the Dodd-Frank Act, which in turn amend TILA. The amendment also proposes to revise current Regulation Z ARM disclosure rules for consistency with DFA section 1418. The proposed revision eliminates the ARM interest rate adjustment notice required at least once each year during which an interest rate adjustment is implemented without resulting in a corresponding payment change.

A. Current and Proposed Interest Rate Adjustment Disclosures

To implement DFA section 1418, the Bureau is proposing to revise § 1026.20(d) to require that creditors, assignees, or servicers provide notices to consumers six to seven months prior to the first time the interest rate of their adjustable-rate mortgages adjusts. In contrast to this one-time disclosure, Regulation Z currently requires notice to consumers regarding each adjustment of their adjustable-rate mortgages.

Under current rule § 1026.20(c), creditors must provide consumers with a notice of interest rate adjustment for variable-rate transactions subject to § 1026.19(b) at least 25, but no more than 120, calendar days before a payment at a new level is due. For the reasons discussed below, the Bureau is proposing in § 1026.20(c), among other things, to change the minimum time for providing advance notice to consumers from 25 days to 60 days before payment at a new level is due. The maximum time for advance notice would remain the same: 120 days prior to the due date of the first payment at a new level.

Current § 1026.20(c) also requires creditors to provide consumers with an adjustment notice at least once each year during which an interest rate adjustment is implemented without resulting in a corresponding payment change. The Bureau is proposing to eliminate this provision. As explained in more detail below in the section-by-section analysis, the Bureau believes that certain Dodd-Frank Act amendments to TILA and the Bureau's proposed amendments that would implement those provisions provide consumers with much of the information contained in the annual notice, thereby greatly minimizing its value for consumers.

In the interest of harmonizing the two proposed ARM disclosures, the coverage, content, and format of proposed § 1026.20(c) and (d) closely track one another and incorporate most of the content currently required by § 1026.20(c).

Historic context of § 1026.20(c) 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.[43] 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 payment at new level is due in order to track the rules of the OCC and to provide creditors with flexibility in giving adjustment notices for a variety of ARMs.[44] 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.[45]

Since 1987, the popularity of ARMs has increased, especially during the period from 2002 to 2007.[46] Beginning in 2007, ARM growth began to slow as consumers experienced difficulty repaying such loans and concerns grew about the risk of payment shock that ARMs pose.[47] According to Freddie Mac, ''[i]n June 2004, ARMs hit a peak share of 40% of the home-purchase market but by early 2009, that share had fallen to just 3%, according to the Federal Housing Finance Agency.'' [48] Generally, ARMs are financing just over 10% of new home-purchase loans but are expected to rise to a 14% share of that market in 2012.[49]

For many consumers, the current era of declining interest rates has reduced the incidence of the significant payment increases that can accompany ARM interest rate adjustments. Anecdotal evidence from mortgage servicers with which the Bureau has conducted outreach supports this conclusion. To the extent interest rates rise in the future, ARM interest rate adjustments may result in significant payment increases for many consumers. The popularity of adjustable-rate mortgages, which provide the opportunity for reduced interest rates, also may increase along with the advent of higher interest rates.

Regardless of current market conditions, ARMs can pose a risk of payment shock. Therefore, it is critical that consumers receive advance notice of ARM payment changes so that, if their rates increase, they can prepare to make higher mortgage payments or pursue alternative plans, such as seeking to refinance their loans.

Timing of current and proposed ARM regulations. DFA section 1418 requires that interest rate adjustment disclosures be provided to consumers six to seven months before the interest rate adjusts for the first time (which is equivalent to 210 to 240 days before payment at a new level is due). Generally, this much advance notice will require disclosure of an estimated new interest rate and payment instead of exact amounts. This is because ARM contracts generally require an index value published closer to the adjustment date to calculate the adjusted interest rate and new payment. Nevertheless, the consumer would be put on notice of upcoming changes and would have ample time to refinance or pursue other alternatives if the estimate indicates a potential increase in payments that the consumer cannot afford.

Current § 1026.20(c) requires notice of rate adjustments resulting in a corresponding payment change at least 25 days prior to when payment at a new level is due. This notice, unlike the one required under DFA section 1418, provides the actual, not estimated, new interest rate and payment. Twenty-five days likely does not provide sufficient time for consumers to refinance, pursue other alternatives, or adjust their finances to make higher payments. Research conducted for the years 2004 through 2007 also suggested that a requirement to provide ARM adjustment disclosures 60, rather than 25, days before payment at a new level is due more closely reflects the time needed for

[43] 52 FR 48665 (Dec. 24, 1987).

[44] 74 FR 43232, 43269 (Aug. 26, 2009) (*citing* 52 FR 48665, 48668 (Dec. 24, 1987)).

[45] *Id.* at 43272.

[46] *Id.* at 43269.

[47] *Id.*

[48] Press Release, Freddie Mac, *Freddie Mac Releases 28th Annual ARM Survey Results* (January 18, 2012), available at: *http://freddiemac.mediaroom.com/index.php?s=12329&item=109996.*

[49] *Id.*

consumers to refinance a loan.[50] In the current market, the nation's biggest mortgage lenders take an average of more than 70 days to complete a refinance.[51]

For these reasons, proposed § 1026.20(c) revises the time frame for providing the ARM adjustment notice from the current 25 to 120 days to 60 to 120 days before payment at a new level is due. Under the proposed rule, consumers will know the actual amount of their new interest rate and payment at least 60 days before the new payment is due. Most existing ARMs will be able to comply with this proposed timing. The Bureau proposes grandfathering 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. *See* section-by-section analysis for proposed § 1026.20(c) for a full discussion of timing and look-back periods.

Content of current and proposed ARM regulations. The Bureau is generally proposing to retain the content required by current § 1026.20(c). Proposed § 1026.20(c) would require additional information such as a statement that the consumer's interest rate is scheduled to adjust, 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; the date when the new payment is due after the adjustment; any interest rate or payment limits; any unapplied carryover interest and the earliest date it could be applied; additional amortization information for negatively-amortizing and interest-only loans; and the amount and expiration date of any prepayment penalty. Much of this additional content was proposed by the Board's 2009 Closed-End Proposal to amend Regulation Z's payment change interest rate adjustment disclosures.[52]

The initial interest rate adjustment notices proposed by § 1026.20(d) include much of the same information listed above for proposed § 1026.20(c). The content of the two proposed notices in § 1026.20(c) and (d) closely track one another in order to promote consistency and simplify compliance. However, proposed § 1026.20(c), which applies to the ongoing disclosures at each interest rate adjustment that results in a corresponding payment change, would not require some of the disclosures mandated for the initial interest rate adjustment notices by DFA section 1418. These disclosures include 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 Bureau believes it is not necessary to provide this information in § 1026.20(c) notices because much of it will be provided to consumers through other mortgage servicing measures implemented by the Dodd-Frank Act. For example, new TILA section 128(f), which would be implemented by proposed rule § 1026.41 for periodic statements, each billing cycle would provide information on how to contact the appropriate State housing finance authority and how to access a list of government-certified counseling agencies and programs. Also, the early intervention provisions of the 2012 RESPA Servicing Proposal would require this same information as well as examples of alternatives consumers may want to consider. Finally, consumers will have received this information pursuant to § 1026.20(d) the first time their adjustable-rate mortgages adjust.

The model forms proposed for § 1026.20(c) and (d) closely track one another and disclose virtually the same information, except for the additional information proposed for § 1026.20(d), as discussed above, and the reference to estimates in the proposed § 1026.20(d) notices. The Bureau believes that harmonizing the two proposed rules regarding ARM interest rate adjustment disclosures would ease the burden of compliance for creditors, assignees, and servicers while providing consumers with consistent information in similar notices.

The Bureau is proposing model and sample forms[53] for both § 1026.20(c) and (d). The Bureau worked with Macro to design and test the forms for § 1026.20(d), but did not specifically test § 1026.20(c) notices. *See* Part II.B above. Because of the similarity in the model forms for both proposed rules, the results of the testing of § 1026.20(d) forms is relevant for proposed § 1026.20(c) as well. Thus, throughout the section-by-section analysis for § 1026.20(c), the Bureau refers to the testing results for § 1026.20(d) where the information and concepts tested are identical in the model forms for both proposed § 1026.20(c) and (d).

B. Proposed Rule Regarding Prompt Crediting of Mortgage Payments and Response to Requests for Payoff Amounts

DFA section 1464(a) codifies the existing Regulation Z requirements in § 1026.36(c)(1)(i) on prompt crediting of payments. The proposed modifications to § 1026.36(c) would clarify the handling of partial payments. The proposal would limit application of the current prompt crediting provision, existing § 1026.36(c)(1)(i), to full contractual payments (as opposed to all payments), and add a new provision, § 1026.36(c)(1)(ii), to address the handing of partial payments (anything less than a full contractual payment).

DFA section 1464(b) generally codifies the existing Regulation Z requirement in § 1026.36(c)(3) to provide payoff statements, with modifications relating to the scope and timing of the requirement, and the need for the request to be written. Proposed modifications to § 1026.36(c) reflect these changes.

As part of implementing these changes, the Bureau is proposing a reorganization of the requirements in § 1026.36(c).

C. Proposed Rule Regarding Periodic Statements

DFA section 1420 establishes new TILA section 128(f), requiring periodic statements for residential mortgage loans to be provided each billing cycle. The statute requires that a creditor, assignee, or servicer disclose certain information in the periodic statement, along with ''such other information as the Bureau may prescribe in regulations.''[54] The statute requires the Bureau to develop and prescribe a standard form for this disclosure, taking into account that the required statements may be transmitted in writing or electronically.[55] The statute also provides an exemption to the periodic statement requirement for fixed-rate loans where the creditor, assignee, or servicer provides the obligor with a coupon book which provides substantially the same information as the periodic statement.[56]

[50] Robert B. Avery, Kenneth P. Brevoort, & Glenn B. Canner, *The 2007 HMDA Data,* 94 Fed. Reserve Bull. A107 (Dec. 23, 2008).

[51] 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.*

[52] 74 FR 43232, 43269–73 (Aug. 26, 2009).

[53] The Bureau proposes four model forms for the ARM adjustment notices: Two forms for the § 1026.20(c) ARM payment change notices, one labeled a model form and the other a sample form and two forms for the § 1026.20(d) ARM initial interest rate adjustment notices, one labeled a model form and the other a sample form. *See* Appendix H–4(D)(1)–(4).

[54] TILA section 128(f)(1)(H).

[55] TILA section 128(f)(2).

[56] TILA section 128(f)(3).

Proposed § 1026.41 contains the periodic statement requirement. Paragraph (a) establishes the general requirement for creditors, assignees, or servicers to provide a periodic statement. Paragraphs (b)–(d) establish requirements for the timing, form, content, and layout of the statement. Paragraph (e) sets forth exemptions from the periodic statement requirement.

The periodic statement is designed to serve a variety of purposes, including informing consumers of their payment obligations, providing the consumer with information about their mortgage in an easily readable and understandable format, creating a record of the transaction to aid in error detection and resolution, and providing information to certain delinquent borrowers.

The Bureau is proposing sample forms in accordance with TILA section 129(f)(2). The Bureau examined several forms used today by various servicers, considered how these forms met the needs of consumers, and identified changes that would benefit consumers. As discussed above in part II.B, the Bureau worked with Macro to design and test sample forms.

The proposed periodic statement is designed to provide information to consumers in a format they can easily understand and use. As such, the proposed regulation would require certain related pieces of information to be grouped together. The proposed formatting requirements of the periodic statement are discussed in detail in the section-by-section analysis for proposed § 1026.41(d).

The proposed periodic statement is also designed to provide additional information to consumers in several potentially confusing scenarios: Partial payments, payment-option loans, and delinquency. First, the handling of partial payments would be clarified on the periodic statement, both on the transaction activity line and in the past payment breakdown. Additionally, if funds are held in a suspense or unapplied funds account, the proposed rule would require a message on what must be done to release the funds. Second, payments for payment-option loans would be clarified by listing the options in the Amount Due section, and providing details about each of the options in the Explanation of Amount Due section. Finally, delinquent consumers would receive information in several places on the periodic statement. The overdue amount would be stated in the Explanation of Amount Due section, and any fees would be listed in the Transaction Activity section. The breakdown of past payments will help the consumer understand how past payments were applied, which can be confusing. Additionally, consumers who are more than 45 days delinquent will have a delinquency information included in the periodic statement providing specific information about their loan. These requirements are discussed in greater detail in the section-by-section analysis on proposed § 1026.41 below.

Finally, the proposal contains several exemptions from the periodic statement requirement. One exemption is for fixed-rate loans using coupon books that meet certain requirements, as set forth in TILA 128(f)(3). Another exemption clarifies that timeshares are not subject to the periodic statement requirement as per the definition of ''residential mortgage loan.'' [57] The Bureau is also proposing exemptions for reverse mortgages and certain small servicers.

V. Legal Authority

The Bureau is issuing this proposed 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, Title X of the Dodd-Frank Act, and certain subtitles and provisions of Title XIV of the Dodd Frank Act, are Federal consumer financial laws.[59] Accordingly, the Bureau has authority to issue regulations pursuant to TILA, Title X, and the enumerated subtitles and provisions of Tile XIV, including to implement 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 resets or adjusts. Additionally, the savings clause in TILA section 128A(c) allows the Bureau to require this notice for adjustable-rate mortgage loans that are not hybrid adjustable-rate loans. DFA 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 requires 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 also include such information as the Bureau may require in regulations. DFA 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. In addition to proposing rules to implement these TILA provisions of the Dodd-Frank Act, the Bureau proposes amending current TILA interest rate adjustment disclosures required by § 1026.20(c) as proposed § 1026.20(c).

The proposed 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. 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] TILA section 103(cc)(5).

[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 TILA), 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 avoid 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. 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 proposing regulations to carry out TILA's purposes and is proposing 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. In developing these aspects of the proposal 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 borrower, including—

(1) Any related financial arrangements of the borrower, as determined by the Bureau;

(2) The financial sophistication of the borrower relative to the type of transaction; and

(3) The importance to the borrower 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 proposing to exempt certain transactions from the requirements of TILA pursuant to its authority under TILA section 105(f). In developing this proposal under TILA section 105(f), the Bureau has considered the relevant factors and determined that the proposed exemptions may be appropriate.

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). Section 1022(b)(2) of the Dodd-Frank Act prescribes certain standards for rulemaking that the Bureau must follow in exercising its authority under section 1022(b)(1). 12 U.S.C. 5512(b)(2). As discussed above, TILA is a Federal consumer financial law. Accordingly, the Bureau proposes to exercise its authority under DFA section 1022(b) to prescribe rules under TILA that carry out the purposes and prevent evasion of those laws.

Dodd-Frank Act section 1032. Section 1032(a) of the Dodd-Frank Act governs disclosures and 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 DFA 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 DFA 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 proposed rules under Dodd-Frank Act section 1032(a) for this proposal, 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 proposing portions of this rule pursuant to its authority under Dodd-Frank Act section 1032(a).

In addition, DFA 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, using a clear format and design, such as readable type font, and succinctly explains the information that must be communicated to the consumer. DFA section 1032(b)(2); 12 U.S.C. 5532(b)(2). As discussed in the section-by-section analysis for proposed §§ 1026.20(d) and 1026.41, the Bureau is proposing model forms for ARM interest rate adjustment notices and periodic

[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.

statements. As discussed in this notice, the Bureau is proposing these model forms pursuant to its authority under DFA section 1032(b)(1).

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, the authority granted by section 1405(b) applies to ''disclosure requirements'' generally, and is not limited to a specific statute or statutes. Accordingly, DFA section 1405(b) is a broad source of authority to modify the disclosure requirements of TILA.

In developing proposed rules for residential mortgage loans under Dodd-Frank Act section 1405(b) for this proposal, 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 proposing portions of this rule pursuant to its authority under Dodd-Frank Act section 1405(b).

See the section-by-section analysis for each proposed section for further elaboration on legal authority.

VI. 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 generally applicable to disclosures under subpart C. The Bureau proposes to make certain modifications to these requirements as applicable to the ARM interest rate adjustment payment change notices under proposed § 1026.20(c) and the initial ARM interest rate adjustment notices under proposed § 1026.20(d).

Section 1026.17(a) requires, among other things, that certain disclosures contain only information directly related to that disclosure. Current § 1026.20(c) is not included in the list of disclosures subject to this requirement. Further, commentary to § 1026.17(a)(1) states that the disclosures required by current § 1026.20(c) are not subject to the general segregation requirements under § 1026.17(a)(1).

The payment change notice proposed by § 1026.20(c) is intended to inform consumers of upcoming changes to their interest rate and mortgage payments and to give them time to explore alternatives. The Bureau does not believe that the form requirements applicable to current § 1026.20(c) notices are sufficient to highlight and emphasize important information consumers need to make decisions about their adjustable-rate mortgages. Presenting information to consumers separate from other information enhances consumers' awareness of the material. Therefore, the Bureau proposes to amend § 1026.17(a)(1) and comment 17(a)(1)–2.ii to add proposed § 1026.20(c) to the enumerated disclosures required to contain only information directly related to the disclosure and to require that proposed § 1026.20(c) disclosures be grouped together and segregated from everything else.

Other § 1026.17(a)(1) requirements, such as that disclosures be clear and conspicuous, in writing, and provided electronically subject to compliance with Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.), would continue to apply to § 1026.20(c).

TILA section 128A provides that the initial ARM interest rate adjustment notices, which the Bureau proposes to implement in proposed § 1026.20(d), be ''separate and distinct from all other correspondence to the consumer.'' Accordingly, the Bureau proposes to revise § 1026.17(a), to make clear that the proposed § 1026.20(d) disclosures are not subject to the general segregation requirement under that section but rather, pursuant to proposed § 1026.20(d), are required to be separate and distinct from all other correspondence. *See* comment 20(d) for further discussion of the separate and distinct requirement. Other requirements of § 1026.17(a), such as that disclosures be clear and conspicuous, in writing, and provided electronically subject to compliance with the E-Sign Act, would apply to the proposed § 1026.20(d) disclosures.

The proposed application of § 1026.17(a)(1), as modified, to proposed § 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 proposed 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 proposed ARM notices. Moreover, as discussed below, the disclosures proposed under § 1026.20(c) are authorized, among other provisions, under TILA section 128(f)(2), which authorizes the Bureau to develop and prescribe a standard form for the disclosures required under TILA section 128(f).

As to proposed § 1026.20(d) disclosures, DFA section 1418, TILA section 128A(b) specifically provides that the disclosures shall be in writing, separate and distinct from all other correspondence. In addition, the Bureau believes, consistent with DFA section 1032(a), that the proposed application of § 1026.17(a)(1), as modified, 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. The Bureau further believes, consistent with DFA section 1405(a), that it is proper to modify DFA section 1418 to apply the form requirements in proposed § 1026.17(a)(1) to improve consumer awareness and understanding of ARM adjustments.

17(b) Time of Disclosures

The Bureau is proposing to revise § 1026.17(b) to add proposed § 1026.20(d) to the list of variable-rate disclosure provisions with special timing requirements. This proposed amendment would alert creditors, assignees, and servicers that, as with proposed § 1026.20(c) payment adjustment notices, there are timing requirements particular to the proposed § 1026.20(d) initial interest rate adjustment notices.

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 under § 1026.20(c), the disclosures shall reflect the credit terms to which the parties are legally bound when the disclosures are provided. The Bureau proposes revising comment 17(c)(1)–1 to make clear that the disclosures required under proposed § 1026.20(d), like those under proposed § 1026.20(c), shall reflect the credit terms to which the parties are legally bound when the disclosures are provided, rather than at the outset of the transaction.

Section 1026.18 Content of Disclosures

18(f) Variable Rate

18(f)–1

Current 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 current § 1026.20(c). Under current § 1026.20(c), disclosures are permissive in such cases because the § 1026.19(b) substitution is only permitted for variable-rate transactions not secured by the consumer's principal dwelling or variable-rate transactions secured by the consumers' principal dwelling, but with a term of one year or less. These transactions are not covered by current § 1026.20(c). Thus, current comment 18(f)–1 does not alter the legal requirements applicable to creditors. The clarification was, however, helpful because current § 1026.20(c) cross-references § 1026.19(b) and applies to transactions covered by § 1026.19(b).

The Bureau proposes to delete this reference to § 1026.20(c) from the comment because it is no longer helpful since neither proposed § 1026.20(c) nor (d) cross-references § 1026.19(b) and those proposed provisions define their scope of coverage without reference to § 1026.19(b). Moreover, proposed § 1026.20(c) or (d) apply to some ARMs with terms of one year or less such that applying the current comment would create an unwarranted exception to the requirement to provide ARM notices to consumers with those types of ARMs. For these reasons, the Bureau proposes to delete the reference to § 1026.20(c) in comment 18(f)–1.

Section 1026.19 Certain Mortgage and Variable-Rate Transactions

19(b) Certain Variable Rate Transactions

19(b)–4 Other Variable-Rate Regulations

The Bureau proposes revising comment 19(b)–4 to delete reference to current § 1026.20(c) and (d). Current 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 current § 1026.20(d). Consistent with the proposed deletion of current § 1026.20(d), the Bureau proposes revising comment 19(b)–4 to delete reference to current § 1026.20(c) and (d).

19(b)–5.i.C Certain Mortgage and Variable-Rate Transactions

The Bureau proposes revising comment 19(b)–5.i.C to cross-reference other commentary that makes clear that proposed § 1026.20(c) and (d) do 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.

19(b)(2)(xi)–1 Adjustment Notices

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 proposes adding reference to proposed § 1026.20(d) to the comment, since those disclosures would be provided to consumers under the Bureau's proposed rule. The proposed comment also makes conforming changes to the text suggested for describing the ARM notices to reflect the timing and content of the disclosures proposed by § 1026.20(c) and (d).

Section 1026.20 Subsequent Disclosure Requirements

20(c) Rate Adjustments

Current § 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 annual notice and the notices required each time the interest rate adjustment results in a corresponding payment change. Current § 1026.20(c) 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 fully amortize the loan at the new interest rate over the remainder of the loan term.

The Bureau proposes two major changes to § 1026.20(c). First, the Bureau proposes eliminating the 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 believes that 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 the annual notice thereby greatly minimizing the need for its protections. Second, the proposal updates current § 1026.20(c) by adding disclosures that the Bureau believes will enhance protections for consumers with ARMs. The proposed revisions to § 1026.20(c) also harmonize with the requirements the Bureau is proposing for the initial ARM interest rate adjustment notice under § 1026.20(d), thereby promoting consistency between the Regulation Z ARM provisions.

Elimination of annual disclosure. First, proposed § 1026.20(c) eliminates the annual notice requirement under the current rule. The Bureau believes that consumers who receive the current 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 proposed periodic statement would provide consumers with comprehensive information about their mortgages each billing cycle. The periodic statement would include 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 provide other information that may be useful to consumers who would receive the § 1026.20(c) annual ARM notice, including the existence and amount of any prepayment penalty; allocation of the consumer's payment by principal, interest, and escrow; the amount of the outstanding principal; contact information for the State housing finance authority; and information to access a list of Federally-certified housing counselors.

In light of the amount, type, and frequency of the information the Bureau proposes to provide in the periodic statement to consumers with ARMs that are subject to the current § 1026.20(c) annual ARM interest rate notice, the Bureau proposes to eliminate the requirement for the annual notice as duplicative and as potentially contributing to information overload that could deflect consumer attention away from the information such consumers would receive in other required disclosures. The Bureau solicits comments on the need, value, or use of retaining the annual notice required under current § 1026.20(c) for consumers whose ARM interest rates adjust during the course of a year without resulting in corresponding payment changes.

The Bureau proposes to delete comments 20(c)(1)–1 and 20(c)(4)–1 which, among other things, address the content of the § 1026.20(c) annual notice the Bureau is proposing to eliminate. Current 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 year period. Current 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 or maturity of the loan if the change resulted from the rate adjustment. The Bureau also proposes deletion of these current comments as they relate to the recurring disclosures that would be required by proposed § 1026.20(c) for interest rate adjustments resulting in a corresponding payment change. The Bureau proposes to replace these comments with the new commentary discussed below.

Amendment of payment change disclosure. Second, proposed § 1026.20(c) would amend existing § 1026.20(c) as it relates to interest rate adjustments that result in a corresponding payment change. The proposal retains much of the content required in the current notice and also would require disclosure of additional information that the Bureau believes would help consumers better understand and manage their adjustable-rate mortgages. The proposed revisions to current § 1026.20(c) harmonize with the initial ARM interest rate adjustment notice proposed by § 1026.20(d). The Bureau believes that promoting consistency between the ARM disclosure provisions of § 1026.20(c) and (d) would reduce compliance burdens on industry and minimize consumer confusion.

Creditors, assignees, and servicers. The Bureau also proposes to amend § 1026.20(c) to provide that it applies to creditors, assignees, and servicers. Current § 1026.20(c) applies to creditors and existing comment 20(c)–1 clarifies that the requirements of § 1026.20(c) also apply to subsequent holders, *i.e.,* assignees. The Bureau's proposal provides that § 1026.20(c) would apply to servicers, as well as to creditors and assignees. Proposed comment 20(c)–1 clarifies that a creditor, assignee, or servicer that no longer owns the mortgage loan or the mortgage servicing rights is not subject to the requirements of § 1026.20(c).

As discussed below, proposed § 1026.20(c) is authorized under, among other authorities, TILA section 128(f), which applies to creditors, assignees, and servicers. The proposal is consistent with proposed § 1026.20(d) such that both proposed § 1026.20(c) and (d) would apply to creditors, assignees and servicers.

The Bureau believes that applying § 1026.20(c) to creditors and assignees, but not servicers, would compromise consumers' recourse in the case of a violation of § 1026.20(c). 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 mortgage 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. Moreover, it can be difficult for consumers to ascertain the identity of the creditor or assignee, even though servicers would be required to identify the owner of a mortgage under rules proposed pursuant to DFA section 1463. Thus, in the case of a violation of proposed § 1026.20(c), consumers should be able to seek relief against the servicer as the primary party from whom they receive service and with whom they maintain communication regarding their mortgages. *See* below, section 20(d), for a discussion of application of proposed § 1026.20(d) initial ARM interest rate adjustment notices to assignees. The same rationale applies to proposed § 1026.20(c) ARM payment adjustment notices.

Proposed comment 20(c)–1 explains that any provision of subpart C that applies to the disclosures required by § 1026.20(c) also applies to creditors, assignees, and servicers. This is the case even where the other provisions of subpart C refer only to creditors. For the reasons discussed above, the Bureau proposes that the requirements of other regulations that apply to the § 1026.20(c) ARM payment adjustment notices apply to servicers as well as to creditors and assignees.

The proposal also would delete current comment 20(c)–1, which, among other things, refers to subsequent holders, in favor of consistent usage of the term assignee in proposed § 1026.20(c) and (d). It would also delete comment 20(c)–3 as duplicative of the § 1026.17(c)(1) requirement that the disclosures reflect the terms of the parties' legal obligations.

Conversions. Proposed § 1026.20(c) also applies to ARMs converting to fixed-rate mortgages when the adjustment to the interest rate results in a corresponding payment change. Providing this notice would alert consumers to their new interest rate and payment following conversion from an ARM to a fixed-rate mortgage. Proposed comment 20(c)–2 explains that, in the case of an open-end account converting to a closed-end adjustable-rate mortgage, § 1026.20(c) disclosures are not required until the implementation of the first interest rate adjustment that results in a corresponding payment change post-conversion. Under the proposed rule, this conversion is analogous to consummation. Thus, like other ARMs subject to the requirements of proposed § 1026.20(c), disclosures for these types of converted ARMs would not be required until the first interest rate adjustment following the conversion which results in a corresponding payment change. The proposed rule is consistent with existing commentary and proposed § 1026.20(d) regarding conversions. *See* current comment 20(c)–1.

Authority. The Bureau proposes to amend § 1026.20(c) pursuant to its authority under TILA section 105(a). For the reasons discussed in the section-by-section analysis for each of the proposed amendments to § 1026.20(c), the Bureau believes that the proposed amendments 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. Proposed § 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.'' Proposed § 1026.20(c) is further authorized under DFA section 1405(b), which permits the Bureau to modify disclosure requirements where such modification is in the interest of consumers and the public.

Although TILA section 128(f) authorizes the Bureau to require that the content for the § 1026.20(c) ARM notices be included in the periodic statement, the Bureau believes, for the reasons set forth above and below, that consumers would be better served if this information was provided as a separate disclosure. Under proposed § 1026.17(a), the proposed § 1026.20(c) ARM payment adjustment notice would have to be provided separate and distinct from the periodic statement. The disclosures required by proposed § 1026.20(c), however, may be provided to consumers together with the periodic statement, depending on the mode of delivery, in the same envelope or as an additional attachment to the email. The Bureau also believes that the interest of consumers and the public interest would be better served by receiving the § 1026.20(c) ARM notice, within the time frame discussed below, each time the ARM interest rate adjusts resulting in a corresponding payment change, rather than with each billing cycle.

20(c)(1) Coverage of Rate Adjustment Disclosures

20(c)(1)(i) In General

Proposed § 1026.20(c)(1) defines an adjustable-rate mortgage, 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. 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 proposes deleting the cross-reference to § 1026.19(b), thereby expanding the scope of proposed § 1026.20(c) to include loans with terms of one year or less. Proposed § 1026.20(c)(1)(i) would replace current § 1026.20(c) and comment 20(c)–1 with regard to which loans are subject to the interest rate adjustment disclosures.

There is one type of short-term ARM that the Bureau proposes to except from the requirements of § 1026.20(c): Construction loans with terms of one year or less. *See* section 20(c)(1)(ii) below for a full discussion of this proposed exception for construction ARMs with terms of one year or less. The Bureau solicits comment on whether there are other ARMs with terms of less than one year and whether the proposed 60-day minimum notice period is appropriate for such loans. *See* section 20(c)(2) below for a full discussion of the timing proposed for § 1026.20(c). If the 60-day period is not appropriate, the Bureau solicits comment on what period would be appropriate that would also provide consumers with sufficient notice of a payment change. This proposal regarding coverage is consistent with the statutory requirements of TILA section 128A and proposed § 1026.20(d) in that those provisions generally apply to all ARMs, regardless of term length. Thus, the proposal to expand § 1026.20(c) to ARMs with terms of one year or less would harmonize the coverage of the two types of ARM adjustment notices, thereby ensuring that both § 1026.20(d) notices and § 1026.20(c) notices, when required, are provided to the same consumers.

The Bureau proposes 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 clarifies that the term ''variable-rate transaction,'' as used in § 1026.19(b) and elsewhere in Regulation Z, is synonymous with the term ''adjustable-rate mortgage'' or ''ARM'', except where specifically distinguished. The Bureau proposes this revision because ''adjustable-rate mortgage'' or ''ARM'' are the terms commonly used for mortgages covered by current and proposed § 1026.20(c).

Proposed comment 20(c)(1)(i)–1 also clarifies that the requirements of § 1026.20(c)(1)(i) are not limited to transactions financing the initial acquisition of the consumer's principal dwelling, but also 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).

20(c)(1)(ii) Exceptions

Proposed § 1026.20(c)(1)(ii) sets forth two exceptions to the disclosure requirements of § 1026.20(c). These exceptions apply 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 is 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 be required by proposed § 1026.20(d). Proposed comments 20(c)(1)(ii)–1 and –2 provide further explanation. Proposed § 1026.20(d) also would except the same construction loans.

As discussed in more detail below in connection with the notice required for an initial ARM interest rate adjustment under § 1026.20(d), the Bureau also considered, but decided against, permitting or requiring small creditors, assignees, and servicers to include in the periodic statement the information required for the first payment change notice under proposed § 1026.20(c). The Bureau also considered this option with regard to all notices that small entities would be required to provide to consumers under proposed § 1026.20(c). As discussed further below, the Bureau solicits comments from small entities—and from creditors, assignees, and servicers in general—as to whether small entities or all creditors, assignees, and servicers should be permitted or required to provide the information required in the first payment change notices under proposed § 1026.20(c) in the periodic statement instead of as a separate ARM notice and whether this should be done for all § 1026.20(c) notices.

Regarding the first exception the Bureau proposes, construction loans generally have short terms of six months to one year and are subject to frequent interest rate adjustments, usually monthly or quarterly. The construction period usually involves several disbursements of funds at times and in amounts that are unknown at the beginning of that period. The consumer generally pays only accrued interest until construction is completed. The creditor, assignee, or servicer, in addition to disbursing payments in stages, closely monitors the progress of construction. Generally, at the completion of the construction, the construction loan is converted into permanent financing in which the loan amount is amortized just as in a standard mortgage transaction. *See* comment 17(c)(6)–2 for additional information on 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 consumer, distinguish construction loans from other ARMs. These loans are meant to function as bridge financing until construction is completed and permanent financing can be put in place. Consumers with construction ARM loans are not at risk of payment shock like other ARMs where interest rates change less frequently. Moreover, given the frequency of interest rate adjustments on construction loans, creditors, assignees, or servicers would have difficulty complying with the proposed requirement to provide the notice to consumers 60 to 120 days before payment at a new level is due for each adjustment resulting in a corresponding payment change. For these reasons, providing notices under § 1026.20(c) for these loans would not provide a meaningful benefit to the consumer nor improve consumers' awareness and understanding of their construction loans with terms of one year or less. Proposed comment 20(c)(1)(i)–1 applies the standards in comment 19(b)–1 for determining the term of a construction loan.

The second exception, for the first adjustment to an ARM causing a payment change if the first payment at the adjusted level is due within 210 days after consummation, would apply only if the exact interest rate, not an estimate, is disclosed at consummation. For ARMs adjusting within six months of consummation, *i.e.,* 210 days before the first payment is due at the new level, the disclosures proposed by § 1026.20(d) must be provided at consummation. The recency of consummation obviates the need for the § 1026.20(c) notice in this circumstance because consumers would have been apprised of the upcoming adjustment and payment change just months prior to its occurrence and their mortgages would be so new as to not require the alerts in the notice regarding pursuing alternatives. Thus, providing § 1026.20(c) disclosures in these circumstances would be duplicative, not contribute to consumer awareness and understanding, and not provide a meaningful benefit to consumers.

Proposed comment 20(c)(1)(ii)–3 discusses other loans to which the proposed rule does not apply. Proposed comment 20(c)(1)(ii)–3 is consistent with proposed comment 20(d)(1)(ii)–2 with regard to the loans which are not 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 clarifies that, for purposes of § 1026.20(c), the following loans, if fixed-rate transactions, are not ARMs and therefore not 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 particular features of these types of loans may trigger interest rate or payment changes over the term of the loan or at the time the consumer pays off the final balance. However, these changes are based on factors other than a change in the value of an index or a formula. Because the enumerated loans are not ARMs they are not covered by proposed § 1026.20(c) and require no disclosures under this section.

Proposed and current § 1026.20(c) are generally consistent with regard to the ARMs to which they do not apply. The principal difference is that current § 1026.20(c) does apply to renewable balloon-payment instruments and preferred-rate loans, even if they are structured as fixed-rate transactions while proposed § 1026.20(c) would not apply to such loans. *See* § 1026.19(b) and comment 19(b)–5.i.A and B. Also, as discussed above, current § 1026.20(c) does not apply to loans with terms of one year or less. This category includes construction loans, which are excepted from coverage under proposed § 1026.20(c). Logically, the Bureau's proposed exception for initial § 1026.20(c) ARM adjustments if the first payment at the adjusted level is due within 210 days of consummation is inapplicable to the current rule since proposed § 1026.20(d) is not yet implemented to replace the current § 1026.20(c) disclosures provided at consummation.

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). Therefore, like the proposed rule, such loans are not subject to current § 1026.20(c).

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, these loans are not adjustable-rate mortgages and the Bureau does not believe that it is appropriate to require the disclosures in proposed § 1026.20(c) for such loans. The particular features of these types of loans may trigger interest rate or payment changes over the term of the loan or at the time the consumer pays off the final balance. However, these changes are based on factors other than a change in the value of an index or a formula. For example, whether or when the interest rate will adjust for a preferred-rate loan with a fixed interest rate is likely not knowable to the creditor, assignee, or servicer 60 to 120 days in advance of the due date for the first payment at a new level after the adjustment. This is because the loss of the preferred rate is based on factors other than a formula or change in the value of an index agreed to at consummation. Like the Bureau's proposed rule, the Board also proposed to remove renewable balloon-payment instruments and preferred-rate loans from coverage under § 1026.20(c) in its 2009 Closed-End Proposal.[61]

20(c)(2) Timing and Content of Rate Adjustment Disclosures

Proposed § 1026.20(c)(2) would require that ARM disclosures be provided to consumers 60 to 120 days before payment at a new level is due. Under current § 1026.20(c), notices must be provided to consumers 25 to 120 days before payment at a new level is due. Thus, the proposed rule would increase the minimum advance notice to consumers from 25 to 60 days before a new payment amount is due. There are

[61] 74 FR 43232, 43264, 43387 (Aug. 26, 2009).

two circumstances under which the rule proposes a different time frame, which are discussed below. Proposed comment 20(c)(2)–1 would replace current comment 20(c)–1 regarding timing.

Current and proposed § 1026.20(c) disclosures provide consumers with their actual new interest rate and payment. The disclosures proposed by § 1026.20(d) likely would provide estimates of these amounts. The longer time frame proposed by the rule is intended to give consumers adequate time to refinance or take other actions based on these exact amounts, if they are not able to make higher payments. The current minimum time of 25 days does not give consumers sufficient time to pursue meaningful alternatives such as refinancing, home sale, loan modification, forbearance, or deed in lieu of foreclosure. In the current market, ''it now takes the nation's biggest mortgage lenders an average of more than 70 days to complete a refinance.[62] Even if consumers elect not to refinance or pursue other alternatives, the proposed rule would give them more time to adjust their finances to the actual amount of an increase in their mortgage payments.

The Bureau believes that for most adjustable-rate mortgages, the proposed 60-day minimum time frame would provide sufficient time for creditors, assignees, and servicers to comply with the proposed rule. Through outreach to servicers of adjustable-rate mortgages it appears that, for most ARMs, servicers know the index value from which the new interest rate and payment are calculated at least 45 days before the date of the interest rate adjustment. Because interest generally is paid one month in arrears, this mean that, for most ARMs, servicers 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 begins 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 will be selected which serves as the basis for the new interest rate and payment. In general, 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 falls on the first of the month following the change date.

Based on outreach conducted by the Bureau, it appears that small servicers often send out the payment change notices required by § 1026.20(c) on the same day the index value is selected. In that case, for a loan with a 45-day look-back period, the notice is ready 45 days before the change date and, with an approximately 30-day billing cycle between the change date and the date payment at the new level is due, the interest rate adjustment notice can be provided to the consumer approximately 75 days before the new payment is 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 is due.

On the other hand, many large creditors, assignees, or 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 insure the notices are correct.[63] In these cases, for a loan with a 45-day look-back period, the payment change notices can be provided between approximately 42 and 35 days prior to the change date, which is either 70 to 73 or 63 to 66 days before the new payment is 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 thirteen days. For loans with the shortest verification period of three days, the payment change notice could be provided to consumers within 70 days prior to payment due at a new level.

In sum, it appears that for most ARMs, creditors, assignees, or servicers could comply with the 60-day time period proposed by the Bureau. The Bureau solicits comment about this proposed timing of the § 1026.20(c) notice.

Some ARMs have look-back periods shorter than 45 days. For example, ARMs backed by the FHA and VA often have look-back periods of 15 or 30 days. For some ARMs, the calculation date is the first business day of the month that precedes the effective date of the interest rate change. Since 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 is proposing a different time period from the proposed 60 to 120 days. The Bureau proposes that existing ARMs with look-back periods of less than 45 days that were originated before a specified date provide the notices required under this proposed rule within 25 to 120 days before payment at a new level is due. The Bureau proposes that the specified date be July 21, 2013. The Bureau understands that the creditors, assignees, or servicers of such loans would not be able to comply with the 60- to 120-day time frame proposed in § 1026.20(c). Although this time frame would shorten the advance notice provided to some consumers, the Bureau is proposing to grandfather these ARMs in order to prevent altering existing contractual agreements regarding the look-back period. Thus, going forward, ARMs must be structured to permit compliance with the proposed 60- to 120-day time frame. The Bureau solicits comment on whether it should grandfather existing ARMs with look-back periods of less than 45 days. The Bureau also seeks comment on whether July 21, 2013 is an appropriate time frame for grandfathering existing ARMs with look-back periods of less than 45 days or if another time period would be more appropriate and why. If not, the Bureau seeks comment on what would be an appropriate time frame for the expiration of the grandfathering period. The Bureau also solicits comments on whether other adjustable-rate mortgages should be allowed to continue with a 25- to 120-day period.

The Bureau also proposes to alter the timing requirements for ARMs that adjust for the first time within 60 days of consummation where the actual, not estimated, new interest rate was not disclosed at consummation. (If the actual interest rate was disclosed at consummation, such loans would be excepted from the rule pursuant to proposed § 1026.20(c)(1)(ii)). The creditors, assignees, or servicers of such loans would not be able to comply with the proposed 60-day time frame. For such loans, the disclosures proposed by § 1026.20(c) must be provided to consumers as soon as practicable, but not less than 25 days before a payment at a new level is due.

The Bureau solicits comment about the feasibility of applying the proposed 60-day period to ARMs that have look-back period of less than 45 days. The Bureau solicits comments about whether a look-back period of 45 days or longer is feasible going forward for loans that currently use shorter look-

[62] Timiraos & Simon, *supra* note 52.

[63] No creditor, assignee, or servicer contacted by the Bureau used a system employing an automatic feed of information from the publisher of an index source. All data was entered and verified manually.

back periods and, if not, why not. The Bureau solicits comments on the extent, if any, to which the relative length of the look-back period may affect the interest rate risk for the creditor, assignee, or servicer.

For all ARMs, the Bureau solicits comments on the operational changes that would be required to provide § 1026.20(c) notices at least 60 days before payment at a new level is due. Comment is requested on any factors that would hinder compliance with this time frames. In light of technological and other advances since the promulgation of current § 1026.20(c) in 1987, the Bureau also solicits comment on whether, and if so why, lengthy verification periods are necessary and on the feasibility of reducing the length of these verification periods.

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 inform consumers that, under the terms of their adjustable-rate mortgage, the specific period in which their interest rate stayed the same will end on a certain date and that their interest rate and mortgage payment will change on that date. This disclosure is similar to the pre-consummation disclosures provided to consumers pursuant to current § 1026.19(b)(2)(i) and § 1026.37(i) as recently proposed by the 2012 TILA–RESPA Proposal.

Under proposed § 1026.20(c)(2)(i)(B), the creditor, assignee, or servicer must include in the disclosure the date of the impending and future interest rate adjustments. Proposed § 1026.20(c)(2)(i)(C) would require disclosure of any other changes to the loan 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 first ARM model form tested did not contain the proposed 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 was adjusting 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 round two and three of testing understood that, under the scenario presented to them, their interest rate would change annually.[64]

20(c)(2)(ii) Table With Current and New Interest Rates and Payments

Proposed § 1026.20(c)(2)(ii) would require 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- mortizing 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 appear within the larger table containing all the required disclosures.

This table would follow the same order as, and have headings and format substantially similar to, those in the table in Forms H–4(D)(1) and (2) in Appendix H of subpart C. The Bureau learned through consumer testing that, when presented with information in a logical order, consumers more easily grasped the complex concepts contained in the proposed § 1026.20(c) notice. For example, the form begins by informing consumers of the basic purpose of the notice: Their interest rate is going to adjust, when it will adjust, and the adjustment will change their mortgage payment. This introduction is immediately followed by a visual illustration of this information in the form of a table comparing consumers' current and new interest rates. Based on consumer testing, the Bureau believes that consumer understanding is 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 proposes that creditors, assignees, or servicers disclose the information in the table as set forth in Forms H–4(D)(1) and (2) in Appendix H.

Proposed § 1026.20(c)(2)(ii) replaces current § 1026.20(c)(1) and (4), but retains the obligation to disclose the current and new interest rates and the amount of the new payment. Proposed § 1026.20(c)(2)(ii)(A) also would require disclosure of the date when the consumer must start paying the new payment and proposed comment § 1026.20(c)(2)(ii)(A)–1 clarifies that the new interest rate must be the actual rate, not an estimate. Proposed rule § 1026.20(c)(2)(ii) also replaces the language ''prior'' and ''current'' in the current rule with the terms ''current'' and ''new,'' respectively, and deletes comment 20(c)(2)–1 which, among other things, uses the terms ''prior'' and ''current.'' This change is designed to make clear that ''current'' means the interest rate and payment in effect prior to the interest rate adjustment and ''new'' means the interest rate and payment resulting from the interest rate adjustment.

Proposed comment 20(c)(2)(ii)(A)–1 defines the term ''current'' interest rate as the one in effect on the date of the disclosure. This more succinct definition replaces the lengthy definition of ''prior interest rates'' in current comment 20(c)(1) 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 would increase as a result of the adjustment. All participants in all rounds of testing understood that their interest rate and payment were going to increase and when these changes would occur.[65]

Current ARM notices are not required to show the allocation of payments among principal, interest, and escrow accounts for any ARM. The Bureau proposes including this information in the table for interest-only and negatively-amortizing ARMs. The Bureau believes this information would help consumers better understand the risk of these products by demonstrating that their payments would not reduce the principal. The Bureau also believes providing the payment allocation would help 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. Since payment allocation may change over time, the proposed rule would require disclosure of the expected payment allocation for the first payment period during which the adjusted interest rate would apply.

The allocation of payment disclosure was tested in the third round of testing. The rate adjustment notice tested showed the following scenario: The first adjustment of a 3/1 hybrid ARM—an ARM with a fixed interest rate for three years followed by annual interest rate

[64] Macro Report, *supra* note 38, at vii.

[65] *Id.*

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 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.[66]

The Bureau recognizes that certain Dodd-Frank Act amendments to TILA will restrict origination of non-amortizing and negatively-amortizing loans. For example, TILA section 129C and the 2011 ATR (Ability to Repay) Proposal which would implement that provision, generally require creditors to determine that a consumer can repay a mortgage loan and include a requirement that these determinations assume a fully-amortizing loan. Thus, this law and regulation, when finalized, will restrict the origination of risky mortgages such as interest-only and negatively-amortizing ARMs.

Other Dodd-Frank amendments to TILA, such as the proposed periodic statement provisions discussed below, will provide payment allocation information to consumers for each billing cycle. Thus, consumers who currently have interest-only or negatively-amortizing loans or may obtain such loans in the future will receive information about the interest-only or negatively-amortizing features of their loans through the payment allocation information in the periodic statement. Also, as noted above, consumer testing showed that participants were confused by the allocation table. Since the Bureau was not able to test a revised version of the model form to see if it rectified the confusion caused by the allocation table or if the concepts of interest-only and negatively-amortizing ARMs themselves are the source of the confusion, the Bureau is uncertain of the value of disclosing this information to consumers in the ARM interest rate adjustment notice. In view of these changes to the law and the outcome of consumer testing, the Bureau solicits comments on whether to include allocation information for interest-only and negatively-amortizing ARMs in the table proposed above.

20(c)(2)(iii) Explanation of How the Interest Rate Is Determined

Proposed § 1026.20(c)(2)(iii) would require the ARM disclosures to explain how the interest rate is determined. Consumer testing revealed that consumers generally have difficulty understanding the relationship of the index, margin, and interest rate.[67] Therefore, the Bureau is proposing a relatively brief and simple explanation that the new interest rate is calculated by taking the published index rate and adding a certain number of percentage points, called the ''margin.'' Proposed § 1026.20(c)(2)(iii) would also require disclosure of the specific amount of the margin.

The proposed explanation of how the consumer's new interest rate is determined, such as adjustment of the index by the addition of a margin, mirrors 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 parallels the pre-consummation disclosure of the index and margin proposed in the 2012 TILA–RESPA Proposal. Proposed § 1026.20(c) also would require disclosure of the name 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 replace the current § 1026.20(c)(2) required disclosure of the index values upon which the ''current'' and ''prior'' interest rates are based. The Bureau believes that providing consumers with index values is less valuable than providing them with their actual interest rates. Current comment 20(c)(2)–1, which addresses the requirement to disclose current and prior interest rate, would also be deleted.

Consumer testing indicated that the explanation helped consumers better understand the relationship between interest rate, index, and margin. It also helped dispel the notion held by many consumers in the initial rounds of testing that lenders subjectively determined their new interest rate at each adjustment.[68] The Bureau believes that its proposed rule and forms strike an appropriate balance between providing consumers with key information necessary to understand the basic interest rate adjustment of their adjustable-rate mortgages without overloading consumers with complex and confusing technical information.

20(c)(2)(iv) Rate Limits and Unapplied Carryover Interest

Proposed § 1026.20(c)(2)(iv) would require 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 require disclosure of the extent to which the creditor has 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 believes that knowing the limitations of their ARM rates and payments would help consumers understand the consequences of interest rate adjustments and weigh the relative benefits of pursuing alternatives. For example, if an adjustment causes a significant increase in the consumer's payment, knowing how much more the interest rate or payment could increase could help inform a consumer's decision on whether or not to seek alternative financing.

Both proposed § 1026.20(c)(2)(iv) and current § 1026.20(c)(3) require disclosure of any foregone interest rate increase. Unlike the current rule, the proposed rule would require an explanation in the ARM payment change notice that the additional interest was not applied due to a rate limit and provide the earliest date such foregone interest may be applied.

Proposed comment 20(c)(2)(iv)–1 regarding unapplied interest closely parallels, and would replace, current comment 20(c)(3)–1. The proposed comment explains that disclosure of foregone interest would apply only to transactions permitting interest rate carryover. It further explains that the amount of the interest increase foregone is the amount that, subject to rate caps, can be added to future interest rate adjustments to increase, or offset decreases in, the rate determined according to the index or formula.

Consumers had difficulty understanding the concept of interest rate carryover when it was introduced during the third round of testing. This difficulty may have been due 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 has simplified the explanation of carryover interest.[69]

The Bureau recognizes that the disclosure of rate limits and unapplied

[66] *Id.* at vii–viii. This revision to the allocation disclosure, which is identical in the proposed § 1026.20(c) and (d) notices, was made after the third round of testing of the § 1026.20(d) notice, and therefore was not tested with consumers.

[67] *Id.* at viii.

[68] *Id.*

[69] *Id.* at viii–ix.

carryover interest provide information that may help consumers better understand their ARMs. However, the Bureau is considering whether the help this information may provide outweighs its distraction from other more key information. Also, as explained above, consumers had difficulty understanding the concept of carryover interest and the Bureau does not want this difficulty to diminish the effectiveness of the proposed § 1026.20(c) disclosures. The Bureau solicits comment on whether to include rate limits and unapplied carryover interest in the proposed § 1026.20(c) disclosures.

20(c)(2)(v) Explanation of How the New Payment Is Determined

Proposed § 1026.20(c)(2)(v) would require ARM disclosures to explain how the new payment is 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 is consistent with the disclosures provided at the time of application pursuant to § 1026.19(b)(2)(iii). It is also consistent with the TILA section 128A requirement to disclose the assumptions upon which the new payment is based, which the Bureau proposes to implement in proposed § 1026.20(d), and thus promotes consistency among Regulation Z ARM disclosures.

The current rule, as explained in comment 20(c)(4)–1, which the proposed rule would delete, 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 require 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 explains that a disclosure regarding the application of previously foregone interest is required only for transactions permitting interest rate carryover. The proposed comment further explains that foregone interest is 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 found that this explanation helped consumers better understand how the index or formula and margin determine their new payment and dispelled the notion held by many consumers in the initial rounds of testing that the lender subjectively determined their new interest rate, and thus the new payment, at each adjustment.

The proposal would require 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 on which the balance is taken differs 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 proposes 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 or maturity of the loan caused by the adjustment.

Disclosure of the four key assumptions upon which the new payment is based provides a succinct overview of how the interest rate adjustment works. It also demonstrates that factors other than the index can increase consumers' interest rates and payments. Disclosures of these factors would provide 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 requires disclosure of certain information related to loans that are not fully amortizing. Disclosure of similar information is proposed in § 1026.20(c)(2)(vi), discussed below.

20(c)(2)(vi) Interest-Only and Negative-Amortization Statement and Payment

Proposed § 1026.20(c)(2)(vi) would require § 1026.20(c) notices to include a statement regarding the allocation of payments to principal and interest for interest-only or negatively-amortizing loans. If negative amortization occurs as a result of the interest rate adjustment, the proposed rule would require disclosure of the payment necessary to fully amortize such loans at the new interest rate over the remainder of the loan term. As explained in proposed comment 20(c)(2)(vi)–1, for interest-only loans, the statement would inform the consumer that the new payment covers all of the interest but none of the principal owed and, therefore, will not reduce the loan balance. For negatively-amortizing ARMs, the statement would inform the consumer that the new payment covers only part of the interest and none of the principal, and therefore the unpaid interest will add to the balance or increase the term of the loan. The current rule, clarified by current comment 20(c)(5)–1, requires disclosure of the payment necessary to fully amortize 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 replace 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 fully amortize those loans at the new interest rate over the remainder of the loan term. However, the Bureau believes there are countervailing considerations regarding whether to include this information in proposed § 1026.20(c).

The Bureau recognizes that certain Dodd-Frank Act amendments to TILA will restrict origination of non-amortizing and negatively-amortizing loans. For example, TILA section 129C and the 2011 ATR Proposal that would implement that provision, generally require creditors to determine that a consumer can repay a mortgage loan and include a requirement that these determinations assume a fully-amortizing loan. Thus, this law and regulation, when finalized, will restrict the origination of risky mortgages such as interest-only and negatively-amortizing ARMs.

Other Dodd-Frank amendments to TILA, such as the periodic statement proposed by § 1026.41, will include information about non-amortizing and negatively-amortizing loans in each billing cycle, such as an allocation of payments. Thus, consumers who currently have interest-only and negatively-amortizing ARMs or may obtain such loans in the future will receive certain information about the interest-only or negatively-amortizing features of their loans in another disclosure, although this will not include the payment required to fully amortize negatively-amortizing loans. Disclosure of the payment necessary to fully amortize negatively-amortizing loans was not consumer tested but 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 is weighing the value of disclosing specific information regarding amortization, such as the payment needed to fully amortize negatively-amortizing ARMs. In view of these changes to the law and the outcome of consumer testing, the Bureau solicits comments on whether to include the payment required to amortize ARMs that became negatively amortizing as a result of an interest rate adjustment.

20(c)(2)(vii) Prepayment Penalty

Proposed § 1026.20(c)(2)(vii) would require disclosure of the circumstances under which any prepayment penalty may be imposed, such as selling or refinancing the principal residence, the time period during which such penalty would apply, and the maximum dollar amount of the penalty. The current rule does not have this requirement. The proposed rule cross-references the definition of prepayment penalty in subpart E, § 1026.41(d)(7)(iv), in the proposed rule for periodic statements.

Interest rate adjustments may cause payment shock or require consumers to pay their mortgage at a rate they may no longer be able to afford, prompting them to consider alternatives such as refinancing. In order to fully understand the implications of such actions, the Bureau believes that consumers should know whether prepayment penalties may apply. Such information should include the maximum penalty in dollars that may apply and the time period during which the penalty may be imposed. The dollar amount of the penalty, as opposed to a percentage, is more meaningful to consumers.

The Bureau also proposes disclosure of any prepayment penalty in § 1026.20(d) ARM rate adjustment 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.[70] For this reason, the Bureau proposes to clarify the circumstances under which a prepayment penalty would apply. The proposed forms would alert consumers that a prepayment penalty may apply if they pay off their loan, refinance, or sell their home before the stated date.

The Bureau recognizes that Dodd-Frank Act amendments to TILA, such as 129C and the 2011 ATR Proposal that would implement that provision, would significantly restrict a lender's ability to impose prepayment penalties. Other Dodd-Frank amendments to TILA, such as the proposed periodic statement, would provide consumers with information about their prepayment penalties for each billing cycle. Thus, consumers who currently have ARMs with prepayment penalty provisions or may 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 solicits comments on whether to include information regarding prepayment penalties in proposed § 1026.20(c).

20(c)(3) Format of Disclosures

As discussed above, the Bureau proposes to make § 1026.20(c) subject to certain of the § 1026.17(a)(1) form requirement to which § 1026.20(c) disclosures are currently not subject. These requirements include grouping the disclosures together, segregating them from everything else, and prohibiting inclusion of any information not directly related to the § 1026.20(c) disclosures.[71] As discussed above in connection with Section 17(a)(1), this revises the current rule but the Bureau believes the revision is necessary to effectively highlight information for consumers about changes to their ARM interest rates and payments.

20(c)(3)(i) All Disclosures in Tabular Form

Proposed § 1026.20(c)(3)(i) would require that the 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 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.[72] They also had difficulty with the concepts of amortization and interest rate carryover.[73] 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 Bureau's testing showed that consumers can more readily understand these concepts when the information is presented to them in a simple manner and in the groupings contained in the model forms. The Bureau also observed that consumers 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 consumer testing, the Bureau believes that consumer understanding is 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 proposes that creditors, assignees, or servicers disclose the information required by proposed § 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, participant comprehension improved with each successive iteration of the model form. As a result, the Bureau believes that displaying the information in tabular form focuses consumer attention and lends to 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 consumers both could understand and from which they could benefit.

20(c)(3)(ii) Format of Interest Rate and Payment Table

Proposed § 1026.20(c)(3)(ii) would require tabular format for ARM payment change notices of: The current and new interest rates, the current and new payments, and the date the first new payment is due. For interest-only and negatively-amortizing ARMs, the table would also include the allocation of

[70] *Id.* at vi.

[71] Other § 1026.17(a)(1) form requirements that currently apply to § 1026.20(c) would continue to apply, such as the option of providing the disclosures to consumers in electronic form, subject to compliance with consumer consent and other applicable provisions of the E-Sign Act.

[72] Macro Report, *supra* note 38, at viii.

[73] *Id.* at viii–ix.

payments. This table would be located within the table proposed by § 1026.20(c)(3)(i). This table is substantially similar to the one tested by the Board for its 2009 Closed-End Proposal to revise § 1026.20(c). The proposal would require the table to follow the same order as, and have headings, content, 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 those rates with the adjusted rate and new payment. Consumer testing revealed that nearly all participants were readily able to identify the table and understand the content.[74] The new interest rate and payment and date the first new payment is due is key information the consumer must know in order to commence payment at the new rate. For these reasons, the Bureau proposes locating this information prominently in the disclosure.

20(d) Initial Rate Adjustments

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 the 2009 Closed-End Proposal, the Board proposed amending the regulation that is now § 1026.20, including deleting the provision that is current § 1026.20(d). 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.'' [75] The Board explained that when it originally adopted the provision in 1987, as footnote 45c of § 226.20(c) of Regulation Z,[76] the regulations of other financial institution supervisory agencies—namely the OCC, the Federal Home Loan Bank Board (the FHLBB), and HUD—contained subsequent disclosure requirements for ARMs.[77]

The Bureau proposes deleting the current content of § 1026.20(d) because it is not aware of any other Federal financial institution supervisory agency rules requiring comprehensive disclosure requirements for ARMs. The Bureau solicits comment on whether there is any reason to retain this provision. The Bureau solicits comments, for example, on whether this proposed regulatory change would have implications for rights under the Alternative Mortgage Transaction Parity Act. For the reasons discussed above with respect to proposed § 1026.20(c), the Bureau proposes this deletion pursuant to its authority under TILA sections 105(a) and 128(f)(1)(H) and DFA section 1405(b).

New initial ARM interest rate adjustment disclosures. In the section that would be left vacant by the proposed deletion of § 1026.20(d), the Bureau proposes to implement the initial ARM adjustment notice mandated by TILA section 128A. Proposed § 1026.20(d) would require disclosure to consumers with certain adjustable-rate mortgages, approximately six months prior to the initial interest rate adjustment, of key information about the upcoming adjustment, including the new rate and payment and options for pursuing alternatives to their adjustable-rate mortgage. This initial ARM adjustment notice would harmonize with the ARM payment change notice that would be required under the proposed revisions to § 1026.20(c). The Bureau believes that promoting consistency between the ARM disclosure provisions of proposed § 1026.20(c) and (d) would reduce compliance burdens on industry and minimize consumer confusion.

Form of delivery. As required under TILA section 128A(b), proposed § 1026.20(d) would require 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 explains that to satisfy this requirement, the notices must be mailed or delivered separately from any other material. For example, in the case of mailing the disclosure, there should be no material in the envelope other than the initial interest rate adjustment notice. In the case of emailing the disclosure, the only attachment should be the initial interest rate adjustment notice. This requirement contrasts with proposed § 1026.20(c), which would be subject to the less stringent segregation requirements of § 1026.17(a)(1), as amended by the Bureau's proposal. The proposed comment further explains that the notices proposed by § 1026.20(d) may be provided to consumers in electronic form with consumer consent, pursuant to the requirements of § 1026.17(a)(1). The Bureau solicits comments on whether consumer protection would be compromised by providing § 1026.20(d) notices on a separate piece of paper but in the same envelope or as email correspondence with other messages from the creditor, assignee, or servicer.

Creditors, assignees, and servicers. Proposed § 1026.20(d) applies to creditors, assignees, and servicers. Proposed comment 20(d)–1 clarifies that a creditor, assignee, or servicer that no longer owns the mortgage loan or the mortgage servicing rights is not subject to the requirements of § 1026.20(c). This proposed language tracks, in part, the requirements of TILA section 128A that creditors and servicers must provide the initial ARM interest rate adjustment notices, but adds assignees to the list of covered persons. The Bureau believes that holding creditors, but not assignees, liable under the regulation would result in inconsistent levels of consumer protection and an unlevel playing field for owners of mortgages.

It is a common practice for creditors to sell many or all of the loans they originate rather than hold them in portfolio. If the creditor were to sell the ARM, the consumer would have no recourse against the subsequent holder for violations of § 1026.20(d) if assignees were not made subject to § 1026.20(d). Shielding assignees from liability under the proposed rule would have particularly deleterious effects on consumers seeking relief against a servicer to whom an assignee sold the ARM's mortgage servicing rights, if that servicer had insufficient resources to satisfy a judgment the consumer may obtain for violations of § 1026.20(d). Consumers who happen to have ARMs sold by the original creditor to a subsequent holder would have less protection under the regulation than consumers with ARMs that are retained in portfolio by the creditor originating the loan. It also would create an unfair advantage for assignees. The Bureau believes 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 proposes to make assignees, along with creditors and servicers, subject to the requirements § 1026.20(d).

Proposed comment 20(d)–1 explains that any provision of subpart C that applies to the disclosures required by § 1026.20(d) also applies to creditors, assignees, and servicers. This is the case even where the other provisions of subpart C refer only to creditors. For the reasons discussed above, the Bureau

[74] *Id.* at vii.

[75] 74 FR 43232, 43272 (Aug. 26, 2009).

[76] 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 CRF 1026.

[77] 74 FR 43232, 43273 (*citing* 52 FR 48665, 48671 (Dec. 24, 1987)).

proposes that the requirements of other regulations that apply to the § 1026.20(d) initial ARM interest rate adjustment notices apply to assignees as well as to creditors and servicers.

The extension of the requirement to assignees is authorized 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 proposes to use its authority under DFA section 1405(b) to extend the applicability of the initial ARM adjustment notices under TILA section 128A to assignees. As discussed above, this extension would serve the interest of consumers and the public interest. Application of proposed § 1026.20(d) to assignees is consistent with current § 1026.20(c) commentary applying that disclosure requirement to subsequent holders. Application of proposed § 1026.20(d) to creditors, assignees, and servicers also promotes consistency with proposed § 1026.20(c) and the periodic statement proposed by § 1026.41, which also apply to creditors, assignees, and servicers.

Timing. Proposed § 1026.20(d) generally follows the statutory requirement in TILA section 128A that the initial interest rate adjustment notice must be provided to consumers during the one-month period that ends six months before the date on which the interest rate in effect during the introductory period ends. Thus, the disclosure must be provided six to seven months before the initial interest rate adjustment. The § 1026.20(d) disclosures are designed to avoid payment shock so as to put consumers on notice of upcoming changes to their adjustable-rate mortgages that may result in higher payments. The six to seven month advance notice allows sufficient time for consumers to consider their alternatives if the notice discloses an increase in payment that they cannot afford. One alternative consumers might consider is refinancing their home. In the current market, ''it now takes the nation's biggest mortgage lenders an average of more than 70 days to complete a refinance . * * * '' [78]

In the interest of consistency within Regulation Z, proposed § 1026.20(d) ties its timing requirement to the date the first payment at a new level is due rather than the date of the interest rate adjustment. This is consistent with the time frame for both current and proposed § 1026.20(c). Since interest generally is paid in arrears, for most ARMs, this adds another approximately 30 days to the time frame for delivery of the disclosures. Thus, the notices proposed by § 1026.20(d) must 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 are 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, proposed § 1026.20(d) is more precise, since months can vary in length, and maintains consistency with the timing requirements of proposed § 1026.20(c).

Pursuant to TILA section 128A, for ARMs adjusting for the first time within six months after consummation, the proposed § 1026.20(d) initial interest rate adjustment notices must be provided at consummation. The proposed rule states that when this occurs, the disclosure must be provided 210 days before the first date payment at a new level is due. The proposed rule ties the timing of this requirement to days rather than months, thereby ensuring both internal consistency and consistency with § 1026.20(c).

Proposed comment 20(d)–2 explains that the timing requirements exclude any grace period. It also explains that the date the first payment at the adjusted level is due is the same as the due date of the first payment calculated using the adjusted interest rate.

SBREFA. The small entity representatives (SERs) that advised the SBREFA panel on the mortgage servicing rules under consideration by the Bureau expressed doubt as to the value of the § 1026.20(d) notices because providing the notices so many months in advance of the interest rate adjustment would require disclosure of an estimated, rather than the actual, interest rate and payment due.[79] Several SERS expressed concern that the estimates would confuse consumers. They also noted that, in addition to the requirement to provide initial interest rate adjustment notices under § 1026.20(d), servicers would remain obliged to also provide a later notice in the case of a payment change, pursuant to § 1026.20(c), for the initial rate adjustments in order to apprise consumers of the actual amount of their interest rate and payment resulting from the adjustment. They expressed concerns about the one-time development costs and on-going costs associated with providing both the initial ARM adjustment notices and the recurring notices under § 1026.20(c).[80]

Consistent with this recommendation, after conclusion of the SBREFA process, the Bureau conducted further policy analysis of a possible exemption for small creditors, assignees, and servicers. After additional consideration, however, the Bureau decided to propose that notices under both § 1026.20(c) and § 1026.20(d) be provided. The Bureau believes that the two notices serve related but distinct purposes, such that eliminating the § 1026.20(c) notice could harm consumers. In particular, the § 1026.20(d) notice is designed to provide consumers with very early warning that their rates are about to change, so that consumers can begin exploring other options. If the consumer chooses not to do so or has not completed that process, a notice closer to the adjustment date that reflects the actual rather than estimated change in payment is still valuable to the consumer as both a second warning and budgeting tool. While the ARM interest rate adjustment information proposed for the first payment change notice required by proposed § 1026.20(c) could be provided in the periodic statement that would be provided to consumers under proposed § 1026.41, discussed below, rather than as a standalone notice under § 1026.20(c), the Bureau notes that that might require greater programming complexity in connection with the periodic statements. In addition, the Bureau is proposing to exempt certain small servicers from the periodic statement requirement.

The Bureau also believes that the amount of burden reduction for servicers from an exemption from providing a § 1026.20(c) notice in connection with an initial interest rate adjustment would be extremely minimal, given that servicers would have to maintain systems to generate § 1026.20(c) notices for each subsequent interest rate adjustment resulting in a corresponding payment change. Thus, excepting small servicers from providing the first § 1026.20(c) notice would not provide a significant reduction in burden.

The Bureau also considered whether to except small servicers, creditors, and assignees from the initial ARM interest rate notice required by § 1026.20(d). The SERs expressed concern that consumers would be confused by receiving estimates, rather than their actual new interest rate and payment, in the

[78] Timiraos & Simon, *supra* note 52.

[79] *See* SBREFA Final Report, *supra* note 22, at 20–21, 29–30.

[80] *Id.*

§ 1026.20(d) notice.[81] However, the Bureau believes the best approach to address this concern is to clarify the contents of the notice, rather than eliminate it entirely. Congress has made a specific policy judgment that an early notice has value to consumers. Creating an exemption for small creditors, assignees, and servicers would deprive certain consumers of the benefits that Congress intended, specifically advance notice seven to eight months before payment at a new level is due after the initial interest rate adjustment to allow consumers time to weigh the potential impacts of a rate change and to explore alternative actions. An exception would also deprive certain consumers of the information provided in the § 1026.20(d) notice about alternatives and how to contact their State housing finance authority and access a list of government-certified counseling agencies and programs.

On balance, the Bureau does not believe that the § 1026.20(d) notice imposes a significant burden on small entities because it is a one-time notice. Moreover, the notice is designed to be consistent with the § 1026.20(c) notice in order to, among other things, reduce the burden on industry. For these reasons, the Bureau proposes generally to require all creditors, assignees, and servicers to provide the ARM interest rate adjustment notices required by proposed § 1026.20(c) and (d). However, the Bureau seeks comment on the issues raised by the two sets of disclosures, particularly whether the burden imposed on small entities by the requirements of § 1026.20(d) outweighs the consumer protection benefits afforded by the early notice of the initial ARM interest rate adjustment.

The Bureau also solicits comment on whether small servicers (or creditors, assignees, and servicers in general) that provide a periodic statement to a consumer with an ARM should be permitted or required to provide the information required by § 1026.20(c), for an initial interest rate adjustment for which a notice under § 1026.20(d) is required, in a periodic statement provided to consumers 60 to 120 days before payment at a new level is due. The Bureau further solicits comment on whether to permit or require all § 1026.20(c) notices required by the proposed rule to be incorporated into periodic statements in lieu of providing a separate notice.

Conversions. Proposed comment 20(d)–3 explains that in the case of an open-end account converting to a closed-end adjustable-rate mortgage, § 1026.20(d) disclosures are not required until the implementation of the initial interest rate adjustment post-conversion. Under the proposed rule, the conversion is analogous to consummation. Thus, like other ARMs subject to the requirements of proposed § 1026.20(d), disclosures for these converted ARMs would not be required until the first interest rate adjustment following the conversion. This proposal is consistent with the § 1026.20(c) proposal for open-end accounts converting to closed-end adjustable-rate mortgages.

20(d)(1) Coverage of the Initial Rate Adjustment Disclosures

20(d)(1)(i) In General

Proposed § 1026.20(d)(1)(i) defines an adjustable-rate mortgage or ARM 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 uses the wording from the definitions of ''adjustable-rate'' and ''variable-rate'' mortgage in subpart C of Regulation Z. It does this to promote consistency within the regulation. Proposed comment 20(d)(1)(i)–1 explains that the definition of ARM means variable-rate mortgage as that term is used elsewhere in subpart C of Regulation Z, except as provided in proposed comment 20(d)(1)(ii)–2.

Applicability to closed-end transactions. The Bureau believes that TILA section 128A and the implementing disclosures in proposed 1026.20(d) primarily benefit consumers with closed-end adjustable-rate mortgages. In contrast, open-end credit transactions secured by a consumer's dwelling (home equity plans) with adjustable-rate features are 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 proposes to use its authority under TILA section 105(a) and (f) to exempt adjustable-rate home equity plans from the requirements of proposed § 1026.20(d).

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. *See* § 1026.40(d)(12). The required account opening disclosures for home equity plans also must include information about any variable or adjustable-rate feature, including the circumstances under which rates may increase, limitations on the increase, and the effect of any increase. *See* § 1026.6(a)(1)(ii) and (3)(vii).

Thus, Regulation Z already contains a comprehensive scheme for disclosing to consumers the variable or adjustable-rate features of home equity plans. The Bureau believes 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 be inconsistent with, and largely duplicative of, the current disclosure regime and would be confusing and unhelpful for consumers. Moreover, 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 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. Finally, the alerts to consumers required by TILA section 128A and proposed by § 1026.20(d) would not provide a benefit to consumers with home equity plans with adjustable-rate features. Generally, introductory periods for adjustable-rate features on home equity plans tend to last less than six months. The Bureau believes it is unlikely consumers would consider pursuing alternatives so close in time to opening their home equity plans.

Two other factors also support the Bureau's use of the TILA section 105(a) exemption authority to exclude home equity plans from the requirements of proposed § 1026.20(d). First, use of the term ''consummation'' in TILA section 128A supports 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

[81] *Id.* at 21.

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.'' *See* § 1026.17(b) and § 1026.5(b)(1)(i). Because Regulation Z uses the term ''consummation'' in connection with closed-end credit transactions, use of the word ''consummation'' in DFA section 1418 supports the Bureau's proposed exemption for open-end home equity plans from the requirements of § 1026.20(d). Second, DFA section 1418 is codified in TILA section 128A. The adjacent and similarly numbered provision, TILA section 128, is entitled and applies only to ''Consumer Credit not under Open End Credit Plans.'' Congress's placement of the new ARM disclosure requirement in a segment of TILA that applies only to closed-end credit transactions further supports the Bureau's decision to exempt open-end credit transactions, in this case variable or adjustable-rate home equity plans, from the requirements of that section.

For the reasons discussed above, exempting home equity plans from the requirements of § 1026.20(d) is necessary and proper under TILA section 105(a) to further the consumer protection purposes of TILA and facilitate compliance. As discussed above, the Bureau believes that the information contained in the notice proposed by § 1026.20(d) 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 proposes 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, are not structured in such a way as to garner benefit from the disclosures proposed by § 1026.20(d), 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 the proposed § 1026.20(d) notice for open-end accounts that have adjustable-rate features 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 borrower (including related financial arrangements, financial sophistication, and the importance to the borrower of the loan). The Bureau further notes, in light of TILA section 105(f)(2)(D), that the requirements in § 1026.20(d) would only apply to loans secured by the consumer's principal dwelling.

Savings Clause. Regarding other categories of loans to which proposed § 1026.20(d) would apply, the statute's provisions apply to hybrid ARMs, which it defines 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.'' [82] The statute, however, has a ''savings clause,'' that allows the Bureau to require the initial interest rate adjustment notice for loans that are not hybrid ARMs. The Bureau proposes to use this authority generally to extend the disclosure requirements of proposed § 1026.20(d) to ARMs that are not hybrid. The Bureau believes this approach is necessary because both hybrid ARMs and those that are not hybrid may subject consumers to the same payment shock that the advance notice of the first interest rate adjustment is designed to address. For example, both 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 initial interest rate adjusts after three years and then every three years after that, adjust for the first time after three years and present the same potential payment shock to consumers holding either mortgage. The same is 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.

Proposed comment 20(d)(1)(i)–1 clarifies that the initial ARM adjustment notice are not limited to transactions financing the initial acquisition of the consumer's principal dwelling but also 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).

20(d)(1)(ii) Exceptions

Proposed § 1026.20(d)(1)(ii) excepts construction loans with terms of one year or less from the disclosure requirements of § 1026.20(d). Proposed § 1026.20(c) includes the same exception. Proposed comment 20(d)(1)(ii)–1 applies the standards in comment 19(b)–1 for determining the term of a construction loan.

Construction loans generally have short terms of six months to one year and are subject to frequent interest rate adjustments, usually monthly or quarterly. The construction period usually involves several disbursements of funds at times and in amounts that are unknown at the beginning of that period. The consumer generally pays only accrued interest until construction is completed. The creditor, assignee, or servicer, in addition to disbursing payments in stages, closely monitors the progress of construction. Generally, at the completion of the construction, the construction loan is converted into permanent financing in which the loan amount is amortized just as in a standard mortgage transaction. *See* comment 17(c)(6)–2 for additional information on construction loans.

The frequent interest rate adjustments, multiple disbursements of funds, the 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 construction is completed and permanent financing can be put in place. Consumers with construction ARM loans are not at risk of payment shock like other ARM where interest rates change less frequently. Moreover, given the frequency of interest rate adjustments on construction loans, creditors, assignees, or servicers would have difficulty complying with the proposed requirement to provide the notice to consumers 210 to 240 days before the first payment at the adjusted level is due. For these reasons, providing notices under § 1026.20(d) for these loans would not provide a meaningful benefit to the consumer nor improve consumers' awareness and understanding of their construction loans with terms of less than one year.

Authority. Accordingly, the Bureau proposes to use its authority under TILA section 105(a) to except construction loans with terms of one year or less from the requirements of proposed § 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 construction loan. Thus, exempting such loans is necessary and proper under TILA section 105(a) to further the consumer protection

[82] 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 start out with a rate that adjusts at set intervals, such as 3/3 (adjusts every three years), 5/5 (adjusts every five years), etc.

purposes of TILA and facilitate compliance. The Bureau further proposes the exemption for construction 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 construction 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 borrower (including related financial arrangements, financial sophistication, and the importance to the borrower of the loan). The Bureau further notes, in light of TILA section 105(f)(2)(D), that the requirements in § 1026.20(d) would only apply to loans secured by the consumer's principal dwelling.

The Bureau solicits comment on whether there are other ARMs with terms of less than one year, and whether such ARMs should be excepted from the requirements of § 1026.20(d). If the time period of the advance notice for consumers required by § 1026.20(d) is not appropriate for these short-term ARMs, the Bureau solicits comment on what period would be appropriate that would also provide consumers with sufficient notice of the estimated initial adjusted interest rate and any new payment.

Proposed comment 20(d)(1)(ii)–2 discusses other loans to which the proposed rule does not apply. Proposed comment 20(d)(1)(ii)–2 is consistent with proposed comment 20(c)(1)(ii)–3 with regard to the loans which are not 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 clarifies that, for purposes of proposed § 1026.20(d), the following loans, if fixed-rate transactions, are not ARMs and therefore are not 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 particular features of these types of loans may trigger interest rate or payment changes over the term of the loan or at the time the consumer pays off the final balance. However, these changes are based on factors other than a change in the value of an index or a formula. For example, whether or when the interest rate will adjust for the first time for a preferred-rate loan with a fixed interest rate is likely not knowable six to seven months in advance of the adjustment. This is because the loss of the preferred rate is based on factors other than a formula or change in the value of an index agreed to at consummation. Because the enumerated loans are not ARMs they are not covered by TILA section 128A or proposed § 1026.20(d) and require no disclosures under this rule.

20(d)(2) Content of Initial Rate Adjustment Disclosures

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, and descriptions of actions the consumer must take to pursue these alternatives; (5) contact information for HUD- or State housing agency-approved housing counselors or programs reasonably available; and (6) contact information for the State housing finance authority for the State where the consumer resides.

The Bureau interprets the explanation of how the interest rate and payments will be determined set forth in (2) above to require disclosure of any adjustment to the index, for example, 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 or maturity of the loan caused by the interest rate adjustment.

The Bureau interprets the good faith estimate, required under (3) above, to require disclosure, when available, of the exact amount of the new monthly payment after the interest rate adjustment. As discussed below, the Bureau believes that in most cases the lengthy advance notice required by proposed § 1026.20(d) will necessitate disclosure in the initial ARM interest rate adjustment notices of estimates of the new interest rate and payment, rather than exact amounts. The Bureau believes, however, that a good faith estimate would require disclosure of the exact amount of the new monthly payment, if known, rather than an estimate. The Bureau interprets the assumptions on which the good faith estimate is based to require disclosure, among other things, of the current interest rate and payment, as well as the amount of the new interest rate after the adjustment, if known, or an estimate if the exact amount of the new interest rate is not known. As with the new payment amount, the Bureau believes that generally only an estimate of the new interest rate will be available at the time the notice is provided, but interprets the statute to require disclosure of the exact amount of the new interest rate, if this amount is available. Even if this content were not contemplated under the statute, the Bureau believes it would be appropriate to use its adjustment authority to require disclosure of such information for the reasons discussed below.

Additional content. In addition to the content explicitly required under the statute, the Bureau proposes, as discussed in more detail below, to require the ARM initial interest rate 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 is scheduled to adjust pursuant to the terms of the loan, that the adjustment may effect a change in the mortgage payment, the specific time period the current interest rate has been in effect, the dates of the upcoming and future interest rate adjustments, and any other changes to loan terms, features, or options taking 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 fully amortize an ARM that becomes 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 is an estimate, a statement that another disclosure containing the actual new interest rate and payment will be provided within a specified time period—if the actual interest rate adjustment results in a corresponding payment change; and the amount and expiration date of any prepayment penalty and the circumstances under which such penalty might apply.

The proposed additional content, including the content that the Bureau interprets to be required under the statute, is authorized under TILA section 105(a). As further discussed below, the proposed additional content is necessary and proper to assure that consumers understand the consequences of the upcoming ARM 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 proposed additional content is further authorized under DFA 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 proposed 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 DFA section 1405(b), that the proposed additional content would improve consumer awareness and understanding of their residential ARM loans and is thus in the interest of consumers and the public interest. The proposed 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.

Good faith estimate. As noted above, TILA section 128A provides that the § 1026.20(d) interest rate adjustment disclosures should 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.'' ARM contracts generally provide that the calculation of the new interest rate and payment be based on an index value published closer to the date of the interest rate adjustment than those available during the time frame within which creditors, assignees, and servicers must provide the initial ARM interest rate adjustments pursuant to § 1026.20(d). *See* 20(c)(2) above for a full discussion of the time frame generally required for ascertaining the index rate used to calculate the adjusted interest rate and new payment. Thus, it is unlikely creditors, assignees, and servicers will be able to disclose the actual new interest rate and payment in the initial ARM interest rate notices. For this reason, consistent with the language of the statute regarding estimates, proposed § 1026.20(d)(2) provides that if the new interest rate or any other calculation using the new interest rate is not known as of the date of the disclosure, use of an estimate, labeled as such, is permissible. The Bureau interprets 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 pursuant to the time frame required by proposed § 1026.20(d). Since the notice is designed to alert consumers to upcoming changes to their mortgage 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 would benefit consumers. 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 payment at a new level was due.[83]

To implement the requirements of TILA section 128A that the good faith estimate of the new payment be based on accepted industry standards, proposed § 1026.20(d) would require that any estimate be calculated using the index figure disclosed in the source of information described in proposed § 1026.20(d)(2)(iii)(A) within fifteen 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 would prevent consumer confusion as to the recency of the index value. As discussed above under Section 20(c)(2), the fifteen-day period allows 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.

20(d)(2)(i) Date of the Disclosure

Proposed § 1026.20(d)(2)(i) would require that the initial ARM adjustment notice include the date of the disclosure. In order to group together all data regarding the ARM, proposed § 1026.20(d)(3)(ii) would require 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 explains that the date would be the date the creditor, assignee, or servicer generates the notice. It also must be within fifteen business days after publication of the index level used to calculate the adjusted interest rate and new payment, if it is an estimate and not the actual adjusted interest rate and new payment.[84] Because the disclosures must be provided to consumers so far in advance, the Bureau expects estimates will be used in most cases. Tying the date of the disclosure to the date of the index level should prevent consumer confusion as to the recency of the index value upon which the estimated interest rate and new payment are based.

20(d)(2)(ii) Statement Regarding Change to Interest Rate and Payment

Proposed § 1026.20(d)(2)(ii)(A) would require 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 interest rate stayed the same will end on a certain date, that their interest rate may change on that date, and that any change in their interest rate may result in a change to their mortgage payment. This information is similar to the information required to be disclosed in the pre-consummation disclosures provided to consumers pursuant to current § 1026.19(b)(2)(i) and § 1026.37(i), recently proposed in the 2012 TILA–RESPA Proposal. Proposed comment 20(d)(2)(ii)(A)–1 clarifies that the current interest rate is the one in effect on the date of the disclosure.

Proposed § 1026.20(d)(2)(ii)(B) would require the proposed initial ARM interest rate adjustment notices to include the dates of the impending and future interest rate adjustments and inform consumers that these changes are dictated by the terms of their adjustable-rate mortgages. Proposed § 1026.20(d)(2)(ii)(C) also would require the § 1026.20(d) disclosures to inform consumers 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 first ARM model form tested did not contain the statement required by proposed § 1026.20(d)(2)(ii) informing consumers of impending and future changes to their interest rate and the

[83] Macro Report, *supra* note 38, at viii.

[84] *See* proposed § 1026.20(d)(2).

basis for these changes. Although participants understood that their interest rate was adjusting 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.[85]

20(d)(2)(iii) Table With Current and New Interest Rates and Payments

Proposed § 1026.20(d)(2)(iii) would require 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 estimated new payment allocated to interest, principal, and property taxes and mortgage-related insurance, as applicable. The information in this table would appear within the larger table containing the other required disclosures, except for the date of the disclosure.

This table would follow the same order as, and have headings and format substantially similar to, those in the table in Forms H–4(D)(3) and (4) in Appendix H of subpart C. The Bureau learned through consumer testing that, when presented with information in a logical order, consumers more easily grasped the complex concepts contained in the proposed § 1026.20(d) notice. For example, the form begins by informing consumers of the basic purpose of the notice: Their interest rate is going to adjust, when it will adjust, and the adjustment will change their mortgage payment. This introduction is immediately followed by a visual illustration of this information in the form of a table comparing the consumers' current and new interest rates. Based on consumer testing, the Bureau believes that consumer understanding is 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 proposes that creditors, assignees, or servicers disclose the information in the table as set forth in Forms H–4(D)(3) and (4) in Appendix H.

[85] Macro Report, *supra* note 38, at vii.

In all rounds of testing, consumers were presented with model forms with tables depicting a scenario in which the interest rate and payment would increase as a result of the adjustment. All participants in all rounds of testing understood that their interest rate and payment were going to increase and when these changes would occur.[86]

The Bureau proposes including allocation information in the table for interest-only and negatively-amortizing ARMs. The Bureau believes this information would help consumers better understand the risk of these products by demonstrating that their payments would not reduce the loan principal. The Bureau also believes providing the payment allocation would help 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. Since payment allocation may change over time, the proposed rule would require disclosure of the expected payment allocation for the first payment period during which the adjusted interest rate will apply.

The allocation of payment disclosure was tested in the third round of testing. The notice tested showed the scenario of a 3/1 hybrid ARM with interest-only payments for the first three years of the loan adjusting for the first time. On the date of the adjustment, the interest-only feature would expire and the ARM would become amortizing. Only about half of participants understood that their payments would be 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.[87]

The Bureau recognizes that certain Dodd-Frank Act amendments to TILA will restrict origination of non-amortizing and negatively-amortizing loans. For example, TILA section 129C and the 2011 ATR Proposal that would implement that provision, generally require creditors to determine that a consumer can repay a mortgage loan and include a requirement that these determinations assume a fully-amortizing loan. Thus, this law and regulation, when finalized, will restrict the origination of risky mortgages such as interest-only and negatively-amortizing ARMs.

[86] *Id.*

[87] *Id.* at vii–viii. This revision was made after the third round of testing, and therefore was not tested with consumers.

Other Dodd-Frank amendments to TILA, such as the proposed periodic statement provisions discussed below, will provide payment allocation information to consumers for each billing cycle. Thus, consumers who currently have interest-only or negatively-amortizing loans or may obtain such loans in the future will receive information about the interest-only or negatively-amortizing features of their loans through the payment allocation information in the periodic statement. Also, as noted above, consumer testing showed that participants were confused by the allocation table. Since the Bureau was not able to test a revised version of the form to see if it rectified the confusion caused by the allocation table or if the concepts of non-amortizing and negatively-amortizing ARMs themselves are the source of the confusion, the Bureau questions the value of disclosing this information to consumers in the ARM interest rate adjustment notice. In view of these changes to the law and the outcome of consumer testing, the Bureau solicits comments on whether to include allocation information for interest-only and negatively-amortizing ARMs in the table proposed above.

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 require disclosure of the name and published source of the index or formula. This disclosure requirement is consistent with the pre-consummation disclosure requirements of current rule § 1026.19(b)(2)(iii). Proposed § 1026.37(i), part of 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 how the index was adjusted, such as by the addition of a margin. Proposed § 1026.20(d)(2)(iv) would require § 1026.20(d) notices to include an explanation of how the new interest rate is determined. This disclosure requirement is consistent with the pre-consummation disclosure requirements of current rule § 1026.19(b)(2)(iii). The 2012 TILA–RESPA Proposal's proposed 1026.37(i) likewise would require disclosure prior to consummation of the amount of the margin expressed as a percentage.

Consumer testing revealed that consumers generally have difficulty understanding the relationship of the index, margin, and interest rate.[88] Therefore, the Bureau is proposing a relatively brief and simple explanation that the new interest rate is 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 includes the specific amount of the margin.

Consumer testing indicated that the explanation helped consumers better understand the relationship between the interest rate, index, and margin. It also helped dispel the notion held by many of the consumers in the initial rounds of testing that the lender subjectively determined their new interest rate at each adjustment.[89] The Bureau believes that its proposed rule and forms strike an appropriate balance between providing consumers with key information necessary to understand the basic interest rate adjustment of their adjustable-rate mortgages without overloading consumers with complex and confusing technical information.

20(d)(2)(v) Rate Limits

Proposed rule § 1026.20(d)(2)(v) would require the disclosure of any limits on the interest rate or payment increases at each adjustment and over the life of the loan. The Bureau believes 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 be required to be disclosed under proposed § 1026.20(d)(2)(viii). For example, if an adjustment might cause a significant increase in the consumer's payment, knowing how much more the interest rate or payment could increase could help inform a consumer's decision on whether or not to seek alternative financing.

Proposed § 1026.20(d)(2)(v) also requires disclosure of the extent to which the creditor, assignee, or servicer has foregone any increase in the interest rate. If there is foregone interest, it would require disclosure that the additional interest was not applied due to a rate limit and include the earliest date such foregone interest may be applied. Proposed comment 20(d)(2)(iv)–1 explains that disclosure of foregone interest would apply only to transactions permitting interest rate carryover. It further explains that the amount of increase foregone at the initial adjustment is the amount that, subject to rate caps, can be added to future interest rate adjustments to increase, or offset decreases in, the rate determined according to the index or formula.

Consumers had difficulty understanding the concept of interest rate carryover when it was introduced during the third round of testing. This difficulty may have been due 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 has simplified the explanation of carryover interest.[90]

The Bureau recognizes that the disclosure of rate limits and unapplied carryover interest provide information that may help consumers better understand their ARMs. However, the Bureau is considering whether the help this information would provide outweighs its distraction from other more key information. Also, as explained above, consumers had difficulty understanding the concept of carryover interest and the Bureau is concerned this difficulty might diminish the effectiveness of the proposed § 1026.20(d) disclosures. The Bureau solicits comment on whether to include rate limits and unapplied carryover interest in the proposed § 1026.20(d) disclosures.

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 implement this statutory provision by requiring the content discussed below. This proposed disclosure is consistent with the disclosures required at the time of application pursuant to current§ 1026.19(b)(2)(iii). It is also consistent with content required under proposed § 1026.20(c) and thus promotes consistency in Regulation Z ARM disclosures.

The disclosure required under proposed § 1026.20(d)(2)(vi) explains that the new payment is based on (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 is an estimate, a statement that another disclosure containing the actual new interest rate and new payment will be provided to the consumer 2 to 4 months prior to the date the first new payment is due, if the interest rate adjustment causes a corresponding change in payment, pursuant to § 1026.20(c).

The proposal would require 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 require disclosure of any change in the term or maturity of the loan caused by the adjustment.

As discussed in proposed § 1026.20(d)(2)(iv) above, the Bureau found that this explanation helped consumers better understand how the index or formula and margin determine their new payment and dispelled the notion held by many consumers in the initial rounds of testing that, at each adjustment, the lender subjectively determined their new interest rate, and thus the new payment. Disclosure of the four key assumptions upon which the new payment is based provides a succinct overview of how the interest rate adjustment works. It also demonstrates that factors other than the index can increase consumers' interest rates and payments. Disclosures of these factors would provide 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. If an estimated new interest rate and new payment is used, the statement that the consumer will receive another disclosure with the actual new interest rate and new payment, if the interest rate adjustment results in a corresponding payment change, notifies consumers that the creditor, assignee, or servicer will inform them of the actual rate and payment two to four months in advance of the date their first new payment is due.

20(d)(2)(vii) Interest-Only and Negative-Amortization Statement and Payment

Proposed § 1026.20(d)(2)(vii) would require § 1026.20(d) notices to include a statement regarding the allocation of payments to principal and interest for interest-only or negatively-amortizing loans. If negative amortization occurs as a result of the interest rate adjustment,

[88] *Id.* at viii.

[89] *Id.*

[90] *Id.* at viii-ix.

the proposed rule would require disclosure of the payment necessary to fully amortize such loans at the new interest rate over the remainder of the loan term. As explained in proposed comment 20(d)(2)(vii)–1, for interest-only loans, the statement would inform the consumer that the new payment covers all of the interest but none of the principal owed and, therefore, will not reduce the loan balance. For negatively-amortizing ARMs, the statement would inform the consumer that the new payment covers only part of the interest and none of the principal, and therefore the unpaid interest will add to the balance or increase the term of the loan.

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 fully amortize loans at the new interest rate over the remainder of the loan term. However, the Bureau believes there are countervailing considerations regarding whether to include this information in proposed § 1026.20(d).

The Bureau recognizes that certain Dodd-Frank Act amendments to TILA will restrict origination of non-amortizing and negatively-amortizing loans. For example, TILA section 129C and the 2011 ATR Proposal that would implement that provision, generally require creditors to determine that a consumer can repay a mortgage loan and include a requirement that these determinations assume a fully-amortizing loan. Thus, this law and regulation, when finalized, will restrict the origination of risky mortgages such as interest-only and negatively-amortizing ARMs.

Other Dodd-Frank Act amendments to TILA, such as the periodic statement proposed by § 1026.41, will include information about non-amortizing and negatively-amortizing loans in each billing cycle, such as an allocation of payments. Thus, consumers who currently have interest-only and negatively-amortizing ARMs or may obtain such loans in the future will receive certain information about the interest-only or negatively-amortizing features of their loans in another disclosure, although this will not include the payment required to fully amortize negatively-amortizing loans. The payment necessary to fully amortize these loans was not consumer tested but testing of the table showing the payment allocation of interest-only and negatively-amortizing ARMs indicated that consumers were confused by this concept. Thus, the Bureau is weighing the value of disclosing specific information regarding amortization, such as the payment needed to fully amortize negatively-amortizing ARMs. In view of these changes to the law and the outcome of consumer testing, the Bureau solicits comments on whether to include the payment required to amortize ARMs that became negatively amortizing as a result of an interest rate adjustment.

20(d)(2)(viii) List of 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 include refinancing, renegotiation of loan terms, payment forbearance, and pre-foreclosure sales. Proposed § 1026.20(d)(2)(viii) would require disclosure in § 1026.20(d) initial ARM interest rate notices of the four alternatives set forth in the statute. The Bureau proposes to use simpler, commonly used terms in the model forms to describe the alternatives when possible.

The proposed model forms present the list as possibilities for consumers seeking alternatives to the upcoming changes to their interest rate and payment. The proposed forms also explain that most of the alternatives are subject to approval by the lender. All participants tested in the first and second round of testing were able to identify the list of alternatives.[91]

The list of alternatives generally and concisely describes the actions consumers must take to pursue these alternatives, such as contacting their lender or another lender. Another action consumers may take to pursue these alternatives is contacting government organizations. Proposed § 1026.20(d)(2)(xi) would require disclosure in the initial ARM interest rate adjustment notice of information on how to contact such agencies, including the contact information for the State housing finance authority for the State in which the consumer resides and the Web site and telephone number to access the most current list of homeownership counselors or counseling organizations either made available by the Bureau or maintained by HUD. The Bureau proposes to require disclosure of this concise list of alternatives in lieu of a more detailed account of actions consumers may take in order to maximize the effectiveness of the disclosure without weighing it down with information that may not add significant value.

[91] *Id.* at viii.

20(d)(ix) Prepayment Penalty

Proposed § 1026.20(c)(d)(ix) would require disclosure of the circumstances under which any prepayment penalty may be imposed, such as selling or refinancing the principal dwelling, the time period during which such penalty would apply, and the maximum dollar amount of the penalty. The proposed rule cross-references the definition of prepayment penalty in subpart E under § 1026.41(d)(7)(iv) in the proposed rule for periodic statements.

Interest rate adjustments may cause payment shock or require consumers to pay their mortgage at a rate they may no longer be able to afford, prompting them to consider alternatives such as refinancing. In order to fully understand the implications of such actions, the Bureau believes that consumers should know whether prepayment penalties may apply. Such information should include the maximum penalty (in dollars) that may apply and the time period during which the penalty may be imposed. The dollar amount of the penalty, as opposed to a percentage, is more meaningful to consumers.

The Bureau also proposes disclosure of any prepayment penalty in § 1026.20(c) ARM payment change notices and 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.[92] For this reason, the Bureau proposes to clarify the circumstances under which a prepayment penalty would apply. The proposed forms alert consumers that a prepayment penalty may apply if they pay off their loan, refinance, or sell their home before the stated date.

The Bureau recognizes that Dodd-Frank Act amendments to TILA, such as 129C and the 2011 ATR Proposal proposing to implement that provision, would significantly restrict a lender's ability to impose prepayment penalties. Other Dodd-Frank amendments to TILA, such as the proposed periodic statement, would provide consumers with information about their prepayment penalty for each billing

[92] *Id.* at vi.

cycle. Thus, consumers who currently have ARMs with prepayment penalty provisions or may 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 solicits comments on whether to include information regarding prepayment penalties in proposed § 1026.20(d).

20(d)(2)(x) Telephone Number of Creditor, Assignee, or Servicer

Proposed § 1026.20(d)(2)(x) would require disclosure of the telephone number of the creditor, assignee, or servicer for consumers to call if they anticipate having problems paying the new payment.

20(d)(2)(xi) Contact Information for Government Agencies and Counseling Agencies or Programs

TILA section 128A mandates that the initial interest rate adjustment notices include the name, mailing and Internet address, and telephone number of the State housing finance authority (as defined in section 1301 of FIRREA) for the State in which the consumer resides. Proposed § 1026.20(d)(2)(xi) would implement this statutory mandate by requiring inclusion of this information in the § 1026.20(d) initial interest rate adjustment notice. 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 require contact information for the State housing finance authority. However, those proposals would require the contact information for the State in which the property is located rather than in which the consumer resides, since the scope of those proposed rules is not limited to a consumer's principal dwelling. This is consistent with the proposed ARM rule since the consumer's principal dwelling should be located in the State in which the property is located. The Bureau seeks comment on how to address any compliance difficulties posed by this inconsistency.

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.

On July 9, 2012, the Bureau released proposed rules to implement other Dodd-Frank Act requirements expanding protections for ''high-cost'' mortgage loans under HOEPA, including a requirement that borrowers receive housing counseling (2012 HOEPA Proposal).[93] The 2012 HOEPA proposal also proposed to implement other homeownership-counseling-related requirements that are not amendments to HOEPA, including a proposed amendment to Regulation X that lenders provide a list of five homeownership counselors or counseling organizations to applicants for a federally related mortgage loan.[94]

The Bureau has taken an alternative approach with regard to the initial ARM interest rate adjustment notice and proposes to use its exception authority to require creditors, assignees, and servicers simply to provide the Web site address to access either the Bureau list or the HUD list of homeownership counseling agencies and programs,[95] instead of requiring contact information for a list of specific counseling agencies or programs. The Bureau believes that this approach appropriately balances consumer and industry interests based on the following considerations:

The ARM notice required by proposed § 1026.20(d) has limited space and contains a significant amount of important technical information about the consumer's loan. 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 burden than simply listing one of the agencies' Web sites.

Providing consumers 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 the consumer to use. However, directing consumers to the actual list would allow them to choose a conveniently located program or agency and to locate other programs or agencies if those contacted initially could not help the consumer at that time. The Bureau seeks comment on whether this proposal strikes an appropriate balance, and on the benefits and burdens to both consumers and industry of requiring that a list of several individual housing counselors be included in the initial ARM interest rate adjustment notice.

Authority. The Bureau proposes to use its authority under TILA sections 105(a) and (f) and DFA section 1405(b) to exempt creditors, assignees, and servicers from the requirement in TILA section 128A to include in the initial ARM interest rate adjustment notice contact information for specific government-certified counseling agencies or programs reasonably available to the consumer, and its authority under TILA section 105(a) and DFA section 1405(b) to instead require that the initial ARM interest rate adjustment notice contain information that directs consumers to the Bureau list or HUD list of homeownership counselors or counseling agencies. For the reasons discussed above, the Bureau believes that the proposed exception 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 of the 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 borrower (including related financial arrangements, financial sophistication, and the importance to the borrower of the loan). The Bureau

[93] *See* 2012 HOEPA Proposal, available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf,* at 29–35.

[94] The list provided by the lender pursuant to the 2012 HOEPA Proposal would include only homeownership counselors or counseling organizations from either the most current list of homeownership counselors or counseling 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. The 2012 HOEPA Proposal proposed that the list include five homeownership counselors or counseling organizations located in the zip code of the loan applicant's current address, or, if there are not the requisite five counselors or counseling organizations in that zip code, then counselors or organizations within the zip code or zip codes closest to the loan applicant's current address. To facilitate compliance with the proposed list requirement, the Bureau 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. *See* 2012 HOEPA Proposal at 31–32 (discussing proposed Regulation X § 1024.20(a)).

[95] At the time of publishing, the Bureau list was not yet available; the HUD list is available at *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm.*

further notes, in light of TILA section 105(f)(2)(D), that the requirements in § 1026.20(d) would only apply to loans secured by the consumer's principal dwelling. Moreover, in the estimation of the Bureau, the proposed exemption would simplify the initial ARM adjustment notice and improve the housing counselor 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 the proposed 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 of Initial Rate Adjustment Disclosures

As discussed above, the Bureau proposes to make proposed § 1026.20(d) subject to certain of the general form requirements of § 1026.17(a)(1), including requiring that the disclosure be clear and conspicuous, in writing, and in a form consumers can keep, and giving creditors, assignees, and servicers the option of providing the disclosures to consumers in electronic form, subject to compliance with consumer consent and other applicable provisions of the E-Sign Act. However, as discussed above, because § 1026.20(d) disclosures are subject to the statutory requirement that they must be provided separate and distinct from all other correspondence, the Bureau proposes to amend § 1026.17(a) to provide that the general segregation and grouping requirements in that provision would not apply to § 1026.20(d).

Authority. In addition, as described below, § 1026.20(d)(3) proposes additional form requirements for initial ARM adjustment notices. For the reasons described below, these requirements are authorized under TILA section 105(a) and DFA sections 1032(a) and 1405(b). As discussed in the section-by-section analysis for each of the proposed sections of § 1026.20(d)(3), the Bureau believes, consistent with TILA section 105(a), that the proposed 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 DFA section 1032(a), that the proposed formatting requirements ensure that the features of the ARM loans covered by proposed § 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 DFA section 1405(b), the Bureau believes that modification of the provision in TILA section 128A to require the proposed format discussed below would 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 require 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.

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.[96] They also had difficulty with the concepts of amortization and interest rate carryover.[97] 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 Bureau's testing showed that consumers can more readily understand these concepts when the information is presented to them in a simple manner and in the groupings contained in the model forms. The Bureau also observed that consumers 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 form: That their interest rate is going to adjust, when it will adjust, and that the adjustment may change their mortgage payment. This introduction is immediately followed by a table visually showing the consumers' current and estimated 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 consumer testing, the Bureau believes that consumer understanding is 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 proposes that creditors, assignees, or servicers disclose the information required by proposed § 1026.20(d) with headings, content, and format substantially similar to Forms H–4(D)(3) and (4) in Appendix H to this part.

Over the course of consumer testing, participant comprehension improved with each successive iteration of the model form. As a result, the Bureau believes that displaying the information in tabular form focuses consumer attention and lends to 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 consumers both could understand and from which they could benefit.

20(d)(3)(ii) Format of Date of Disclosure

Proposed § 1026.20(d)(3)(ii) would require that the date of the disclosure appear outside of and above the table required by proposed § 1026.20(d)(3)(i). As discussed above with respect to paragraph 20(d)(2)(i), the date would be segregated since it is not information specific to the consumer's adjustable-rate mortgage.

20(d)(3)(iii) Format of Interest Rate and Payment Table

Proposed § 1026.20(d)(3)(iii) would require tabular format for initial ARM interest rate adjustment notices for interest rates, payments, and the allocation of payments for loans that are interest-only or are negatively amortizing. This table would be located within the table proposed by § 1026.20(d)(3)(i). This table is substantially similar to the one tested by the Board for its 2009 Closed-End Proposal to revise § 1026.20(c). The proposal would require 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

[96] Macro Report, *supra* note 38, at viii.

[97] *Id.* at viii-ix.

identify and understood the table and its contents.[98] The estimated or actual new interest rate and payment and date the first new payment is due is key information the consumer must know in order to commence payment at the new rate. For these reasons, the Bureau proposes locating this information prominently in the disclosure.

Section 1026.36 Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

36(c) Servicing Practices

Existing § 1026.36(c) provides requirements for servicers in connection with a consumer credit transaction secured by a consumer's principal dwelling. Essentially, such servicers must promptly credit payments, must not ''pyramid'' late fees, and must provide payoff statements at the consumer's request. The Dodd-Frank Act essentially codifies the § 1026.36(c) provisions on prompt crediting and payoff statements with minor changes, as discussed below. The Bureau is amending Regulation Z both to implement the new statutory requirements, and to address the related issue of the handling of partial payments. Currently, Regulation Z addresses prompt crediting in § 1026.36(c)(1)(i). The Bureau is proposing limiting the scope of existing § 1026.36(c)(1)(i) to full contractual payments, and addressing partial payments (anything less than a full contractual payment) in proposed § 1026.36(c)(1)(ii), as discussed below. The Bureau proposes to retain the substantive requirements on non-conforming payments currently in § 1026.36(c)(2), but to move them to paragraph (c)(1)(iii). Likewise, the Bureau does not propose to change the Regulation Z provision addressing ''pyramiding'' of late fees currently in § 1026.36(c)(1)(ii), but only to move the provision to new paragraph (c)(3). Finally, the Bureau is proposing four substantive changes to the provisions on payoff statements, currently located in § 1026.36(c)(1)(iii), as well as to move these provisions to proposed paragraph 36(c)(3).

The Bureau believes these changes to Regulation Z are best implemented by restructuring paragraph (c) and simplifying some of the language. This restructuring generally is not intended to make any substantive changes. All substantive changes to the paragraph (c) are discussed below.

[98] *Id.* at vii.

36(c)(1)(i) Full Contractual Payments

DFA section 1464(a) established TILA section 129F, which codifies 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 new paragraph (c)(1)(i) generally restates existing (c)(1)(i) with the only change that the existing regulation applies to all payments, while proposed (c)(1)(i) would be limited to full contractual payments. The Bureau is proposing to establish new § 1026.36(c)(1)(ii) to clarify servicers' obligations when they receive a partial payment (anything less than a full contractual payment), as discussed below.

As discussed above, proposed § 1026.36(c)(i) generally tracks the Dodd-Frank Act and current regulation, but changes the reference to ''a payment'' to ''a full contractual payment'' and makes minor modifications to reflect the proposed restructuring of the regulation. The proposed regulation text provides that a full contractual payment covers 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. This ensures that consumers get the full benefit of having made a payment. The Bureau seeks comment as to whether late fees should also be included in the definition of a full contractual payment.

36(c)(1)(ii) Partial Payments

Current Regulation Z does not define what constitutes a ''payment'' for purposes of the crediting requirement, but leaves that question to be determined by the contractual documents and other applicable law. Specifically, current comment 36(c)(1)(i)–2 refers to ''the legal obligation between the consumer and the creditor'' as determined by ''applicable state or other law'' to determine whether a partial payment is a ''payment'' under the payment crediting provisions. Outreach to consumer and industry stakeholders revealed that partial payments are currently handled in a variety of ways. Some lenders do not accept partial payments, some lenders apply partial payments, and some lenders send partial payments to a suspense or unapplied funds account. Currently there is no Federal regulation that governs such accounts. The Bureau is proposing to address partial payments in new § 1026.36(c)(1)(ii).

Proposed § 1026.36(c)(1)(ii) provides specific rules regarding the handling of partial payments and suspense accounts. New paragraph (c)(1)(ii) would require, 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. The servicer must also disclose when such funds will be applied to the outstanding payments due on the account. This proposed requirement is authorized under TILA section 129(f), which requires creditors, assignees, and servicers to send statements for each billing cycle including ''[s]uch other information as the Bureau may prescribe in regulations.''

Additionally, proposed § 1026.36(c)(1)(ii) provides that if a servicer holds 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 must apply those funds to the oldest outstanding payment due. The proposed requirement that the funds be applied to the oldest outstanding payment would advance the date of delinquency by one billing cycle, and thus benefit the consumer. For example, suppose a previously current consumer must make a $1,000 monthly payment, and the consumer paid $500 on January 1st and $500 on February 1st. When the second $500 payment is made, a full contractual payment of $1,000 (assuming late fees are not included in the definition of full contractual payment) is in the suspense account and must be applied to the January payment. Thus, this consumer would only be one month delinquent at the end of February. 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 proposed requirement that partial payments held in suspense accounts be credited to the oldest outstanding payment when a full contractual payment accumulates. Crediting the funds to a payment that was not the most delinquent 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 proposed 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 to the oldest outstanding payment when sufficient funds accumulate in such an account to cover a full contractual payment.

Proposed comment 36(c)(1)(ii)–1 describes the servicer's options upon receipt of a partial payment, including: Crediting the payment on receipt, returning the payment, or holding the payment in a suspense or unapplied funds account.

The proposed regulation would leave 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 would also ensure greater consistency in the handling of suspense accounts by requiring, consistent with proposed § 1026.41, that servicers disclose on the periodic statement that the funds are being held in such accounts and, once sufficient funds accumulate to cover a full contractual payment, that the servicer apply the funds to the oldest outstanding payment owed by the consumer. If sufficient funds accumulate to cover more than one full contractual payment, these funds would be applied to the next oldest outstanding payment. Partial payment amounts would be treated as described above.

The Bureau believes this proposed approach would clarify servicers' obligations in processing both full contractual payment and partial payments, as well as ensure all payments are properly applied. The proposed disclosures would help consumers understand that their payments are being held in a suspense account rather than having been applied, and when those partial payments would be applied. Additionally, requiring application to the oldest outstanding payment when a full payment accumulates will provide protection to consumers, as well as reduce the outstanding principal balance on certain consumer loans.

Finally, the Bureau seeks comment on if this approach is the proper way to address suspense accounts, and specifically, whether there should be time requirements on returning partial payments. If a servicer chooses not to accept a partial payment, must that payment be returned within a specific amount of time, and if so, how long should that time be? Additionally, the SBREFA Panel recommended the Bureau consider if additional flexibility can be provided in the proposed rule for small servicers, to the extent their current practices differ from the proposal and provide appropriate consumer protections.[99] The Bureau seeks comment on whether the proposed rule differs from existing small servicer practices, and if so, how additional flexibility can be provided while still providing appropriate consumer protection.

36(c)(1)(iii) Non-Conforming Payments

TILA section 129F(b) further provides that ''[i]f a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of 5 days after receipt.'' This provision codifies the treatment of non-conforming payments in current § 1026.36(c)(2). The Bureau is not making any substantive changes to this provision, as the current rule is clear and provides protection for consumers, but the Bureau proposes to redesignate the section as new § 1026.36(c)(1)(iii).

The Bureau notes 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 Bureau's proposal, partial payments retained in suspense or unapplied funds accounts are treated as payments that have not been accepted subject to § 1026.36(c)(1)(ii), as opposed to non-conforming payments that have been accepted subject to proposed § 1026.36(c)(1)(iii), which must be credited within five days of receipt.

36(c)(2) Prohibition on Pyramiding of Late Fees

The Bureau is not proposing any substantive changes to existing 36(c)(1)(ii), prohibiting the pyramiding of late fees. However the Bureau proposes redesignating this as new paragraph 36(c)(2).

[99] SBREFA Final Report, *supra* note 22, at 32.

36(c)(3) Payoff Statements

DFA section 1464(b) established TILA section 129G, which requires that a creditor or servicer send an accurate payoff balance amount 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 codifies existing § 1026.36(c)(1)(iii) of Regulation Z regarding provision of payoff statements with four substantive changes. First, while existing Regulation Z only applied the requirements to servicers, the statute applies the requirements to both servicers and creditors. Second, the statute applies the prompt response requirement to ''home loans,'' rather than consumer credit transactions secured by the consumer's principal dwelling. Third, the statute limits the reasonable time for responding to not more than seven business days; by contrast, existing comment 36(c)(1)(iii)–1 generally creates a five business day safe harbor for responding, but notes that it might be reasonable to take longer to respond in certain circumstances. Fourth, the statute requires a prompt response only to written requests for payoff amounts, while the existing regulation requires a prompt response to all such requests. Due to the reorganization of paragraph (c), the proposed provisions on payoff statements will be located in paragraph (c)(3).

Covered persons. Existing § 1026.36(c)(1)(iii) applies to servicers. TILA section 129G, as established by DFA section 1464(b), applies the payoff statement requirement to creditors and servicers. For the reasons discussed in the section-by-section analysis of § 1026.20(d) above, the Bureau interprets this to mean the payoff statement provision applies to creditors, assignees, and servicers as applicable. Proposed comment 36(c)(3)–1 clarifies that a creditor who no longer owns the mortgage loan or the mortgage servicing rights is not ''applicable'' and therefore not subject to the payoff statement requirements. The Bureau notes that the other subparts of paragraph (c) continue to be limited to servicers.

Scope. Existing § 1026.36(c)(1)(iii) is limited to consumer credit transactions secured by principal dwellings. The Bureau is proposing to expand the scope of the provision to consumer credit transactions secured by all dwellings. TILA section 129G, as established by DFA section 1464(b), applies the payoff statement requirement to ''home loans,'' a term not used elsewhere in TILA. The Bureau interprets this term to expand the scope of the requirement from consumer credit transaction secured by principal dwellings to consumer credit transactions secured by any dwelling. Thus, the proposed regulation applies to consumer credit transactions (both open- and closed-end), secured by a dwelling, not just a principal dwelling. The Bureau notes that the other subparts of paragraph (c) continue to be limited to consumer credit transactions secured by a consumer's principal dwelling.

Seven business days. Existing § 1026.36(c)(1)(iii) requires the payoff statement to be sent within a reasonable amount of time, and comment 36(c)(1)(iii)–1 clarifies that a reasonable time is ''within 5 business days under most circumstances.'' New TILA section 129G provides that a reasonable time may not be more than seven business days after the receipt of the request. Proposed § 1026.36(c)(3) reflects this change. Because of this change, the Bureau proposes removing existing comment 36(c)(1)(iii)–1.

Written requests. Existing § 1026.36(c)(1)(iii) requires the payoff statement to be sent after a request is received from the consumer. New TILA section 129G limits the requirement to provide a prompt response to ''written requests'' for payoff statements. Thus proposed new paragraph (c)(3) would require payoff statements to be provided after receipt of a written request. Related comment (c)(3)–3 (renumbered from (c)(1)(iii)–3)), which provides examples of reasonable requirements the servicer may establish for payoff requests, is also updated to reflect this change.

The SBREFA Panel recommended the Bureau consider if additional flexibility can be provided in the proposed rule for small servicers, to the extend their current practices differ from the proposal and provide appropriate consumer protections.[100] The Bureau seeks comment on whether the proposed rule differs from existing small servicer practices, and if so, how additional flexibility can be provided while still providing appropriate consumer protection.

Section 1026.41 Periodic Statements for Residential Mortgage Loans

Proposed § 1026.41 would establish the periodic statement requirement for residential mortgage loans. This section implements TILA section 128(f) as established by DFA section 1420. 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 housing counselor information), as well as such other information as the Bureau may prescribe in regulations.[101] The Bureau believes 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 proposes pursuant to TILA section 129(f)(1)(H) that each periodic statement also include this additional information.

TILA section 128(f) applies the requirement to provide a periodic statement to creditors, assignees, and servicers of residential mortgage loans. To increase readability, proposed § 1026.41 uses the term ''servicer'' to describe the entities covered by the proposed requirement, and defines servicer to mean creditors, assignees, or servicers for the purposes of § 1026.41. This terminology is also used in the section-by-section analysis for proposed § 1026.41. The statute applies the periodic statement to ''the creditor, assignee, or servicer.'' Comment 41(a)–3 clarifies 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 sent the statement. Comment 41(a)–4 clarifies that a creditor who no longer owns the mortgage loan or the mortgage servicing rights is not ''applicable'' and therefore not subject to the requirements. The Bureau interpretation of the statute would not apply the on-going 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.

As proposed, the periodic statement carefully balances the need to provide consumers with sufficient information against the risk of overwhelming consumers with too much information. The proposed requirements are designed to make the statement easy to read, whether provided in a paper form or electronically. The Bureau believes that imposing a requirement that information be grouped would present the information in a logical format, while allowing servicers flexibility in customizing the statement. Thus, the proposed regulations discussed below would require 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 due and information on the late fee is 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 also include 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 housing 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.

Additionally, the proposed regulation sets forth requirements regarding the timing and form of the periodic statement and establishes exemptions to the requirement to provide a periodic statement.

41(a) In General

Proposed § 1026.41(a) states 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. As discussed below, the proposed requirements and exemptions are authorized under TILA sections 128(f), and 105(a) and (f), and DFA sections 1032(a) and 1405(b).

As discussed above, the periodic statement is intended to serve a variety of purposes, including informing consumers of their payment obligations, providing information about the

[100] *Id.*

[101] TILA section 129(f)(1).

mortgage loan, creating a record of transactions that increase or decrease the outstanding balance, providing the information needed to identify and assert errors, and providing information when borrowers are delinquent. To meet these goals, paragraphs (b), (c), and (d) respectively, propose the requirements for the timing, form, content, and layout of the periodic statement. Paragraph (e) proposes exemptions from the proposed periodic statement requirement.

Entities covered. TILA section 128(f) imposes the periodic statement requirement on creditors, assignees, and servicers. Proposed § 1026.41(a) would implement this provision by specifying that the duty to transmit periodic statements applies to the servicer, defined to mean creditor, assignee, or servicer. The consumer is only required to receive one periodic statement each billing cycle, but creditors, assignees, and servicers would all be responsible for ensuring that the consumer receives a periodic statement that meets the requirements of § 1026.41.

Scope. Under TILA section 128(f), the periodic statement requirement applies to residential mortgage loans. The term ''residential mortgage loan'' is generally defined in TILA section 103(cc)(5) to 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 paragraph (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.

Transmit to the consumer. Proposed § 1026.41(a) would require 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 would be required to 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 clarifies that joint obligors need not receive separate statements; a single statement addressed to both of them would satisfy the periodic statement requirement.

Billing cycles. Proposed § 1026.41(a) would require 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 as determined by the mortgage note and any subsequent modifications to that obligation. 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-then-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 realizes 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, paragraph (a) allows that 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. Related proposed comment 41(a)–2 clarifies how such a single statement would aggregate information from multiple billing cycles.

Authority. Proposed paragraph (a) implements new 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 proposes in paragraph (a) to use its authority under TILA section 105(a) and (f) and DFA 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 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 proposed 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 borrower (including related financial arrangements, financial sophistication, and the importance to the borrower 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 DFA section 1405(b), the proposed exemption will prevent the consumer confusion that might result from receiving multiple periodic statements in close sequence, thus furthering the consumer protection purposes of the statute.

Paragraph (b) interprets the statutory requirement that a periodic statement must be provided for each billing cycle by requiring the periodic statement be delivered or placed in the mail within a reasonably prompt time after the close of the grace period of the previous billing cycle.

Paragraph (c) invokes authority under TILA sections 105(a), 122, and 128(f)(2) to require that the disclosures must be made clearly and conspicuously in writing, or electronically if the consumer agrees, and in a form the consumer may keep. The Bureau also interprets the statute to mandate certain of these form requirements.

As discussed in more detail below, the Bureau generally proposes to impose the periodic statement requirement pursuant to its authority under TILA sections 128(f) and 105(a), and DFA sections 1032(a) and 1405(b).

41(b) Timing of the Periodic Statement

Proposed § 1026.41(b) provides 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 provides that four days after the close of any grace period would be considered reasonably prompt.

For the first payment on the mortgage loan, proposed paragraph (b) would require that the first periodic statement be sent no later than 10 days before this first payment is due. This adjustment is necessary because there is no previous billing cycle from which to time the sending of the first statement.

The periodic statement serves the dual purposes of giving an accounting of payments received since the pervious 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. If a payment is due on the first of the month, grace periods may give the consumer as late as the 15th of the month to make that payment. Thus, if a statement is sent before the 15th of the month, that statement may not reflect the consumer's most recent payment, or any late charge imposed due to a late payment. However, if a statement is sent at the close of the month, that statement may not arrive before the next payment is due on the first day of the next month. Allowing a few days for processing and mailing of statements creates a tight timeframe. The Bureau seeks comment on whether the proposed regulation appropriately addresses this timeframe. Additionally, the Bureau seeks comment on whether it is operationally difficult to have the first statement delivered or placed in the mail 10 days before the first payment is due.

The Bureau interprets the requirement in TILA section 128(f) that periodic statements be sent for ''each billing cycle'' to authorize the timing requirements proposed in § 1026.41(b). In addition, the proposed timing requirements are authorized under TILA section 105(a), and DFA sections 1032(a) and 1405(b). For the reasons noted above, the Bureau believes, consistent with TILA section 105(a), that the proposed requirements are necessary and proper to effectuate the purposes of TILA to assure a meaningful disclosure of credit terms and protect consumers against inaccurate and unfair credit billing practices by assuring that consumers receive the periodic statement at a time that is useful to them. In addition, consistent with DFA section 1032(a), the Bureau believes that the proposed 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 DFA section 1405(b), the Bureau believes that the proposed timing requirements would improve consumer awareness and understanding of their residential mortgage loans by assuring that consumers receive the periodic statements at a meaningful time, after their last payment is made and before their next payment is due, and that proposed requirements are thus in the interest of consumers.

41(c) Form of the Periodic Statement

Proposed § 1026.41(c) provides that the periodic statement disclosures required by section § 1026.41 must be made clearly and conspicuously in writing, or electronically, if the consumer agrees, and in a form the consumer may keep. TILA section 128(f)(1) specifies that periodic statements must be ''conspicuous and prominent,'' and TILA section 128(f)(2) requires the Bureau to develop and prescribe a standard form to be transmitted in writing or electronically. The Bureau proposes to implement these provisions, in part through the form requirements set forth in proposed § 1026.41(c) and the related forms provided in Appendix H–28. In addition, the proposed form requirements are authorized under TILA section 122, which requires the disclosures under TILA be clear and conspicuous, TILA section 105(a) and DFA sections 1032(a) and 1405(b). As discussed below, the Bureau believes, consistent with TILA section 105(a), that the proposed form requirements are necessary and proper to effectuate the purposes of TILA to assure a meaningful disclosure of credit terms and protect the consumer against inaccurate and unfair credit billing practices by assuring that the periodic statement sent to consumers is in a form that they can understand. In addition, consistent with DFA section 1032(a), the Bureau believes that the proposed 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 DFA section 1405(b), the Bureau believes that the proposed form requirements would improve consumer awareness and understanding of their residential mortgage loans by assuring 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.

Clear and conspicuous. TILA section 122 requires that disclosures under TILA be clear and conspicuous. Existing § 1026.31(b) generally implements this requirement with respect to disclosures required by subpart E, where new § 1026.41 will be located. Section 1026.31(b) applies only to creditors, however. Thus, to make this requirement applicable to servicers (defined to include creditors and assignees), proposed paragraph 41(c) would require, consistent with TILA section 122 and existing § 1026.31(b), that the periodic statement be clear and conspicuous. Proposed comment 41(c)–1 clarifies the clear and conspicuous standard, stating that it generally requires that disclosures be in a reasonably understandable form, and explains 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 is traditionally found on their periodic statements, but not proposed as required by this 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.

Additional information. Proposed comment 41(c)–2 states that nothing in this subpart 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 the applicable law. For example, the grouping requirements discussed below may not be overridden by additional information in the statement.

Based on industry outreach, the Bureau understands that some institutions provide a combined statement for mortgage loans and other financial products. For example if a consumer has both a checking account and a mortgage with a credit union, the consumer may receive a single combined statement. The Bureau seeks comment on how servicers would actually combine statements. In particular, the Bureau notes that difficulties may arise when different disclosures have different timing requirements, and when multiple disclosures have requirements that information be presented on the first page of the statement. For example, if both mortgage loan disclosures and credit card disclosures are required to be on the first page of a statement, how would these statements be combined?

Electronic distribution. TILA section 128(f)(2) provides that periodic statements ''may be transmitted in writing or electronically.'' Consistent with this provision, proposed § 1026.41(c) would allow statements to be provided electronically, if the consumer agrees. As discussed above, the requirement to transmit a periodic statement to the consumer may be met by sending the consumer an e-mail notification that the statement is available, rather than e-mailing the statement itself in light of information security concerns. This paragraph would require only affirmative consent by the consumer to receive statements, not compliance with E-Sign verification procedures. The Bureau does not believe E-Sign consent is required by the statute. E-Sign is designed to provide an electronic alternative to required writings. The statute, however, requires only periodic ''statements'' as opposed to ''writings'' to be transmitted to consumers. Additionally, the statute contemplates electronic statements, as TILA section 129(f)(2) provides that the Bureau shall prescribe a standard form, taking into account that the statements required may be transmitted in writing or electronically. Thus, the Bureau believes that Congress did not intend to require E-Sign verification procedures. The Bureau seeks comment as to whether additional requirements should be placed on when a consumer consents to receiving electronic statements. For example, must consent be obtained or confirmed electronically in a manner that demonstrates that the consumer is able to access information electronically? The Bureau also seeks comment on whether consumers who already receive electronic statements should be deemed as having consented to receive statements electronically. Additionally, the Bureau seeks comment on whether consumers who have auto-debit set up to deduct payments from their bank account should be deemed as having consented to receive statements electronically.

Retainability. Proposed § 1026.41(c) would require the disclosure be provided 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.

Sample forms. Proposed § 1026.41(c) also states that sample forms are provided in Appendix H–28, and that appropriate use of these forms will be deemed to comply with the section. The sample forms were developed through consumer testing as discussed in part III.B above, and 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. The sample forms also contain additional information (for example, a tear-off coupon on the bottom) that is not required to be on the form, but is included to give context to the sample. These proposed regulations and sample forms were crafted to give servicers flexibility in designing their periodic statements. The Bureau proposes these sample forms pursuant to its authority, inter alia, under TILA section 128(f)(2).

41(d) Content and Layout of the Periodic Statement

Proposed § 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 DFA sections 1302(a) and 1405(b).

The content required by paragraph (d) is authorized under TILA section 128(f)(1). Such content is authorized as follows:

• *Statutorily-required content:* TILA sections 128(f)(1)(a) through (g) requires the inclusion of certain items of information in the periodic statement. The proposed regulation generally implement 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 proposed under this authority.

The grouping and other form requirements of the layout in paragraph (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 under TILA section 128(f)(2) for the Bureau to develop and prescribe a standard form for the periodic statement disclosure. In addition, as discussed above with respect to the form requirements under § 1026.41(c) and for the reasons explained below, the proposed grouping and form requirements under § 1026.41(d) are authorized under TILA section 105(a) and DFA sections 1032(a) and 1405(b).

The periodic statement is designed to provide the consumer with information in an easy-to-read format. The goal of the proposed grouping and form requirements is to highlight key information—the amount due—and organize information so the statement would not be overwhelming to the consumer. The commentary to paragraph (d), discussed below, reflects these goals.

Exemptions and adjustments: TILA section 128(f)(1)(G) requires the periodic statement to include the names, addresses and other contact information for government-certified counseling agencies or programs reasonably available to the consumer. For the reasons discussed below, the Bureau proposes to use its authority under TILA section 105(a) and (f) to exempt servicers from having to include this information in periodic statements to and to instead require the periodic statement to include contact information for the State housing finance authority for the State in which the property is located and information to access the HUD list or Bureau list of homeownership counselors or counseling organizations. This adjustment is additionally authorized under DFA section 1405(b).

Close proximity. Proposed § 1026.41(d) would require 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. The General Design Principles discussed in the Macro final report (Macro Report) include grouping together related concepts and figures because consumers are likely to find it easier to absorb and make sense of financial forms if the information is grouped in a logical way.[102]

Proposed comment 41(d)–1 clarifies 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 the information to be located immediately next to or directly above or below, without any intervening text or graphical displays.[103]

Information not applicable. Proposed comment 41(d)–2 provides that information that is not applicable to the loan may be omitted from a periodic statement. For example, if a loan does

[102] Macro Report, *supra* note 38, at 4.

[103] *See* comments 24(b)–2 and 48–3 respectively.

not have a prepayment penalty, the periodic statement may omit the prepayment penalty disclosure.

Terminology. Proposed comment 41(d)–3 provides 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.[104] 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.

41(d)(1) Amount Due

Proposed § 1026.41(d)(1) would require 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 to be grouped together and located at the top of the first page of the statement. The amount due would have to be more prominent than any information on the page. This is consistent with the general principle of designing disclosures to highlight the most important information for consumers to make it easy for them to find.[105] A primary purpose of the periodic statement is to alert the consumer to upcoming payment obligations. The Bureau interprets TILA section 129(f)(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 as well as the date the fee would be imposed if the payment has not been received, as well as 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. Because of the importance of this information, it is placed in the prominent position of the top of the first page, and the total amount must be 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.[106]

If the consumer has a payment-option loan, each of the payment options must be displayed with the amount due information. An example of such a statement is included in proposed Appendix H–28(C).

41(d)(2) Explanation of Amount Due

Proposed § 1026.41(d)(2) would require periodic statements to include an explanation of the amount due, providing the monthly payment amount, including the allocation of that payment to principal, interest and escrow (if applicable). Additionally, the statement would have to provide the total fees or charges incurred since the last statement, and any amount past-due (which would include both over-due payments and over-due fees). This information would have 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); and 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, discussed below. Additionally, this section would show the total of past due payments and fees from previous billing cycles. In the first round of consumer testing, Macro tested the form to see if participants were able to understand what charges constituted the total amount due. The sample form used in testing showed a late payment fee. After looking at the Explanation of Amount Due, all participants understood the amount due included a regular monthly payment and a late fee.[107] This indicates that the Explanation of Amount Due helps consumers understand the amount they need to pay.

If the consumer has a payment-option loan, a breakdown of each of the payment options would be required in the Explanation of Amount Due. Additionally, the Explanation of Amount Due would require inclusion of information about how each of the payment options will affect the outstanding loan balance. A form with such a box was tested 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.[108] A sample form is provided in Appendix H–28(C).

41(d)(3) Past Payment Breakdown

Proposed paragraph (d)(3) would require periodic statements to include a snapshot of how past payments have been applied. Proposed § 1026.41(d)(3)(i) would require 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 require 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 to be grouped together in close proximity, and located on the first page of the statement.

The past payment breakdown disclosure serves several purposes on the periodic statement, 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 paragraph (d)(3)(i), showing all payments made since the last statement, would allow the consumer to confirm that his or her payments was properly applied. If the payments were not properly applied, the breakdown would provide the consumers the information needed to assert an error. Although testing participants had some confusion about partial payments as discussed below, they were able to identify how their payments had been applied based on the past payment breakdown information included on the sample statement.[109]

Both the breakdown since the last billing cycle and the breakdown of the

[104] Macro Report, *supra* note 38, at 12.

[105] *Id.* at 4.

[106] *See id.* at 6.

[107] *Id.*

[108] *Id.* at 14.

[109] *Id.* at 9.

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 consumers may be surprised by how much of their payment is going to interest or fees as opposed to principal. Aggregated over the year-to-date can bring this expense to a consumers' 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, especially since 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.

Partial Payments. Proposed comment 41(d)(3)-1 provides 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 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. Consumer testing revealed that consumers have very little understanding about how partial payments are handled.[110] As discussed in part IV.C 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.

41(d)(4) Transaction Activity

Proposed § 1026.41(d)(4) would require 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 clarifies that transaction activity includes any activity that credits or debits the outstanding loan balance. For example, proposed comment 41(d)(4)–1 states 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 provide 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. The Bureau seeks comment on whether the periodic statement should be required to include a message under paragraph (d)(5) when a partial payment is returned to the consumer.

Late fee description. Proposed comment 41(d)(4)–2 clarifies 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. The Bureau interprets TILA section 129(f)(E), which requires that the periodic statement include ''a description'' of any late payment fees, to require disclosure of this information, as well as information regarding late fees discussed above.

Suspense accounts. Proposed comment 41(d)(4)–3 clarifies 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 should be provided in the messages section. The messages section, discussed below, should include an explanation of what the consumer must do to release the funds from the suspense account.

41(d)(5) Messages

Proposed § 1026.41(d)(5) would require 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 seeks comment on what, if any, additional messages should be required. In particular, the Bureau seeks comment on whether there should be a required disclosure where the consumer has a negatively-amortizing or interest-only loan. Additionally, the Bureau seeks comment on whether there should be a required disclosure on private mortgage insurance and when it may be eliminated. Finally, the Bureau seeks comment as to if more than one message is required, and if so, should these be grouped together and should these messages be required to be on the first page of the statement?

41(d)(6) Contact Information

Proposed § 1026.41(d)(6) would require that the periodic statement contain contact information specifying where a consumer may obtain information regarding the mortgage. Proposed comment 41(d)(6)–2 clarifies that this contact information must be the same as the contact information for asserting errors or requesting information. The Bureau seeks comment on whether consumers are likely to contact the servicer for information other than errors or inquiries, which would necessitate a different number being included on the periodic statement. Proposed § 1026.41(d)(6) provides that the contact information provided must include a toll-free telephone number. Proposed comment 41(d)(6)–1 clarifies that the servicer may provide additional information, such as a web address, at its option. Proposed § 1026.41(d)(6) does not require 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 allow servicers to include this information with their company name and logo at the top of the page or elsewhere on the statement.

41(d)(7) Account Information

Proposed § 1026.41(d)(7) would require that the following information about the mortgage, as required by the statute, be included on the statement: The amount of principal obligation, the current interest rate in effect for the loan, the date on which the interest rate

[110] *Id.* at 11.

may next reset or adjust, the amount of any prepayment penalty, and information on housing counselors. This information may be included anywhere on the statement. This information may, but need not be, grouped together. While the sample form has this information on the first page, the servicer is not required to include this information on the first page.

Prepayment penalty. Proposed § 1026.41(d)(7)(iv) defines 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 is further clarified in the proposed commentary. Proposed comment 41(d)(7)(iv)–1 gives the following examples of prepayment penalties: (1) A charge determined by treating the loan balance as outstanding for a period of time after prepayment in full and applying the interest rate to such ''balance,'' even if the charge results from interest accrual amortization used for other payments in the transaction under the terms of the loan contract; (2) a fee, such as an origination or other loan closing cost, that is waived by the creditor on the condition that the consumer does not prepay the loan; (3) a minimum finance charge in a simple interest transaction; and (4) computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d). Proposed comment 41(d)(7)(iv)–1.i further clarifies that ''interest accrual amortization'' refers to the method by which the amount of interest due for each period (*e.g.,* month) in a transaction's term is determined and states, for example, that ''monthly interest accrual amortization'' treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of any grace period). The proposed comment also provides an example where a prepayment penalty of $1,000 is imposed because a full month's interest of $3,000 is charged even though only $2,000 in interest was accrued in the month during which the consumer prepaid.

Proposed comment 41(d)(7)(iv)–2 clarifies that a prepayment penalty does not include: (1) Fees imposed for preparing and providing documents when a loan is paid in full, if the fees are imposed whether or not the loan is prepaid, such as a loan payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the loan; or (2) loan guarantee fees.

The definition of prepayment penalty in proposed § 1026.41(d)(7)(iv) and comments 41(d)(7)(iv)–1 and –2 substantially incorporate the definitions of and guidance on prepayment penalties from other rulemakings addressing mortgages and, as necessary, reconciles their differences. For example, the Bureau is proposing to incorporate the language from the Board's 2009 Closed-End Proposal but omitted in the Board's 2011 ATR Proposal listing a minimum finance charge as an example of a prepayment penalty and stating that loan guarantee fees are not prepayment penalties, because similar language is found in longstanding Regulation Z commentary. Based on the differing approaches taken by the Board in its recent mortgage proposals, however, the Bureau seeks comment on whether a minimum finance charge should be listed as an example of a prepayment penalty and whether loan guarantee fees should be excluded from the definition of the term prepayment penalty.

The Bureau expects to coordinate the definition of the term prepayment penalty in proposed § 1026.41(d)(7)(iv) with the definitions in other pending rulemakings relating to mortgages.

The Bureau seeks comment on the feasibility of disclosing the amount of any prepayment penalty, as the amount of the penalty could depend on the timing or amount of prepayment, and if a preferable alternative would be to disclose the maximum amount of a prepayment penalty. Alternatively, the Bureau seeks comment on whether a better alternative would be for the periodic statement to disclose the existence of a prepayment penalty in place of the amount.

Housing counselors. Proposed § 1026.41(d)(7)(v) would require the periodic statement to include contact information for the State housing finance authority for the State in which the property is located, and information to access either the Bureau list or the HUD list of homeownership counselors or counseling organizations.

TILA section 128(f)(1)(G) requires the periodic statement to include the names, 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 Housing and Urban Development 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 housing counselors in connection with the application process for mortgage loans.[111] In connection with those requirements, 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. The Bureau also indicated that it is expecting to develop a website 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 housing counselors with a minimum amount of effort.[112]

In connection with the periodic statement requirement, however, the Bureau is proposing 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. The Bureau believes that this approach appropriately balances consumer and servicer interests based on several considerations.

First, the Bureau is 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 housing 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 with each billing cycle is significantly higher than with regard to a single provision of the list. Space on the periodic statements is limited, and importing updated information from the CFPB website each cycle would involve more programming burden than simply listing the two agencies' websites in the first instance.

To address these concerns, the proposal would require that the periodic

[111] *See* 2012 HOEPA Proposal, available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf*, at 29–35.

[112] The list provided by the lender pursuant to the 2012 HOEPA Proposal would include only homeownership counselors or counseling organizations from either the most current list of homeownership counselors or counseling 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 id.* at 32–33.

statements include the contact information to access the State housing finance authority for the State in which the property is located, and the website and telephone number to access either the Bureau list or the HUD list of homeownership counselors or counseling organizations.[113] Directing consumers to this information would allow them to choose a program or agency conveniently located for them, and would allow the consumer to locate other programs or agencies if those contacted initially could not help the consumer at that time. The Bureau seeks comment on whether this proposal strikes an appropriate balance, and on the benefits and burdens to both borrowers and servicers of requiring that a list of several individual housing counselors be included in or with the periodic statement.

Because housing counselor information may not be relevant to consumers who are current and not facing any problems, the proposal does not require this information to be on the front of the statement. The Bureau seeks comment if this information should be required to be located on the front of this statement. In a related requirement, when the delinquency information is provided, the proposed regulations would require that the delinquency information contain a reference to this housing counselor information. This would ensures that the housing counselor information would be brought to the attention of delinquent consumers. These provisions are discussed further below.

The Bureau expects to coordinate the housing counselor information requirement in proposed § 1026.41(d)(7)(v) with the definitions in other pending rulemakings concerning mortgage loans that address housing counselors. The Bureau believes that, to the extent consistent with consumer protection objectives, adopting a consistent approach to providing housing counselor information across its various pending rulemakings will facilitate compliance. The Bureau notes that other housing counselor requirements (for example, the ARMs initial interest rate adjustment notification) require the contact information for the State housing finance authority for the State in which the consumer resides (as opposed to the State in which the property is located). While the Bureau expects the State in which the property is located will most often be the State where the consumer resides, under certain circumstances (a vacation home), these may be different States. Additionally, the Bureau notes that a difference in regulation requirements for different disclosures may increase compliance costs for servicers. The Bureau seeks comment on which State housing finance authority's contact information should be required on the periodic statement.

The Bureau proposes to use its authority under TILA section 105(a) and (f) and DFA 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, and to instead require that periodic statements disclose the State housing finance authority for the State in which the property is located and information to access either the Bureau list or HUD list of homeownership counselors or organizations. For the reasons discussed above, the Bureau believes that the proposed exception 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 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 the amount of the loan, the status of the borrower (including related financial arrangements, financial sophistication, and the importance to the borrower of the loan), or whether the loan is secured by the principal residence of the consumer. Further, in the estimation of the Bureau, the proposed exemption will simplify the periodic statement, and improve the housing counselor information provided to the consumer, thus furthering the consumer protection purposes of the statute. In addition, consistent with DFA section 1405(b), the Bureau believes that the proposed 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 Notice

Proposed § 1026.41(d)(8) would require 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 in a delinquency scenario. The combination of fees, partial payments being sent to suspense accounts, and application of payments to oldest outstanding payments due can quickly lead to confusion. Additionally, consumers in delinquency are often facing stress due to the situation that left them unable to make their mortgage payments. The proposed early intervention rules would require servicers to disclose information about loss mitigation or loan modification, but this information would not be customized to individual consumers. The delinquency notice, discussed below, would provide information that is tailored to the specific consumer. This information would benefit the consumer in several ways. First, this notice would ensure that the consumer is aware of the delinquency as well as potential consequences. Second, this information would ensure that the consumer has the information about his or her loan. For example, certain loan modification programs are tied to specific timelines in delinquency. This information would ensure that consumers understand the timeline for their delinquency so they can benefit from early intervention information. Finally, the delinquency information would create 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.

Delinquency date and risks. Proposed paragraph (d)(8)(i) would require 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 consumers 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 paragraph (d)(8)(ii) would require the periodic statement to include a statement reminding the consumer of potential risks of delinquency, for example, late fees may be assessed or, after a number of months, the consumer can be subject to foreclosure.

[113] At the time of publishing, the Bureau list was not yet available and the HUD list is available at *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm.*

A recent account history. Proposed paragraph (d)(8)(iii) would require 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 consumers 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 of payment allocations. Although some of this information would be available from previous periodic statements, the Bureau believes that providing a separate recent account history is warranted under the circumstances.

The Bureau believes 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 paragraph (d)(8)(iii) would require 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 is 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 6 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 paragraph (d)(8)(iv) would require the periodic statement to include as part of the delinquency information in the periodic statement notice of any acceptance into a modification program, either trial or permanent, create a record of acceptance into the modification program.

Notice if the loan has been referred to foreclosure. Proposed paragraph (d)(8)(v) would require 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.

Total amount to bring the loan current. Proposed paragraph (d)(8)(vi) would require that the total amount needed to bring the loan current be included in the delinquency information to ensure that consumers knows how much money they must pay to bring the loan back to current status.

Housing counselor information reference. Proposed paragraph (d)(8)(vii) would require that the delinquency notice also contain a statement directing the consumer to the housing counselor information located on the statement, as proposed by paragraph (d)(7)(v). For example, if the housing 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.

45 Days. The delinquency information is intended to assist consumers who have fallen behind on their mortgage payments. The proposal would not require provision of this information until the consumer is 45 days delinquent. The Bureau recognizes that not all delinquencies indicate troubled consumers; a single missed payment may be the result of other factors such as misdirected mail. Such consumers would likely be notified of a single missed payment by their servicer, and the lack of payment received 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, unlike simply failing to remember to send in a payment on time. Thus, the delinquency information would be required at 45 days to ensure receipt of this information by a borrower who missed two consecutive payments.

41(e) Exemptions

41(e)(1) Reverse Mortgages

Proposed § 1026.41(e)(1) exempts reverse mortgages, as defined by § 1026.33(a), from the periodic statement requirement. The Bureau is proposing 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 massive alterations to the form and regulation. The Bureau believes that it is more appropriate to address consumer protections relating to reverse mortgages in a separate comprehensive rulemaking.

The Bureau proposes to use its authority under TILA sections 105(a) and (f) and DFA 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 proposed 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 borrower (including related financial arrangements, financial sophistication, and the importance to the borrower of the loan), or whether the loan is secured by the principal residence of the consumer. Further, in the estimation of the Bureau, the proposed 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.

In addition, consistent with DFA section 1405(b), the Bureau believes that the proposed 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) Time Shares

Proposed § 1026.41(e)(2) would clarify that timeshares as defined by 11 U.S.C. 101 (53(D)) 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 timeshares do not fall under this definition.

41(e)(3) Coupon Book Exemption

Proposed § 1026.41(e)(3) would implement the statutory exemption 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 seeks 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 is proposing to modify the coupon book exception permitted by TILA section 128(f)(3) to apply the exception where the coupon book contains certain static information and other dynamic information is made accessible to the consumer.

Proposed comment 41(e)(3)–1 defines ''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 explains what a coupon book is.

The Bureau proposes to use 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 is proposing to use its TILA 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 via the inquiry process. The Bureau believes this proposed exemption is necessary and proper to facilitate compliance.

Information in the coupon book. Proposed paragraph (e)(3)(i) would require 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 paragraph (e)(3)(ii) would require 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 fee that may be charged, the contact information for the servicer, and housing counselor information. Each of these items is discussed above in the section-by-section analysis of proposed paragraph (d). The coupon book would also be required to disclose information on how the consumer may obtain the dynamic information discussed below. The information described above may, 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 clarifies that a coupon book need only include the outstanding principal balance at the beginning of that time period.

Information made available. As discussed above, due to the static nature of the coupon book, certain dynamic information that is required to be included on periodic statements cannot be included. To use the coupon book provision, the proposed rule would require that the dynamic information be made available upon the consumer's request. The servicer could provide the information orally, or in writing, or electronically, if the consumer consents. Thus, proposed paragraph (e)(3)(iii) would require 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.

The Bureau seeks comment on whether requiring servicers to make this information available would impose significant burden or costs that exceed consumer benefits. In particular, the Bureau seeks comment on whether providing the past payment breakdown information would impose greater burden then benefits.

Delinquency information. Because of the importance of the delinquency information, proposed paragraph (e)(3)(iv) would require that to qualify for the coupon book exception, the delinquency information required by proposed § 1026.41(d)(8), discussed above, to 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.

41(e)(4) Small Servicer Exemption

Proposed paragraph (e)(4) would exempt certain smaller servicers from the duty to provide periodic statements for certain loans. A small servicer would be defined 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 has decided to propose this exemption after careful consideration of the benefits and burdens of the periodic statement requirement. As proposed, the Bureau believes that the periodic statement will be helpful to consumers because it will provide 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 believes 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 recognizes 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 borrower's statement for each billing cycle. The Bureau recognizes that very 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 SBREFA panel process confirming the technological and operational challenges faced by small servicers, as well as postage and other expenses that would be associated with providing periodic statements on an ongoing basis. Because small servicers maintain small portfolios, the SBREFA participants 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 believes 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 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.[114] Because those servicers have a long-term relationship with the borrowers, their incentives with regard to charging fees and other servicing practices may be more aligned with borrower interests. These motivations to ensure a good relationship incentivize good customer service, including making information about upcoming payments, fees charged and payment history, and information for distressed borrowers easily available to consumers by other means.

The Bureau believes, however, that both conditions are 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 that originated the loans and either retained ownership or servicing rights. 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, 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 does 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 servicing rights, without regard to size.

SBREFA Panel. The proposed exemption is consistent with feedback that the Bureau received from small entity representatives during the SBREFA panel process regarding the potentially significant burdens that would be imposed by a periodic statement requirement. Participants explained that they already provided much of the information in the proposed periodic statement through alternative means, including correspondence, more limited periodic statements, coupon books, passbooks, and telephone conversations.[115] Even where SERs did not affirmatively provide particular items of information to borrowers, they stated that their companies would 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.[116]

The SERs 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.[117] 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 SERs stated that simply 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. The Bureau lacks the data necessary to precisely calibrate the amount of burden that would be imposed by the periodic statement requirement on servicers of different sizes. However, the Bureau believes that a threshold of 1,000 loans serviced may be an appropriate approximation to limit the proposed exemption to smaller servicers in the market. Assuming that, on average, most loans are refinanced about every five years, this threshold works out to an average of 200 originations per year. The Bureau estimates that a small servicer of this size would earn about $600,000 annually in servicing fee revenues.[118] The SERs estimated that the periodic statement burden could cost thousands of dollars each month.[119] For comparison, the Bureau notes that the top 100 mortgage servicers, as measured by size of unpaid principal balance serviced, (which together have approximately 82% of the mortgage servicing market share [120]) each service in excess of $3 billion of unpaid principal balance.

In addition to the 1,000 loan threshold, the exemption from the

[114] See *Re-Thinking Loan Serving,* Prime Alliance Loan Servicing, p. 8 (April 2010) available at: *http://cuinsight.com/media/doc/WhitePaper_CaseStudy/wpcs_ReThinking_LoanServicing_May2010.pdf.*

[115] SBREFA Final Report, *supra* note 22, at 16–19.

[116] *Id.*

[117] *Id.* at 17.

[118] This estimate assumes that a servicer generates a net mortgage servicing fee rate of 35 basis points and that the average unpaid principal balance on the 1,000 loans is $175,000. The 35 basis points represents a blend of different mortgage servicing asset quality. Mortgage servicing fees for conventional servicing are generally 25 basis points; mortgage servicing fees for subprime mortgage loans or loans sold to trusts guaranteed by Ginnie Mae may vary between 40–50 basis points. Servicers are also able to generate ancillary income from sources other than the mortgage servicing fee, including additional fee revenue, such as late fees, and float on principal, interest and escrow payments, the composition of which may vary significantly among servicers. The Bureau believes that 35 basis points is a reasonable assumption in current market conditions. See, e.g., Newcastle Investment Corp., Form 10–Q, filed May 10, 2012, at 15–16, *available at http://www.sec.gov/Archives/edgar/data/1175483/000138713112001455/nct-10q_033112.htm* (last accessed June 13, 2012 (describing REIT investment in excess mortgage servicing rights (MSRs) from a portfolio of MSRs generating an initial weighted average total mortgage servicing fee amount of 35 basis points).

[119] SBREFA Final Report, *supra* note 22, at 19. (One SER estimated it could cost an additional $11,000 per month in on-going support, another SER estimated that a vendor might charge $1,000–$2,000 per month in fees, a third SER estimated monthly costs of $2,200 based on a cost of $1 per statement).

[120] Inside Mortgage Finance, Issue 2012:13 (March 30, 2012) at 12.

periodic statement would be limited to entities that exclusively service loans that they or an affiliate originated or was the entity to which the obligation was initially payable. A servicer must both exclusively service such loans and satisfy the 1000-loan threshold to qualify for the small servicer exemption. The exemption is limited to these servicers because of the incentive discussed above.

The proposed commentary clarifies the application of the small servicer definition. Proposed comment 41(e)(4)–1 states 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 states that in determining whether a small servicer services 1,000 mortgage loans or less, a servicer is 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 will 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 gives examples for calculating when a servicer who crosses the 1,000 loan threshold would need to begin sending periodic statements. The purpose of this provision is to permit a servicer that crosses 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 provisions for which the servicer was previously exempt.

Proposed comments 41(e)(4)–3 clarifies when 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 clarifies 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 believes that permitting an exemption in such circumstance could potentially exempt a larger master servicer from the obligation to provide periodic statements, even if it has master servicing responsibility for several thousand loans.

The Bureau seeks comment on all aspects of the proposed exemption, particularly whether the regulation should exempt small servicers,[121] and, if so, whether the proposed scope and definition of a small servicer is appropriate. Specifically, should the test be the one proposed regarding origination, and is 1,000 or less the appropriate size threshold? The Bureau particularly requests data on implementation costs and the level of general activity by small servicers. The Bureau also seeks comment on whether it would be appropriate to exempt small servicers from other elements of the proposed servicing rules under TILA and RESPA.

Authority. The Bureau proposes to exercise its authority under TILA section 105(a) and (f), and DFA 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 proposed 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 borrower (including related financial arrangements, financial sophistication, and the importance to the borrower of the loan), or whether the loan is secured by the principal residence of the consumer. In addition, consistent with DFA section 1405(b), for the reasons discussed above, the Bureau believes that the proposed 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 proposes to exercise its authority under TILA section 105(c) to propose model and sample forms for § 1026.20(c) and (d).

Appendix H–4(D) to Part 1026

The Bureau proposes to exercise its authority under TILA section 105(c) to propose 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 add the appendix sections that would 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 whose format or content may not be changed by creditors.

Appendix H—Closed Model Forms and Clauses-7(i)

Proposed revisions to Appendix H–7(i) would include § 1026.20(d), as well as § 1026.20(c), as the types of models illustrated in this appendix. The proposed revision also would add text so that the provision stated that the Appendix H–4(D) includes 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.

VII. Section 1022(b)(2) Analysis

In developing the proposed rule, the Bureau has considered potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators, HUD, the FHFA, and the Federal Trade Commission, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.[122] 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 proposed rule on those entities' loan programs.

In this rulemaking, the Bureau proposes to amend Regulation Z, which implements TILA, and the official commentary to the regulation, as part of

[121] As discussed above, for the purposes of § 1026.41, the term ''servicer'' includes creditors, assignees and servicers.

[122] 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.

its implementation of the Dodd-Frank Act amendments to TILA's mortgage servicing rules. The proposed amendments to Regulation Z implement Dodd-Frank Act Sections 1418 (initial interest rate adjustment notice for ARMs), 1420 (periodic statement), and 1464 (prompt crediting of mortgage payments and response to requests for payoff amounts). The proposed rule would also revise 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 2012 RESPA Servicing Proposal that would implement section 1463 of the Dodd-Frank Act. The RESPA proposal addresses 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 discussed in part II above, mortgage servicing has been marked by pervasive and profound consumer protection problems. As a result of these problems, Congress included in the Dodd-Frank Act the provisions described above, which specifically address mortgage servicing. The new protections in the rules proposed under TILA and RESPA would 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 when dealing with servicers.

A. Provisions To Be Analyzed

The analysis below considers the benefits, costs, and impacts of the following major proposed provisions:

1. New initial interest rate adjustment notices for most closed-end adjustable-rate mortgages.

2. Changes in the format, content, and timing of the Regulation Z § 1026.20(c) disclosure for most closed-end adjustable-rate mortgages.

3. New periodic statement disclosure for most closed-end mortgages.

4. 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.

With respect to each major proposed provision, the analysis considers the benefits and costs to consumers and covered persons. The analysis also addresses certain alternative provisions that were considered by the Bureau in the development of the rule. The Bureau requests comments on the analysis of the potential benefits, costs and impacts of the proposal.

B. Baseline for Analysis

The amendments to TILA are self-effectuating, and the Dodd-Frank Act does not require the Bureau to adopt regulations to implement these amendments. Specifically, the proposed provisions 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 proposed provisions would arise largely or entirely from the statute, not from the proposed rule. The proposed provisions would provide substantial benefits compared to allowing these TILA amendments to take effect alone, even without the proposed additional content and other features of the disclosures, by clarifying parts of the statute that are ambiguous. Greater clarity on these issues should reduce the compliance burdens on covered persons by reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation. Moreover, the costs that these provisions would impose beyond those imposed by the statute itself are likely to be minimal.

DFA section 1022 permits the Bureau to consider the benefits, costs, and impacts of the proposed rule solely compared to the state of the world in which the statute takes effect without an implementing regulation. 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 proposed rule 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 proposed provisions regarding prompt crediting of payments and response to requests for payoff amounts also implement self-effectuating amendments to TILA. These amendments to TILA, however, largely codify existing Regulation Z provisions in § 1026.36(c). Thus, the pre-statute and post-statute baselines are substantially the same. The proposed provisions would clarify servicer[123] duties that are ambiguous under the statute and existing regulations.

Finally, the proposed provisions regarding the § 1026.20(c) disclosure for adjustable-rate mortgages impose obligations on servicers[124] that are authorized, but not required, under TILA sections 105(a) and 128(f) and DFA section 1405(b). With respect to proposed § 1026.20(c), the Bureau has chosen to consider the benefits, costs, and impacts of the proposed provisions against the baseline provided by the current provisions of § 1026.20(c).

The Bureau has discretion in future rulemakings to choose the most appropriate baseline for that particular rulemaking.

C. Coverage of the Proposal

Each proposed provision covers certain consumer credit transactions secured by a dwelling, as described further in each section below.

D. Potential Benefits and Costs to Consumers and Covered Persons

1. New Initial Interest Rate Adjustment Notice for Adjustable-Rate Mortgages

Section 1418 of the Dodd-Frank Act requires servicers to provide a new disclosure to consumers who have hybrid ARMs. The disclosure concerns the initial interest rate adjustment and must be given either (a) between 6 and 7 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 Bureau proposes to implement this provision by requiring that the disclosure be given 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 in TILA section 128A(b), proposes to broaden the scope of the proposed rule to include ARMs that are not hybrid. The proposed disclosure would include the content required by the statute, except for providing contact information for housing counseling agencies and programs (where the proposed rule provides an alternative disclosure), and certain additional information. Finally, as explained above, the Bureau conducted three rounds of consumer testing. The

[123] Reference in parts VII, VIII, and IX to ''servicers'' with regard to the proposed rule for requests for payoff amounts means creditors and servicers.

[124] Reference in parts VII, VIII, and IX to ''servicers'' with regard to the proposed rules for adjustable-rate mortgages means creditors, assignees, and servicers.

disclosures were revised after each round of testing to improve their effectiveness with consumers.

Benefits to consumers. The information in the proposed interest rate adjustment notice would provide a number of benefits to consumers with closed-end adjustable-rate mortgages at the initial interest rate adjustment. These benefits may be broadly categorized as facilitating (a) the choice of an alternative to making the new payment, including refinancing; (b) the correction of any errors in the adjusted payment; (c) the budgeting of household resources; and (d) 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 proposed rule would require 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 would give consumers a significant amount of time in which to pursue alternatives to repaying the loan 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 adjustable-rate mortgages may benefit from disclosure of any potential new interest rate and payment (or estimates of these amounts) well before payment 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.[125] 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 to address a problem with affordability. Thus, consumers facing the initial interest rate adjustment may benefit from the proposed 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 proposed disclosure would help the consumer respond to problems with making the new payment. In addition to information on the amount of the new payment, the proposed disclosure lists alternatives to making the new payment and gives a brief explanation of each alternative. It explains the circumstances under which any prepayment penalty may be imposed and the maximum amount of the penalty. 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 the State housing authority and information to access certain lists of homeownership counselors made available by Federal agencies. All of this information benefits a consumer who needs to find an alternative to making the new payment.

Certain items on the proposed disclosure may assist the consumer in detecting any errors in the computation of the new payment estimate. The proposed disclosure provides an explanation of how the new interest rate and payment are determined, including the index or formula used and any additional adjustment, such as a margin added to the index. It also states any limits on the increase in the interest rate or payment at each adjustment and over the life of the loan. This information may also facilitate consumers' ability to compare their current mortgage against competing products and provide other benefits, but at the very least it assists consumers in verifying the accuracy of the new estimated payment.

Finally, certain items on the proposed 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.[126] The disclosure also states that the new payment will not be allocated to pay loan principal. 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 proposed 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, the Bureau is proposing 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 proposed 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 proposed rule. The Bureau's testing showed that consumers 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 proposed formatting requirements are generally informed by decades of consumer testing. The Bureau believes that disclosures that satisfy the proposed formatting requirements likely provide greater benefits to consumers than both the

[125] *See* Christopher Mayer, Karen Pence, & Shane Sherlund, *The Rise in Mortgage Defaults,* 23 J. Econ. Persps. 27, 37 (2009).

[126] The current payment allocation would also appear on the proposed 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.

alternatives tested and disclosures that do not satisfy these requirements.[127]

Magnitude of the benefits to consumers. Research shows that consumers make important decisions about housing finance at the initial interest rate adjustment. Consumers often choose to prepay at 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.[128]

More controversial is the question of whether payment shock at the initial interest rate adjustment causes default. In general, data from the 2000s does not find a causal relationship between payment shock at the initial interest rate adjustment and default.[129] However, for consumers with certain hybrid ARMs originated in the 2000s, a substantial number experienced a payment shock of at least 5% 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.[130]

Whether or not the proposed initial interest rate adjustment notice would reduce default under certain conditions, the disclosure may generally facilitate the important decisions about housing finance that consumers make at the initial interest rate adjustment. Extrapolating from FHFA data, the Bureau estimates that approximately 285,000 adjustable-rate mortgages will have an initial interest rate adjustment in each of the next three years. Few adjustable-rate mortgages in recent years have had teaser rates; however, consumers with these mortgages may benefit from shifting to a fixed-rate mortgage. If the new initial interest rate adjustment notice prompts just 1% of consumers who receive the notice to refinance and these consumers save $50 per month, the annual savings to consumers would be over $1.7 million.

The Bureau does not have the data necessary to fully quantify the benefits of the proposed initial interest rate adjustment notice to consumers. Certain consumers with adjustable-rate mortgages 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, of addressing an error in computing 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, the possibility of an error in computing a potential new payment, 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. However, the Bureau believes that the proposed initial interest rate adjustment notice may provide substantial benefits to these consumers.

Costs to consumers. As explained below in the discussion of costs to covered persons, the cost per disclosure would be about $2.60. This estimate takes into account both one-time costs (amortized over five years) and annual production and distribution costs.[131] Under conservative assumptions, in the illustration above, the benefits to consumers who receive the disclosure would be $6.

Given the small cost per disclosure, 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 proposed 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 this case, lenders or investors may bear some of the cost. Servicers may also attempt to obtain higher compensation for servicing from originators. Originators 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 of the costs, but not necessarily all of them. The relative sensitivity of supply and demand in these inter-related markets would determine the proportion of the cost increase borne by different persons, including consumers.

The proposed rule limits how servicers may present the required information in the disclosure. Servicers would have to present the required information in a format substantially similar to the format of the proposed 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 there are any such costs in this case. The Bureau is unaware of any 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 proposed model forms. The Bureau worked closely with Macro to develop the model disclosures, conducted three rounds of consumer testing, and revised the disclosure after testing.

During the SBREFA process, the Bureau received comments from some SERs that disclosing an estimate of the new monthly payment may confuse certain consumers. 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

[127] 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,* 97 Fed. Reserve Bull. 1 (Aug. 2011).

[128] 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,* (Div. of Research & Statistics and Div. of Monetary Affairs, Fed. Reserve Bd., Washington, D.C. 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).

[129] Mayer, Pence, & Sherlund, *supra* note 125, at 37.

[130] Anthony Pennington-Cross & Giang Ho, *The Termination of Subprime Hybrid and Fixed-Rate Mortgages,* 38 Real Est. Econs. 399, 420 (2010).

[131] 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.

confusion on this point. The Bureau notes that section 1418 of the Dodd-Frank Act requires disclosure of a good faith estimate of the new monthly payment. In addition, servicers must provide an accurate statement of the new monthly payment in the notice if it is available; and if it is not available, then consumers will receive an accurate statement 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 proposed § 1026.20(c) disclosure.

Benefits to covered persons. The timing and the content of the proposed initial interest rate adjustment notice may provide certain benefits to servicers. Servicers benefit when distressed consumers contact them well in advance of a possible increase in interest rate and payment, since early communication gives servicers and consumers more time to work together constructively. The proposed disclosure provides consumers with substantial advance notice about their potential future payment and alternatives. Distressed consumers with such notice may be more likely to contact their servicer well in advance of an increase in payment, work constructively with their servicer, and, if necessary, explore alternatives.

Costs to covered persons. The proposed initial interest rate adjustment notice will result in certain compliance costs to covered persons. Servicers (or their vendors) may need to adapt their software and compliance systems to produce the new form. The new proposed form would also provide to borrowers 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 seeks information from servicers and vendors that provide services to servicers with respect to operations regarding the storage of loan-level information and the costs of providing the proposed new loan-level information to consumers.

Some of the information provided in the proposed initial interest rate adjustment notice is also provided in the proposed revisions to the § 1026.20(c) disclosure. The Bureau believes that harmonizing the two disclosures would mitigate the compliance burden for servicers and reduce the aggregate production costs to servicers.

Based on discussions with servicers and software vendors to date, the Bureau believes that servicers will for the most part use vendors for one-time software and IT upgrades and for ongoing production and distribution (*i.e.,* mailing) of the disclosure. Servicers will also incur one-time costs to learn about the proposed rule, but those costs will be minimal. Furthermore, the Bureau believes 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 servicers but pass along these costs to small servicers. All servicers would pay distribution costs.

Based on discussions with industry and extrapolating from FHFA data, the Bureau estimates the one-time cost of the proposed disclosure to be just over $3 million for 12,800 servicers. Amortizing this cost over five years and combining it with annual costs of $139,000 gives a total annual cost of $58 per servicer, or $2.60 per notice. The use of vendors substantially mitigates the costs of revising software and IT, as the efforts of a single vendor addresses the needs of a large number of servicers. The ongoing costs reflect the fact that there will be relatively few initial interest rate adjustments on adjustable-rate mortgages over the next few years.

For small servicers, the one-time cost of the proposed disclosure is $2.3 million. This also gives a total annual cost of about $58 per servicer. However, it is not possible to estimate the number of initial interest rate adjustment notices that small servicers will produce each year, since the Bureau is not aware of any reasonably obtainable data on the loan portfolios of small servicers. The Bureau believes that the number is small since the total number of mortgages serviced by small servicers is small and the notice is given only once to each ARM borrower. The Bureau seeks comment on these estimates and asks interested parties to provide data, research, and other information that may inform the further consideration of these costs.

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 has 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. Servicers may also receive reduced fee income from delinquent borrowers (or investors) if the notice helps borrowers avoid delinquency. The Bureau believes that the proposed initial interest rate adjustment notice is likely to have a small effect on the costs to servicers through the channels just described, but the Bureau seeks data with which it may further consider these costs.

Finally, as discussed in part VI, the Bureau considered but decided not to except small servicers from the proposed initial interest rate adjustment notice. The Bureau is not proposing an exception for small servicers because an exception would deprive certain consumers of the seven to eight months advance notice before payment at a new level is due that is provided by the disclosure and the information about alternatives and how to contact various sources of assistance. Conversely, the Bureau believes that the benefit to small entities from an exception 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 proposed notice is given just once to each consumer with an adjustable-rate mortgage. As discussed above, the Bureau believes that five annual payments of $58 by each small servicer will fully amortize the one-time cost of the proposed interest rate adjustment notice.

2. Changes in the Format, Content, and Timing of the Regulation Z § 1026.20(c) Disclosure for Adjustable-Rate Mortgages

Under current § 1026.20(c), creditors must mail or deliver to consumers whose payments will change as a result of an interest rate adjustment a notice of interest rate adjustment for variable-rate transactions subject to § 1026.19(b) 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 Bureau is proposing to eliminate the annual disclosure. Thus, the discussion below relates exclusively to the payment change disclosure required under § 1026.20(c).[132] The

[132] As discussed in part VI, the Bureau believes that annual notice is duplicative given the proposed

Continued

Bureau is proposing to change the minimum time for providing advance notice to consumers from 25 days to 60 days before payment at a new level is due, with an accommodation for existing ARMs with look-back periods of less than 45 days.[133] The maximum time for advance notice would remain the same: 120 days prior to the due date of the first payment at a new level. The coverage, content, and format of the revised § 1026.20(c) disclosure closely tracks the coverage, content, and format of the proposed initial interest rate adjustment disclosure.

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 payment at a new level is due more closely reflects the time needed for consumers to refinance a loan.

Regarding the proposed changes in the content of the § 1026.20(c) disclosure, the Bureau believes that it is helpful to consumers to receive similar notices for similar purposes. Thus, the Bureau believes there is some consumer benefit in harmonizing the § 1026.20(c) disclosure with the proposed initial interest rate adjustment disclosure. However, the two disclosures are triggered by different (although related) events and the benefit of the information to consumers is somewhat different.

Both the current and proposed § 1026.20(c) disclosure provide the current and upcoming interest rate and payment (not an estimate) and the date the first new payment is due. This information facilitates household budgeting and may alert the consumer to a potential problem with affordability.

Proposed § 1026.20(c) requires the disclosure to include an explanation of how the new interest rate and payment are determined, including the index or formula used, any margin added, and any previously foregone interest increase applied. The proposed disclosure also states any limits on the interest rate or payment increase at each adjustment and over the life of the loan. This information assists the consumer in detecting any errors in the computation of the new payment. In contrast, the current § 1026.20(c) disclosure provides the index value without any explanation and does not provide information about limits on interest rate or payment increases.

Information provided in the proposed § 1026.20(c) disclosure facilitates the evaluation of alternatives to paying the new amount due. For example, the proposed disclosure provides an explanation of the circumstances under which any prepayment penalty may be imposed and the maximum amount of the penalty, which highlights the direct cost of refinancing into a different loan. Also, disclosure of key features of the loan like the new allocation of payments for interest-only and negatively-amortizing ARMs, the rate limit per year and over the life of the loan, and warnings about interest-only payments and increases in the loan balance may also facilitate the comparison of the current loan with alternatives. Disclosures required by current § 1026.20(c) do not provide any of this information.

The proposed § 1026.20(c) disclosure provides the same information as the proposed initial interest rate adjustment notice regarding features of the mortgage that affect the accumulation of equity. The disclosure of the loan balance itself is useful for this purpose. For interest-only or negatively-amortizing loans, the disclosure states the amount of the new payment allocated to pay principal, interest, and taxes and insurance in escrow, as applicable, and that the new payment will not be allocated to pay loan principal. 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 rate. The proposed 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 noted above, 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. However, some of the information on the proposed § 1026.20(c) disclosure that also appears on the proposed periodic statement disclosure is provided on the § 1026.20(c) disclosure in order to facilitate comparisons between the current and new payment before the new payment is due. Since the proposed § 1026.20(c) disclosure is provided only if the payment changes, the benefit to consumers from receiving the same information on both disclosures is likely greater than the benefit of receiving this information only on the periodic statement disclosure.[134]

Finally, the Bureau is proposing formatting requirements for the § 1026.20(c) disclosure similar to those for the initial interest rate adjustment notice. As discussed above, these requirements benefit consumers by facilitating consumer understanding of the information in the disclosures. The proposed 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 forms provided with the proposed rule. The Bureau's testing of the same information proposed for inclusion in § 1026.20(c) notice in the proposed § 1026.20(d) notice showed that consumers readily understood the information in the notice when the terms and calculations were presented in the logical order contained in the model forms. As discussed above, while there is no formula for producing the ideal disclosure, the Bureau believes that disclosures that satisfy the proposed formatting requirements likely provide greater benefits to consumers than both the alternatives tested and disclosures that do not satisfy these requirements.

periodic statement, which would provide much of the same information. Thus, eliminating the annual notice reduces costs for servicers with little or no loss in benefits to consumers.

[133] As explained above, the Bureau is aware that for certain ARMs, there is currently less than 60 days between the date on which the index value is selected that serves as the basis for the new payment and the date on which payment at a new level is due. It may therefore be difficult for servicers to provide a notice of interest rate adjustment within 60 days of the date on which payment at a new level is due. The Bureau may provide an accommodation for some of these ARMs by requiring a different minimum time for providing this advance notice. The Bureau solicits comments on the operational changes that would be required to provide § 1026.20(c) notices at least 60 days before payment at a new level is due.

[134] Of course, a consumer who receives the proposed § 1026.20(c) disclosure may derive little additional benefit from shortly thereafter receiving the same information on the proposed periodic statement disclosure. There would, however, likely be little cost saving for servicers in not having to provide the information on the proposed periodic statement disclosure that also appears on the § 1026.20(c) disclosure for just one or two months.

Extrapolating from FHFA data, the Bureau estimates that approximately 650,000 adjustable-rate mortgages will adjust in each of the next three years. To illustrate the possible benefits of the proposed § 1026.20(c) disclosure, suppose that the proposed change in the timing of the disclosure from 25 days to 60 days before payment at a new level is due prompts certain consumers to refinance one month sooner. If the change in timing provides just 5% of consumers with ARMs a one-time benefit of $50, the annual savings to consumers would be over $1.6 million.

Costs to consumers. As explained further in the discussion of costs to covered persons, the proposed provisions would produce a minimal increase in costs, about 80 cents per disclosure. This estimate takes into account both one-time additional costs (amortized over five years) and additional annual production and distribution costs. Under conservative assumptions, in the illustration above, the benefit to consumers would be $2.50 per disclosure.

Given the small additional cost per disclosure, the Bureau believes that consumers would not see any 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 proposed § 1026.20(c) disclosure, however, the costs to be shifted are very small. Thus, the proposed disclosure is not likely to impose any cost increase on consumers.

As with the proposed initial interest rate adjustment notice, the proposed rule limits how servicers may present the required information in the proposed § 1026.20(c) disclosure. Servicers would have to present the required information in a format substantially similar to the format of the proposed model form. 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 there are any such costs in this case. The Bureau is unaware of any efforts by servicers to develop a payment adjustment notice that meets the requirements of proposed § 1026.20(c) and provides the benefits to consumers of the proposed model forms.

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. These ARMs contractually will not be able to comply with the proposal to require sending the § 1026.20(c) disclosure 60 to 120 days before payment at a new level is due. The Bureau is proposing grandfathering these existing ARMs. Going forward, however, ARMs must be structured to permit compliance with the proposed 60- to 120-day time frame.

Initial outreach suggests that the absence of adjustable-rate mortgages with short look-back periods will not reduce the mortgage options available to consumers. It is possible, however, that mortgages with short look-back periods may have certain cost advantages to servicers or investors in certain interest rate environments (*e.g.,* when rates are rising quickly) and that competition may translate some of these advantages into benefits to consumers. In this case, the proposed 60- to 120-day time frame would impose a cost on consumers. The Bureau seeks comments on both the grandfathering provision and general requirement for compliance with the proposed time frame going forward.

Benefits to covered persons. The timing and content of the proposed § 1026.20(c) disclosure may provide certain benefits to servicers. Servicers benefit when distressed consumers contact them in advance of a possible increase in interest rate and payment, since early communication gives servicers and consumers more time to work together constructively. Changing the minimum time for providing advance notice to consumers from 25 days to 60 days before payment at a new level is due provides essential household budgeting information to consumers sooner. Distressed consumers may then contact their servicer sooner, and the servicer and the consumer would then have additional time to work together and if necessary to explore alternatives.

Costs to covered persons. The proposed modifications of the § 1026.20(c) disclosure will result in certain compliance costs to covered persons. Servicers (or their vendors) may need to adapt their software and compliance systems to produce the revised disclosure. The revised disclosure would also provide to borrowers 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 solicits information about servicer and vendor operations regarding the storage of loan-level information and the costs of providing the proposed new loan-level information to consumers.

As discussed above, some of the information provided in the proposed revisions to the § 1026.20(c) disclosure is also provided in the proposed initial interest rate adjustment disclosure. The Bureau believes that harmonizing the two disclosures would mitigate the compliance burden for servicers and reduce the aggregate production costs to servicers.

Based on discussions with servicers and software vendors to date, the Bureau believes that, in general, servicers of all sizes will incur minimal one-time costs to learn about the proposed provision. They will for the most part use vendors for one-time software and IT upgrades and for producing and distributing (*i.e.,* mailing) the disclosure. Under existing vendor contracts, large servicers will not be charged for the upgrades and production but may be charged for distribution. Smaller servicers may be charged for all these costs, but they service relatively few loans so in aggregate these costs are small.

Based on discussions with industry and extrapolating from FHFA data, the Bureau estimates one-time costs of just under $2 million for the 12,800 servicers overall. Amortizing this cost over five years and combining it with annual costs of $129,000 gives a total annual cost of $41 per servicer, or 80 cents per disclosure. For small servicers, the one-time cost is $1.65 million. This also gives a total additional annual cost of about bout $41 per servicer. The Bureau is not aware of any reasonably obtainable data on the loan portfolios of small servicers, so it is not possible to estimate the number of disclosure that small servicers would produce each year. The Bureau seeks comment on these estimates and asks interested parties to provide data, research, and other information that may inform the further consideration of these costs.

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. The discussion of this point for the initial interest rate adjustment notice applies equally to the revised § 1026.20(c) disclosure.

Finally, as discussed above, the Bureau recognizes that there may be costs to covered persons from extending the minimum advance notice period to 60 days. Mortgages with short look-back periods may have certain cost advantages in certain interest rate environments (*e.g.,* when rates are rising quickly). The Bureau seeks comments on both the grandfathering provision and general requirement for compliance with the proposed time frame going forward.

3. 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 [135] to include additional content to be included in the periodic statement. The statute provides an exception 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.

The proposed rule would require 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 proposed rule provides a coupon book exemption for fixed-rate loans when the consumer is given a coupon book with certain of the information required by the periodic statement. The proposed rule also has exemptions for small servicers, reverse mortgages, and timeshares.

The proposed periodic statement disclosure would be provided to all consumers with a closed-end residential mortgage, unless one of the exemptions applies.

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 may comply with the proposed rule. Servicers do have an incentive to provide consumers with basic billing information. This includes the payment due date, amount of any late payment fee, amount due, and current interest rate. This information also appears on the proposed periodic statement. While this basic information provides benefits to consumers, those benefits are already provided for by current disclosures. The proposed periodic statement will also contain information that could appear on a coupon book that does provide additional benefits to consumers, for example, the housing counselor information.

There is other information that 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. This information is accurate because it follows a set formula. 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 borrower makes an extra payment, provides a partial payment, or misses a payment entirely.

All of this aforementioned information appears on the proposed periodic statement. However, on the proposed 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 proposed 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 or on a billing statement that provides the same information as 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 to them if their servicer is using a coupon book) providing specific information about the delinquency of their loan. This is one way the servicer may catch the attention of the consumer. The messages section provides an additional route. The only message the proposed rule requires the servicer to provide concerns partial payments; however, the proposal also seeks comment on other messages that should be required. Consumers who make partial payments may benefit from knowing what they must do to have the funds in a suspense or unapplied funds account applied to the outstanding balance.

All of this information is useful to distressed or delinquent consumers who may need to assert an error and evaluate alternatives to paying the current mortgage. A consumer with past due amounts on a mortgage, car, and credit card would need information about the past due amounts and how the fees and charges accumulate in order to determine the most advantageous way of reducing total debt. The information generally benefits 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.

The Bureau is proposing grouping requirements in the format of the periodic statement. The grouping requirement presents the information in a logical format and may facilitate consumer understanding of the information in the different components of the disclosure. The General Design Principles discussed in the Macro Final Report, discussed in the section-by-section analysis, include grouping together related concepts and figures because consumers are likely to find it easier to absorb and make sense of financial 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 exceptions to the proposed periodic statement requirement. The first, provided by statute, is an exception for consumers with fixed-rate mortgages and 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 to make additional payments, partial payments or miss a payment and may obtain substantially reduced benefits because of the exception.

[135] Reference in parts VII, VIII, and IX to ''servicers'' with regard to the proposed rule for the periodic statement, means creditors, assignees, and servicers.

The Bureau is also proposing an exception for small servicers. A small servicer would be defined as a servicer (i) who services 1,000 or fewer mortgage loans and (ii) that 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. Such small servicers will not have to provide the proposed periodic statement.

As discussed in the section-by-section analysis on § 1026.41(e)(4), the Bureau believes that servicers that meet both conditions generally provide consumers with ready access to the information on the proposed periodic statement, but possibly through other channels. Servicers that meet the first condition face either a reduction in the value of an asset on its portfolio or the loss of an investment in the relationship with the consumer which was established by originating 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 can and generally do provide their customers with ready access to comprehensive information about their payments, amounts due and other account information through a variety of channels. Thus, the Bureau believes that the proposed exemption would produce at most a minimal reduction in benefits to the customers of small servicers.

Using regulatory filings, the Bureau roughly estimates that approximately 49 million consumers would receive the proposed periodic statement disclosure (even taking into account the small servicer exception). To illustrate the possible benefits of the disclosure, suppose 10% save 15 minutes each year because the proposed disclosure provides them with information about their loan or payments that their billing statements or coupon books may not provide (e.g., a past payment breakdown) and they would spend 15 minutes obtaining this information, say by contacting their servicer by phone, mail or some other means. This is a savings of 1.225 million hours per year, or almost $21 million at the median wage of $17 per hour.

Benefits to covered persons. Providing the proposed content 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 also benefit from reduced costs when they manage fewer partial payments and delinquencies and can resolve delinquencies sooner.

Costs to covered persons. The proposed periodic statement disclosure will result in certain compliance costs to servicers. Servicers (or their vendors) may need to adapt their software and compliance systems to produce the new disclosure. The new proposed disclosure would also provide to borrowers 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 solicits information about servicer and vendor operations regarding the storage of loan-level information and the costs of providing the proposed new loan-level information to consumers.

The Bureau believes that, in general, servicers of all sizes will incur minimal one-time costs to learn about the proposed provision. Based on information provided by servicers and by software vendors, the Bureau believe that servicers will use vendors for one-time software and IT upgrades and for producing and distributing (*i.e.,* mailing) the disclosure. Under existing vendor contracts, large servicers will not be charged for the upgrades and production but may be charged for distribution. Smaller servicers may be charged for all these costs, but they service relatively few loans so in aggregate these costs are small.

The Bureau is not aware of any reasonably obtainable data that would allow an accurate calculation of the additional annual cost from the proposed disclosure per servicer. This calculation would depend critically on the number of servicers not covered by the exception and the number of adjustable-rate mortgages with coupon books that these servicers currently service. A plausible illustration is that 2,013 servicers not covered by the exception begin providing 1 million consumers (i.e., those with coupon books and adjustable rate mortgages) twelve new disclosures per year at fifty cents per disclosure, for an average annual cost of $2,981 per servicer. This figure does not include the additional annual cost to these servicers of providing the information on the proposed periodic statement disclosure that is not currently provided on their existing billing statements. The Bureau welcomes comment on this estimate and asks interested parties to provide data, research, and other information that may inform the further consideration of the costs of the proposed periodic statement disclosure.

The small servicer exemption in proposed § 1026.41(e)(4) would benefit small servicers by providing an alternative, and potentially less expensive, means of compliance with the periodic statement requirement. The SBREFA panel stated that a periodic statement requirement would impose significant burdens on small servicers. The panel explained that while much of the information in the proposed 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 is difficult for small servicers.

The SERs 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 believe 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 are unable to gain cost efficiencies and cannot 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).

For small servicers, the cost savings from the proposed exception equals the costs not incurred to begin providing periodic statements or to improve existing disclosures to consumers who would be required to receive the periodic statement under the proposal. The only consumers who need not receive the proposed disclosure are those with fixed-rate mortgages and coupon books. The Bureau believes that this is a relatively small fraction of the loans held on portfolio or sold with servicing retained by servicers with less than 1,000 loans. Thus, small servicers would have to increase the content of existing disclosures or begin providing the periodic statement disclosure to almost all of their consumers. However, many of these consumers receive billing statements, so there would not be additional distribution costs from the proposed disclosure, and the exception does not mitigate costs that would not be incurred.

There is no reasonably available data with which the Bureau can accurately estimate the number of these consumers or the mix of new disclosures and improved disclosures. However, based on regulatory data, the Bureau believes that approximately 10,800 small servicers service 2.3 million mortgages. Based on discussions with industry, the Bureau believes that each periodic statement would cost a range of 20–50 cents to provide. Thus, a reasonable estimate of the cost savings for small servicers from the proposed exception is $6 million–$14 million. The Bureau seeks data and other information with which it may further consider the question of the cost savings from the proposed small servicer exception.

4. Prompt Crediting of Payments and Response to Requests for Payoff Amounts

DFA section 1464(a) codifies existing Regulation Z § 1026.36(c)(1)(i) on prompt crediting. The Bureau is proposing an additional requirement for the handling of partial payments (*i.e.,* payments that are not full contractual payments). Under the proposal, if servicers hold partial payments in a suspense account, once the amount in the account equals a full contractual payment, the servicer must credit the payment to the most delinquent outstanding payment. The Bureau proposes to define a full contractual payment as a payment covering principal, interest and escrow (if applicable). A proposed alternative to the definition would include late fees.

DFA 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.

Benefits and costs to consumers. The proposed provision on prompt crediting generally ensures that consumers benefit from every effort that they make to pay their mortgage debt. The proposed provision helps consumers manage and reduce default by clarifying the rules servicers must follow when processing partial payments.

As the statute largely codifies an existing regulation, the benefits and costs to consumers from a pre-statute baseline are small. However, the existing regulation does not specifically address the handling of partial payments. As discussed above, the proposed regulation would leave servicers significant flexibility in the handling of partial payments but would also ensure greater consistency in the handling of suspense accounts. The Bureau believes this proposed approach would clarify servicers' obligations in processing both full contractual payment and partial payments, as well as ensure all payments are properly applied. The proposed disclosures would help consumers understand the processing of their payments. Additionally, requiring application to the oldest outstanding payment when a full payment accumulates will provide protection to consumers, as well as reduce the outstanding principal balance on certain consumer loans. The Bureau requests comment on the benefits and costs to consumers of including late fees in the definition of a full contractual payment. Not including late fees in the definition of a full contractual payment would require servicers to credit a payment that covered principal, interest and escrow even if late fees were outstanding. Consumers who made such a payment would benefit from having that payment credited. While some servicers currently follow this practice, other servicers who hold such payments in suspense accounts until the fees are paid would be required to change their practices.

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 small. The proposed provision on prompt crediting may cause certain covered persons with different crediting practices to forfeit some fee income or float income, but the Bureau has no data with which to determine whether this is the case. The Bureau requests comment on the benefits and costs to covered persons of including late fees in the definition of a full contractual payment.

E. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in § 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, the Bureau believes that larger depositories and credit unions will incur only minimal costs from this rulemaking.

The initial interest rate adjustment notice is a new disclosure, but the Bureau believes that the larger depository institutions and credit unions (of those with $10 billion or less in total assets) 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, and based on discussions with industry the Bureau understands that 70–80% 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 the larger depositories and credit unions (of those with $10 billion or less in total assets) from the proposed changes to the two other proposed disclosures will also be minimal. The Bureau expects that the information collection and data processing costs of the periodic statement disclosure and the proposed changes in the § 1026.20(c) disclosure will largely be absorbed by third-party vendors. The Bureau believes that the mailing costs of the periodic statement disclosure are likely to be the same as those for billing statements that it would replace. The proposed provision on periodic statements would require consumers who use a coupon book for payments on an adjustable-rate mortgage to receive a periodic statement, but the number of such consumers is small. The mailing costs of the proposed § 1026.20(c) disclosure would be the same as the mailing costs of the current disclosure.

The Bureau believes that smaller depositories and credit unions may incur some additional costs from this rulemaking. Smaller depositories also use third-party vendors, but the Bureau believes that contracts with these vendors may allow them to pass along the information collection and data processing costs to the servicers. Even for smaller depository servicers, however, the additional costs from the two proposed disclosures for adjustable-rate mortgage are likely to be small. There will be few initial interest rate adjustments in the near term, and servicers currently are required to send the § 1026.20(c) disclosure. Thus, most new costs will come from the one-time and ongoing costs of providing the periodic statement disclosure. As discussed above, the Bureau is proposing to exempt certain small servicers from the periodic statement disclosure requirement if they service fewer than 1,000 loans and either hold the loans in portfolio or originated them. Using Call Report data, the Bureau concludes that almost all servicers with under $175 million in assets would qualify for this exemption, as would many servicers with greater assets. However, the Bureau will examine this question further and requests data and additional information on the small servicers who would qualify for the proposed exemption.

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 proposed provisions for prompt crediting of payments and response to requests for payoff amounts.

2. Impact of the Proposed Provisions on Consumers in Rural Areas

Consumers in rural areas may experience benefits from the proposed 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 proposed rule is designed to provide, including the benefits to consumers with adjustable-rate mortgages. On the other hand, it is also possible that a lack of alternatives for consumers in some rural areas regarding lenders who also service mortgages may cause the proposed rule to provide rural consumers with greater benefits than the rule may provide to other consumers.

The Bureau will further consider the impact of the proposed rule on consumers in rural areas. The Bureau therefore asks interested parties to provide data, research results and other factual information on the impact of the proposed rule on consumers in rural areas.

F. Additional Analysis Being Considered and Request for Information

The Bureau will further consider the benefits, costs, and impacts of the proposed provisions and additional proposed modifications before finalizing the proposal. As noted below, there are a number of areas where additional information would allow the Bureau to better estimate the benefits and costs of this proposal.

In addition, the Bureau asks interested parties to provide general information, data, and research results on:

- How consumers might respond to the information proposed for inclusion in the new initial interest rate adjustment disclosure, the additional information proposed for inclusion in the revised Regulation Z § 1026.20(c) disclosure, and the information proposed for inclusion in the new periodic statement disclosures;
- The coverage and format of these proposed disclosures;
- The benefits to consumers from the disclosures listed above; and
- The potential impact on servicers and on the functioning of the servicing market from the disclosures listed above and the prompt crediting requirement.

The Bureau also requests specific information on the costs to covered persons of complying with the proposal, such as revising compliance software and systems.

To supplement the information discussed in this preamble and any information that the Bureau may receive from commenters, the Bureau is currently working to gather additional data that may be relevant to this and other mortgage-related rulemakings. These data may include 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. The Bureau expects that each of these datasets will be confidential. This section now describes each dataset in turn.

First, as the sole system supporting licensure/registration of mortgage companies for 53 regulatory agencies for states and territories and mortgage loan originators under the SAFE Act, NMLS contains basic identifying information for non-depository mortgage loan origination companies. Firms that hold a State license or State registration through NMLS are required to complete either a standard or expanded Mortgage Call Report (MCR). The Standard MCR includes data on each firm's residential mortgage loan activity including applications, closed loans, individual mortgage loan originator (MLO) activity, line of credit, and other data repurchase information by State. It also includes financial information at the company level. The expanded report collects more detailed information in each of these areas for those firms that sell to Fannie Mae or Freddie Mac.[136] To date, the Bureau has received basic data on the firms in the NMLS and de-identified data and tabulations of data from the MCR. These data were used, along with HMDA data, to help estimate the number and characteristics of non-depository institutions active in various mortgage activities. In the near future, the Bureau may receive additional data on loan activity and financial information from the NMLS including loan activity and financial information for identified lenders. The Bureau anticipates that these data will provide additional information about the number, size, type, and level of activity for non-depository lenders engaging in various mortgage origination and servicing activities. As such, it supplements the Bureau's current data for non-depository institutions reported in HMDA and the data already received from NMLS. For example, these new data will include information about the number and size of closed-end first and second loans originated, fees earned from origination activity, levels of servicing, revenue estimates for each firm, and other information. The Bureau may compile some simple counts and tabulations and conduct some basic statistical modeling to better model the levels of various activities at various types of firms. In particular, the information from the NMLS and the MCR may help the Bureau refine its estimates of benefits, costs, and impacts for each of the revisions to the RESPA Good Faith Estimate and settlement statement forms, changes to the HOEPA thresholds, changes to requirements for appraisals, updates to loan originator compensation rules, proposed new servicing requirements, and the new ability to repay standards.

Second, the Bureau is working to obtain a random selection of loan-level data from several lenders. The Bureau intends to request loan file data from lenders of various sizes and geographic locations to construct a representative dataset. In particular, the Bureau will request a random sample of RESPA, GFE, and RESPA settlement statement forms from loan files for closed-end loans. These forms include data on some or all loan characteristics including settlement charges, origination charges, appraisal fees, flood certifications, mortgage insurance premiums, homeowner's insurance, title charges, balloon payments, prepayment penalties, origination charges, and credit charges or points. Through conversations with industry, the Bureau believes that such loan files exist in standard electronic formats allowing for the creation of a representative sample for analysis. The Bureau may use these data to further measure the impacts of certain proposed changes. Calculations of various categories of settlement and origination charges may help the Bureau calculate the various impacts of

[136] More information about the Mortgage Call Report can be found at *http://mortgage.nationwidelicensingsystem.org/slr/common/mcr/Pages/default.aspx*.

proposed changes to the definition of finance charge and other aspects of the proposal, including proposed changes in the number and characteristics of loans that exceed the HOEPA thresholds, loans that would meet the high rate or high risk definitions mandating additional consumer protections, and loans that meet the points and fees thresholds contained in the ability to repay provisions of the Dodd-Frank Act.

Third, the Bureau may also use data from the pilot phases of the National Mortgage Database (NMDB) to refine its proposals and/or its assessments of the benefits, costs, and impacts of these proposals. The NMDB is a comprehensive database, currently under development, of loan-level information on first lien single-family mortgages. It is designed to be a nationally representative sample (1%) and contains data derived from credit reporting agency data and other administrative sources along with data from surveys of mortgage borrowers. The first two pilot phases, conducted over the past two years, vetted the data development process, successfully pretested the survey component and produced a prototype dataset. The initial pilot phases validated that sampled credit repository data are both accurate and comprehensive and that the survey component yields a representative sample and a sufficient response rate. A third pilot is currently being conducted with the survey being mailed to holders of 5,000 newly originated mortgages sampled from the prototype NMDB. Based on the 2011 pilot, a response rate of 50% or higher is expected. These survey data will be combined with the credit repository information of non-respondents, and then de-identified. Credit repository data will be used to minimize non-response bias, and attempts will be made to impute missing values. The data from the third pilot will not be made public. However, to the extent possible, the data may be analyzed to assist the Bureau in its regulatory activities and these analyses will be made publicly available.

The survey data from the pilots may be used by the Bureau to analyze consumers' shopping behavior regarding mortgages. For instance, the Bureau may calculate the number of consumers who use brokers, the number of lenders contacted by borrowers, how often and with what patterns potential borrowers switch lenders, and other behaviors. Questions may also assess borrowers' understanding of their loan terms and the various charges involved with origination. Tabulations of the survey data for various populations and simple regression techniques may be used to help the Bureau with its analysis.

The Bureau requests commenters to submit data and to provide suggestions for additional data to assess the issues discussed above and other potential benefits, costs, and impacts of the proposed rule. The Bureau also requests comment on the use of the data described above.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by SBREFA, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations. 5 U.S.C. 601 *et seq.* The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required. 5 U.S.C. 609.

The Bureau has not certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the Bureau convened and chaired a SBREFA Panel to consider the impact of the proposed rule on small entities that would be subject to that rule and to obtain feedback from representatives of such small entities. The SBREFA Panel for this rulemaking is discussed below in part VIII.A.

The Bureau is publishing an IRFA. Among other things, the IRFA estimates the number of small entities that will be subject to the proposed rule and describes the impact of that rule on those entities. The IRFA for this rulemaking is set forth below in part VIII.B.

A. Small Business Review Panel

Under section 609(b) of the RFA, as amended by SBREFA and the Dodd-Frank Act, the Bureau seeks, prior to conducting the IRFA, information from representatives of small entities that may potentially be affected by its proposed rules to assess the potential impacts of that rule on such small entities. 5 U.S.C. 609(b). Section 609(b) sets forth a series of procedural steps with regard to obtaining this information. The Bureau first notifies the Chief Counsel for Advocacy (Chief Counsel) of the SBA and provides the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the types of small entities that might be affected. 5 U.S.C. 609(b)(1). Not later than 15 days after receipt of the formal notification and other information described in section 609(b)(1) of the RFA, the Chief Counsel then identifies the SERs, the individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule. 5 U.S.C. 609(b)(2). The Bureau convenes a SBREFA Panel for such rule consisting wholly of full-time Federal employees of the office within the Bureau responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs (OIRA) within the OMB, and the Chief Counsel. 5 U.S.C. 609(b)(3). The SBREFA Panel reviews any material the Bureau has prepared in connection with the SBREFA process and collects the advice and recommendations of each individual small entity representative identified by the Bureau after consultation with the Chief Counsel on issues related to sections 603(b)(3) through (b)(5) and 603(c) of the RFA.[137] 5 U.S.C. 609(b)(4). Not later than 60 days after the date the Bureau convenes the SBREFA Panel, the panel reports on the comments of the SERs and its findings as to the issues on which the SBREFA Panel consulted with the SERs, and the report is made public as part of the rulemaking record. 5 U.S.C. 609(b)(5). Where appropriate, the Bureau modifies the rule or the IRFA in light of the foregoing process. 5 U.S.C. 609(b)(6).

On April 9, 2012, the Bureau provided the Chief Counsel with the formal notification and other information required under section 609(b)(1) of the RFA. To obtain feedback

[137] As described in the IRFA in part VIII.B, below, sections 603(b)(3) through (b)(5) and 603(c) of the RFA, respectively, require a description of and, where feasible, provision of an estimate of the number of small entities to which the proposed rule will apply; a description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. 603(b)(3), 603(b)(4), 603(b)(5), 603(c).

from small entity representatives to inform the SBREFA Panel pursuant to sections 609(b)(2) and 609(b)(4) of the RFA, the Bureau, in consultation with the Chief Counsel, identified five categories of small entities that may be subject to the proposed rule for purposes of the IRFA: Commercial banks/savings institutions, credit unions, non-depositories engaged primarily in lending funds with real estate as collateral (included in NAICS 522292), non-depositories primarily engaged in loan servicing (included in NAICS 522390), and certain non-profit organizations. Section 3 of the IRFA, in part VIII.B.3, below, describes in greater detail the Bureau's analysis of the number and types of entities that may be affected by the proposed rule. Having identified the categories of small entities that may be subject to the proposed rule for purposes of an IRFA, the Bureau then, in consultation with the Chief Counsel, selected 16 small entity representatives to participate in the SBREFA process. As described in chapter 7 of the SBREFA Final Report, described below, the SERs selected by the Bureau in consultation with the Chief Counsel 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).

On April 10, 2012, the Bureau convened the SBREFA Panel pursuant to section 609(b)(3) of the RFA. Afterwards, to collect the advice and recommendations of the SERs under section 609(b)(4) of the RFA, the SBREFA Panel held an outreach meeting/teleconference with the small entity representatives on April 24, 2012. To help the small entity representatives prepare for the outreach meeting beforehand, the SBREFA Panel circulated briefing materials prepared in connection with section 609(b)(4) of the RFA that summarized the proposals under consideration at that time, posed discussion issues, and provided information about the SBREFA process generally.[138] All 16 small entity representatives participated in the outreach meeting either in person or by telephone. The SBREFA Panel also provided the small entity representatives with an opportunity to submit written feedback until May 1, 2012. In response, the SBREFA Panel received written feedback from five of the representatives.[139]

On June 11, 2012, the SBREFA Panel submitted to the Director of the Bureau, Richard Cordray, a written SBREFA Final Report that 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 small entity representatives who were selected to advise the SBREFA Panel; a summary of the SBREFA Panel's outreach to obtain the advice and recommendations of those small entity representatives; a discussion of the comments and recommendations of the small entity representatives; and a discussion of the SBREFA Panel findings, focusing on the statutory elements required under section 603 of the RFA. 5 U.S.C. 609(b)(5).[140]

In preparing this proposed rule and the IRFA, the Bureau has carefully considered the feedback from the small entity representatives participating in the SBREFA process and the findings and recommendations in the SBREFA Final Report. The section-by-section analysis of the proposed rule in part VI, above, and the IRFA discuss this feedback and the specific findings and recommendations of the SBREFA Panel, as applicable. The SBREFA process provided the SBREFA Panel and the Bureau with an opportunity to identify and explore opportunities to minimize the burden of the rule on small entities while achieving the rule's purposes. It is important to note, however, that the SBREFA Panel prepared the SBREFA Final Report at a preliminary stage of the proposal's development and that the SBREFA Final Report—in particular, the SBREFA Panel's findings and recommendations—should be considered in that light. Also, any options identified in the SBREFA Final 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 TILA, the Dodd-Frank Act, and their statutory purposes. The proposed rule and the IRFA reflect further consideration, analysis, and data collection by the Bureau.

B. Initial Regulatory Flexibility Analysis

Under RFA section 603(a), an IRFA ''shall describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). Section 603(b) of the RFA sets forth the required elements of the IRFA. Section 603(b)(1) requires the IRFA to contain a description of the reasons why action by the agency is being considered. 5 U.S.C. 603(b)(1). Section 603(b)(2) requires a succinct statement of the objectives of, and the legal basis for, the proposed rule. 5 U.S.C. 603(b)(2). The IRFA further must contain a description of and, where feasible, provision of an estimate of the number of small entities to which the proposed rule will apply. 5 U.S.C. 603(b)(3). Section 603(b)(4) requires a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record. 5 U.S.C. 603(b)(4). In addition, the Bureau must identify, to the extent practicable, all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule. 5 U.S.C. 603(b)(5). The Bureau, further, must describe any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. 603(b)(6). Finally, as amended by the Dodd-Frank Act, RFA section 603(d) requires that the IRFA include a description of any projected increase in the cost of credit for small entities, a description of 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 (if such an increase in the cost of credit is projected), and a description of the advice and recommendations of representatives of small entities relating to the cost of credit issues. 5 U.S.C. 603(d)(1); DFA section 1100G(d)(1).

1. Description of the Reasons Why Agency Action Is Being Considered

As discussed in the Overview, part I above, mortgage servicing has been marked by pervasive and profound consumer protection problems. As a result of these problems, Congress included a number of provisions in the Dodd-Frank Act specifically to address mortgage servicing. These provisions are DFA sections 1418 (initial rate adjustment notice for adjustable-rate

[138] The Bureau posted these materials on its website and invited the public to email remarks on the materials. *See http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-outlines-borrower-friendly-approach-to-mortgage-servicing/* (the materials are accessible via the links within this document).

[139] This written feedback is attached as appendix A to the SBREFA Final Report, discussed below.

[140] SBREFA Final Report, *supra* note 22.

mortgages (ARMs)), 1420 (periodic statement), 1463 (amending RESPA), and 1464 (prompt crediting of mortgage payments and response to requests for payoff amounts). The Bureau also proposes to amend current rule § 1026.20(c) to harmonize with DFA section 1418, although not required by statute.

The Dodd-Frank Act and TILA authorize the Bureau to adopt implementing regulations for the statutory provisions provided by DFA sections 1418, 1420, and 1464. The Bureau is using this authority to propose regulations in order to provide servicers with clarity about their statutory obligations under these three provisions. The Bureau is also proposing to adjust servicers' statutory obligations, including the obligations of small servicers, in certain circumstances. The Bureau is taking this action in order to ease burden when doing so would not sacrifice adequate protection of consumers.

Elsewhere in today's Federal Register, the Bureau is publishing a proposed rule issued under RESPA that would implement DFA section 1463, the 2012 RESPA Servicing Proposal, which addresses 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; and continuity of contact for delinquent borrowers.

The new statutory requirements take effect automatically on January 21, 2013, as written in the statute, unless final rules are issued prior to that date. The Dodd-Frank Act provides the Bureau with limited authority to extend the effective date of statutory requirements when adopting implementing regulations. The Bureau will consider the time servicers need to come into compliance in determining the effective date.

The Bureau's proposed rules under Regulation Z and X represent another important step towards establishing uniform minimum national standards. As discussed in part II above, other Federal regulatory agencies have issued guidance on mortgage servicing and loan modifications and taken enforcement actions against mortgage servicers (including that National Mortgage Settlement, discussed in part II.C above).

These varied regulatory responses are understandable when viewed as a response to an unprecedented mortgage crisis and significant problems in the servicing of mortgage loans. Ultimately, however, both borrowers and mortgage servicers will be better served by having uniform national standards that govern mortgage servicing. When adopted in final form, the Bureau's rules will generally apply to all mortgage servicers, whether depository institutions or non-depository institutions, and to all segments of the mortgage market, regardless of the ownership of the loan.

2. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

DFA section 1418 requires servicers to provide a new disclosure to consumers who have hybrid ARMs. The disclosure concerns the initial interest rate adjustment and 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 Bureau proposes implementing TILA section 128A(b) by broadening the scope of the proposed rule generally to adjustable-rate mortgages, not just hybrid ARMs.

The proposed new ARM disclosure for the initial interest rate adjustment provides the content listed in the statute and certain additional information. The disclosure provides, among other things, information about the terms of the loan, a description of the way the new rate and upcoming payment would be determined, a good faith estimate of the upcoming payment, and information that may be especially useful to distressed and delinquent borrowers. The proposed revisions to the Regulation Z § 1026.20(c) disclosure would harmonize the timeframe and content requirements with those of the new ARM disclosure.

The Bureau believes that the current era of declining interest rates has reduced the payment shock that can result from ARM interest rate adjustments. If interest rates increase quickly, however, then payment shock may also increase. Furthermore, the popularity of adjustable-rate mortgages, which provide the opportunity for reduced interest rates during an introductory period, likely would increase along with the advent of higher interest rates.

The proposed rule is intended to mitigate the consequences of payment shock by ensuring that consumers have sufficient time to identify and execute the best course of action. As explained above, the proposed rule would implement DFA section 1418 requirements for the initial ARM interest rate adjustment notice, which generally will be provided to consumers between six and seven months prior to the initial interest rate adjustment. The Bureau also proposes to revise the timeframe of the Regulation Z § 1026.20(c) disclosure for rate adjustments that result in an accompanying payment change, from the current 25 to 120 days before payment at a new level is due to 60 to 120 days before payment at a new level is due.

DFA section 1420 generally requires the creditor, assignee, or servicer of a residential mortgage loan to transmit to the borrower, 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 additional content to be included in the periodic statement. The statute provides an exception 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.

The proposed periodic statement disclosure would require the periodic statement to include the content listed in the statute, as well as additional loan information, billing information, and information that may be helpful to distressed or delinquent borrowers. In accordance with the statute, the proposed rule has a coupon book exemption for fixed-rate loans when the borrower is given a coupon with certain information required by the periodic statement and information to access other information included in the periodic statement. The proposed rule also has exemptions for certain small servicers, reverse mortgages, and timeshares.

The proposed 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 the transaction to aid in error detection and resolution, and providing information to distressed or delinquent borrowers.

The Bureau understands that most borrowers will need only some of the information in the disclosure on a regular basis. However, distressed and delinquent borrowers will likely need more information. The proposed periodic statement disclosure was subjected to three rounds of consumer testing and refinement to identify the content and format that best promote consumer understanding.

DFA section 1464 generally codifies requirements for the prompt crediting of mortgage payments received by servicers in connection with consumer credit transactions secured by a consumer's principal dwelling. The statute also generally codifies the requirement to provide an accurate and timely response to a borrower request for payoff amounts for home loans.

The proposed rule would require that once funds in a suspense account equal a full contractual payment that the servicer must credit the payment to the most delinquent outstanding payment. The proposed rule also would require a servicer to send an accurate payoff balance, 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.

The objective of the prompt crediting requirement is to ensure that consumers benefit from every effort that they make to pay their mortgage debt. However, the Bureau understands that requiring immediate crediting of partial payments might induce some servicers to return partial payments. The Bureau believes that this outcome would not serve the interests of consumers who have demonstrated that they are trying to pay their mortgage debt.

The objective of the payoff statement provision is to ensure that consumers can obtain this basic information about their mortgage debt in a timely way. This information is generally useful to consumers but must be provided in a timely way for selling or refinancing a home or modifying a mortgage loan.

3. Description and, Where Feasible, Provision of an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

As discussed in the SBREFA Final 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 standards.[141] 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.[142]

During the SBREFA 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[143] (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.[144]

The following table provides the Bureau's estimate of the number and types of entities that may be affected by the proposals under consideration:

TABLE 1—ESTIMATED NUMBER OF AFFECTED ENTITIES AND SMALL ENTITIES BY NAICS CODE AND ENGAGEMENT IN CLOSED-END MORTGAGE LOAN SERVICING

Category	NAICS	Small entity threshold	Total entities	Small entities	Entities engaged in mortgage loan servicing	Small entities engaged in mortgage loan servicing
Commercial banks & savings institutions.	522110, 522120	$175,000,000 assets	7,724	4,250	7,502	4,098
Credit unions	522130	$175,000,000 assets	7,491	6,568	5,190	4,270
Real estate credit	522292	$7,000,000 revenues	5,791	5,152		
Other activities related to credit intermediation (includes loan servicing).	522390	$7,000,000 revenues	5,494	5,319	1,388	800

For commercial banks, savings institutions, and credit unions, the number of entities and asset sizes were obtained from December 2010 Call Report data as compiled by SNL Financial. 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

[141] The current SBA size standards are found on SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards.*

[142] *See id.*

[143] Savings institutions include thrifts, savings banks, mutual banks, and similar institutions.

[144] The Bureau is continuing to refine its description of small non-profit organizations engaged in mortgage loan servicing and working to estimate the number of these entities, but it is not possible to estimate the number of these entities at this time. 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.

Licensing System and Registry 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.[145]

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report

The proposed rule does not impose new reporting or recordkeeping requirements. The possible compliance costs for small entities from each major component of the proposed rule are presented below. The Bureau presents these costs against a pre-statute baseline. Benefits to consumers from the proposed rule are discussed in the DFA section 1022 analysis in part VII above.

(i) ARM—Notice 6 Months Prior to Initial Interest Rate Adjustment

DFA section 1418 amends TILA by adding a new requirement that a creditor or servicer provide a notice regarding the initial interest rate adjustment of a hybrid adjustable-rate mortgage at the end of the introductory period either (a) between six and seven months prior to the adjustment, or (b) at consummation of the mortgage if the first adjustment occurs during the first six months after consummation. The Bureau proposes to use the authority granted by TILA section 128A(b) to require this notice for hybrid as well as ARMs that are not hybrid (1/1, 3/3, 5/5, etc.).[146]

The proposed form would require the content listed in the statute. This includes, in part, a good faith estimate of the amount of the resulting payment; a list of alternatives that the consumer may pursue, including refinancing and loan modification; and information on how to contact housing counselors approved by HUD or a State housing finance authority. Additionally, the Bureau is proposing certain required additional information including details about the loan, key terms of the ARM, and information about the upcoming payment.

The new disclosure may provide some benefit to servicers. Distressed borrowers who contact servicers well in advance of a possible increase in the interest rate and payment may have more time in which to pursue an alternative financing solution. Information about loss mitigation alternatives and the availability of housing counseling may prompt borrowers to work proactively and constructively with their servicers.

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 SER reported the changes could take two to four days of IT support. These would be one-time costs. The Bureau is mitigating the one-time cost by providing servicers with tested model forms.

SERs noted that producing and sending the new disclosures would impose new costs on them either directly or through vendor charges. The ongoing costs are mitigated somewhat since the disclosures can be provided to consumers in electronic form with consumer consent. One SER noted that vendors have not provided cost quotes at this point.

A number of SERs expressed concern that the proposed initial ARM interest rate adjustment disclosure would confuse borrowers because it would only provide an estimate that would not accurately reflect the actual adjusted rate. The costs and benefits to consumers of the initial interest rate adjustment disclosure are discussed in the DFA section 1022 analysis in part VII above.

(ii) Revised 1026.20(c) Notice

The Bureau is also proposing changes to existing Regulation Z § 1026.20(c). The existing provision applies to all ARMs and requires a disclosure prior to each interest rate adjustment that effects a change in payment and annually for interest rate adjustments that do not cause payment changes. The Bureau is proposing to eliminate the annual notice. The Bureau also proposes to amend the current disclosures requiring a notice each time an interest rate adjustment causes a corresponding change in payment.

Regarding timing, the Bureau proposes changing the timeframe for providing the payment change notice to consumers from 25 to 120 days before payment at a new level is due to 60 to 120 days before payment at a new level is due. SERs did not identify any costs associated with this change and two reported they already provide the disclosure 60 to 100 days before payment at a new level is due. One SER reported that the new rate is calculated 45 days prior to the rate change date. This SER provides the borrower with a notice a minimum of 25 days, and typically 42 days, prior to the new interest rate becoming effective. This SER stated that the new interest rate becomes effective 55–72 days prior to the due date of the new payment. Another SER reported substantially similar numbers. The timing of the disclosures reported by these SERs is consistent with the proposed new timeframe.

Regarding content, the Bureau is considering proposing content for the revised 1026.20(c) notices that closely tracks the content it is proposing for the ARM initial interest rate adjustment notices pursuant to DFA section 1418. Servicers will need to obtain one-time system upgrades from vendors or make programming changes themselves. Given the substantial similarity of the revised 1026.20(c) form and the initial ARM interest rate adjustment notice, the Bureau believes that the additional ongoing cost of producing the revised form, on top of the initial ARM interest rate adjustment form, will be minimal.

(iii) Periodic Statements

As discussed in the section-by-section analysis above, DFA section 1420 amends TILA by adding a new requirement that a servicer of any residential mortgage loan provide a periodic statement to the consumer for each billing cycle. The Bureau tested a model periodic statement with consumers.

The proposed rule has the following exemptions: Fixed-rate mortgages with coupon books, certain small servicers, reverse mortgages, and timeshares. These proposed provisions are discussed separately below.

The proposed periodic statement requirement imposes one-time and ongoing costs on small servicers. The specific types of costs incurred by a servicer depend on whether the servicer produces the proposed 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

[145] The CFPB is continuing to refine its estimate of the number of firms providing real estate credit and engaging in other activities related to credit intermediation that are small and which engage in mortgage loan servicing.

[146] Conventional ARMs, unlike hybrid ARMs which have a period with a fixed rate of interest, *start* with an adjustable rate and that rate readjusts at even intervals.

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 borrowers 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 SERs who use vendors stated that they did not know what their vendors would charge so they could comply with the new periodic statement requirement. The SERs 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.

Small servicers reported a range of one-time costs of complying with the proposed provision. One non-depository SER estimated it would cost $150,000–$500,000 to convert to a new periodic statement system, a depository institution SER estimated a cost of $150,000–$200,000, and a credit union SER estimated a cost of $30,000–$40,000. Estimates of ongoing costs ranged from $11,000 per month from a non-depository SER to $2,200 per month from a depository SER; the latter estimated ongoing costs would be approximately $1 per statement. One depository SER estimated $5,000–$6,000 per month in production costs, before postage.

The Bureau understands that the estimates of ongoing costs from the SERs did not exclude the costs of periodic statements, coupon books, or other payment mechanisms that they currently provide borrowers. Some of the SERs stated that they currently provide borrowers with a periodic statement that contains much of the information required under the proposal. However, none of the SERs stated that they include contact information for housing counseling agencies or programs of the type required by DFA section 1420. As explained above in the section-by-section analysis, the Bureau is proposing to use authority under TILA sections 105(a) and (f) and DFA Section 1405(b) to require periodic statements to provide only information about where a borrower can access a complete list of housing counselors. The Bureau believes that the proposed provision will impose a substantially smaller burden than the statutory requirement.

In accordance with DFA section 1420, the proposed rule would include 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 exception. If this provision is included in the final rule, it is possible that small servicers would provide coupon books to all borrowers with fixed-rate mortgages. Many of the SERs reported that they provide consumers with coupon books for ARMs. However, there is no data with which to estimate the fraction of small servicer portfolio loans that are in fixed-rate mortgages; in fact, the Bureau understands that many small servicer portfolio loans are adjustable-rate mortgages.

The Bureau is also proposing a small servicer exemption. Servicers servicing 1,000 or fewer loans, all of which they must either own or have originated, would be eligible. A preliminary analysis indicates that all but 13 small insured depositories and credit unions would be covered by the exemption and would not have to provide the proposed periodic statement disclosure. The Bureau does not currently have the data necessary to estimate the number of small entity non-depositories that would be covered by the exemption. However, data from depositories suggests that approximately 584 small entity non-depositories (65% of the 800 small entity non-depositories) would be covered by the exemption.[147] As discussed in the DFA section 1022 analysis in part VII.F, the Bureau is currently working to gather additional data that may be relevant to estimating the number of small non-depositories covered by the small servicer exemption. These data may include 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. The Bureau is also continuing its outreach efforts with industry and requests interested parties to provide data, research results, and other information relating to this issue.

[147] Roughly 35% of depositories that earn less than $7 million from servicing also have too many loans to qualify for the small servicer exemption. Extrapolating to non-depositories, roughly 35% of non-depositories that earn less than $7 million from servicing—and are small entities—also service too many loans to qualify for the small servicer exemption.

Finally, the proposed rule has exemptions for reverse mortgages and timeshares. Information that would be relevant and useful on a reverse mortgage statement differs substantially from the information required on the periodic statement; *see* the section-by-section analysis for further discussion. The proposed rule also exempts timeshares as these are not residential mortgage loans as defined in TILA.

(iv) Prompt Crediting and Request for Payoff Amounts

DFA section 1464(a) generally codifies existing Regulation Z § 1026.36 on prompt crediting. The Bureau is further proposing a new requirement for the handling of partial payments (*i.e.,* payments that are not full contractual payments). Under the proposal, if servicers hold partial payments in a suspense account, then once the amount in the account equals a full contractual payment, the servicer must credit the payment to the most delinquent outstanding payment.

DFA 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 borrower. This essentially codifies existing Regulation Z § 1026.36 on payoff statements, except that Regulation Z requires payoff statements to be sent within a reasonable time and creates a safe harbor for responses sent within five business days.

The SERs generally reported that these provisions would have no impact on them as they are already in compliance. In correspondence, one SER suggested that the seven day maximum for payoff amounts should be even shorter, to prevent other servicers from delaying closings.

(v) Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report or Record

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.3.

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 and crediting partial payments from borrowers either immediately or when they constitute a full payment.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

The Dodd-Frank Act codified certain requirements contained in existing regulations and in some cases imposed new requirements that expand or vary the scope of existing regulations. The Bureau is working to eliminate conflicts and to harmonize the earlier rules with the new statutory requirements. In general, the existing and expanded regulations cover the following topics:

- New Regulation Z ARM disclosures, as required by DFA section 1418, will be provided six to seven months prior to the initial adjustment of interest rates. These disclosures will provide similar information to existing Regulation Z § 1026.20(c) notices, however there are timing differences, and the new notice is required only for the first rate adjustment. The DFA section 1418 notice is intended to be sent early enough for the consumer to take action (*i.e.* refinance or apply for a loan modification) before the monthly payment increases.
- Regulation Z § 1026.36(c)(1)(i) contains a prompt crediting provision that is generally codified by the prompt crediting provision in DFA section 1464(a).
- Regulation Z § 1026.36(c) addresses the application of payments. The Bureau is proposing modifying this rule to mandate the application of funds to the most delinquent outstanding payment if a full contractual payment has accumulated in any suspense or unapplied funds account.
- Regulation Z 1026.36(c)(1)(iii) contains a provision regarding payoff amount requests that is generally codified by the Dodd Frank Act.

Elsewhere in today's Federal Register, the Bureau is publishing a proposed rule that would implement DFA section 1463 and is issued under RESPA. The RESPA proposal addresses 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; and continuity of contact for delinquent borrowers.

These regulations do not duplicate, overlap, or conflict and the Bureau is not aware of any other Federal regulations that currently duplicate, overlap, or conflict with the proposals under consideration.

6. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

(i) New Initial Interest Rate Adjustment Notice for Adjustable-Rate Mortgages

As discussed above, DFA section 1418 requires servicers to provide a new disclosure to consumers who have hybrid ARMs regarding the initial interest rate adjustment. The Bureau is proposing to use its discretionary authority to require the initial interest rate adjustment notice for ARMs that are not hybrid (e.g., 1/1, 3/3, 5/5, etc.) as well. Thus, the disclosure under the original statutory language would have a smaller economic impact on small entities.

The Bureau opted for its current proposal because all ARMs, not just hybrid ARMs, may subject consumers to the same payment shock after the introductory period expires. Consumers with ARMs that are not hybrid would therefore also benefit from the protections provided by the new disclosure.

The Bureau also considered whether to except small servicers from the proposed initial ARM interest rate adjustment notice. The SERs did express some concern about the one-time and ongoing costs of providing the proposed notice. They expressed concern that consumers would be confused by receiving estimates rather than their actual new interest rate and payment.

The Bureau believes an exception would deprive certain consumers of the seven to eight months advance notice before payment at a new level is due provided by the disclosure. This advance notice is designed to allow consumers time to weigh their alternatives and pursue alternative actions. An exception would also deprive certain consumers of the information provided in the notice about alternatives and how to contact their State housing finance authority and counseling agencies and programs.

The Bureau recognizes that the proposed initial ARM interest rate adjustment notice will impose some burden on small servicers, but it does not believe that it will impose a significant burden since it is a one-time notice. The Bureau seeks comment on whether the burden imposed on small entities by the requirements of the initial rate adjustment notice outweighs the consumer protection benefits it affords.

(ii) Regulation Z § 1026.20(c) Disclosure for Adjustable-Rate Mortgages

The Bureau is proposing to change the timing of the ARM payment change notice required under current § 1026.20(c) to be provided to consumers from 25 to 120 days before payment at a new level is due to 60 to 120 days before payment at a new level is due. The longer lead time is designed to give consumers time to refinance or take other ameliorative actions if they are not financially equipped to pay their mortgages at an increased adjusted rate. The Bureau recognizes that the longer lead time may impose a burden on small servicers.

According to outreach conducted by the Bureau, small servicers often are able to send out the ARM payment change notices required by § 1026.20(c) on the same day the index value is selected. In that case, for a loan with a 45-day look-back period, the notice is ready 45 days before the change date and, with the 28 to 31 days between the change date and the date payment at the new level is due, the interest rate adjustment notice goes out to the consumer 73 to 76 days before the new payment is due. Under these circumstances, small servicers could provide the payment change notice within the 60 day minimum period. The Bureau is also proposing an alternative 25-day minimum period for certain existing adjustable-rate mortgages in which the mortgage note requires a look-back period of less than 45 days.

(iii) Periodic Statements

As discussed above, DFA section 1420 requires servicers to provide a new periodic statement to the consumer for each billing cycle. The proposed rule would generally require both the content listed in the statute, additional billing information, and information about how to dispute and resolve errors. The Bureau is proposing to use its discretionary authority to require the additional information. Thus, the disclosure under the original statutory language would impose a smaller economic impact on small entities that must provide the periodic statement disclosure.

The Bureau believes the additional information provides important consumer benefits. Only some of the information in the disclosure will be required to be provided to consumers on a regular basis. However, distressed or delinquent borrowers will likely need more information. The proposed periodic statement disclosure was the subject of three rounds of consumer testing and refinement to identify the form, content, headings, and format that best promotes consumer understanding.

As discussed above, the Bureau is proposing a small servicer exemption. Servicers servicing 1,000 or fewer loans, all of which they must either own or have originated, would be eligible. As discussed above, the Bureau believes that almost all small insured depositories and credit unions would be covered by the exemption. The Bureau does not currently have the data necessary to estimate the number of small entity non-depositories that would be covered by the exemption. However, the Bureau is currently working to gather additional data that may be relevant to estimating the number of small non-depositories covered by the small servicer exemption.

(iv) Prompt Crediting and Request for Payoff Amounts

As discussed above, the SERs generally reported that the proposed provisions regarding prompt crediting and payoff amounts would have no impact on them as they are already in compliance. In correspondence, one SER suggested that the seven day maximum for payoff amounts should be even shorter, to prevent other servicers from delaying closings.

7. Discussion of Impact on 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 SERs identified in consultation with the Chief Counsel through the SBREFA 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.[148] The Bureau sought to collect the advice and recommendations of the SERs during the SBREFA Panel outreach meeting regarding these issues because, as small financial service providers, the SERs could provide valuable input on any such impact related to the proposed rule.[149]

At the time the Bureau circulated the SBREFA materials to the SERs in advance of the SBREFA 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.[150]

At the SBREFA Panel outreach meeting, the Bureau asked the SERs a series of questions regarding cost of business credit issues.[151] The questions were focused on two areas. First, the SERs 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 SERs 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 SERs' cost of credit.

The SERs 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 SER mentioned that at times people may use a home-secured loan to finance a business, which was corroborated by a different SER based on his personal experience with starting a business. The Bureau is generally interested in the use of personal home-secured credit to finance a business and invites interested parties to provide data and other factual information on this issue.

Based on the feedback obtained from SERs at the outreach meeting, the Bureau currently does not anticipate that the proposed rule will result in an increase in the cost of credit for small business entities. To further evaluate this question, the Bureau solicits comment on whether the proposed rule will have any impact on the cost of credit for small entities.

IX. Paperwork Reduction Act

The Bureau's information collection requirements contained in this proposed rule, and identified as such, will be 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). 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 title of this information collection is 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing. The frequency of response is on-occasion. This proposed rule would amend Regulation Z. Regulation Z currently contains collections of information approved by OMB, and the Bureau's OMB control number for Regulation Z is 3170–0015 (Truth in Lending Act (Regulation Z) 12 CFR 1026). As described below, the proposed rule would amend the collections of information currently in Regulation Z.

The information collection would be required to provide benefits for consumers and would be 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 proposed rule, the Bureau generally would account 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

[148] *See* 5 U.S.C. 603(d)(2). The Bureau provided this notification as part of the notification and other information provided to the Chief Counsel with respect to the SBREFA Panel process pursuant to RFA section 609(b)(1).

[149] *See* 5 U.S.C. 603(d)(2)(B).

[150] *See* TILA section 104(1); RESPA section 7(a)(1).

[151] *See* SBREFA Final Report, *supra* note 22, at 154–55 (appendix D, PowerPoint slides from the SBREFA Panel outreach meeting, ''Topic 7: Impact on the Cost of Business Credit'').

respondents), and certain non-depository servicers (the Bureau non-depository respondents). The Bureau and the FTC generally both have enforcement authority over non-depository institutions under Regulation Z. Accordingly, the Bureau has allocated to itself half of its estimated burden to Bureau 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 proposed changes to Regulation Z for the roughly 12,813 institutions, including Bureau respondents,[152] that are estimated to service consumer mortgages subject to the proposed rule would be approximately 25,000 one-time burden hours and 74,000 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 proposing four changes to the information collection requirements in Regulation Z. First, as previously discussed, proposed § 1026.20(d) regarding adjustable-rate mortgages would require creditors, assignees, and 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. Second, proposed § 1026.20(c) regarding adjustable-rate mortgages would change the format, content, and timing of the existing rate adjustment disclosure. The proposed rule would change the minimum time for providing advance notice to consumers from 25 days to 60 days before payment at a new level is due. Servicers would 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.

Third, proposed § 1026.41 would require 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 adjustment, outstanding principal balance, etc.; and other information that may be helpful to troubled borrowers. Certain small servicers (those servicing less than 1,000 mortgages and own or originated all the loans they are servicing) would be exempt from this requirement. Fixed-rate mortgages would be exempt if the servicer provides the consumer with a coupon book that contained certain information, and makes other information available to the consumer.

Fourth, proposed § 1026.36 would make changes to the existing requirements on servicers to promptly credit borrower payments that satisfy payment rules specified by a servicer. Proposed § 1026.36 would also make changes to the existing requirements on creditors and servicers to provide an accurate payoff balance upon request. An information collection is created by the proposed requirement to provide accurate payoff statements.

B. Burden Analysis Under the Four Proposed Information Collection Requirements[153]

1. New Initial Rate Adjustment Notice for Adjustable-Rate Mortgages

All CFPB respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain CFPB respondents would 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 CFPB depository respondents and 1,488 hours and $115,000 for CFPB non-depository respondents.[154]

Certain CFPB respondents would have ongoing burden associated with the IT used in producing the disclosure. All CFPB respondents would have ongoing costs associated with distributing (*e.g.,* mailing) the disclosure. The Bureau estimates this ongoing burden to be 600 hours and $63,000 for CFPB depository respondents and 70 hours and $3,400 for CFPB non-depository respondents.

2. Changes in the Regulation Z § 1026.20(c) Disclosure for Adjustable-Rate Mortgages

All CFPB respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain CFPB respondents would 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 CFPB depository respondents and 600 hours and $58,000 for CFPB non-depository respondents.

Regarding ongoing burden, the Bureau is proposing to require 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 proposed § 1026.20(c) disclosure. The Bureau recognizes that there is content in the proposed 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 burden for purposes of PRA. The Bureau estimates the ongoing burden to be 1,400 hours for CFPB depository respondents and 110 hours and $8,000 for CFPB non-depository respondents.

[152] 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.

[153] Based on discussions with industry, 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.

[154] Dollar figures include estimated costs to vendors.

3. New Periodic Statement

All CFPB respondents that are not exempt would have a one-time burden under this requirement associated with reviewing the regulation. Certain CFPB respondents would have a one-time burden from creating software and IT capability to modify existing periodic disclosures or produce a new disclosure. The proposed disclosure incorporates all of the 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 CFPB depository respondents and 600 hours and $20,000 for CFPB 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 proposed 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 proposed periodic statement disclosure beyond what may be usual and customary to provide in existing billing statements. The Bureau estimates the ongoing burden to be 52,000 hours and $5,600,000 for CFPB depository respondents and 6,300 hours and $300,000 for CFPB non-depository respondents.

4. Prompt Crediting of Payments and Response to Requests for Payoff Amounts

All CFPB respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain CFPB respondents would have a one-time burden from creating software and IT costs associated with changes in the payoff statement disclosure. The Bureau estimates this one-time burden to be 110 hours for CFPB depository respondents and 500 hours and $115,000 for CFPB non-depository respondents.

Regarding ongoing burden, the Bureau understands that the proposed payoff statement will replace 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 CFPB depository respondents and 200 hours and $9,600 for CFPB non-depository respondents.

C. Summary of Burden Hours for CFPB Respondents

	Respondents	Disclosures per respondent	Hours burden per disclosure	Total burden hours	Total vendor costs
Ongoing:					
ARM 20(c) Notice	824	700	0.002777778	1,000	$8,000
ARM 20(d) Notice	824	300	0.002881756	1,000	67,000
Periodic Statements	564	35,800	0.002881756	58,000	5,914,000
Prompt Crediting & Payoff Statements	824	800	0.002881756	2,000	188,000
One-Time:					
ARM 20(c) Notice	824	1	0.93	1,000	58,000
ARM 20(d) Notice	824	1	1.97	2,000	115,000
Periodic Statements	564	1	1.36	1,000	20,000
Prompt Crediting & Payoff Statements	824	1	0.77	1,000	115,000

D. Comments

Comments are specifically requested concerning: (i) Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (ii) the accuracy of the estimated burden associated with the proposed collections of information; (iii) how to enhance the quality, utility, and clarity of the information to be collected; and (iv) how to minimize the burden of complying with the proposed collections of information, including the application of automated collection techniques or other forms of information technology. All comments will become a matter of public record. Comments on the collection of information requirements should be sent to the Office of Management and Budget (OMB), Attention: Desk Officer for the Consumer Financial Protection Bureau, Office of Information and Regulatory Affairs, Washington, DC 20503, or by the Internet to *http://oira_submission@omb.eop.gov,* with copies to the Bureau at the Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, or by the Internet to *CFPB_Public_PRA@cfpb.gov.*

Text of the Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation and official interpretation. New language is shown inside ►bold-faced arrows◄, while language that would be removed is set off with **[**bold-faced brackets**]**.

List of Subjects in 12 CFR Part 1026

Advertising, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection proposes to amend 12 CFR part 1026, as follows:

PART 1026—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 1026 continues to read as follows: 12 U.S.C. 5512, 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. ►Except for § 1026.20(d), which requires disclosures to be provided separate and distinct from all other correspondence, the◄ [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),◄ or § 1026.47. The disclosures may include an acknowledgment of receipt, the date of the transaction, and the consumer's name, address, and account number. The following disclosures may be made together with or separately from other required disclosures: The creditor's identity under § 1026.18(a), the variable rate example under § 1026.18(f)(1)(iv), insurance or debt cancellation under § 1026.18(n), and certain security interest charges under § 1026.18(o). The itemization of the amount financed under § 1026.18(c)(1) must be separate from the other disclosures under § 1026.18, except for private education loan disclosures made in compliance with § 1026.47.

* * * * *

(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 section heading and paragraphs (c) and (d) to read as follows:

§ 1026.20 [Subsequent d]►D◄isclosure requirements► regarding post-consummation events◄.

* * * * *

(c) [*Variable-rate*] ►*Rate*◄ *adjustments.* ►The creditor, assignee, or servicer of an adjustable-rate mortgage shall provide disclosures to consumers, as described in § 1026.20(c), in connection with the adjustment of interest rates resulting in a corresponding adjustment to the payment. To the extent that other provisions of subpart C apply to the disclosures required by this section, those provisions apply to assignees and servicers as well as to creditors. The disclosures required under this section 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.◄ [Except as provided in paragraph (d) of this section, an adjustment to the interest rate with or without a corresponding adjustment to the payment in a variable-rate transaction subject to § 1026.19(b) is an event requiring new disclosures to the consumer. At least once each year during which an interest rate adjustment is implemented without an accompanying payment change, and at least 25, but no more than 120, calendar days before a payment at a new level is due, the following disclosures, as applicable, must be delivered or placed in the mail:

(1) The current and prior interest rates.

(2) The index values upon which the current and prior interest rates are based.

(3) The extent to which the creditor has foregone any increase in the interest rate.

(4) The contractual effects of the adjustment, including the payment due after the adjustment is made, and a statement of the loan balance.

(5) The payment, if different from that referred to in paragraph (c)(4) of this section, that would be required to fully amortize the loan at the new interest rate over the remainder of the loan term.]

►(1) *Coverage of rate adjustment disclosures.* (i) *In General.* For purposes of § 1026.20(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) *Exceptions.* The requirements of § 1026.20(c) do not apply to:

(A) Construction loans with terms of one year or less; or

(B) The first adjustment to an ARM if the first payment at the adjusted level is due within 210 days after consummation and the actual, not estimated, new interest rate was disclosed at consummation pursuant to § 1026.20(d).

(2) *Timing and content of rate adjustment disclosures with a change in payment.* Disclosures required by § 1026.20(c) must be provided to consumers at least 60, but no more than 120 days before a payment at a new level is due. Disclosures must be provided to consumers at least 25, but no more than 120 days before a payment at a new level is due for ARMs originated prior to July 21, 2013 in which the mortgage note 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. Disclosures must be provided to consumers as soon as practicable, but not less than 25 days before a payment at a new level is due for the first adjustment to an ARM if it occurs within 60 days of consummation and the actual, not estimated, new interest rate was not disclosed at consummation. The disclosures must provide the following information:

(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 that the interest rate and mortgage payment will change;

(B) The effective date of the interest rate adjustment, and when additional future interest rate changes 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 based on the expected payment allocation for the last payment prior to the date of the disclosure. The new payment allocation disclosed shall be based on 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 adjustments and a source of information about the index or formula; and

(B) Any adjustment to the index, including the amount of any margin and an explanation that the margin is the addition of a certain number of percentage points to the index;

(iv) Any limits on the interest rate or payment increases at each 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 may apply to additional 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) The amount of any adjustment to the index or formula, for example, by the addition of a margin or application of previously foregone interest increase;

(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. Any change in the term or maturity of the loan caused by the adjustment also shall be disclosed;

(vi) For interest-only or negatively-amortizing loans, a statement that the new payment will not be allocated to pay loan principal. If negative amortization occurs as a result of the adjustment, the statement shall set forth the payment required to fully amortize the loan at the new interest rate over the remainder of the loan term or to fully amortize the loan without extending the loan term; and

(vii) The circumstances under which any prepayment penalty, as defined in subpart E by § 1026.41(d)(7)(iv), may be imposed when consumers fully repay their adjustable-rate mortgages, such as when selling or refinancing their principal residence, the time period during which the penalty may be imposed, and the maximum amount (in dollars) of the penalty possible during that time period.

(3) *Format of disclosures.* (i) The disclosures required by § 1026.20(c) shall be provided in the form of the 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) 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) [Information provided in accordance with variable-rate subsequent disclosure regulations of other Federal agencies may be substituted for the disclosure required by paragraph (c) of this section.]▶ *Initial rate adjustments.* The creditor, assignee, or servicer of an adjustable-rate mortgage shall provide disclosures to consumers, as described in § 1026.20(d), in connection with the initial interest rate adjustment. To the extent that other provisions of subpart C apply to the disclosures required by this section, those provisions apply to assignees and servicers as well as to creditors. The disclosures shall be provided in writing, separate and distinct from all other correspondence. The disclosures shall be provided 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 of initial rate adjustment disclosures.* (i) *In general.* For purposes of § 1026.20(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) *Exceptions.* The requirements of § 1026.20(d) do not apply to construction loans with terms of one year or less.

(2) *Content of initial rate adjustment disclosures.* 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 index figure reported in the source of information described in paragraph (d)(2)(iv)(A) within fifteen business days prior to the date of the disclosure. The disclosures required by § 1026.20(d) shall provide the following:

(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 changes 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 based on the expected payment allocation for the last payment prior to the date of the disclosure. The new payment allocation disclosed shall be based on 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 adjustments and a source of information about the index or formula; and

(B) Any adjustment to the index, including the amount of 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 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 may apply to additional 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) The amount of any adjustment to the index or formula, for example, by 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. Any change in the term or maturity of the loan caused by the adjustment also shall be disclosed; 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 2 to 4 months prior to the date the first new payment is due for interest rate adjustments that result in a corresponding payment change, pursuant to § 1026.20(c);

(vii) For interest-only or negatively-amortizing loans, a statement that the new payment will not be allocated to pay loan principal. If negative amortization occurs as a result of the adjustment, the statement shall set forth the payment required to fully amortize the loan at the new interest rate over the remainder of the loan term or to fully amortize the loan without extending the loan term;

(viii) A list of the following alternatives to paying at the new rate that consumers may pursue and a brief explanation of each alternative:

(A) Refinancing the loan with the current or other lender;

(B) Selling the property and using the proceeds to pay off the loan;

(C) Modifying the terms of the loan with the lender; or

(D) Arranging payment forbearance with the lender;

(ix) The circumstances under which any prepayment penalty, as defined in subpart E by § 1026.41(d)(7)(iv), may be imposed when consumers fully repay their adjustable-rate mortgages, such as when selling or refinancing their principal residence, the time period during which the penalty may be imposed, and the maximum amount (in dollars) of the penalty possible during that time period;

(x) The telephone number of the creditor, assignee, or servicer for consumers to call if they anticipate not being able to make the new payment; and

(xi) The mailing and Internet addresses and telephone number to access the State housing finance authority (as defined in Section 1301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989) for the State in which the consumer resides, and the Web site and telephone number to access either the Bureau list or the HUD list of homeownership counselors or counseling organizations.

(3) *Format of initial rate adjustment disclosures.* (i) Except for the disclosures provided by paragraph (d)(2)(i), the disclosures required by § 1026.20(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) shall appear outside of and above the table required in paragraph (d)(3)(i); and

(iii) The disclosures required by paragraph (d)(2)(iii) 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 a 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) *Full contractual payments.* No servicer shall fail to credit a full contractual 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 full contractual payment is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle. A payment qualifies as a full contractual payment even if it does not include amounts required to cover late fees or other fees that have been assessed.

(ii) *Partial payments.* Any servicer that retains a partial payment, meaning any payment less than a full contractual 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 required by § 1026.41, if a periodic statement is required.

(B) Promptly apply funds held in the suspense or unapplied funds account to the oldest outstanding payment when sufficient funds accumulate in such account to cover a full contractual payment.

(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 5 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 full contractual payment received on the due date, or within any applicable grace 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 provided within a reasonable time, but in no case more than 7 business days, after receiving a written request from the consumer or any person acting on behalf of the consumer.◀

⟦(1) In connection with a consumer credit transaction secured by a consumer's principal dwelling, no servicer shall:

(i) Fail to credit a payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, or except as provided in paragraph (c)(2) of this section;

(ii) Impose on the consumer any late fee or delinquency charge in connection with a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within any applicable grace period; or

(iii) Fail to provide, within a reasonable time after receiving a request from the consumer or any person acting on behalf of the consumer, an accurate statement of the total outstanding balance that would be required to satisfy the consumer's obligation in full as of a specified date.

(2) If a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of 5 days after receipt.

(3) For purposes of this paragraph (c), the terms ''servicer'' and ''servicing'' have the same meanings as provided in 12 CFR 1024.2(b), as amended.❚

* * * * *

5. Section 1026.41 is added to read as follows:

►§ 1026.41 Periodic statements for residential mortgage loans.

(a) *In general.* A servicer of a closed-end consumer credit transaction secured by a dwelling, must transmit to the consumer for each billing cycle a periodic statement meeting the requirements of paragraphs (b), (c), and (d) of this section, unless an exemption in paragraph (e) of this section applies. 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. For the purposes of this section, *servicer* is defined to mean creditor, assignee, or servicer, as applicable.

(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 grace period provided for the previous billing cycle. The first periodic statement must be sent no later than 10 days before the first payment is due.

(c) *Form of the periodic statement.* The creditor, assignee, or 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–28. Proper use of these forms will be deemed in compliance with this section.

(d) *Content and layout of the periodic statement.* The periodic statement shall contain the information in this paragraph (d), in the manner described below.

(1) *Amount due.* The following disclosures must be grouped together in close proximity to each other, and be 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. The amount due must be more prominent than other disclosures on the page. If a loan has multiple payment options, the amount due under each of the payment options must be listed.

(2) *Explanation of amount due.* The following items must be 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. If a loan has multiple payment options, a breakdown of each of the payment options must be listed along with a statement 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 must be 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 how much, if any, of those payments was applied to principal, interest, escrow, fees and charges, and any partial payment or suspense account; and

(ii) The total of all payments received since the beginning of the current calendar year, including a breakdown of how much, if any, of those payments was applied to principal, interest, escrow, fees and charges, and the amount currently held in any partial payment or suspense account.

(4) *Transaction activity.* A list of all the transaction activity that occurred since the last statement must be included on the periodic statement. For purposes of this paragraph (d)(4), *transaction activity* means any activity that credits or debits the outstanding account balance. The transaction activity 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) *Messages.* If a statement reflects a partial payment that was placed in a suspense or unapplied funds account, the periodic statement must state what must be done for the funds to be applied. Such statement must be on the front page of the statement.

(6) *Contact information.* The periodic statement must include a toll-free telephone number and, if applicable, an electronic mailing address that may be used by the consumer to obtain information about the mortgage, on the front page of the statement.

(7) *Account information.* The following items must be provided on the statement:

(i) The amount of the outstanding principal balance;

(ii) The current interest rate in effect for the loan;

(iii) The date on which the interest rate may next change; and

(iv) The amount of any prepayment penalty that may be charged. For the purposes of this paragraph (d)(7)(iv), *prepayment penalty* means a charge imposed for paying all or part of a transaction's principal before the date on which the principal is due.

(v) *Housing counselor information.* The periodic statement must include the website address, if applicable, and telephone number to access:

(A) any State housing finance authority (as defined in Section 1301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989) for the State in which the property is located; and

(B) Either the Bureau list or the HUD list of homeownership counselors or counseling organizations.

(8) *Delinquency information.* If the consumer is more than 45 days delinquent, the following items must be grouped together in close proximity to each other and located on the first page of the statement:

(i) The date on which the consumer became delinquent;

(ii) A statement alerting the consumer to possible risks, such as foreclosure, and expenses that may be incurred if the delinquency is not cured;

(iii) An account history showing the consumer, for the lesser of the past 6 months or the period since the last time the account was current, the amount due for each billing cycle, or if a payment was fully paid, the date on which it was considered fully paid;

(iv) Notice of any loan modification programs (trial or permanent) to which the consumer has been accepted, if applicable;

(v) Notice that the loan has been referred to foreclosure, if applicable;

(vi) The total payment amount needed to bring the loan current; and

(vii) A statement directing the consumer to the housing counselor information required by (d)(7)(v).

(e) *Exemptions.* (1) *Reverse Mortgages.* Reverse mortgage transactions, as defined by § 1026.33(a), are exempt from the requirements of this section.

(2) *Timeshare.* Timeshare plans, as defined by 11 U.S.C. 101(53(D)), are exempt from the requirements of this section.

(3) *Coupon Book Exemption.* The requirements of paragraph (a) do not apply to fixed-rate loans if the creditor, assignee, or 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 the following information available to the consumer by telephone, writing or electronically, if the consumer consents:

(A) The information in Explanation of Amount Due, listed in paragraph (d)(2) of this section;

(B) The past payment breakdown information, listed in paragraph (d)(3) of this section; and

(C) The transaction activity information listed in paragraph (d)(4) of this section;

(iv) Provides the consumer the information listed in paragraphs (d)(8) of this section in writing, for any billing cycle during which the borrower is more than 45 days delinquent.

(4) *Small Servicer Exemption.* A creditor, assignee or servicer is exempt from the requirements of this section for loans serviced by a small servicer. To qualify as a small servicer, a servicer must meet all of the following requirements:

(i) Service 1,000 or fewer mortgage loans. In determining whether a small servicer services 1,000 mortgage loans or fewer, a servicer is 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 will have six months or until the beginning of the next calendar year, whichever is later, to begin compliance other than as a small servicer.

(ii) Only service mortgage loans for which the servicer (or an affiliate) is the owner or assignee or the servicer (or an affiliate) is the entity to whom the mortgage loan obligation was initially payable.◄

6. Appendix H to Part 1026 is amended by removing the entry for H–4(D) Variable-Rate Model Clauses (§ 1026.20(c)), adding entries for H–4(D)(1), H–4(D)(2), H–4(D)(3), and H–4(D)(4), adding entries for H–28(A), H–28(B), H–28(C), and H–28(D), and removing and adding entries in the table of contents at the beginning of the appendix to read as follows:

Appendix H to Part 1026—Closed-End Model Forms and Clauses

* * * * *

[H–4(D) Variable-Rate Model Clauses (§ 1026.20(c))]

►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–28(A) Sample Form of Periodic Statement

H–28(B) Sample Form of Periodic Statement with Delinquency Box

H–28(C) Sample Form of Periodic Statement for a Payment-Options Loan

H–28(D) Sample Clause for Housing Counselor Contact Information◄

* * * * *

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[

H-4(D)—Variable-Rate Model Clauses

Your new interest rate will be ________%, which is based on an index value of ________%.
Your previous interest rate was ________%, which was based on an index value of ________%.
[The new interest rate does not reflect a change of ________ percentage point in the index value which was not added because of ________.]
[The new payment will be $________.]
[Your new loan balance is $________.]
[Your (new) (existing) payment will not be sufficient to cover the interest due and the difference will be added to the loan amount. The payment amount needed to pay your loan in full by the end of the term at the new interest rate is $________.]
[The following interest rate adjustments have been implemented this year without changing your payment: ___________. These interest rates were based on the following index values: ________.]

]►

H–4(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)* your mortgage *(change 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)*)**

<u>Interest Rate</u>: 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)*.

[<u>Rate Limit[s]</u>]: [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 amount may be applied when your interest rate adjusts again on *(date)*.]

<u>New Interest Rate and Monthly Payment</u>: The table above shows your new interest rate and new monthly payment. Your new payment is based on the *(index)*, your margin of __%, [other adjustment to the index], your loan balance of $______ and your remaining loan term of ___ months.

[<u>Interest-Only Payments</u>: Your new payment will not cover any principal. Therefore, making this payment will not reduce your loan balance. 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.]

[<u>Warning about Increase in Your Loan Balance</u>: Your new payment covers only part of the interest and no principal. Therefore, the unpaid interest will add to the balance of the loan or will increase the term of your 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.]

[<u>Prepayment Penalty</u>: Keep in mind that if you pay off your loan, refinance or sell your home before *(date)*, you could be charged a penalty of up to $______.]

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 of 2.25%, 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 of up to $3,400.00.

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)* your mortgage *(change 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 [will] calculate 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)*.

[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 amount may be applied when your interest rate 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)*, your margin of __%, [other adjustment 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. 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.]

[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 or will increase the term of your 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.]

Possible Alternatives: 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.

[Prepayment Penalty: Keep in mind that if you pay off your loan, refinance or sell your home before *(date)*, you could be charged a penalty of up to $______.]

(Continued on other side)

<u>If You Anticipate Problems Making Your Payments</u>: Contact *(mortgage company)* at *(telephone number)* [or *(email address)*] as soon as possible. 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 counseling agencies or programs in your area, go to *(internet address of the U.S. Department of Housing and Urban Development)* or call *(telephone number)*.] [U.S. Consumer Financial Protection Bureau (CFPB) Counseling Agency List: For a list of counseling agencies and programs in your area, go to *(internet address of U.S. Consumer Financial Protection Bureau Counseling Agency List)* or call (*telephone number*).]

- *(State Housing Finance Agency)*
  (Address)
  (Telephone Number)
  (Internet Address)

H–4(D)(4) Sample Form for § 1026.20(d)

February 15, 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 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 will calculate 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 amount may be applied when your interest rate 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, your margin of 2.25%, 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.**

Possible Alternatives: 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.

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 of up to $3,400.

If You Anticipate Problems Making Your Payments: Contact Springside Mortgage at 1-800-555-4567 as soon as possible. If you would like counseling or assistance, you can contact the following:

(Continued on other side)

- U.S. Department of Housing and Urban Development (HUD): For a list of counseling agencies or programs in your area, go to http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm or call 800-569-4287.

- Tennessee Housing Development Agency
  404 James Robertson Pkwy, Ste 1200
  Nashville, TN 37243-0900
  615-815-2200 or 1-800-228-THDA
  www.thda.org

◄

* * * * *

►H–28(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	$3,500.00

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–28(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	$3,500.00

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–28(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	$3,500.00

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–28(D) Sample Clause for Housing 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 counseling agencies or programs in your area, go to *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm* or call 800–569–4287.
- Tennessee Housing Development Agency, 404 James Robertson Pkwy, Ste 1200, Nashville, TN 37243–0900, 615–815–2200 or 1–800–228–THDA, *www.thda.org.* ◄

7. In Supplement I to Part 1026:

A. Under *Section 1026.17—General Disclosure Requirements,* revise paragraphs 17(a)(1)–2.ii and 17(c)(1)–1.

B. Under *Section 1026.18—Content of Disclosures,* revise paragraph 18(f)–1.

C. Under *Section 1026.19—Certain Mortgage and Variable-Rate Transactions,* revise paragraphs 19(b)–4, 19(b)–5.i.C and 19(b)(2)(xi).

D. Under *Section 1026.20—Subsequent Disclosure Requirements:*

i. Revise the section heading.

ii. Amend *20(c) Variable-Rate Adjustments* by revising paragraphs 1. and 2. and removing paragraph 3.

iii. Remove subheading *Paragraph 20(c)(1)* and remove paragraph 1. under this subheading.

iv. New subheading *Paragraph 20(c)(1)(i)* is added and paragraph 1. under this subheading is added.

v. New subheading *Paragraph 20(c)(1)(ii)* is added and paragraphs 1., 2., and 3. under this subheading are added.

vi. Amend *Paragraph 20(c)(2)* by revising paragraph 1.

vii. New subheading *Paragraph 20(c)(2)(ii)(A)* is added and paragraph 1. under this subheading is added.

viii. New subheading *Paragraph 20(c)(2)(iv)* is added and paragraph 1. under this subheading is added.

ix. New subheading *Paragraph 20(c)(2)(v)(B)* is added and paragraph 1. under this subheading is added.

x. New subheading *Paragraph 20(c)(2)(vi)* is added and paragraphs 1. and 2. under this subheading are added.

xi. Remove subheading *Paragraph 20(c)(3)* and remove paragraph 1. under this subheading.

xii. Remove subheading *Paragraph 20(c)(4)* and remove paragraph 1. under this subheading.

xiii. Remove subheading *Paragraph 20(c)(5)* and remove paragraph 1. under this subheading.

xiv. New subheading *Paragraph 20(d)* is added and paragraphs 1., 2., and 3. under this subheading are added.

xv. New subheading *Paragraph 20(d)(1)(i)* is added and paragraph 1. under this subheading is added.

xvi. New subheading *Paragraph 20(d)(1)(ii)* is added and paragraphs 1. and 2. under this subheading are added.

xvii. New subheading *Paragraph 20(d)(2)(i)* is added and paragraph 1. under this subheading is added.

xviii. New subheading *Paragraph 20(d)(2)(iii)(A)* is added and paragraph 1. under this subheading is added.

xix. New subheading *Paragraph 20(d)(2)(v)* is added and paragraph 1. under this subheading is added.

xx. New subheading *Paragraph 20(d)(2)(vii)* is added and paragraphs 1. and 2. under this subheading are added.

xxi. New subheading *Paragraph 20(d)(2)(viii)* is added and paragraph 1. under this subheading is added.

E. Under *Section 1026.36(c)—Servicing Practices:*

i. Under subheading *Paragraph 36(c)(1)(iii),* remove paragraph 1.

ii. New subheading *Paragraph 36(c)(3)* is added and paragraph 1. under this subheading is added.

iii. Redesignate existing paragraphs 2., 3., and 4. under subheading *Paragraph 36(c)(1)(iii)* as new paragraphs 2., 3., and 4., respectively, under subheading *Paragraph 36(c)(3).*

iv. Redesignate existing paragraphs 1., 2., and 3. under subheading *Paragraph 36(c)(2)* as new paragraphs 1., 2., and 3., respectively, under subheading *Paragraph 36(c)(1)(iii).*

v. Redesignate existing paragraph 1 under subheading *Paragraph 36(c)(1)(ii)* as paragraph 1 under subheading *Paragraph 36(c)(2).*

vi. Under subheading *Paragraph 36(c)(1)(ii),* add new paragraph 1.

vii. Under subheading *Paragraph 36(c)(3),* revise the first sentence of new paragraph 1 and the first sentence of new paragraph 2.

F. Add new *Section 1026.41—Periodic Statements for Residential Mortgage Loans:*

i. New section heading *Section 41—Periodic Statements for Residential Mortgage Loans* is added.

ii. New subheading *41(a) In General* is added and paragraphs 1., 2., 3., and 4. under this subheading are added.

iii. New subheading *41(b) Timing of the Periodic Statement* is added and paragraph 1. under this subheading is added.

iv. New subheading *41(c) Form of the Periodic Statement* is added and paragraphs 1., 2., and 3. under this subheading are added.

v. New subheading *41(d) Content and Format of the Periodic Statement* is added and paragraphs 1., 2., and 3. under this subheading are added.

vi. New subheading *41(d)(3) Past Payment Breakdown* is added and paragraph 1. under this subheading is added.

vii. New subheading *41(d)(4) Transaction Activity* is added and paragraphs 1., 2., and 3. under this subheading are added.

viii. New subheading *41(d)(6) Contact Information* is added and paragraphs 1. and 2. under this subheading are added.

ix. New subheading *41(d)(7)(iv) Prepayment Penalty* is added and paragraphs 1. and 2. under this subheading are added.

x. New subheading *41(e) Exemptions* is added and paragraph 1. under this subheading is added.

xi. New subheading *41(e)(3) Coupon Book Exemption* is added and paragraphs 1., 2., 3., and 4. under this subheading are added.

xii. New subheading *41(e)(4) Small Servicers* is added and paragraphs 1., 2., 3., and 4. under this subheading are added.

G. Under *Appendices G and H—Open-End and Closed-End Model Forms and Clauses,* revise paragraph 1.

H. Under *Appendix H—Closed-End Model Forms and Clauses,* revise paragraph 7(i).

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) [and 1026.20(c)] 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 1026.18—Content of Disclosures

*   *   *   *   *

18(f)—Variable Rate

1. *Coverage.* The requirements of § 1026.18(f) apply to all transactions in which the terms of the legal obligation allow the creditor to increase the rate originally disclosed to the consumer. It includes not only increases in the interest rate but also increases in other components, such as the rate of required credit life insurance. The provisions, however, do not apply to increases resulting from delinquency (including late payment), default, assumption, acceleration or transfer of the collateral. Section 1026.18(f)(1) applies to variable-rate transactions that are not secured by the consumer's principal dwelling and to those that are secured by the principal dwelling but have a term of one year or less.

Section 1026.18(f)(2) applies to variable-rate transactions that are secured by the consumer's principal dwelling and have a term greater than one year. Moreover, transactions subject to § 1026.18(f)(2) are subject to the special early disclosure requirements of § 1026.19(b). (However, ''shared-equity'' or ''shared-appreciation'' mortgages are subject to the disclosure requirements of § 1026.18(f)(1) and not to the requirements of §§ 1026.18(f)(2) and 1026.19(b) regardless of the general coverage of those sections.) Creditors are permitted under § 1026.18(f)(1) to substitute in any variable-rate transaction the disclosures required under § 1026.19(b) for those disclosures ordinarily required under § 1026.18(f)(1). Creditors who provide variable-rate disclosures under § 1026.19(b) must comply with all of the requirements of that section, including the timing of disclosures, and must also provide the disclosures required under § 1026.18(f)(2). [Creditors substituting § 1026.19(b) disclosures for § 1026.18(f)(1) disclosures may, but need not, also provide disclosures pursuant to § 1026.20(c)]. (Substitution of disclosures under § 1026.18(f)(1) in transactions subject to § 1026.19(b) is not permitted.)

* * * * *

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)[, and are exempt from the requirements of § 1026.20(c), by virtue of § 1026.20(d)]. The exception is also available to creditors that are required by State law to comply with the Federal variable-rate regulations noted above. Creditors using this exception should comply with the timing requirements of those regulations rather than the timing requirements of Regulation Z in making the variable-rate disclosures.

5. * * * i. * * *

A. * * *

B. * * *

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)[–2]►(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 not more than 240, days before the first payment at the adjusted level is due after the initial 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 [25]►60◄, but no more than 120, days before the due date of a payment at a new level. This notice will contain information about the ►adjustment, including the◄[index and] interest [rates] ►rate◄, payment amount, and loan balance.'' [In transactions where there may be interest rate adjustments without corresponding payment adjustments in a year, the disclosure might read, ''You will be notified once each year during which interest rate adjustments, but no payment adjustments, have been made to your loan. This notice will contain information about the index and interest rates, payment amount, and loan balance.'']

* * * * *

Section 1026.20 [Subsequent] Disclosure Requirements ►Regarding Post-Consummation Events◄

20(c) [Variable-]►R◄ate adjustments

1. ►*Creditors, assignees, and servicers.* Creditors, assignees, and servicers are subject to the requirements of § 1026.20(c), unless they no longer own the applicable adjustable-rate mortgage or the mortgage servicing rights. Creditors, assignees, and servicers are also subject to the requirements of any provision of subpart C that applies to § 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.

2. *Conversions.* In addition to the disclosures required by this section for the interest rate adjustment of an adjustable-rate mortgage, § 1026.20(c) disclosures are also required for an ARM converting to a fixed-rate transaction when the adjustment to the interest rate results in a corresponding payment change. When an open-end account converts to a closed-end adjustable-rate mortgage, § 1026.20(c) disclosures are 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, the first § 1026.20(c) disclosure would not be required until three years after conversion, and only if that first adjustment resulted in payment change. ◄[*Timing of adjustment notices.* This section requires a creditor (or a subsequent holder) to provide certain disclosures in cases where an adjustment to the interest rate is made in a variable-rate transaction subject to § 1026.19(b). There are two timing rules, depending on whether payment changes accompany interest rate changes. A creditor is required to provide at least one notice each year during which interest rate adjustments have occurred without corresponding payment adjustments. For payment adjustments, a creditor must deliver or place in the mail notices to borrowers at least 25, but not more than 120, calendar days before a payment at a new level is due. The timing rules also apply to the notice required to be given in connection with the adjustment to the rate and payment that follows conversion of a transaction subject to § 1026.19(b) to a fixed-rate transaction. (In cases where an open-end account is converted to a closed-end transaction subject to § 1026.19(b), the requirements of this section do not apply until adjustments are made following conversion.)

2. *Exceptions.* Section 1026.20(c) does not apply to ''shared-equity,'' ''shared-appreciation,'' or ''price level adjusted'' or similar mortgages.

3. *Basis of disclosures.* The disclosures required under this section shall reflect the terms of the parties' legal obligation, as required under § 1026.17(c)(1).

Paragraph 20(c)(1)

1. *Current and prior interest rates.* The requirements under this paragraph are satisfied by disclosing the interest rate used to compute the new adjusted payment amount (current rate) and the adjusted interest rate that was disclosed in the last adjustment notice, as well as all other interest rates applied to the transaction in the period since the last notice (prior rates). (If there has been no prior adjustment notice, the prior rates are the interest rate applicable to the transaction at consummation, as well as all other interest rates applied to the transaction in the period since consummation.) If no payment adjustment has been made in a year, the current rate is the new adjusted interest rate for the transaction, and the prior rates are the adjusted interest rate applicable to the loan at the time of the last adjustment notice, and all other rates applied to the transaction in the period between the current and last adjustment notices. In disclosing all other rates applied to the transaction during the period between notices, a creditor may disclose a range of the highest and lowest rates applied during that period.]

►*Paragraph 20(c)(1)(i)*

1. *In general.* An adjustable-rate mortgage, as defined under this section, is a variable-rate transaction as that term is used in subpart C, except as distinguished by commentary to § 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. *Construction loans.* 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 for ARMs if the first payment at the adjusted level is due within 210 days after consummation, when the actual new interest rate (not an estimate) is disclosed at consummation pursuant to § 1026.20(d). This exception is intended to avoid duplicative disclosures, since § 1026.20(d) requires disclosures at consummation if the first payment at the adjusted level is due within 210 days after consummation. For example, the creditor, assignee, or servicer would not be required to provide the disclosures required by § 1026.20(c) for the first time the interest rate adjusts for an ARM if the first payment at the adjusted level was due 120 days after consummation and the actual adjusted interest rate was disclosed at consummation pursuant to § 1026.20(d).

3. *Non-adjustable-rate mortgages.* For purposes of this section, the following transactions, if structured as fixed-rate and not adjustable-rate mortgages, 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; or

v. Preferred-rate loans.◄

Paragraph 20(c)(2)

1. ❲*Current and prior index values.* This section requires disclosure of the index or formula values used to compute the current and prior interest rates disclosed in § 1026.20(c)(1). The creditor need not disclose the margin used in computing the rates. If the prior interest rate was not based on an index or formula value, the creditor also need not disclose the value of the index that would otherwise have been used to compute the prior interest rate.❳

►*Timing.* The requirement that the disclosures must be provided between 60 to 120 days ''before a payment at the new level is due'' requires the creditor, assignee, or servicer to provide the notice to consumers 60 to 120 days prior to the due date, excluding any grace period, of the first payment calculated using the adjusted interest rate. For example, assume an ARM has a 45-day ''look-back'' period. In such an ARM, the most recent index figure available as of the date 45 days before a new interest rate goes into effect is used to determine the new interest rate. Because interest generally is paid in arrears, the first payment at the new level would not be due until the end of the billing cycle after the new interest rate goes into effect, typically a period of 28 to 31 days. Assume also that the creditor, assignee, or servicer has a 3-day verification period in which to verify the interest rate and perform other quality control measures before providing the notice to consumers. In this case, depending on the delivery method, the creditor, assignee, or servicer can provide the notice to consumers as early as 70 to 73 days before payment at the new level is due.

Because creditors, assignees, or servicers cannot comply with the disclosure timing requirements for ARMs adjusting for the first time within 60 days of consummation when the new interest rate is not known at consummation, the disclosures required under § 1026.20(c) for such loans must be provided as soon as practicable, but not less than 25 days before payment at a new level is due.

Paragraph 20(c)(2)(ii)(A)

1. The *current 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.''

Paragraph 20(c)(2)(iv)

1. *Rate limits and unapplied index increases.* The disclosures regarding foregone interest increases apply only to transactions permitting interest rate carryover. The amount of increase foregone at any adjustment is the amount that, subject to rate caps, can be added to future interest rate adjustments to increase, or offset decreases in, the rate determined by using the index or formula.

Paragraph 20(c)(2)(v)(B)

1. *Application of a previously foregone interest increase.* The disclosures regarding foregone interest increases apply only to transactions permitting interest rate carryover. Foregone interest is any percentage added or carried over to the new interest rate because a rate cap prevented the increase at an earlier adjustment.

Paragraph 20(c)(2)(vi)

1. *Amortization statement.* For 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 loans, § 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 balance of the loan or will increase the term of the loan.

2. *Amortization payment.* Disclosure of the payment needed to fully amortize the loan at the new interest rate is required only when negative amortization occurs as a result of the 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 fully amortize 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)(3)*

1. *Unapplied index increases.* The requirement that the consumer receive information about the extent to which the creditor has foregone any increase in the interest rate applies only to those transactions permitting interest rate carryover. The amount of increase that is foregone at an adjustment is the amount that, subject to rate caps, can be applied to future adjustments independently to increase, or offset decreases in, the rate that is determined according to the index or formula.

Paragraph 20(c)(4)

1. *Contractual effects of the adjustment.* The contractual effects of an interest rate adjustment must be disclosed including the payment due after the adjustment is made whether or not the payment has been adjusted. A contractual effect of a rate adjustment would include, for example, disclosure of any change in the term or maturity of the loan if the change resulted from the rate adjustment. In transactions in which paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the amount of the adjusted payment must be disclosed if such payment has changed as a result of the rate adjustment. A statement of the loan balance also is required. The balance required to be disclosed is the balance on which the new adjusted payment is based. If no payment adjustment is disclosed in the notice, the balance disclosed should be the loan balance on which the payment disclosed under § 1026.20(c)(5) is based, if applicable, or the balance at the time the disclosure is prepared.

Paragraph 20(c)(5)

1. *Fully-amortizing payment.* This paragraph requires a disclosure only when negative amortization occurs as a result of the adjustment. A disclosure is not required simply because a loan calls for interest-only or partially amortizing payments. For example, in a transaction with a five-year term and payments based on a longer amortization schedule, and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor would not have to disclose the payment necessary to fully amortize the loan in the remainder of the five-year term. A disclosure is required, however, if the payment disclosed under § 1026.20(c)(4) is not sufficient to prevent negative amortization in the loan. The adjustment notice must state the payment required to prevent negative amortization. (This paragraph does not apply if the payment disclosed in § 1026.20(c)(4) is sufficient to prevent negative amortization in the loan but the final payment will be a different amount due to rounding.)❳

► *Paragraph 20(d)*

1. *Creditors, assignees, and servicers.* Creditors, assignees, and servicers are subject to the requirements of § 1026.20(d), unless they no longer own the applicable adjustable-rate mortgage or the mortgage servicing rights. Creditors, assignees, and servicers are also subject to the requirements of any provision of subpart C that applies to § 1026.20(d). For example, the requirements of § 1026.17(a) with regard to providing disclosures to consumers electronically, apply to § 1026.20(d) disclosures and thus, assignees and servicers, as well as creditors, are subject to those requirements.

2. *Timing and form of initial rate adjustment.* The requirement that the disclosures be provided in writing, separate and distinct from all other correspondence, means that the initial ARM interest rate adjustment notice must be mailed or delivered separately from any other material. For example, in the case of mailing the disclosure, there should be no material in the envelope other than the § 1026.20(d) initial ARM interest rate adjustment notice. In the case of emailing the disclosure, the only attachment should be the initial ARM interest rate adjustment notice. The requirement that the disclosures be provided between 210 to 240 days ''before the first payment at the adjusted level is due'' means the creditor, assignee, or servicer must provide the notice to consumers 210 to 240 days prior to the due date, excluding any grace period, of the first payment calculated using the adjusted interest rate. Creditors, assignees, or servicers may provide the initial ARM interest rate adjustment notices to consumers in electronic form if they comply with the electronic delivery requirements in § 1026.17(a)(1).

3. *Conversions.* When an open-end account converts to a closed-end adjustable-rate mortgage, § 1026.20(d) disclosures are 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, § 1026.20(d) disclosures would not be required until three years after conversion, when the interest rate adjusts for the first time.

Paragraph 20(d)(1)(i)

1. *In general.* An adjustable-rate mortgage, as defined under this section, is a variable-rate transaction as that term is used in subpart C, except as distinguished by commentary to § 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. *Construction loans.* 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.* For purposes of this section, the following transactions, if structured as fixed-rate and not adjustable-rate mortgages, 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; or

v. Preferred-rate loans.

Paragraph 20(d)(2)(i)

1. *Date of the disclosure.* The date that appears 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. The *current and new interest rates.* The current interest rate is the interest rate that applies on the date of the disclosure, pursuant to § 1026.20(d)(2). 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 interest rate'' has the same meaning as the ''adjusted interest rate.''

Paragraph 20(d)(2)(v)

1. *Rate limits and unapplied index increases.* The disclosures regarding foregone interest increases apply only to transactions permitting interest rate carryover. The amount of increase foregone at the first interest rate adjustment is the amount that, subject to rate caps, can be added to future interest rate adjustments to increase, or offset decreases in, the rate determined by using the index or formula.

Paragraph 20(d)(2)(vii)

1. *Amortization statement.* For 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 loans, § 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 add to the balance of the loan or will increase the term of the loan.

2. *Amortization payment.* Disclosure of the payment needed to fully amortize the loan at the new interest rate is required only when negative amortization occurs as a result of the 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 fully amortize 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. *List of alternatives.* The list of alternatives provided to consumers should avoid technical terms and explain the alternatives using the terms and explanations in Form H–4(D)(3) and (4) in Appendix H to this part. For the alternative ''payment forbearance,'' the disclosure should explain that payment forbearance temporarily gives the consumer more time to pay. ◄

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Subpart E—Special Rules for Certain Home Mortgage Transactions

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Section 1026.36—Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

►*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 and the legal obligation between the parties, the servicer may take any of the following actions:

(i) Credit the partial payment upon receipt; or

(ii) Return the partial payment to the consumer; or

(iii) Hold the payment in a suspense or unapplied funds account. If the payment is held in a suspense or unapplied funds account, this must be reflected on the periodic statement, in accordance with § 1026.41. When sufficient funds accumulate to cover a full contractual payment, they must be applied to the oldest outstanding payment.

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)(1)(ii)*】

▶*Paragraph 36(c)(2)*◀

1. *Pyramiding of late fees.* The prohibition on pyramiding of late fees in this subsection should be construed consistently with the ''credit practices rule'' of the Federal Trade Commission, 16 CFR 444.4.

【*Paragraph 36(c)(1)(iii)*】

▶*Paragraph 36(c)(3)*◀

【1. *Reasonable time.* The payoff statement must be provided to the consumer, or person acting on behalf of the consumer, within a reasonable time after the request. For example, it would be reasonable under most circumstances to provide the statement within five business days of receipt of a consumer's request. This time frame might be longer, for example, when the servicer is experiencing an unusually high volume of refinancing requests.】

▶1. *As Applicable.* A creditor who no longer owns the mortgage loan or the mortgage servicing rights is not ''applicable'' and therefore is not subject to the requirements of this section to provide a periodic statement.◀

2. *Person acting on behalf of the consumer.* For purposes of § 1026.36(c)【(1)(iii)】▶(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 servicer may take reasonable measures to verify the identity of any person acting on behalf of the consumer and to obtain the consumer's authorization to release information to any such person before the ''reasonable time'' period begins to run.

3. *Payment requirements.* The servicer may specify reasonable requirements for making payoff requests, such as requiring requests to be 【in writing and】 directed to a mailing address, email address, or fax number specified by the servicer 【or orally to a telephone number specified by the servicer,】 or any other reasonable requirement or method. If the consumer does not follow these requirements, a longer time frame for responding to the request would be reasonable.

4. *Accuracy of payoff statements.* Payoff statements must be accurate when issued.

【*Paragraph 36(c)(2)*

1. *Payment requirements.* The servicer may specify reasonable requirements for making payments in writing, such as requiring that payments be accompanied by the account number or payment coupon; setting a cut-off hour for payment to be received, or setting different hours for payment by mail and payments made in person; specifying that only checks or money orders should be sent by mail; specifying that payment is to be made in U.S. dollars; or specifying one particular address for receiving payments, such as a post office box. The servicer may be prohibited, however, from requiring payment solely by preauthorized electronic fund transfer. (*See* Section 913 of the Electronic Fund Transfer Act, 15 U.S.C. 1693k.)

2. *Payment requirements—limitations.* Requirements for making payments must be reasonable; it should not be difficult for most consumers to make conforming payments. For example, it would be reasonable to require a cut-off time of 5 p.m. for receipt of a mailed check at the location specified by the servicer for receipt of such check.

3. *Implied guidelines for payments.* In the absence of specified requirements for making payments, payments may be made at any location where the servicer conducts business; any time during the servicer's normal business hours; and by cash, money order, draft, or other similar instrument in properly negotiable form, or by electronic fund transfer if the servicer and consumer have so agreed.】

* * * * *

▶*Section 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 mortgage loan, the disclosures may be given 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 should separately list the upcoming payment due dates and amounts due, as required by paragraph (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 applies to the ''creditor, assignee, or servicer as applicable.'' The creditor, assignee, or servicer are all subject to this requirement, however 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 who will send the statement.

4. *As Applicable.* A creditor who no longer owns the mortgage loan or the mortgage servicing rights is not ''applicable'' and therefore is not subject to the requirements of this section to provide a periodic statement.

41(b) Timing of the Periodic Statement

1. *Reasonably Prompt Time.* Delivering or placing the periodic statement in the mail within 4 days of close the grace period of the previous billing cycle would be considered reasonably prompt.

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 this subpart 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, such as the grouping requirements of paragraph 41(d) 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. Due to concerns about information security, if statements are provided electronically, the creditor, assignee or servicer may send the consumer a notification that their statement is available, with a link to where the statement can be accessed.

41(d) Content and Format of the Periodic Statement

1. *Close Proximity.* Paragraph (d) requires several disclosures to be provided in close proximity. 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, 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, commonly referred to as the ''escrow account,'' as an ''impound account.''

41(d)(3) Past Payment Breakdown

1. *Partial Payments.* The disclosure of any portion of payments since the last statement that was applied to a partial payment or suspense account as required by (d)(3)(i) should reflect any funds that were received in the time period covered by the transaction activity of that statement and that were sent

to a suspense or unapplied funds 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 (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 $1000 is due, but the consumer only sends in $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 suspense account, the January statement should reflect: Unapplied funds since last statement—$600. Unapplied funds YTD—$600.

(ii) Assuming the same facts as Example (i) above, 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) Assuming the same facts as Example (ii) above, except that during March the consumer sends in $400. Of this payment, $100 completes a full contractual payment when added to the $900 in funds already held in the suspense account. This $1000 should be applied to the January payment, and the remaining $300 would be held 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 activity that credits or debits the outstanding account balance. Examples of 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, an explanation of what must be done for the payments to be applied must be provided on the front of the statement, and the funds must be included as unapplied funds in the information required by (d)(3) Past Payment Breakdown.

41(d)(6) Contact Information

1. A toll-free telephone number is required. Additional contact information, such as a web address, may also be provided at the servicer's option.

2. If servicer has provided a telephone number for error resolution and inquiries pursuant to 12 CFR 1024.35 and § 1024.36, that number should be provided in the contact information section.

41(d)(7)(iv) Prepayment Penalty

1. *Examples of prepayment penalties.* For purposes of § 1026.41(d)(7)(iv), the following are examples of prepayment penalties:

i. A charge determined by treating the loan balance as outstanding for a period of time after prepayment in full and applying the interest rate to such ''balance,'' even if the charge results from interest accrual amortization used for other payments in the transaction under the terms of the loan contract. ''Interest accrual amortization'' refers to the method by which the amount of interest due for each period (*e.g.,* month) in a transaction's term is determined. For example, ''monthly interest accrual amortization'' treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of any grace period). Thus, under the terms of a loan contract providing for monthly interest accrual amortization, if the amount of interest due on May 1 for the preceding month of April is $3,000, the loan contract will require payment of $3,000 in interest for the month of April whether the payment is made on April 20, on May 1, or on May 10. In this example, if the consumer prepays the loan in full on April 20 and if the accrued interest as of that date is $2,000, then assessment of a charge of $3,000 constitutes a prepayment penalty of $1,000 because the amount of interest actually earned through April 20 is only $2,000.

ii. A fee, such as an origination or other loan closing cost, that is waived by the creditor on the condition that the consumer does not prepay the loan.

iii. A minimum finance charge in a simple interest transaction.

iv. Computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d). For purposes of computing a refund of unearned interest, if using the actuarial method defined by applicable State law results in a refund that is greater than the refund calculated by using the method described in section 933(d) of the Housing and Community Development Act of 1992, creditors should use the State law definition in determining if a refund is a prepayment penalty.

2. *Fees that are not prepayment penalties.* For purposes of § 1026.41(d)(7)(iv), fees which are not prepayment penalties include, for example:

i. Fees imposed for preparing and providing documents when a loan is paid in full, if such fees are imposed whether or not the loan is prepaid. Examples include a loan payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the loan.

ii. Loan guarantee fees.

41(e) Exemptions

1. *Information made available.* Information made available by the servicer may be obtained through the inquiry process in § 1024.36.

41(e)(3) Coupon Book Exemption

1. *Fixed Rate.* ''Fixed rate'' is to be construed consistently with § 1026.18(s)(7)(iii).

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 amount of the outstanding principal balance. For the purposes of the coupon book, 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

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 are the lender to whom 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. Threshold. In determining whether a small servicer services 1,000 mortgage loans or less, a servicer is 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 will have six months or until the beginning of the next calendar year, whichever is later, to begin compliance other than as a small servicer. Examples:

i. A servicer that crosses the loan threshold on October 1 would no longer be considered a small servicer on April 1 of the following year.

ii. A servicer that crosses the loan threshold on February 1 would no longer be considered a small servicer on January 1 of the following year.

3. *Small servicers that do not qualify for the exemption.* A servicer that services any mortgage loans that are not owned by the servicer or an affiliate or for which the servicer or an affiliate were not the entity to whom the obligation was initially payable is not a small servicer. For example, if a servicer acquires mortgage servicing rights to service mortgage loans the servicer or an affiliate does not own and did not originate is not a small servicer.

4. *Master servicing responsibilities.* The periodic statement requirements apply to master servicers. A subservicer that meets the small servicer definition cannot claim the benefit of any small servicer exemption for mortgage loans that are master serviced by an entity that does not qualify for the small servicer exemption.◀

* * * * *

Appendices G and H—Open-End and Closed-End Model Forms and Clauses

1. *Permissible changes.* Although use of the model forms and clauses is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures. ▶For purposes of the model forms and samples in H–4(D), the term creditors refers to creditors, assignees, and servicers.◀ Creditors may make certain changes in the format or content of the forms and clauses and may delete any disclosures that are inapplicable to a transaction or a plan without losing the Act's protection from liability, except formatting changes may not be made to model forms and samples in ▶H–4(D),◀H–18, H–19, H–20, H–21, H–22, H–23, G–2(A), G–3(A), G–4(A), G–10(A)–(E), G–17(A)–(D), G–18(A) (except as permitted pursuant to § 1026.7(b)(2), G–18(B)–(C), G–19, G–20, and G–21, or to the model clauses in H–4(E), H–4(F), H–4(G), and H–4(H). Creditors may modify the heading of the second column shown in Model Clause H–4(H) to read ''first adjustment'' or ''first increase,'' as applicable, pursuant to § 1026.18(s)(2)(i)(C). The rearrangement of the model forms and clauses may not be so extensive as to affect the substance, clarity, or meaningful sequence of the forms and clauses. Creditors making revisions with that effect will lose their protection from civil liability. Except as otherwise specifically required, acceptable changes include, for example:

i. Using the first person, instead of the second person, in referring to the borrower.

ii. Using ''borrower'' and ''creditor'' instead of pronouns.

iii. Rearranging the sequences of the disclosures.

iv. Not using bold type for headings.

v. Incorporating certain State ''plain English'' requirements.

vi. Deleting inapplicable disclosures by whiting out, blocking out, filling in ''N/A'' (not applicable) or ''0,'' crossing out, leaving blanks, checking a box for applicable items, or circling applicable items. (This should permit use of multipurpose standard forms.)

vii. Using a vertical, rather than a horizontal, format for the boxes in the closed-end disclosures.

* * * * *

Appendix H—Closed Model Forms and 【Clause】

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7. * * *

i. Model H–4(D) illustrates the adjustment 【notice】▶notices◀ required under § 1026.20(c)▶and (d)◀, and provides examples of ▶§ 1026.20(c)◀payment change notices and ▶§ 1026.20(d) initial◀【annual】 notices of interest rate 【changes】 ▶adjustments◀.

* * * * *

Dated: August 9, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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Part IV

Securities and Exchange Commission

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Auditing Standard No. 16, Communications With Audit Committees and Related and Transitional Amendments to PCAOB Standards; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67807; File No. PCAOB–2012–001]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Auditing Standard No. 16, Communications With Audit Committees and Related and Transitional Amendments to PCAOB Standards

September 10, 2012.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Sarbanes-Oxley Act''), notice is hereby given that on August 28, 2012, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rules described in items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rules

On August 15, 2012, the Board adopted Auditing Standard No. 16, *Communications with Audit Committees,* related amendments to its interim auditing standards, and transitional amendments to AU sec. 380, *Communication with Audit Committees,* (collectively, ''the proposed rules''). The text of the proposed rules is set out below.

Auditing Standard No. 16

Communications With Audit Committees

Introduction

1. This standard requires the auditor to communicate with the company's *audit committee* [1] regarding certain matters related to the conduct of an audit [2] and to obtain certain information from the audit committee relevant to the audit. This standard also requires the auditor to establish an understanding of the terms of the audit engagement with the audit committee and to record that understanding in an engagement letter.

2. Other Public Company Accounting Oversight Board (''PCAOB'') rules and standards identify additional matters to be communicated to a company's audit committee (see Appendix B). Various laws or regulations also require the auditor to communicate certain matters to the audit committee.[3] The communication requirements of this standard do not modify or replace communications to the audit committee required by such other PCAOB rules and standards, and other laws or regulations. Nothing in this standard precludes the auditor from communicating other matters to the audit committee.

Objectives

3. The objectives of the auditor are to:

a. Communicate to the audit committee the responsibilities of the auditor in relation to the audit and establish an understanding of the terms of the audit engagement with the audit committee;

b. Obtain information from the audit committee relevant to the audit;

c. Communicate to the audit committee an overview of the overall audit strategy and timing of the audit; and

d. Provide the audit committee with timely observations arising from the audit that are significant to the financial reporting process.

Note: ''Communicate to,'' as used in this standard, is meant to encourage effective two-way communication between the auditor and the audit committee throughout the audit to assist in understanding matters relevant to the audit.

Appointment and Retention

Significant Issues Discussed With Management in Connection With the Auditor's Appointment or Retention

4. The auditor should discuss with the audit committee any significant issues that the auditor discussed with management in connection with the appointment or retention of the auditor, including significant discussions regarding the application of accounting principles and auditing standards.

Establish an Understanding of the Terms of the Audit

5. The auditor should establish an understanding of the terms of the audit engagement with the audit committee. This understanding includes communicating to the audit committee the following:

a. The objective of the audit;

b. The responsibilities of the auditor; and

c. The responsibilities of management.

6. The auditor should record the understanding of the terms of the audit engagement in an engagement letter and provide the engagement letter to the audit committee annually. The auditor should have the engagement letter executed by the appropriate party or parties on behalf of the company.[4] If the appropriate party or parties are other than the audit committee, or its chair on behalf of the audit committee, the auditor should determine that the audit committee has acknowledged and agreed to the terms of the engagement.

Note: Appendix C describes matters that the auditor should include in the engagement letter about the terms of the audit engagement.

7. If the auditor cannot establish an understanding of the terms of the audit engagement with the audit committee, the auditor should decline to accept, continue, or perform the engagement.

Obtaining Information and Communicating the Audit Strategy

Obtaining Information Relevant to the Audit

8. The auditor should inquire of the audit committee about whether it is aware of matters relevant to the audit,[5] including, but not limited to, violations or possible violations of laws or regulations.[6]

Overall Audit Strategy, Timing of the Audit, and Significant Risks

9. The auditor should communicate to the audit committee an overview of the overall audit strategy, including the timing of the audit,[7] and discuss with the audit committee the significant risks identified during the auditor's risk assessment procedures.[8]

[1] Terms defined in Appendix A, *Definitions,* are set in boldface type the first time they appear.

[2] For purposes of this standard, an audit is either an audit of internal control over financial reporting that is integrated with an audit of financial statements or an audit of financial statements only.

[3] *See e.g.,* Section 10A(k) of the Securities Exchange Act of 1934 (''Exchange Act''), 15 U.S.C. 78j–1(k); Rule 2–07 of Regulation S–X, 17 CFR 210.2–07; and Rule 10A–3 under the Exchange Act, 17 CFR 240.10A–3.

[4] Absent evidence to the contrary, the auditor may rely on the company's identification of the appropriate party or parties to execute the engagement letter.

[5] In addition to this inquiry, paragraphs 5.f. and 54–57 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* describe the auditor's inquiries of the audit committee, or equivalent (or its chair) regarding the audit committee's knowledge of the risks of material misstatement, including fraud risks. These inquiries include, among other things, whether the audit committee is aware of tips or complaints regarding the company's financial reporting.

[6] *See* AU sec. 317, *Illegal Acts by Clients,* for a description of the auditor's responsibilities when a possible illegal act is detected. For audits of issuers, *see also* Section 10A(b) of the Exchange Act, 15 U.S.C. 78j–1(b), and Rule 10A–1 under the Exchange Act, 17 CFR 240.10A–1.

[7] *See* paragraphs 8–9 of Auditing Standard No. 9, *Audit Planning,* for a description of the auditor's responsibilities for establishing an overall audit strategy.

[8] Auditing Standard No. 12 requires the auditor to determine whether identified and assessed risks are significant risks. A significant risk is defined as a risk of material misstatement that requires special audit consideration.

Note: This overview is intended to provide information about the audit, but not specific details that would compromise the effectiveness of the audit procedures.

10. As part of communicating the overall audit strategy, the auditor should communicate the following matters to the audit committee, if applicable:

a. The nature and extent of specialized skill or knowledge needed to perform the planned audit procedures or evaluate the audit results related to significant risks;[9]

b. The extent to which the auditor plans to use the work of the company's internal auditors in an audit of financial statements;[10]

c. The extent to which the auditor plans to use the work of internal auditors, company personnel (in addition to internal auditors), and third parties working under the direction of management or the audit committee when performing an audit of internal control over financial reporting;[11]

d. The names, locations, and planned responsibilities[12] of other independent public accounting firms or other persons, who are not employed by the auditor, that perform audit procedures in the current period audit; and

Note: The term ''other independent public accounting firms'' in the context of this communication includes firms that perform audit procedures in the current period audit regardless of whether they otherwise have any relationship with the auditor.

e. The basis for the auditor's determination that the auditor can serve as principal auditor, if significant parts of the audit are to be performed by other auditors.[13]

11. The auditor should communicate to the audit committee significant changes to the planned audit strategy or the significant risks initially identified and the reasons for such changes.[14]

Results of the Audit

Accounting Policies and Practices, Estimates, and Significant Unusual Transactions

12. The auditor should communicate to the audit committee the following matters:

a. Significant accounting policies and practices.[15]

(1) Management's initial selection of, or changes in, significant accounting policies or the application of such policies in the current period; and

(2) The effect on financial statements or disclosures of significant accounting policies in (i) controversial areas or (ii) areas for which there is a lack of authoritative guidance or consensus, or diversity in practice.

b. *Critical accounting policies and practices.* All critical accounting policies and practices to be used, including:[16]

(1) The reasons certain policies and practices are considered critical; and

(2) How current and anticipated future events might affect the determination of whether certain policies and practices are considered critical.

Note: Critical accounting policies and practices, as defined in Appendix A, are a company's accounting policies and practices that are both most important to the portrayal of the company's financial condition and results, and require management's most difficult, subjective, or complex judgments, often as a result of the need to make estimates about the effects of matters that are inherently uncertain. Critical accounting policies and practices are tailored to specific events in the current year, and the accounting policies and practices that are considered critical might change from year to year.

c. *Critical accounting estimates.*

(1) A description of the process management used to develop critical accounting estimates;[17]

(2) Management's significant assumptions used in critical accounting estimates that have a high degree of subjectivity;[18] and

(3) Any significant changes management made to the processes used to develop critical accounting estimates or significant assumptions, a description of management's reasons for the changes, and the effects of the changes on the financial statements.[19]

d. Significant unusual transactions.

(1) Significant transactions that are outside the normal course of business for the company or that otherwise appear to be unusual due to their timing, size, or nature;[20] and

(2) The policies and practices management used to account for significant unusual transactions.

Note: As part of its communications to the audit committee, management might communicate some or all of the matters in paragraph 12. If management communicates any of these matters, the auditor does not need to communicate them at the same level of detail as management, as long as the auditor (1) participated in management's discussion with the audit committee, (2) affirmatively confirmed to the audit committee that management has adequately communicated these matters, and (3) with respect to critical accounting policies and practices, identified for the audit committee those accounting policies and practices that the auditor considers critical. The auditor should communicate any omitted or inadequately described matters to the audit committee.

Auditor's Evaluation of the Quality of the Company's Financial Reporting

13. The auditor should communicate to the audit committee the following matters:

a. Qualitative aspects of significant accounting policies and practices.

(1) The results of the auditor's evaluation of, and conclusions about, the qualitative aspects of the company's significant accounting policies and practices, including situations in which the auditor identified bias in management's judgments about the amounts and disclosures in the financial statements;[21] and

(2) The results of the auditor's evaluation of the differences between (i) estimates best supported by the audit evidence and (ii) estimates included in the financial statements, which are

[9] *See* paragraph 16 of Auditing Standard No. 9 for the requirement for the auditor to determine whether specialized skill or knowledge is needed to perform appropriate risk assessments, plan or perform audit procedures, or evaluate audit results.

[10] *See* AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements,* which describes the auditor's responsibilities related to the work of internal auditors.

[11] *See* paragraphs 16–19 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* which describe the auditor's responsibilities related to using the work of others in an audit of internal control over financial reporting.

[12] *See* paragraphs 8–14 of Auditing Standard No. 9, which discuss the auditor's responsibilities for determining the audit strategy, audit plan, and extent to which audit procedures should be performed at selected locations or business units involving multi-location engagements.

[13] *See* AU sec. 543, *Part of Audit Performed by Other Independent Auditors,* which discusses the professional judgments the auditor makes in deciding whether the auditor may serve as principal auditor.

[14] *See* paragraph 15 of Auditing Standard No. 9, which discusses changes in audit strategy and the audit plan during the course of the audit.

[15] *See, e.g.,* Financial Accounting Standards Board Accounting Standards Codification, Topic 235, Notes to Financial Statements, paragraph 235–10–50–1, which requires the entity to disclose a description of all significant accounting policies as an integral part of the financial statements, and paragraph 235–10–50–3, which describes what should be disclosed.

[16] *See also* Section 10A(k) of the Exchange Act, 15 U.S.C. 78j–1(k), and Rule 2–07(a)(1) of Regulation S–X, 17 CFR 210.2–07(a)(1).

[17] *See* AU sec. 342, *Auditing Accounting Estimates,* which discusses the auditor's responsibilities to obtain and evaluate sufficient appropriate audit evidence to support significant accounting estimates in an audit of financial statements.

[18] *Id.*

[19] *Id.*

[20] *See* paragraph 71.g. of Auditing Standard No. 12.

[21] *See* paragraphs 24–27 of Auditing Standard No. 14, *Evaluating Audit Results,* which describe the auditor's responsibilities related to evaluating the qualitative aspects of the company's accounting practices.

individually reasonable, that indicate a possible bias on the part of the company's management.[22]

b. Assessment of critical accounting policies and practices. The auditor's assessment of management's disclosures related to the critical accounting policies and practices, along with any significant modifications to the disclosure of those policies and practices proposed by the auditor that management did not make.

c. Conclusions regarding critical accounting estimates. The basis for the auditor's conclusions regarding the reasonableness of the critical accounting estimates.[23]

d. Significant unusual transactions. The auditor's understanding of the business rationale for significant unusual transactions.[24]

e. Financial statement presentation. The results of the auditor's evaluation of whether the presentation of the financial statements and the related disclosures are in conformity with the applicable financial reporting framework, including the auditor's consideration of the form, arrangement, and content of the financial statements (including the accompanying notes), encompassing matters such as the terminology used, the amount of detail given, the classification of items, and the bases of amounts set forth.[25]

f. New accounting pronouncements. Situations in which, as a result of the auditor's procedures, the auditor identified a concern regarding management's anticipated application of accounting pronouncements that have been issued but are not yet effective and might have a significant effect on future financial reporting.

g. Alternative accounting treatments. All alternative treatments permissible under the applicable financial reporting framework for policies and practices related to material items that have been discussed with management, including the ramifications of the use of such alternative disclosures and treatments and the treatment preferred by the auditor.[26]

Other Information in Documents Containing Audited Financial Statements

14. When other information is presented in documents containing audited financial statements, the auditor should communicate to the audit committee the auditor's responsibility under PCAOB rules and standards for such information, any related procedures performed, and the results of such procedures.[27]

Difficult or Contentious Matters for Which the Auditor Consulted

15. The auditor should communicate to the audit committee matters that are difficult or contentious for which the auditor consulted outside the engagement team and that the auditor reasonably determined are relevant to the audit committee's oversight of the financial reporting process.

Management Consultation With Other Accountants

16. When the auditor is aware that management consulted with other accountants about significant auditing or accounting matters and the auditor has identified a concern regarding such matters, the auditor should communicate to the audit committee his or her views about such matters that were the subject of such consultation.

Going Concern

17. The auditor should communicate to the audit committee, when applicable, the following matters relating to the auditor's evaluation of the company's ability to continue as a going concern: [28]

a. If the auditor believes there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time, the conditions and events that the auditor identified that, when considered in the aggregate, indicate that there is substantial doubt; [29]

b. If the auditor concludes, after consideration of management's plans, that substantial doubt about the company's ability to continue as a going concern is alleviated, the basis for the auditor's conclusion, including elements the auditor identified within management's plans that are significant to overcoming the adverse effects of the conditions and events; [30]

c. If the auditor concludes, after consideration of management's plans, that substantial doubt about the company's ability to continue as a going concern for a reasonable period of time remains: [31]

(1) The effects, if any, on the financial statements and the adequacy of the related disclosure; [32] and

(2) The effects on the auditor's report.[33]

Uncorrected and Corrected Misstatements

18. The auditor should provide the audit committee with the schedule of uncorrected misstatements related to accounts and disclosures[34] that the auditor presented to management.[35] The auditor should discuss with the audit committee, or determine that management has adequately discussed with the audit committee, the basis for the determination that the uncorrected

[22] *See* paragraph 27 of Auditing Standard No. 14.

[23] *See* AU sec. 342, which discusses the auditor's responsibilities to obtain and evaluate sufficient appropriate audit evidence to support significant accounting estimates in an audit of financial statements.

[24] *See* paragraph .66 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit.*

[25] *See* paragraphs 30–31 of Auditing Standard No. 14, which describe the auditor's responsibilities related to the evaluation of whether the financial statements are presented fairly, in all material respects, in conformity with the applicable financial reporting framework. Other PCAOB standards, such as AU sec. 334, *Related Parties,* and AU sec. 341, *The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern,* describe the auditor's responsibilities related to evaluation of specific disclosures in financial statements.

[26] *See also* Section 10A(k) of the Exchange Act, 15 U.S.C. 78j-1(k), and Rule 2–07(a)(2) of Regulation S–X, 17 CFR 210.2–07(a)(2).

[27] *See, e.g.,* AU sec. 550, *Other Information in Documents Containing Audited Financial Statements.* In addition to AU sec. 550, discussion of the auditor's consideration of other information is included in AU sec. 558, *Required Supplementary Information,* and AU sec. 711, *Filings Under Federal Securities Statutes.*

[28] *See* AU sec. 341 for the requirements regarding an auditor's responsibility to evaluate whether there is substantial doubt about a company's ability to continue as a going concern for a reasonable period of time, not to exceed one year beyond the date of the financial statements being audited. Additionally, AU secs. 341.03a–c provide the auditor with an overview of the requirements for evaluating whether there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time.

[29] *See* AU sec. 341.06, which provides examples of such conditions and events and AU sec. 341.07, which discusses the auditor's procedures if the auditor believes there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time.

[30] *See* AU sec. 341.08, which discusses the auditor's responsibilities related to the auditor's evaluation of management's plans.

[31] *See* AU sec. 341.12, which describes the effects on the auditor's report. *See also* AU sec. 341.03c, which discusses the auditor's evaluation of factors that indicate there is substantial doubt about the company's ability to continue as a going concern.

[32] *See* AU sec. 341.10, which discusses the possible effects on the financial statements and the adequacy of the related disclosure.

[33] *See* AU secs. 341.12–.16, which discuss the auditor's consideration of the effects on the auditor's report when the auditor concludes that substantial doubt exists about the company's ability to continue as a going concern for a reasonable period of time.

[34] Footnote 13 to paragraph 20 of Auditing Standard No. 14 indicates that misstatements include omission and presentation of inaccurate or incomplete disclosures.

[35] *See* Section 13(i) of the Exchange Act, 15 U.S.C. 78m(i), which states, in part, that financial statements prepared in accordance with generally accepted accounting principles and filed with the Securities and Exchange Commission ''shall reflect all material correcting adjustments that have been identified by a registered public accounting firm * * *.''

misstatements were immaterial, including the qualitative factors[36] considered. The auditor also should communicate that uncorrected misstatements or matters underlying those uncorrected misstatements could potentially cause future-period financial statements to be materially misstated, even if the auditor has concluded that the uncorrected misstatements are immaterial to the financial statements under audit.

19. The auditor should communicate to the audit committee those corrected misstatements, other than those that are clearly trivial,[37] related to accounts and disclosures that might not have been detected except through the auditing procedures performed, and discuss with the audit committee the implications that such corrected misstatements might have on the company's financial reporting process.

Material Written Communications

20. The auditor should communicate to the audit committee other material written communications between the auditor and management.[38]

Departure From the Auditor's Standard Report

21. The auditor should communicate to the audit committee the following matters related to the auditor's report:

a. When the auditor expects to modify the opinion in the auditor's report, the reasons for the modification, and the wording of the report; and

b. When the auditor expects to include explanatory language or an explanatory paragraph in the auditor's report, the reasons for the explanatory language or paragraph, and the wording of the explanatory language or paragraph.

Disagreements With Management

22. The auditor should communicate to the audit committee any disagreements with management about matters, whether or not satisfactorily resolved, that individually or in the aggregate could be significant to the company's financial statements or the auditor's report. Disagreements with management do not include differences of opinion based on incomplete facts or preliminary information that are later resolved by the auditor obtaining additional relevant facts or information prior to the issuance of the auditor's report.

Difficulties Encountered in Performing the Audit

23. The auditor should communicate to the audit committee any significant difficulties encountered during the audit. Significant difficulties encountered during the audit include, but are not limited to:

a. Significant delays by management, the unavailability of company personnel, or an unwillingness by management to provide information needed for the auditor to perform his or her audit procedures;

b. An unreasonably brief time within which to complete the audit;

c. Unexpected extensive effort required by the auditor to obtain sufficient appropriate audit evidence;

d. Unreasonable management restrictions encountered by the auditor on the conduct of the audit; and

e. Management's unwillingness to make or extend its assessment of the company's ability to continue as a going concern when requested by the auditor.

Note: Difficulties encountered by the auditor during the audit could represent a scope limitation,[39] which may result in the auditor modifying the auditor's opinion or withdrawing from the engagement.

Other Matters

24. The auditor should communicate to the audit committee other matters arising from the audit that are significant to the oversight of the company's financial reporting process. This communication includes, among other matters, complaints or concerns regarding accounting or auditing matters that have come to the auditor's attention during the audit and the results of the auditor's procedures regarding such matters.[40]

Form and Documentation of Communications

25. The auditor should communicate to the audit committee the matters in this standard, either orally or in writing,[41] unless otherwise specified in this standard. The auditor must document the communications in the work papers, whether such communications took place orally or in writing.[42]

Note: If, as part of its communications to the audit committee, management communicated some or all of the matters identified in paragraphs 12 or 18 and, as a result, the auditor did not communicate these matters at the same level of detail as management, the auditor must include a copy of or a summary of management's communications provided to the audit committee in the audit documentation.

Timing

26. All audit committee communications required by this standard should be made in a timely manner and prior to the issuance of the auditor's report.[43] The appropriate timing of a particular communication to the audit committee depends on factors such as the significance of the matters to be communicated and corrective or follow-up action needed, unless other timing requirements are specified by PCAOB rules or standards or the securities laws.

Note: An auditor may communicate to only the audit committee chair if done in order to communicate matters in a timely manner during the audit. The auditor, however, should communicate such matters to the audit committee prior to the issuance of the auditor's report.

Appendix A—Definitions

A1. For purposes of this standard, the terms listed below are defined as follows:

A2. Audit committee—A committee (or equivalent body) established by and among the board of directors of a company for the purpose of overseeing the accounting and financial reporting processes of the company and audits of the financial statements of the company; if no such committee exists with respect to the company, the entire board of directors of the company.

For audits of nonissuers, if no such committee or board of directors (or equivalent body) exists with respect to the company, the person(s) who oversee the accounting and financial reporting processes of the company and audits of the financial statements of the company.

A3. Critical accounting estimate—An accounting estimate where (a) the nature of

[36] Appendix B of Auditing Standard No. 14 discusses the qualitative factors related to the evaluation of the materiality of uncorrected misstatements.

[37] *See* paragraph 10 of Auditing Standard No. 14, which requires the auditor to accumulate misstatements identified during the audit, other than those that are clearly trivial.

[38] *See also* Section 10A(k) of the Exchange Act, 15 U.S.C. 78j–1(k) and Rule 2–07(a)(3) of Regulation S–X, 17 CFR 210.2–07 (a)(3).

[39] *See* paragraphs .22–.32 of AU sec. 508, *Reports on Audited Financial Statements,* for a discussion of scope limitations.

[40] AU secs. 316.79–.81 and AU sec. 317.17 include specific communication requirements relating to fraud or illegal acts, respectively.

[41] *See* paragraphs .07–.11 of AU sec. 532, *Restricting the Use of an Auditor's Report,* which apply to certain written reports on matters coming to the auditor's attention during the course of the audit.

[42] Consistent with the requirements of Auditing Standard No. 3, *Audit Documentation,* the audit documentation should be in sufficient detail to enable an experienced auditor, having no previous connection with the engagement, to understand the communications made to comply with the provisions of this standard.

[43] Consistent with Rule 2–07 of Regulation S–X, 17 CFR 210.2–07, in the case of a registered investment company, audit committee communication should occur annually, and if the annual communication is not within 90 days prior to the filing of the auditor's report, the auditor should provide an update in the 90-day period prior to the filing of the auditor's report, of any changes to the previously reported information.

the estimate is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change and (b) the impact of the estimate on financial condition or operating performance is material.

A4. Critical accounting policies and practices—A company's accounting policies and practices that are both most important to the portrayal of the company's financial condition and results, and require management's most difficult, subjective, or complex judgments, often as a result of the need to make estimates about the effects of matters that are inherently uncertain.

Appendix B—Communications With Audit Committees Required by Other PCAOB Rules and Standards

This appendix identifies other PCAOB rules and standards related to the audit that require communication of specific matters between the auditor and the audit committee.

a. Auditing Standard No. 4, *Reporting on Whether a Previously Reported Material Weakness Continues to Exist,* paragraphs 60, 62, and 64.

b. Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* paragraphs 78–81, 91, C7, and C14.

c. Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* paragraphs 5.f. and 54–57.

d. PCAOB Rule 3524, *Audit Committee Pre-approval of Certain Tax Services.*

e. PCAOB Rule 3525, *Audit Committee Pre-approval of Non-audit Services Related to Internal Control Over Financial Reporting.*

f. PCAOB Rule 3526, *Communication with Audit Committees Concerning Independence.*

g. AU sec. 316, *Consideration of Fraud in a Financial Statement Audit,* paragraphs .79–.81.

h. AU sec. 317, *Illegal Acts by Clients,* paragraphs .08, .17, and .20.

i. AU sec. 325, *Communications About Control Deficiencies in an Audit of Financial Statements,* paragraphs 4–7 and 9.

j. AU sec. 328, *Auditing Fair Value Measurements and Disclosures,* paragraph .50.

k. AU sec. 333, *Management Representations,* paragraph .05.

l. AU sec. 550, *Other Information in Documents Containing Audited Financial Statements,* paragraphs .04 and .06.

m. AU sec. 711, *Filings Under Federal Securities Statutes,* paragraph .13.

n. AU sec. 722, *Interim Financial Information,* paragraphs .08–.09, .30–.31, and .33–.36.

Appendix C—Matters Included in the Audit Engagement Letter

C1. The auditor should include the following matters in the engagement letter.[44]

The auditor's description of these matters will vary depending on whether the auditor is engaged in a financial statement audit or in an audit of internal control over financial reporting that is integrated with an audit of financial statements (''integrated audit'').

a. The objective of the audit is:

a. *Integrated audit:* The expression of an opinion on both the effectiveness of internal control over financial reporting and the financial statements.

b. *Audit of financial statements:* The expression of an opinion on the financial statements.

b. Auditor's responsibilities:

a. The auditor is responsible for conducting the audit in accordance with the standards of the Public Company Accounting Oversight Board. Those standards require that the auditor:

a. Integrated audit: Plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud, and whether effective internal control over financial reporting was maintained in all material respects. Accordingly, there is some risk that a material misstatement of the financial statements or a material weakness in internal control over financial reporting would remain undetected. Although not absolute assurance, reasonable assurance is a high level of assurance. Also, an integrated audit is not designed to detect error or fraud that is immaterial to the financial statements or deficiencies in internal control over financial reporting that, individually or in combination, are less severe than a material weakness. If, for any reason, the auditor is unable to complete the audit or is unable to form or has not formed an opinion, he or she may decline to express an opinion or decline to issue a report as a result of the engagement.

b. Audit of financial statements: Plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. Accordingly, there is some risk that a material misstatement would remain undetected. Although not absolute assurance, reasonable assurance is a high level of assurance. Also, a financial statement audit is not designed to detect error or fraud that is immaterial to the financial statements. If, for any reason, the auditor is unable to complete the audit or is unable to form or has not formed an opinion, he or she may decline to express an opinion or decline to issue a report as a result of the engagement.

d. An audit includes:

c. *Integrated audit:* In fulfillment of the responsibilities noted above, the auditor communicates:

- To the audit committee and management: All material weaknesses in internal control over financial reporting identified during the audit, in writing.
- To the audit committee: All significant deficiencies identified during the audit, in writing, and informs the audit committee when the auditor has informed management of all internal control deficiencies.
- To management: All internal control deficiencies identified during the audit and not previously communicated in writing by the auditor or by others, including internal auditors or others within the company.
- To the board of directors: Any conclusion that the audit committee's oversight of the company's external financial reporting and internal control over financial reporting is ineffective, in writing.

d. *Audit of financial statements:* Obtaining an understanding of internal control sufficient to plan the audit and to determine the nature, timing, and extent of audit procedures to be performed.[45] An audit of financial statements is not designed to provide assurance on internal control or to identify internal control deficiencies. However, the auditor is responsible for communicating:

1. To the audit committee and management: All significant deficiencies and material weaknesses identified during the audit, in writing.

2. To the board of directors: If the auditor becomes aware that the oversight of the company's external financial reporting and internal control over financial reporting by the audit committee is ineffective, that conclusion, in writing.

c. Management's responsibilities:

f. Management is responsible for the company's financial statements, including disclosures.

g. Management is responsible for establishing and maintaining effective internal control over financial reporting.

h. Management is responsible for identifying and ensuring that the company complies with the laws and regulations applicable to its activities.

i. Management is responsible for making all financial records and relevant information available to the auditor.

j. At the conclusion of the engagement, management will provide the auditor with a letter that confirms certain representations made during the audit.

k. Management is responsible for adjusting the financial statements to correct material misstatements relating to accounts or disclosures and for affirming to the auditor in the representation letter that the effects of any uncorrected misstatements aggregated by the auditor are immaterial, both individually and in the aggregate, to the financial statements taken as a whole.

C2. In connection with a review of interim financial information, to confirm and document the understanding, the auditor should either: (a) Document in the audit engagement letter the nature and objectives of the engagement to review interim financial information and the responsibilities of management and the auditor or (b) issue a separate engagement letter that addresses such matters.[46]

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[44] Certain matters should not be included in an engagement letter; for example, under Securities and Exchange Commission, *Section 602.02.f.i. of the Codification of Financial Reporting Policies,* indemnification provisions are not permissible for audits of issuers.

[45] AU sec. 325, *Communications About Control Deficiencies in an Audit of Financial Statements,* provides direction on control deficiencies identified in an audit of financial statements.

[46] Paragraphs .08–.09 of AU sec. 722, *Interim Financial Information,* discuss the auditor's responsibilities related to establishing an understanding with the audit committee in connection with a review of the company's interim financial information.

Amendments to PCAOB Standards

Auditing Standards

Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting That Is Integrated With An Audit of Financial Statements

Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That is Integrated with An Audit of Financial Statements,* as amended, is amended as follows:

- The following sentence is added at the end of paragraph 80: This communication should be made in a timely manner and prior to the issuance of the auditor's report on internal control over financial reporting.
- *The following sentence is added after the first sentence of paragraph 81:* The auditor should communicate this information to the audit committee in a timely manner and prior to the issuance of the auditor's report on internal control over financial reporting.

Auditing Standard No. 9, Audit Planning

Auditing Standard No. 9, *Audit Planning,* is amended as follows:

- Paragraph 6.c. is replaced with: Establish an understanding of the terms of the audit engagement with the audit committee in accordance with Auditing Standard No. 16, *Communications with Audit Committees.*
- Footnote 4 to paragraph 6 is deleted.
- In footnote 7 to paragraph 9.a., the references to AU sec. 310 and AU sec. 380, *Communication with Audit Committees,* are replaced with a reference to Auditing Standard No. 16, *Communications with Audit Committees.*

Auditing Standard No. 13, The Auditor's Responses to the Risks of Material Misstatement

Auditing Standard No. 13, *The Auditor's Responses to the Risks of Material Misstatement,* is amended as follows:

The note to paragraph 5.d. is deleted.

AU sec. 310, ''Appointment of the Independent Auditor''

SAS No. 1, ''Codification of Auditing Standards and Procedures'' section 310, ''Appointment of the Independent Auditor'' (AU sec. 310, ''Appointment of the Independent Auditor''), as amended, is superseded.

AU sec. 316, ''Consideration of Fraud in a Financial Statement Audit''

SAS No. 99, ''Consideration of Fraud in a Financial Statement Audit'' (AU sec. 316, ''Consideration of Fraud in a Financial Statement Audit''), as amended, is amended as follows:

a. The third sentence of paragraph .79 is replaced with: Fraud involving senior management and fraud (whether caused by senior management or other employees) that causes a material misstatement of the financial statements should be reported directly to the audit committee in a timely manner and prior to the issuance of the auditor's report.

b. The second sentence of paragraph .81 is replaced with: Such a communication may be a part of an overall communication to the audit committee of business and financial statement risks affecting the entity and/or in conjunction with the auditor communication about the qualitative aspects of the entity's accounting policies and practices (see paragraphs 12–13 of Auditing Standard No.16, *Communications with Audit Committees*). The auditor should communicate these matters to the audit committee in a timely manner and prior to the issuance of the auditor's report.

c. Within footnote 10 to paragraph .88, the reference to section 380, *Communication With Audit Committees,* is replaced with a reference to Auditing Standard No.16, *Communications with Audit Committees.*

AU sec. 317, ''Illegal Acts by Clients''

SAS No. 54, ''Illegal Acts by Clients'' (AU sec. 317, ''Illegal Acts by Clients''), as amended, is amended as follows:

- The fourth sentence of paragraph .08 is replaced with:

The auditor should make inquiries of management and the audit committee1 concerning the client's compliance with laws and regulations and knowledge of violations or possible violations of laws or regulations.

- Footnote 1 is added to paragraph .08 after the term ''audit committee'': For this standard, audit committee is defined as a committee (or equivalent body) established by and among the board of directors of an entity for the purpose of overseeing the accounting and financial reporting processes of the entity and audits of the financial statements of the entity; if no such committee exists with respect to the entity, the entire board of directors of the entity. For audits of nonissuers, if no such committee or board of directors (or equivalent body) exists with respect to the entity, the person(s) who oversee the accounting and financial reporting processes of the entity and audits of the financial statements of the entity.
- The first sentence of paragraph .17 is replaced with:

The auditor should assure himself that the audit committee is adequately informed as soon as practicable and prior to the issuance of the auditor's report with respect to illegal acts that come to the auditor's attention.

- Footnote 1 to paragraph .17 is deleted.

AU sec. 328, ''Auditing Fair Value Measurements and Disclosures''

SAS No. 101, ''Auditing Fair Value Measurements and Disclosures'' (AU sec. 328, ''Auditing Fair Value Measurements and Disclosures''), as amended, is amended as follows:

Paragraph .50 is replaced with:

Paragraphs 12–13 of Auditing Standard No. 16, *Communications with Audit Committees,* require the auditor to communicate to the audit committee matters related to critical accounting estimates, which may include fair value measurements.

AU sec. 333, ''Management Representations''

SAS No. 85, ''Management Representations'' (AU sec. 333, ''Management Representations''), as amended, is amended as follows:

The following sentence is added as the last sentence of paragraph .05: The auditor should provide a copy of the representation letter to the audit committee if management has not already provided the representation letter to the audit committee.

AU sec. 341, ''The Auditor's Consideration of an Entity's Ability To Continue as a Going Concern''

SAS No. 59, ''The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern'' (AU sec. 341, ''The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern''), as amended, is amended as follows:

Paragraph .17A is added, along with the heading preceding this paragraph: Communications with Audit Committees.

Paragraph 17 of Auditing Standard No. 16, *Communications with Audit Committees,* describes matters an auditor is required to communicate to the audit committee related to the auditor's evaluation of a company's ability to continue as a going concern for a reasonable period of time.

AU sec. 380, ''Communication With Audit Committees''

SAS No. 61, ''Communication With Audit Committees'' (AU sec. 380, ''Communication With Audit Committees''), as amended, is superseded.

AU sec. 9380, ''Communication With Audit Committees: Auditing Interpretations of Section 380''

AU sec. 9380, ''Communication With Audit Committees: Auditing Interpretations of Section 380,'' is superseded.

AU sec. 532, ''Restricting the Use of an Auditor's Report''

SAS No. 87, ''Restricting the Use of an Auditor's Report (AU sec. 532, ''Restricting the Use of an Auditor's Report''), as amended, is amended as follows:

In the second bullet point of paragraph .07, the reference to Section 380, *Communication With Audit Committees,* is replaced with a reference to Auditing Standard No. 16, *Communications with Audit Committees.*

AU sec. 550, ''Other Information in Documents Containing Audited Financial Statements''

SAS No. 8, ''Other Information in Documents Containing Audited Financial Statements'' (AU sec. 550, ''Other Information in Documents Containing Audited Financial Statements''), as amended, is amended as follows:

a. The sixth sentence of paragraph .04 is replaced with: If the other information is not revised to eliminate the material inconsistency, he should communicate the material inconsistency to the audit committee and consider other actions, such as revising his report to include an explanatory paragraph describing the material inconsistency, withholding the use of his report in the document, and withdrawing from the engagement.

b. The second sentence of paragraph .06 is replaced with: He should communicate the material misstatement of fact to the client and the audit committee, in writing, and consider consulting his legal counsel as to further appropriate action in the circumstances.

AU sec. 711, ''Filings Under Federal Securities Statutes''

SAS No. 37, ''Filings Under Federal Securities Statutes'' (AU sec. 711, ''Filings Under Federal Securities Statutes''), as amended, is amended as follows:

The last sentence of paragraph .13 is replaced with:

In either case, the accountant should communicate the matter to the audit committee and also consider withholding his consent to the use of his report on the audited financial statements in the registration statement.

AU sec. 722, ''Interim Financial Information''

SAS No. 100, ''Interim Financial Information'' (AU sec. 722, ''Interim Financial Information''), as amended, is amended as follows:

The heading preceding paragraph .08, ''Establishing an Understanding With the Client'' is replaced with the heading, ''Establishing an Understanding with the Audit Committee.''

Paragraph .08 is replaced with:

The accountant should establish an understanding of the terms of an engagement to review interim financial information with the audit committee or others with equivalent authority and responsibility (hereafter referred to as the audit committee).6 This understanding includes the objective of the review of interim financial information, the responsibilities of the accountant, and the responsibilities of management. Such an understanding reduces the risk that either the accountant or the audit committee may misinterpret the needs or expectations of the other party. The accountant should record this understanding of the terms of the engagement in an engagement letter and should provide the engagement letter to the audit committee. The accountant should have the engagement letter executed by the appropriate party or parties on behalf of the company. If the appropriate party or parties are other than the audit committee, or its chair on behalf of the audit committee, the accountant should determine that the audit committee has acknowledged and agreed to the terms of the engagement. If the accountant believes he or she cannot establish an understanding of the terms of an engagement to review interim financial information with the audit committee, the accountant should decline to accept, continue, or perform the engagement.

Footnote 6 to paragraph .08 is replaced with: *See* paragraph .16 of QC sec. 20, *System of Quality Control for a CPA Firm's Accounting and Auditing Practice.*

In the first sentence of paragraph .09, the word ''client'' is replaced with the words ''audit committee.''

Paragraph .30 is replaced with:

If management does not respond appropriately to the accountant's communication within a reasonable period of time, the accountant should communicate these matters to the audit committee as soon as practicable and prior to the registrant filing its periodic report with the SEC. The communications to the audit committee should be made and documented in accordance with paragraph 25 of Auditing Standard No. 16, *Communications with Audit Committees.*

f. The following sentence is added at the end of paragraph .33:

The accountant should communicate significant deficiencies or material weaknesses of which the accountant has become aware to the audit committee or those responsible for oversight of the company's financial reporting in a timely manner and prior to the registrant filing its periodic report with the SEC.

g. Paragraph .34 is replaced with:

When conducting a review of interim financial information, the accountant also should determine whether any of the matters described in Auditing Standard No. 16, *Communications with Audit Committees,* as they relate to interim financial information, have been identified. If such matters have been identified, the accountant should communicate them to the audit committee in a timely manner and prior to the registrant filing its periodic report with the SEC. For example, the accountant should communicate a description of the process management used to develop the critical accounting estimates; a change in a significant accounting policy affecting the interim financial information; misstatements that, either individually or in the aggregate, could have a significant effect on the entity's financial reporting process; and uncorrected misstatements aggregated by the accountant that management determined to be immaterial, both individually and in the aggregate, to the interim financial statements taken as a whole.23 As part of its communications to the audit committee, management might communicate some or all of the matters related to the company's accounting policies, practices, estimates, and significant unusual transactions described in paragraph 12 of Auditing Standard No. 16, *Communications with the Audit Committees.* If management communicates any of these matters, the accountant does not need to communicate them at the same level of detail as management, as long as the accountant (1) participated in management's discussion with the audit committee, (2) affirmatively confirmed to the audit committee that management has adequately communicated these matters, and (3) with respect to critical accounting policies and practices, identified for the audit committee those accounting policies and practices that the accountant considers critical. The accountant should communicate any omitted or inadequately described matters to the audit committee.

h. Footnote 23 to paragraph .34 is replaced with:

The schedule of uncorrected misstatements related to accounts and disclosures provided to the audit committee should be the same schedule that was included in or attached to the management representation letter that is described in paragraph .24(*k*) of this section.

i. The last two sentences of paragraph .35 are replaced with:

Therefore, any communication the accountant may make about the entity's accounting policies, practices, estimates, and significant unusual transactions as applied to its interim financial reporting, generally would be limited to the effect of significant events, transactions, and changes in accounting estimates that the accountant considered when conducting the review of interim financial information. Further, interim review procedures do not provide assurance that the accountant will become aware of all matters that might affect the accountant's judgments about the qualitative aspects of the entity's accounting policies and practices that would be identified as a result of an audit.

j. Paragraph .36 is replaced with:

If the accountant has identified matters to be communicated to the audit committee, the accountant should communicate such matters to the audit committee, or at least its chair, in a timely manner and prior to the registrant filing its periodic report with the SEC. The communications to the audit committee should be made and documented in accordance with paragraph 25 of Auditing Standard No. 16, *Communications with Audit Committees.*

Transitional Amendments to AU sec. 380, Communication With Audit Committees

AU sec. 380, Communication With Audit Committees

SAS No. 61, ''Communication With Audit Committees'' (AU sec. 380, ''Communication With Audit Committees''), as amended, is amended as follows:

The last sentence of paragraph .01 is replaced with:

The communications required by this section are applicable to the audits of (i) issuers and (ii) brokers and dealers, as those terms are defined in the Sarbanes-Oxley Act of 2002, as amended.[2]

Footnote 2 to paragraph .01 is replaced with:

See Sections 2(a)(7), 110(3), and 110(4) of the Sarbanes-Oxley Act of 2002.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements. The Board is also requesting that the Commission approve the proposed rules, pursuant to Section 103(a)(3)(C) of the Sarbanes-Oxley Act, for application to audits of emerging growth companies (''EGCs''), as that term is defined in Section 3(a)(80) of the Securities Exchange Act of 1934 (''Exchange Act''). The Board's request is set forth in section D.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

Section 103(a) of the Sarbanes-Oxley Act directs the Board, by rule, to establish, among other things, ''auditing and related attestation standards * * * to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by th[e] [Sarbanes-Oxley] Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.'' The Board adopted Auditing Standard No. 16, *Communications with Audit Committees* (the ''standard''), and related amendments to improve the audit by enhancing communications between auditors and audit committees.

As discussed more fully in Exhibit 3, the Board adopted Auditing Standard No. 16 because it believes that the standard is in the public interest because the standard establishes requirements that enhance the relevance, timeliness, and quality of the communications between the auditor and the audit committee. The enhanced relevance, timeliness, and quality of communications should facilitate audit committees' financial reporting oversight, fostering improved financial reporting, thereby benefitting investors.

With the passage of the Sarbanes-Oxley Act and the establishment of the PCAOB, Congress acknowledged that auditors play an important role in protecting the interests of investors by preparing and issuing informative, accurate, and independent audit reports.[47] The audit committee [48] also plays an important role in protecting the interests of investors by assisting the board of directors in fulfilling its responsibility to a company's shareholders and others to oversee the integrity of a company's accounting and financial reporting processes and audits. The audit committee, among other things, serves as the board of director's principal interface with the company's auditors and facilitates communications between the company's board of directors, its management, and its independent auditors on significant accounting issues and policies. The roles of auditors and audit committees are critical to the efficiency and integrity of the capital markets.

Both the auditor and the audit committee benefit from a meaningful exchange of information regarding significant risks of material misstatement in the financial statements and other matters that may affect the integrity of the company's financial reports. Communications between the auditor and the audit committee allow the audit committee to be well-informed about accounting and disclosure matters, including the auditor's evaluation of matters that are significant to the financial statements, and to be better able to carry out its oversight role. Communications with the audit committee provide auditors with a forum separate from management to discuss matters about the audit and the company's financial reporting process.

Auditing Standard No. 16 is aligned with the requirements of the Sarbanes-Oxley Act. For many public companies, the Sarbanes-Oxley Act served to strengthen and expand the role of the audit committee in the financial reporting process. For example, the Sarbanes-Oxley Act requires that audit committee members of listed companies be independent and that audit committees be responsible for the appointment, compensation, and oversight of the work of the external auditor for the purpose of preparing or

[47] *See* Section 101(a) of the Sarbanes-Oxley Act, 15 U.S.C. 7211(a); Senate Report No. 107–206, at 5–6 (July 3, 2002).

[48] The term ''audit committee,'' as defined in Auditing Standard No. 16, is a committee (or equivalent body) established by and among the board of directors of a company for the purpose of overseeing the accounting and financial reporting processes of the company and audits of the financial statements of the company; if no such committee exists with respect to a company, the entire board of directors of the company. For audits of nonissuers, if no such committee or board of directors (or equivalent body) exists with respect to the company, the person(s) who oversee the accounting and financial reporting processes of the company and audits of the financial statements of the company.

issuing an audit report or related work.[49] These requirements place the audit committee at the center of the relationship between management of a public company and its auditor.

Auditing Standard No. 16 is intended to improve the audit [50] by fostering constructive dialogue between the auditor and the audit committee about significant audit and financial statement matters. The standard requires the auditor to communicate certain matters regarding the audit and the financial statements to the audit committee, which should assist the audit committee in fulfilling its oversight responsibilities regarding the financial reporting process. Effective two-way communication between the auditor and the audit committee on such relevant matters also will benefit the auditor in performing an effective audit.

Auditing Standard No. 16 encourages effective two-way communication between the auditor and the audit committee throughout the audit to assist both parties in understanding matters relevant to the audit. Communications that are tailored to the circumstances and informative, rather than ''boiler-plate'' or standardized, will enable the auditor and the audit committee to engage in a dialogue that is more likely to benefit both the audit committee, in conducting its oversight responsibilities, and the auditor, in conducting an effective audit. Effective communication between the auditor and the audit committee may involve many forms of communication, such as presentations, charts, written reports, or robust discussions.

AU sec. 380, which became effective in January 1989, indicated that audit committee communications are incidental to the audit and are not required to occur prior to the issuance of the auditor's report. In contrast, Auditing Standard No. 16 recognizes the importance of the auditor's communications with the audit committee in today's business and regulatory environment; therefore, Auditing Standard No. 16 requires the auditor to communicate the audit strategy and results of the audit to the audit committee in a timely manner and prior to the issuance of the auditor's report to provide an opportunity for the audit committee and the auditor to take appropriate action to address the matters communicated.

Timely communications with the audit committee help the auditor improve the audit by, among other things (i) informing the audit committee, which has responsibility for the oversight of financial reporting, about significant matters related to the audit and the financial statements, (ii) enabling the auditor to obtain the audit committee's insights and information about transactions and events, (iii) enabling the auditor to learn about complaints regarding accounting or auditing matters, and (iv) assisting the auditor in gaining a better understanding of the company and its control environment.

Auditing Standard No. 16 generally links the new communication requirements to the results of related audit performance requirements in other PCAOB standards, or the conduct of the audit. The standard does not otherwise impose new performance requirements, other than communications. Because other PCAOB standards already require the auditor to perform procedures underlying the communications required in Auditing Standard No. 16, and the standard primarily requires communication of the results of the auditor's procedures, the Board does not anticipate a significant increase in cost as a result of the implementation of the standard.

Some of the matters to be communicated under Auditing Standard No. 16 relate specifically to matters involving management's preparation of the company's financial statements. In many companies, management might communicate these matters or take the lead on communicating these matters to the audit committee. The PCAOB does not have the authority to require management to communicate to the audit committee. Additionally, certain communications by the auditor are mandated by federal securities laws and Commission rules.[51] Therefore, Auditing Standard No. 16 establishes required communications by the auditor to the audit committee but, at the same time, clearly recognizes and acknowledges that management might communicate to the audit committee certain matters related to the company's financial statements. In such circumstances, the auditor does not need to communicate those matters at the same level of detail as management, as long as certain conditions are met, as specified in the standard.

Auditing Standard No. 16 is scalable for audits of companies of various sizes and complexities. A company's size and complexity might affect the risks of misstatements, the audit strategy, and other significant matters that warrant the attention of the audit committee. Based on the specific company's circumstances, the standard requires communications only to the extent that the matters are relevant to the audit of the financial statements of the company or of internal control over financial reporting. For example, an auditor of a smaller, less complex company with fewer difficult auditing or financial reporting issues may have fewer matters to communicate than the auditor of a larger, more complex company.

The proposed rules also amend the Board's interim standards including superseding interim standards AU sec. 380, *Communication With Audit Committees,* and AU sec. 310, *Appointment of the Independent Auditor* (''AU sec. 310'').

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Sarbanes-Oxley Act.

B. Board's Statement on Burden on Competition

Not applicable.

C. Board's Statement on Comments on the Proposed Rules Change Received From Members, Participants or Others

The Board released the proposed rules for public comment in PCAOB Release No. 2010–001 (March 29, 2010). The Board received 35 comment letters. On September 21, 2010, the Board held a roundtable to obtain insight from additional stakeholders, including investors, audit committee members, auditors, and preparers. The Board reopened the public comment period on the original proposed rules to allow for interested parties to provide additional comments on the topics discussed at the roundtable. The Board received nine additional comment letters during this extended comment period.

The Board considered the comments received relating to its initial proposed rules and at the roundtable and made changes to the initial proposed rules. As a result, the Board again sought public comment on the proposed rules on December 20, 2011. The Board received 39 written comment letters relating to its reproposal of the proposed rules.

The Board has carefully considered all comments received. The Board's response to the comments it received

[49] *See* Section 301 of the Sarbanes-Oxley Act and Section 10A(m)(2) of the Exchange Act, 15 U.S.C. 78j–1(m)(2).

[50] For purposes of this release and standard, an audit is either an audit of internal control over financial reporting that is integrated with an audit of financial statements or an audit of financial statements only.

[51] *See e.g.,* Section 10A(k) of the Exchange Act, 15 U.S.C. 78j–1(k); SEC Rule 2–07 of Regulation S–X (''SEC Rule 2–07''), 17 CFR 210.2–07; and Rule 10A–3 under the Exchange Act, 17 CFR 240.10A–3.

and the changes made to the rules in response to the comments received are discussed below.

Overview of Auditing Standard No. 16

Auditing Standard No. 16 provides a definition of audit committee, retains or enhances existing communication requirements, incorporates certain SEC auditor communication requirements to audit committees, and adds new communication requirements that are generally linked to performance requirements in other PCAOB standards.

For audits of issuers, Auditing Standard No. 16 incorporates the Sarbanes-Oxley Act's definition of audit committee as a committee (or equivalent body) established by and among the board of directors of a company for the purpose of overseeing the accounting and financial reporting processes of the company and audits of the financial statements of the company; if no such committee exists with respect to the company, then the audit committee is the entire board of directors of the company. For audits of nonissuers, the definition of audit committee contained in Auditing Standard No. 16 provides that if no audit committee or board of directors (or equivalent body) exists with respect to the company, then the audit committee is the person(s) who oversee the accounting and financial reporting processes of the company and audits of the financial statements of the company.

AU sec. 310 requires the auditor to establish an understanding with the client regarding the services to be performed. Auditing Standard No. 16 requires the auditor to establish the understanding of the terms of the audit engagement with the audit committee. This requirement aligns the auditing standard with the provision of the Sarbanes-Oxley Act that requires the audit committee of listed companies to be responsible for the appointment of the external auditor.[52]

Additionally, Auditing Standard No. 16 requires the auditor to record the terms of the engagement in an engagement letter and to have the engagement letter executed by the appropriate party or parties on behalf of the company and determine that the audit committee has acknowledged and agreed to the terms. These requirements are an expansion of the requirement in AU sec. 310 for the auditor to document the understanding in the working papers, preferably through a written communication with the client.

Auditing Standard No. 16 retains many of the communication requirements in AU sec. 380 and also incorporates the SEC communication requirements.[53] The standard improves the current communication requirements of AU sec. 380 by requiring the communications with the audit committee to occur before the issuance of the audit report. Additionally, the standard enhances certain existing auditor communication requirements by requiring the auditor to communicate:

d. Certain matters regarding the company's accounting policies, practices, and estimates;

e. The auditor's evaluation of the quality of the company's financial reporting;

f. Information related to significant unusual transactions, including the business rationale for such transactions; and

g. The auditor's views regarding significant accounting or auditing matters when the auditor is aware that management consulted with other accountants about such matters and the auditor has identified a concern regarding these matters.

Auditing Standard No. 16 expands the inquiries of the audit committee required by Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* which requires the auditor to inquire of the audit committee regarding the matters important to the identification and assessment of risks of material misstatement and fraud risks. The additional inquiries in Auditing Standard No. 16 address whether the audit committee is aware of matters relevant to the audit, including, but not limited to, violations or possible violations of laws or regulations.

Additionally, Auditing Standard No. 16 adds new communication requirements that provide the audit committee with additional information about significant aspects of the audit. These communications are generally linked to the results of the audit procedures or the conduct of the audit. Under Auditing Standard No. 16 the auditor would be required to communicate:

h. An overview of the overall audit strategy, including timing of the audit, significant risks the auditor identified, and significant changes to the planned audit strategy or identified risks;

i. Information about the nature and extent of specialized skill or knowledge needed in the audit, the extent of the planned use of internal auditors, company personnel or other third parties, and other independent public accounting firms, or other persons not employed by the auditor that are involved in the audit;

j. The basis for the auditor's determination that he or she can serve as principal auditor, if significant parts of the audit will be performed by other auditors;

k. Situations in which the auditor identified a concern regarding management's anticipated application of accounting pronouncements that have been issued but are not yet effective and might have a significant effect on future financial reporting;

l. Difficult or contentious matters for which the auditor consulted outside the engagement team;

m. The auditor's evaluation of going concern;

n. Departure from the auditor's standard report; and

o. Other matters arising from the audit that are significant to the oversight of the company's financial reporting process, including complaints or concerns regarding accounting or auditing matters that have come to the auditor's attention during the audit.

In addition to the communication requirements included in Auditing Standard No. 16, other PCAOB standards and rules that require the auditor to communicate specific matters to the audit committee are referenced in Appendix B to Auditing Standard No. 16.

While the standard establishes certain requirements regarding auditor communications to the audit committee, Auditing Standard No. 16 does not preclude the auditor from providing additional information to the audit committee. Nor does the standard preclude the auditor from responding to audit committee requests for additional information from the auditor.

Definition of Audit Committee (Paragraph A–2 of Auditing Standard No. 16)

Auditing Standard No. 16 defines an audit committee as a committee (or equivalent body) established by and among the board of directors of a company for the purpose of overseeing the accounting and financial reporting processes of the company and audits of the financial statements of the company; if no such committee exists with respect to the company, the entire board of directors of the company. This definition largely incorporates the

[52] *See* Section 301 of the Sarbanes-Oxley Act, and Sections 10A(m)(2) of the Exchange Act, 15 U.S.C. 78j–1(m)(2).

[53] *See* Section 10A(k) of the Exchange Act, 15 U.S.C. 78j–1(k) and SEC Rule 2–07(a)(1)–(3).

definition of ''audit committee'' from the Sarbanes-Oxley Act.[54] The parenthetical phrase ''or equivalent body'' after the term ''committee'' clarifies that entities with bodies performing a function similar to that of an audit committee would fit within this category.

The standard modifies the Sarbanes-Oxley Act's version of the definition of an audit committee as it relates to audits of nonissuers. Specifically, for audits of nonissuers, Auditing Standard No. 16 states that, if no such committee or board of directors (or equivalent body) exists with respect to the company, the audit committee would be considered the person(s) who oversee the accounting and financial reporting processes of the company and audits of the financial statements of the company. This modification was made to recognize that some nonissuers, including brokers and dealers, may have governance structures that do not include boards of directors or audit committees. In those cases, the auditor would identify those persons at the nonissuer company who oversee the company's accounting and financial reporting processes and audits. This modification is meant to indicate that senior persons in an oversight role in such circumstances would be the recipients of the auditor communications.

Using the definition of ''audit committee,'' the auditor would identify the bodies or persons that oversee the company's accounting, auditing, and financial reporting processes to find the appropriate recipient of the communications under the standard.[55] For issuers, the definition is the same as the definition included in the Sarbanes-Oxley Act.[56] For nonissuers, the definition contains three categories of bodies or persons. The first two categories (audit committee and the entire board of directors of the company) are the same as those included in the definition of audit committee for an issuer. The third category covers situations in which the company does not have an audit committee, board of directors, or equivalent body, such as certain non-public brokers and dealers. The parenthetical phrase ''or equivalent body'' after the term ''board of directors'' clarifies that entities with bodies performing a function similar to that of a corporate board of directors would fit within this category.

The reproposed standard required the auditor to communicate to those persons designated to oversee the financial reporting processes of the company in situations in which a nonissuer does not have an audit committee, board of directors, or equivalent body. Some commenters indicated that, for certain nonissuers, the person designated to oversee the accounting and financial reporting processes of the company could be the chief financial officer, in which case the communication would be made to the person preparing the financial statements. Therefore, commenters suggested that the auditor should make relevant communications to the chief executive officer, or equivalent officer of the company.

Some commenters suggested that the standard should clarify to whom the auditor should communicate when the company is a subsidiary of another entity. Auditing Standard No. 16 does not require communication outside the governance structure of the audited entity because the standard designates the appropriate party to receive the auditor communications within the audited entity. If directed by the audit client, or if the auditor otherwise deems it appropriate, the auditor could also communicate to a parent company audit committee or equivalent body.

Objectives (Paragraph 3 of Auditing Standard No. 16)

Auditing Standard No. 16 states that the objectives of the auditor are to (a) communicate to the audit committee the responsibilities of the auditor in relation to the audit and establish an understanding of the terms of the audit engagement with the audit committee; (b) obtain information from the audit committee relevant to the audit; (c) communicate to the audit committee an overview of the overall audit strategy and timing of the audit; and (d) provide the audit committee with timely observations arising from the audit that are significant to the financial reporting process. The objectives of the standard are intended to highlight the overall context for the requirements in the standard.

Significant Issues Discussed with Management in Connection With the Auditor's Appointment or Retention (Paragraph 4 of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to discuss with the audit committee any significant issues that the auditor discussed with management in connection with the appointment or retention of the auditor, including significant discussions regarding the application of accounting principles and auditing standards. This requirement was retained from AU sec. 380.[57]

This requirement is included in the standard because the audit committee might ask management for its views concerning the appointment or retention of the auditor. Management's views might be influenced by the interaction between the auditor and management and the auditor's evaluations and conclusions regarding the application of accounting principles or auditing standards.

Some commenters suggested that these discussions should include a robust fee discussion or a discussion about the results of the auditor's considerations during the client acceptance and continuance process, such as the auditor's views of the entity's accounting and financial reporting practices or management's integrity. The standard was not revised to include such additional matters because the requirement in the standard specifically addresses the auditor's discussions with management related to accounting and auditing matters in connection with the appointment or retention of the auditor. However, Auditing Standard No. 16 requires the auditor to communicate any matters arising from the audit to the audit committee that the auditor believes are significant to the audit committee's oversight of the company's financial reporting process.[58]

Establish an Understanding of the Terms of the Audit (Paragraphs 5–7 of Auditing Standard No. 16)

Auditing Standard No. 16 includes a specific requirement for the auditor to establish an understanding of the terms of the audit engagement with the audit committee. Having a mutually clear understanding of the terms of the engagement, including the objectives of the audit, the responsibilities of the auditor, and the responsibilities of management in connection with the audit, should benefit both the auditor and the audit committee.

[54] Section 2(a)(3) of the Sarbanes-Oxley Act, 15 U.S.C. § 7201.

[55] The Board's proposed definition is not intended to conflict with or affect any requirements, or the application of any requirements, under federal law, state law, foreign law, or an entity's governing documents regarding the establishment, approval, or ratification of board of directors or audit committees, or the delegation of responsibilities of such a committee or board.

[56] Section 2(a)(3) of the Sarbanes-Oxley Act, 15 U.S.C. § 7201.

[57] AU sec. 380.15.

[58] Paragraph 24 of Auditing Standard No. 16.

The requirement in Auditing Standard No. 16 is similar to the requirement in AU sec. 310, *Appointment of the Independent Auditor* (''AU sec 310''), which requires the auditor to establish an understanding with the client regarding the services to be performed. However, Auditing Standard No. 16 more specifically requires that the understanding be with the audit committee due to the audit committee's financial reporting and audit oversight role, rather than with the ''client,'' which could be understood to mean others besides the audit committee in certain circumstances.

Auditing Standard No. 16 also requires the auditor to record the understanding of the terms of the audit engagement in an engagement letter. Appendix C of Auditing Standard No. 16 describes matters that should be included in an engagement letter, including the objective of the audit and the responsibilities of the auditor and management. This is an expansion of the requirement in AU sec. 310, which requires the auditor to document the understanding of the engagement in the working papers, preferably through a written communication with the client.

Some commenters indicated that the engagement letter should describe the responsibilities of the audit committee related to the audit. The Board considered this suggestion and did not change the standard to include the responsibilities of the audit committee, as those responsibilities are governed by the rules of other organizations, such as the Commission and the national securities exchanges.[59] However, the standard does not prohibit the auditor from including other matters in the engagement letter, as agreed upon by the auditor and the audit committee, so long as those matters are not in violation of other standards or rules, for example, independence requirements.

Auditing Standard No. 16 requires the auditor to provide the engagement letter to the audit committee annually. Additionally, the auditor should have the engagement letter executed by the appropriate party or parties on behalf of the company.[60] The standard also states that if the appropriate party or parties are other than the audit committee, or its chair on behalf of the audit committee, the auditor also should determine that the audit committee has acknowledged and agreed to the terms of the engagement. This acknowledgment may be obtained in a variety of ways, such as obtaining the audit committee members' signatures, or its chair's signature on behalf of the audit committee, or obtaining another form of acknowledgement and agreement by the audit committee regarding the terms of the audit engagement. Obtaining this acknowledgement reduces the risk that either the auditor or the audit committee might misinterpret the needs or expectations of the other party. An acknowledgement by the audit committee, the signatures of the audit committee members, or the signature of its chair on behalf of the audit committee on the engagement letter is not intended to conflict with or affect any requirements, or the application of any requirements, under federal law, state law, foreign law, applicable exchange requirements, or the company's governing documents, regarding the authority or lack of authority of the audit committee to enter into any contract or agreement with the auditor.

Several commenters suggested that the standard should specify that the engagement letter should be executed by management in addition to the audit committee or by management alone, along with a representation that it has the authority to do so on behalf of the audit committee. The Board considered these comments and decided that, absent evidence to the contrary, the auditor may rely on the company's identification of the appropriate party or parties to execute the engagement letter. Therefore, the standard does not specify the party that should execute the engagement letter on behalf of the company.

Some commenters suggested that the standard should indicate that the audit committee's acknowledgement can be either written or oral. Other commenters suggested that the audit committee's acknowledgement should be written, either evidenced by a signature on the engagement letter or in the audit committee's minutes, to avoid the potential for subsequent misunderstandings of whether the audit committee's acknowledgement has been obtained.

The Board considered these comments and determined that the audit committee's acknowledgement may be provided in writing, such as a signed engagement letter or through the minutes of the audit committee meeting, or orally. The primary focus of this requirement is that the auditor receives acknowledgment and agreement from the audit committee rather than the method the audit committee uses to provide that acknowledgement; therefore, a change to the standard was not warranted. The reproposed standard did not specify the form of acknowledgment and, therefore, the standard was not revised. However, the auditor could request that the audit committee acknowledge the terms of the audit engagement in writing. If the audit committee's acknowledgement is received orally, in accordance with paragraph 25 of Auditing Standard No. 16, the auditor is required to document the acknowledgement in the auditor's work papers.

Obtaining Information Relevant to the Audit (Paragraph 8 of Auditing Standard No. 16)

Auditing Standard No. 16 includes a requirement for the auditor to inquire of the audit committee about whether it is aware of matters relevant to the audit, including, but not limited to, violations or possible violations of laws or regulations. This inquiry contributes to a two-way dialogue between the auditor and the audit committee concerning matters relevant to the audit. This inquiry would complement the requirement for the auditor to make inquiries of the audit committee (or its chair) about risks of material misstatement, including inquiries related to fraud risks, in accordance with Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement.*[61] This requirement is included in the standard because, in addition to the inquiries required as part of the risk assessment procedures, audit committees may be aware of other matters relevant to the auditor in performing audit procedures.

Auditing Standard No. 16 does not include the reference to ''complaints or concerns received by the audit committee regarding financial reporting matters'' previously included in the reproposed standard. This change is not intended to signal a change in the scope of this communication between the audit committee and the auditor. Rather, the Board notes that such inquiry by the auditor of the audit committee is already included in paragraph 56.b(3) of Auditing Standard No. 12, which requires the auditor to inquire of the audit committee about tips or complaints regarding the company's financial reporting.[62] Since the inquiry

[59] *See, e.g.,* New York Stock Exchange, Listed Company Manual at Section 303A.07, Audit Committee Additional Requirements.

[60] Absent evidence to the contrary, the auditor may rely on the company's identification of the appropriate party or parties to execute the engagement letter.

[61] *See* paragraph 5.f. and 54–57 of Auditing Standard No. 12.

[62] Auditing Standard No. 12 also includes inquiries regarding the audit committee's views about fraud risks, its knowledge of fraud, and the

Continued

in the reproposed standard was similar to the inquiries in Auditing Standard No. 12, Auditing Standard No. 16 was revised to remove the inquiry regarding complaints or concerns.

Auditing Standard No. 16 does not provide specific timing for these inquiries to be made. Depending on the circumstances of the audit, it may be appropriate for the auditor to conduct such inquiries of the audit committee at the outset of the audit and/or at other various stages of the audit. For example, the auditor may want to conduct these inquiries early in the audit to consider any information received from the audit committee in designing the nature, timing, and extent of audit procedures. In other circumstances, as the audit progresses, an auditor may want to inquire of the audit committee as to whether any additional matters or concerns relevant to the audit have come to the attention of the audit committee not previously discussed with the auditor.

The reproposed standard required the auditor to inquire of the audit committee about ''whether it is aware of matters that might be relevant to the audit.'' One commenter raised concerns about this provision of the reproposed standard as being ''too broad and overreaching,'' which could obscure information that is truly relevant to the audit. Other commenters suggested that the inquiries of the audit committee should be expanded to include other matters, such as the audit committee's awareness of significant changes in company conditions or activities.

After considering the comments received on the scope of the information to be communicated under this provision, the term ''might be'' was excluded from this paragraph of the standard. The deletion of the term ''might be'' is appropriate to avoid an overly broad interpretation of the standard to require discussion of matters that may not be directly connected to the audit.

Although the Board did not revise the requirement to list all the matters of which the auditor could inquire in this provision, the requirement in the standard is not meant to be limited only to matters that are related to violations or possible violations of laws. The Board did not consider it practical to revise the requirement in an attempt to list all the matters of which the auditor could inquire in this provision. Such matters can and should vary from audit to audit. Rather, the inclusion of such matters was meant to serve only as an example of a matter that the auditor should discuss with the audit committee.

The same commenter who objected to the breadth of the inquiry also raised concerns related to the audit committee providing information to the auditor about violations or possible violations of laws or regulations and complaints or concerns received regarding financial reporting matters contained in the reproposed standard. The commenter indicated that the audit committee's communication of such information could cause the information to lose its confidentiality status with potential significant harmful consequences to the company, such as reducing the candor and chilling communications between management, employees, and the audit committee. The commenter also indicated that if the audit committee discloses information covered by privileged attorney-client communications or attorney work product to the auditor as part of this communication, the company may face a risk that a court may later deem the company to have waived the protection of such privilege or work product doctrine.

The Board did not change the requirement to exclude inquiries regarding violations or possible violations of laws or regulations that are relevant to the audit. Limiting the scope of information that the audit committee might provide to the auditor could severely affect the auditor's ability to conduct an effective audit.

The purpose of this requirement is to enable the auditor to have the information necessary to conduct the audit to support the auditor's opinion on the company's financial statements. Due to the audit committee's oversight responsibilities, it is appropriate for the auditor to ask the audit committee for information relevant to the audit, including matters related to violations or possible violations of laws or regulations. Without such inquiry, the auditor may not have information that could influence the performance of the audit.

The same commenter also indicated that if the audit committee provides information relevant to the audit, the audit committee's role would change fundamentally from overseeing the accounting and financial reporting process of the company and audits of financial statements to becoming the original source of information for the auditor and guarantor of the accuracy and completeness of the financial statements, a role that historically has been that of management. It is possible, that in some situations, the communication from the audit committee is the first instance in which a matter is brought to the attention of the auditor. For example, in some situations the audit committee may have unique insight into management's performance. By providing the opportunity for the audit committee to discuss information with the auditor, the standard enables the auditor to obtain the audit committee's perspective on matters which may be different from management's perspective.

Overall Audit Strategy, Timing of the Audit, and Significant Risks (Paragraphs 9–11 of Auditing Standard No. 16)

Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee an overview of the overall audit strategy, including the timing of the audit, and to discuss with the audit committee the significant risks[63] identified during the auditor's risk assessment procedures. Under this requirement, the auditor communicates to the audit committee the results of audit procedures performed in accordance with other PCAOB standards, such as Auditing Standard No. 9, *Audit Planning,* which requires the auditor to establish an overall audit strategy that sets the scope, timing, and direction of the audit and guides the development of the audit plan. As part of the auditor's risk assessment process, the auditor is required to identify and assess the risk of material misstatement, including significant risks.[64]

The timing of communications related to the audit strategy may vary from audit to audit based on the facts and circumstances. However, early communication of these matters might enable the audit committee to understand the auditor's views regarding risk and thereby provide an opportunity for the audit committee to communicate insights regarding additional risks that the auditor did not identify and allow the auditor to more effectively incorporate the additional risks into the audit strategy.

Some commenters indicated that the requirement for the auditor to communicate the audit strategy might result in the audit committee second guessing the auditor's strategy and the scope of the audit. These commenters suggested that the standard should

audit committee's response to tips or complaints regarding the company's financial reporting, and how the audit committee exercises oversight of the company's assessment of fraud risks. *See* paragraphs 56.b(1)-(4) of Auditing Standard No. 12.

[63] *See* paragraph A5 of Auditing Standard No. 12, which defines significant risk as a risk of material misstatement that requires special audit consideration.

[64] *See* paragraphs 59, 70, and 71 of the Auditing Standard No. 12.

emphasize that the auditor should not disclose details about the audit strategy that would allow management or the audit committee to take steps that could reduce the effectiveness of the audit strategy. Another commenter suggested the standard should require the auditor to provide specific details about the type and timing of procedures. Auditing Standard No. 16 includes a note, which indicates that the overview of the audit strategy is intended to provide information about the audit, but not specific details that would compromise the effectiveness of the audit procedures. Communicating certain details might reduce the effectiveness of those audit procedures. The Board considers that the language in Auditing Standard No. 16 strikes the appropriate balance; therefore, the standard was not revised.

Some commenters suggested that significant risks should be communicated throughout the audit rather than communicating just those significant risks identified during the auditor's risk assessment procedures. It is not the intent of the standard for the auditor to communicate only the significant risks that are identified during the auditor's risk assessment procedures. Paragraph 11 of Auditing Standard No. 16 requires the auditor to communicate significant changes to the planned audit strategy or the significant risks initially identified and the reasons for such changes.

A commenter suggested that the communication of risks be expanded to include business risks and the auditor's views of the company's internal controls, in addition to the significant risks of material misstatement to the financial statements. As part of obtaining an understanding of the company and its environment, Auditing Standard No. 12 requires the auditor to obtain an understanding of the company's objectives, strategies, and related business risks that could reasonably be expected to result in risks of material misstatement.[65] Under Auditing Standard No. 16, the auditor is required to communicate significant risks to the audit committee. If the auditor determines that a business risk results in a significant risk of material misstatement, the auditor should communicate the significant risk to the audit committee. Additionally, under Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* and AU sec. 325, *Communications About Control Deficiencies in an Audit of Financial Statements,* the auditor is required to communicate to the audit committee material weaknesses and significant deficiencies in internal control over financial reporting identified during the audit.[66] Therefore, the standard was not revised.

Auditing Standard No. 16 also requires communications regarding others involved in the audit, such as persons with specialized skill or knowledge, internal audit, and other firms or persons performing audit procedures. Communications of others involved in the audit might be important for an audit committee to understand as part of the audit committee's oversight of the financial reporting process.

Specialized Skill or Knowledge (Paragraph 10.a. of Auditing Standard No. 16)

Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee the nature and extent of specialized skill or knowledge needed to perform the planned audit procedures or evaluate the audit results related to significant risks. This requirement is designed for the auditor to communicate the determination the auditor is required to make as part of developing the audit strategy in Auditing Standard No. 9.[67] Many audit firms have employees with specialized skill or knowledge that the engagement team can utilize. However, other firms might not have such in-house expertise. The focus of this requirement is on the communication about the need for specialized skill or knowledge, regardless of whether the specialist is from within the firm or outside the firm.

Internal Audit (Paragraphs 10.b. and 10.c. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee the extent to which the auditor plans to use the work of the company's internal auditors in an audit of financial statements, including when internal audit provides direct assistance to the auditor. In addition, Auditing Standard No. 16 requires the auditor to communicate the extent to which the auditor plans to use the work of internal auditors, company personnel (in addition to internal auditors), and third parties working under the direction of management or the audit committee when performing an audit of internal control over financial reporting.

Auditing Standard No. 9 requires the auditor to establish an overall audit strategy that sets the scope, timing, and direction of the audit and guides the development of the audit plan, including the nature, timing, and extent of resources necessary to perform the engagement.[68] Other standards, including AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements,* and Auditing Standard No. 5, provide additional requirements and impose limits on the use of internal audit staff. The requirement in Auditing Standard No. 16 is to communicate to the audit committee the extent to which the auditor plans to use the work of the company's internal auditors and others as determined in the audit plan.

Other Firms or Persons Performing Audit Procedures (Paragraph 10.d. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee the names, locations, and planned responsibilities of other independent public accounting firms or other persons, who are not employed by the auditor, that perform audit procedures in the current period audit. The standard includes a note stating the term ''other independent public accounting firms'' includes firms that perform audit procedures in the current period audit regardless of whether they otherwise have any relationship with the auditor.

In planning and performing the audit, the auditor determines whether to use other auditors or other persons to perform audit procedures at individual client locations, business units, or to perform work related to specific audit areas or procedures. Those other auditors might be affiliated firms, non-affiliated firms, or other persons not employed by the auditor.

The note to Auditing Standard No. 16 was revised from the reproposed standard to clarify that the communication regarding other independent public accounting firms is not based on the type of relationship the auditor otherwise has with the other firms. Rather, the requirement for the auditor to communicate the names, locations, and planned responsibilities of other independent public accounting firms and other persons is to provide information to the audit committee regarding the parties involved in the

[65] *See* paragraph 14 of Auditing Standard No. 12.

[66] *See* paragraphs 78 and 80 of Auditing Standard No. 5 and paragraph 4 of AU sec. 325.

[67] *See* paragraph 16 of Auditing Standard No. 9 for the requirement for the auditor to determine whether specialized skill or knowledge is needed to perform appropriate risk assessments, plan or perform audit procedures, or evaluate audit results.

[68] *See* paragraphs 8–9 of Auditing Standard No. 9.

audit. This requirement also might facilitate a discussion of how the work of other parties would affect the audit.

The reproposed standard also required the auditor to communicate to the audit committee the ''planned roles'' of others involved in the audit and the ''scope of audit procedures.'' One commenter suggested that the requirement to communicate the ''scope of audit procedures'' should be clarified in the standard. Another commenter suggested that the communication should be expanded to be more robust when other participants are used to audit foreign components of a company. Auditing Standard No. 10, *Supervision of the Audit Engagement,* requires the auditor to inform engagement team members of their responsibilities [69] and AU sec. 543, *Part of Audit Performed by Other Independent Auditors,* discusses situations in which the auditor uses the work and reports of other independent auditors who have audited financial statements of one or more subsidiaries, divisions, branches, components or investments included in the financial statements.[70] To align with these requirements, the standard was revised to require the auditor to communicate only the ''planned responsibilities'' of other participants involved in the audit, the requirements to communicate the ''planned roles'' of others involved in the audit and the ''scope of audit procedures'' were removed from the standard, and the standard was not expanded to include other considerations.

Many commenters suggested that the standard provide a threshold for determining when to make communications regarding others involved in the audit, such as when another auditor performs procedures related to a percentage of the company's total assets or addresses significant risks. Others suggested that the communication include only non-affiliated accounting firms. The standard was not revised because audit committees have oversight of the entire audit engagement, which includes work performed by other auditors. The audit committee should be aware of all the participants in the audit. This communication regarding other participants in the audit would enable the audit committee to inquire or otherwise determine, for example, whether the other participants are registered with the Board and are subject to PCAOB inspections and whether they have disciplinary history with the Board or other regulators.

This communication requirement is intended to be scalable. For example, the amount of detail the auditor generally would communicate to the audit committee regarding the participation of other auditors would be greater for participants that perform a significant portion of the audit or that perform procedures related to significant risks.

Principal Auditor (Paragraph 10.e. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee the basis for the auditor's determination that the auditor can serve as principal auditor, if significant parts of the audit are to be performed by other auditors. This communication requirement is based on the auditor's determination that the auditor can serve as the principal auditor in accordance with AU sec. 543. This communication would enable the audit committee to evaluate the extent of work performed by the principal auditor in relation to work performed by other auditors.

The reproposed standard included a note to describe situations where such communications would be required. The Board determined that this note was not necessary because AU sec. 543, governs the determination of whether the auditor can serve as the principal auditor.

Accounting Policies and Practices, Estimates, and Significant Unusual Transactions (Paragraph 12 of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee certain matters related to the company's accounting policies and practices, estimates, and significant unusual transactions. However, the standard recognizes that management also might make communications to the audit committee regarding these matters and that the auditor might not need to communicate the information at the same level of detail as management as long as the auditor meets certain criteria specified in the standard. In such circumstances, the auditor should communicate any omitted or inadequately described matters to the audit committee.

Accounting Policies and Practices (Paragraphs 12.a. and 12.b. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee certain information regarding the company's significant accounting policies and practices and also critical accounting policies and practices.

The standard uses the terms ''significant accounting policies and practices'' and ''critical accounting policies and practices.'' The Financial Accounting Standards Board's (''FASB'') Accounting Standards Codification (''ASC'') and the International Accounting Standards Board, require that companies disclose a description of all significant accounting policies as an integral part of the financial statements.[71] For example, the FASB ASC recognizes that an entity's description of its significant accounting policies is an integral part of the financial statements.[72] Additionally, the term ''significant accounting policies and practices'' is consistent with the term used in AU sec. 380 and understood in practice and, therefore, has not been separately defined.

The definition of ''critical accounting policies and practices'' in Auditing Standard No. 16 is based on the SEC's description of the term ''critical accounting policies and practices'' as a company's accounting policies and practices that are both most important to the portrayal of the company's financial condition and results and require management's most difficult, subjective, or complex judgments, often as a result of the need to make estimates about the effects of matters that are inherently uncertain.[73] The selection of significant accounting policies and practices involves a broader range of transactions and events over time, while the selection of critical accounting policies and practices is tailored to specific events in the current year. Therefore, critical accounting policies and practices might be viewed as a subset of significant accounting policies and practices.

Significant Accounting Policies and Practices (Paragraph 12.a. of Auditing Standard No. 16)

Auditing Standard No. 16 generally retains the requirements from AU sec.

[69] *See* paragraph 5.a. of Auditing Standard No. 10.

[70] *See* AU sec. 543.01.

[71] *See* FASB ASC, Topic 235, Notes to Financial Statements, section 235–10–50. As part of this disclosure, the entity is required to disclose accounting policies and to describe the accounting principles followed by the entity and the methods of applying those principles that materially affect the determination of financial position, cash flows, or results of operations. Additionally, *see* paragraph 117 of International Accounting Standard 1, *Presentation of Financial Statements,* which requires the entity to disclose the summary of significant accounting policies, including the measurement basis used in preparing the financial statements and other accounting policies that are relevant to understanding the financial statements.

[72] *See* FASB ASC paragraphs 235–10–50–1 through 235–10–50–6.

[73] See SEC, Strengthening the Commission's Requirements Regarding Auditor Independence, Securities Act Release No. 8183 (Jan. 28, 2003).

380 related to communication of the company's significant accounting policies and practices, including:

1. Management's initial selection of, or changes in, significant accounting policies or the application of such policies in the current period; and

2. The effect on financial statements or disclosures of significant accounting policies in (i) controversial areas or (ii) areas for which there is a lack of authoritative guidance or consensus, or diversity in practice.

Auditing Standard No. 16 requires the auditor to communicate to the audit committee certain matters related to significant accounting policies and practices, whereas, AU sec. 380 required the auditor only to determine that the audit committee was ''informed.'' This change in wording is intended to indicate that the auditor should make these communications, rather than determine that the audit committee was informed, as required in AU sec. 380. However, the note to paragraph 12 of Auditing Standard No. 16 acknowledges that such communications may be made by management, and if the auditor meets certain conditions, these communications need not be duplicated by the auditor.

Some commenters suggested that it was unclear whether the communication of the initial selection of, or changes in, significant accounting policies or the application of such policies in the current period would require communication annually if there is no change. Another commenter indicated that the auditor may not be in a position to provide information on areas for which there is diversity in practice because the auditor may not be knowledgeable of accounting practices used by other entities.

Auditing Standard No. 16 was not revised in response to these comments. The standard indicates that the auditor should communicate to the audit committee the initial selection in the current period of significant accounting policies. The standard also indicates that the auditor should communicate to the audit committee changes in those policies or changes in the application of those policies in the current period if they differ from those policies that management previously utilized or how they were previously applied.

Additionally, the auditor's responsibility to communicate the effect of significant accounting policies includes (i) controversial areas or (ii) areas for which there is lack of authoritative guidance or consensus, or diversity in practice. The auditor should be aware of diversity in practice related to significant accounting policies and practices used by the company because Auditing Standard No. 12 requires the auditor to evaluate whether the company's selection of and application of accounting principles are appropriate for its business and consistent with the applicable financial reporting framework and accounting principles used in the relevant industry.[74] Based on this evaluation, the auditor should be in a position to make such communication.

Critical Accounting Policies and Practices (Paragraph 12.b. of Auditing Standard No. 16)

Auditing Standard No. 16 incorporates the Exchange Act requirement for the auditor to communicate to the audit committee all critical accounting policies and practices to be used.[75] Auditing Standard No. 16 also requires the auditor to communicate the reasons certain accounting policies and practices are considered critical and how current and anticipated future events might affect the determination of whether certain policies and practices are considered critical.[76]

Some commenters recommended deleting the requirement for the auditor to communicate how anticipated future events might affect the determination of whether certain policies and practices are considered critical since the auditor cannot predict the future. The standard retains the SEC requirement regarding communication of anticipated future events related to critical accounting policies and practices, as this is a component of the required communication the SEC identified in adopting SEC Rule 2–07.[77] The standard notes that critical accounting policies and practices are tailored to specific events in the current year and that the accounting policies and practices that are considered critical might change from year to year. For example, a significant merger or acquisition may result in the related accounting policy being considered critical in the current year in which the related transaction occurs, but not in subsequent years.

[74] Paragraph 12 of Auditing Standard No. 12.

[75] Section 10A(k) of the Exchange Act, 15 U.S.C. 78j-1(k), requires the auditor to report this information to the audit committee. *See also* SEC Rule 2–07 of Regulation S–X (''SEC Rule 2–07''), 17 CFR 210.2–07.

[76] *See* Securities Act Release No. 8183, which describes the SEC's expectations regarding the discussion related to critical accounting policies and practices. In this release, the SEC indicated that it anticipated that the discussion of accounting policies and practices would include how current and anticipated future events might affect the determination of whether certain policies and practices are considered critical.

[77] *Id.*

Auditing Standard No. 16 is aligned with the SEC requirement, therefore the standard was not revised.

Critical Accounting Estimates (Paragraph 12.c. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate the following matters related to critical accounting estimates:

7. A description of the process management used to develop critical accounting estimates;

8. Management's significant assumptions used in critical accounting estimates that have a high degree of subjectivity; and

9. Any significant changes management made to the processes used to develop critical accounting estimates or significant assumptions, a description of management's reasons for the changes, and the effects of the changes on the financial statements.

As the term ''critical accounting estimate'' implies, the communication is not designed to encompass a long list of accounting estimates resulting from the application of accounting policies that cover a substantial number of line items in the company's financial statements. Rather, Auditing Standard No. 16 defines the term ''critical accounting estimate'' as an accounting estimate where (a) the nature of the estimate is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change and (b) the impact of the estimate on financial condition or operating performance is material.

The definition of ''critical accounting estimate'' is based on SEC interpretive guidance in connection with management's discussion and analysis (''MD&A'') of the company's financial condition and results of operations.[78] The alignment of the term critical accounting estimates in PCAOB standards with the same term in the SEC's interpretive guidance allows auditors to use the same concept under SEC requirements and PCAOB standards when communicating matters to the audit committee. The term critical accounting estimate is used to help focus the communication to the audit committee on those estimates that might be subject to a higher risk of material misstatement, such as certain fair value estimates. The definition of a critical accounting estimate is intended to

[78] *See* SEC, *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations,* Securities Act Release No. 8350 (Dec. 19, 2003).

replace the term ''particularly sensitive'' in AU sec. 380.[79]

The requirement to communicate the process management used to develop critical accounting estimates is adapted from the requirement in AU sec. 380 related to particularly sensitive accounting estimates.[80] Additionally, the communication requirements are designed to communicate the results of the auditor's performance requirements under AU sec. 342, *Auditing Accounting Estimates,* which requires the auditor to evaluate the reasonableness of accounting estimates. In evaluating the reasonableness of the accounting estimate, AU sec. 342 also requires the auditor to obtain an understanding of how management developed the estimate.[81] AU sec. 342 also states that in evaluating the reasonableness of an estimate, the auditor normally concentrates on key factors and assumptions that are (a) significant to the accounting estimate, (b) sensitive to variations, (c) deviations from historical patterns, and (d) subjective and susceptible to misstatement and bias.[82]

One commenter suggested that the communication requirement also include how management subsequently monitors critical accounting estimates and, when critical accounting estimates involve a range of possible outcomes, how the recorded estimates relate to the range and how various selections within the range would affect the company's financial statements. Although these requirements are not included in Auditing Standard No. 16, the Board notes that the SEC has stated that management should disclose the company's critical accounting estimates in MD&A.[83] According to the related SEC release, management's discussion should present, among other matters, the company's analysis of the uncertainties involved in applying a principle at a given time or the variability that is reasonably likely to result from its application over time and analyze an estimate's specific sensitivity to change based on other outcomes that are reasonably likely to occur and would have a material effect.[84] The commenter's concerns, therefore, may be addressed through a company's MD&A disclosures.

AU sec. 550, *Other Information in Documents Containing Audited Financial Statements,* requires the auditor to read the other information, such as MD&A in documents containing audited financial statements, and consider whether the information, or the manner of its presentation, is materially inconsistent with information in the financial statements or is a material misstatement of fact.[85] Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee the results of such procedures. Accordingly, no change was made to the standard.

Significant Unusual Transactions (Paragraph 12.d. of Auditing Standard No. 16)

Auditing Standard No. 16 includes requirements for the auditor to communicate to the audit committee (1) significant transactions that are outside the normal course of business for the company or that otherwise appear to be unusual due to their timing, size, or nature;[86] and (2) the policies and practices management used to account for significant unusual transactions. Communication of significant unusual transactions would enable the audit committee to gain the auditor's insight into those transactions and to take any appropriate action.

The requirement in the standard for the auditor to communicate the policies and practices management used to account for significant unusual transactions is similar to the requirement in AU sec. 380.[87] Under Auditing Standard No. 16, such communication also would include the identification of significant unusual transactions.

The reproposed standard required the auditor to communicate significant unusual transactions, of which the auditor is aware, that are outside the normal course of business for the company or otherwise appear to be unusual due to their timing, size, or nature. Many commenters indicated that management also might communicate matters related to significant unusual transactions to the audit committee and that the standard should acknowledge that management might make the communications related to significant unusual transactions. The standard was revised to recognize that management might make these communications to the audit committee and that, in those situations, the auditor might not need to communicate the information at the same level of detail as management as long as certain criteria specified in the standard are met. However, the auditor should communicate any omitted or inadequately described matters to the audit committee.

Additionally, some commenters suggested that the communication should be limited to significant unusual transactions that are considered significant risks. While a significant unusual transaction might also be considered a significant risk, this communication provides the audit committee with additional information regarding the significant unusual transactions and the policies and practices management used to account for such transactions, even if such transactions do not constitute significant risks. Significant unusual transactions, at times, have been considered to be a contributing factor in attempts to mislead investors about a company's financial condition. Therefore, providing the audit committee with information regarding significant unusual transactions could benefit the audit committee in its oversight of the financial reporting process.

Some commenters suggested that the standard include a definition of the term ''significant unusual transactions.'' Auditing Standard No. 16 describes significant unusual transactions as significant transactions that are outside the normal course of business for the company or that otherwise appear to be unusual due to their timing, size, or nature, which is consistent with the description of this term in other PCAOB standards, such as Auditing Standard No. 12.[88] Therefore, the standard was not revised to further define significant unusual transactions.

Consideration of Communications Made by Management (Note to Paragraph 12 of Auditing Standard No. 16)

Auditing Standard No. 16 retains the substance of the communication requirements in AU sec. 380 regarding accounting policies, practices, and estimates. The requirement in the standard for the auditor to communicate critical accounting policies and practices is consistent with Section 10A(k) of the Exchange Act, which requires auditors of issuers to report all critical accounting policies and practices to the issuer's audit committee.[89] In addition, Auditing

[79] *See* AU sec. 380.08, which stated in part, ''[c]ertain accounting estimates are particularly sensitive because of their significance to the fin018ial statements and because of the possibility that future events affecting them may differ markedly from management's current judgments.''

[80] AU sec. 380.08.

[81] *See* AU sec. 342.10.

[82] *See* AU Sec. 342.09.

[83] *See* Securities Act Release No. 8350.

[84] *Id.*

[85] AU secs. 550.04–.05.

[86] *See* paragraph 71.g. of Auditing Standard No. 12.

[87] AU sec. 380.07.

[88] Paragraph 71.g. of Auditing Standard No. 12.

[89] *See also* SEC Rule 2–07.

Standard No. 16 includes a new requirement related to the communication of significant unusual transactions.

Many commenters suggested that the standard should recognize that management has the primary responsibility for reporting to the audit committee and that the auditor's responsibility should be to confirm that management has appropriately communicated. No change was made in response to this comment because, similar to AU sec. 380, Auditing Standard No. 16 acknowledges that management also may be communicating certain matters related to the financial reporting process to the audit committee. The Board recognizes that management as well as the auditor might discuss accounting policies, practices, estimates, and significant unusual transactions with the audit committee and that it would not be cost-effective or practical for the audit committee to listen to essentially the same presentation twice. Therefore, Auditing Standard No. 16 indicates that, in situations in which management communicates matters in paragraph 12, the auditor's communication requirement under the standard would be met if the auditor: (1) Participates in management's discussion with the audit committee,[90] (2) affirmatively confirms to the audit committee that management has adequately communicated these matters, and (3) with respect to critical accounting policies and practices, identifies for the audit committee those accounting policies and practices that the auditor considers critical. In addition, the auditor should communicate any omitted or inadequately described matters to the audit committee.

In situations in which management makes those communications to the audit committee, in order to satisfy the communication requirement in Auditing Standard No. 16, the auditor would be required to participate during discussions between management and the audit committee regarding accounting policies, practices, estimates, and significant unusual transactions, which may include discussions of the importance of critical accounting policies, practices or estimates, or the difficult, subjective, or complex nature of the judgment involved in significant unusual transactions, or the selection or application of accounting policies, practices, or estimates. If the auditor to identifies the accounting policies and practices that the auditor considers critical to the portrayal of the company's financial condition and results and affirmatively confirms that management has adequately communicated the accounting policies, practices, estimates, and significant unusual transactions to the audit committee in a meeting in which the auditor participated the auditor would be deemed to satisfy the requirement for the auditor to report all critical accounting policies and practices to the audit committee, without the need for the auditor to repeat management's presentation on the same topic.

Conversely, if the auditor (1) did not participate in management's meeting with the audit committee in which communication regarding accounting policies, practices, estimates, and significant unusual transactions occurred, (2) did not affirmatively confirm that accounting policies, practices, estimates, and significant unusual transactions had been discussed adequately by management, or (3) with respect to critical accounting policies and practices, did not identify those accounting policies and practices that the auditor considers critical, then the auditor would be required to communicate to the audit committee the matters described in paragraph 12 of Auditing Standard No. 16, regardless of any management communication regarding those matters.

Auditor's Evaluation of the Quality of the Company's Financial Reporting (Paragraph 13 of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate certain matters to the audit committee regarding the auditor's views of the audit and the financial statements as described below.

Qualitative Aspects of Significant Accounting Policies and Practices (Paragraph 13.a. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate the results of the auditor's evaluation of, and conclusions about, the qualitative aspects of the company's significant accounting policies and practices, including situations in which the auditor identified bias in management's judgments about the amounts and disclosures in the financial statements. This requirement is similar to certain communication requirements that have been superseded. AU sec. 380 required the auditor to discuss with the audit committee the auditor's judgments about the quality, not just the acceptability, of the company's accounting principles.[91] Additionally, AU sec. 9312, *Audit Risk and Materiality in Conducting an Audit: Auditing Interpretations of Section 312,* required the auditor to consider whether matters related to management bias should be communicated to the audit committee.[92]

The requirement in Auditing Standard No. 16 is designed for the auditor to communicate the results of the auditor's procedures under Auditing Standard No. 14, *Evaluating Audit Results,* which requires the auditor to, among other things, evaluate the qualitative aspects of the company's accounting practices,[93] including potential bias in management's judgments about the amounts and disclosures in the financial statements.[94]

Additionally, Auditing Standard No. 16 requires the auditor to communicate to the audit committee the results of the auditor's evaluation of the differences between (i) estimates best supported by audit evidence and (ii) estimates included in the financial statements, which are individually reasonable, that indicate a possible bias on the part of the company's management. This communication is designed for the auditor to discuss the results of the auditor's evaluation of these matters as required under Auditing Standard No. 14.[95] Linking the communication requirements with performance requirements in Auditing Standard No. 14 provides context regarding the matters to be communicated.

Some commenters suggested that the standard should retain the requirement in AU sec. 380 for the auditor to discuss with the audit committee the auditor's judgments about the quality, not just the acceptability, of the entity's accounting principles. Auditing Standard No. 16 modifies the requirement from AU sec. 380 by requiring the auditor to communicate to the audit committee the results of the auditor's evaluation of, and conclusions about, the qualitative aspects of the company's significant accounting policies and practices, while linking the communication requirement to the performance requirement in Auditing Standard No. 14. Therefore, no

[90] The auditor's participation in management's discussion with the audit committee could be satisfied in person or via audio or video conference.

[91] AU sec. 380.11.

[92] Following the original proposal of this standard, AU sec. 9312 was superseded when the Board adopted the risk assessment standards. The performance requirement of AU sec. 9312, however, was substantially included in the risk assessment standards.

[93] *See* paragraphs 24–27 of Auditing Standard No. 14.

[94] *Id.*

[95] *See* paragraph 27 of Auditing Standard No. 14.

change was made in response to these comments.

Assessment of Critical Accounting Policies and Practices (Paragraph 13.b. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee the auditor's assessment of management's disclosures related to the critical accounting policies and practices, along with any significant modifications to the disclosures of those policies and practices proposed by the auditor that management did not make. This requirement is based on the Exchange Act's requirement that the auditor report to the audit committee all critical accounting policies and practices.[96] In the release adopting the SEC's related rule, the SEC indicated that it anticipated that the auditor's communications to the audit committee regarding critical accounting policies would include an assessment of management's disclosures along with any significant proposed modifications by the auditor that were not included in those disclosures.[97]

Conclusions Regarding Critical Accounting Estimates (Paragraph 13.c. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate the basis for the auditor's conclusions regarding the reasonableness of the critical accounting estimates. This requirement is similar to a requirement in AU sec. 380.[98] This requirement is designed to require the auditor to communicate the results of the auditor's procedures regarding critical accounting estimates under PCAOB standards, such as AU sec. 342.[99] Communicating these results will provide the audit committee with the auditor's assessment of the critical accounting estimates based on the auditor's procedures.

Significant Unusual Transactions (Paragraph 13.d. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee the auditor's understanding of the business rationale for significant unusual transactions. This communication requirement is aligned with the performance requirement in AU sec. 316, *Consideration of Fraud in a Financial Statement Audit,* which requires the auditor to gain an understanding of the business rationale regarding significant transactions that are outside the normal course of business or that otherwise appear unusual.[100] This communication would provide the audit committee with an opportunity to receive the auditor's perspective of such transactions.

In a separate rulemaking project, the Board has proposed amendments to AU sec. 316 that would require the auditor to design and perform procedures to obtain an understanding of the business purpose (or lack thereof) of each significant unusual transaction and evaluate whether the business purpose (or the lack thereof) indicates that the significant unusual transaction may have been entered into to engage in fraudulent financial reporting or conceal misappropriation of assets.[101] If, at the conclusion of that rulemaking project, the Board adopts the proposed amendments to AU sec. 316, the Board will consider, as appropriate, amending Auditing Standard No. 16 to align the communication with any new performance requirements.

Financial Statement Presentation (Paragraph 13.e. of Auditing of Auditing Standard No. 16)

Similar to AU sec. 380.11, Auditing Standard No. 16 requires the auditor to communicate to the audit committee the results of the auditor's evaluation of whether the presentation of the financial statements and the related disclosures are in conformity with the applicable financial reporting framework, including the auditor's consideration of the form, arrangement, and content of the financial statements (including the accompanying notes), encompassing matters such as the terminology used, the amount of detail given, the classification of items, and the bases of amounts set forth. This communication requirement relates to the auditor's evaluation of whether the financial statements are presented fairly, in all material respects, in conformity with the applicable financial reporting framework, as required by Auditing Standard No. 14.[102]

Some commenters suggested that the standard should retain the requirement in AU sec. 380 for the auditor to discuss with the audit committee the auditor's views about the clarity and completeness of the company's financial statements and disclosures. However, commenters on the original proposed standard indicated it was not clear what was meant by the clarity and completeness of the company's financial statements and related disclosures. Commenters also expressed concern as to what should be included in the communications to the audit committee. The communication requirement in Auditing Standard No. 16 avoids possible confusion 0regarding the meaning of the phrase ''clarity and completeness'' by linking it to the auditor performance requirements included in Auditing Standard No. 14 for the auditor to evaluate the presentation of the financial statements, including disclosures. The performance requirements in Auditing Standard No. 14 [103] provide context regarding the matters to be communicated under Auditing Standard No. 16.

New Accounting Pronouncements (Paragraph 13.f. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee situations in which, as a result of the auditor's procedures, the auditor identified a concern regarding management's anticipated application of accounting pronouncements that have been issued but are not yet effective and might have a significant effect on future financial reporting. This requirement is based on the situations in which, as a result of the auditor's procedures, the auditor has identified a concern regarding the anticipated application of a new accounting pronouncement. Auditing Standard No. 16 does not require the auditor to perform additional procedures to identify such concerns.

Some commenters noted that management generally discloses in the financial statements the potential effects of adoption of new accounting standards and that this auditor communication to the audit committee should be related to the auditor's evaluation of management's disclosures related to new accounting pronouncements. The intent of the required communication to the audit committee is not meant to provide an additional evaluation of management's disclosures. Rather, the intent is to inform the audit committee when the auditor ''has identified a concern'' regarding the planned implementation of a new accounting pronouncement or

[96] *See* Section 10A(k) of the Exchange Act, 15 U.S.C. 78j–1(k); and SEC Rule 2–07.

[97] *See* Securities Act Release No. 8183.

[98] *See* AU sec. 380.08.

[99] *See* AU secs. 342.04, 09-.10.

[100] *See* AU sec. 316.66.

[101] *Proposed Auditing Standard—Related Parties, Proposed Amendments to Certain PCAOB Auditing Standards Regarding Significant Unusual Transactions, and Other Proposed Amendments to PCAOB Auditing Standards,* PCAOB Release No. 2012–001 (Feb. 28, 2012).

[102] See paragraphs 30–31 of Auditing Standard No. 14, which describe the auditor's responsibility relating to the evaluation of whether the financial statements are presented fairly, in all material respects, in conformity with the applicable financial reporting framework.

[103] *Id.*

whether management has devoted adequate resources to prepare its accounting and disclosure processes, and other financial reporting systems, for the timely implementation of the new accounting pronouncement. This communication might inform the audit committee's oversight of the company's financial reporting process. Requiring the discussion of such matters is intended to allow the audit committee to properly consider the auditor's concerns regarding future financial statements. Accordingly, no change to the standard was made.

Alternative Accounting Treatments (Paragraph 13.g. of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate all alternative treatments permissible under the applicable financial reporting framework for policies and practices related to material items that have been discussed with management, including the ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the auditor. This requirement is consistent with Section 10A(k) of the Exchange Act and with SEC Rule 2–07, which requires the auditor to report to the audit committee all alternative treatments that are related to material items, were discussed with management, and are permissible under the applicable financial reporting framework.[104]

Other Information in Documents Containing Audited Financial Statements (Paragraph 14 of Auditing Standard No. 16)

Auditing Standard No. 16 retains the requirement from AU sec. 380.12 for the auditor to communicate to the audit committee the auditor's responsibility under PCAOB rules and standards for other information presented in documents containing audited financial statements, any related procedures performed, and the results of such procedures. Such other information would include documents described in AU sec. 550, AU sec. 558, *Required Supplementary Information,* and AU sec. 711, *Filings Under Federal Securities Statutes.*

The auditor's responsibility under AU sec. 550 requires the auditor to read the other information and consider whether such information, or the manner of its presentation, is materially inconsistent with information, or the manner of its presentation, in the financial statements.[105] One commenter suggested that Auditing Standard No. 16 should also include a requirement to communicate any identified material inconsistencies or misstatements of facts, including the auditor's response to such matters.

Auditing Standard No. 16 requires the auditor to communicate the results of the auditor's procedures related to other information in documents containing audited financial statements, which would require the auditor to communicate identified inconsistencies or misstatements of facts to the audit committee. The Board is amending AU sec. 550 to require the auditor to communicate to the audit committee the material inconsistency between the other information and the financial statements in situations in which the information is not revised to eliminate the material inconsistency. The Board also is amending AU sec. 550 to require the auditor to communicate to the client and the audit committee, in writing, a material misstatement of fact in the other information. Thus, it was not necessary to revise the standard in response to commenters.

Difficult or Contentious Matters for Which the Auditor Consulted (Paragraph 15 of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee matters that are difficult or contentious for which the auditor consulted outside the engagement team and that the auditor reasonably determined are relevant to the audit committee's oversight of the financial reporting process. The required communications of difficult or contentious matters are based on the results of the procedures the auditor performed regarding such matters during the course of the audit and do not require the performance of new or additional procedures.

Many matters that arise during an audit can be complex or unusual, and the auditor might consult on such matters with the firm's national office, industry specialists, or external parties. Difficult or contentious issues can arise in various stages of the audit, including in the auditor's evaluation of management's judgments, estimates, accounting policies, or assessment of identified control deficiencies. Difficult or contentious issues generally are the critical matters that concern the auditor when he or she is making the final assessment of whether the financial statements are presented fairly.

A difficult issue might not always be synonymous with a contentious issue. Rather, a difficult issue might be a matter that requires consultation. A contentious issue might be a matter that not only requires consultation but also leads to significant points of disagreement, debate, or deliberation between the auditor and management. Audit committees might better appreciate the importance of difficult or contentious matters if they are aware that such consultations took place.

During the course of the audit difficult or contentious issues might arise for which the auditor did not consult, but which the auditor believes are relevant to the audit committee's oversight of the financial reporting process. Auditing Standard No. 16 does not preclude the auditor from communicating to the audit committee difficult or contentious matters for which the auditor did not consult outside the engagement team.

Some commenters suggested that the standard should define difficult or contentious matters. The term ''difficult or contentious matter'' is used in Auditing Standard No. 7, *Engagement Quality Review.* Therefore, the term ''difficult or contentious matter'' is not defined in this standard.

Some commenters suggested that the standard should exclude the discussions between the auditor and the engagement quality reviewer from communications to the audit committee regarding consultation outside the engagement team on difficult or contentious matters. The communication to the audit committee in Auditing Standard No. 16 focuses on the difficult or contentious matters on which the auditor consulted, not on the parties involved in the consultation. Therefore, the standard was not revised.

Management Consultation With Other Accountants (Paragraph 16 of Auditing Standard No. 16)

When the auditor is aware that management consulted with other accountants about significant auditing or accounting matters and the auditor has identified a concern regarding such matters, Auditing Standard No. 16 requires the auditor to communicate to the audit committee the auditor's views about such matters that were the subject of such consultation. This requirement is similar to a requirement in AU sec. 380.[106] Communicating matters that

[104] *See* SEC Rule 2–07, Section 10A(k) of the Exchange Act, 15 U.S.C. 78j-1(k), and Securities Act Release No. 8183.

[105] *See generally,* AU secs. 550.04-.07, which require that the auditor read the information and consider whether it is materially inconsistent with information in the financial statements or whether it contains any material misstatements of fact.

[106] AU sec. 380.14.

were the subject of consultations only when the auditor has identified a concern about those matters should allow the audit committee to focus its efforts on important accounting and auditing issues.

Some commenters suggested that communicating management consultations with other accountants should be management's responsibility and that the standard should clarify that the auditor should comment only on what management has communicated regarding such consultations. The standard does not impose a communication requirement on management. The requirement in Auditing Standard No. 16 is specifically related to the auditor's responsibilities when management has consulted with other accountants and only when the auditor has a concern regarding the accounting and auditing matters that were the subject of management's consultations. Therefore, Auditing Standard No. 16 was not revised.

As part of the comment process, the Board asked whether the requirement to communicate about consultations should be expanded to include consultations on accounting or auditing matters with non-accountants, such as consulting firms or law firms. Some commenters suggested that communication regarding management's consultations with non-accountants should be required, while others suggested that communication about these consultations should be made at the auditor's discretion depending on the facts or circumstances and the significance of the consultation to the financial statements. However, many commenters indicated that this communication should not be expanded to include consultations with non-accountants, as the auditors would not be in position to know about all management consultations with non-accountants. Some commenters indicated that this requirement could result in the auditor expending significant effort to identify and evaluate management's consultations with non-accountants. After consideration of these comments, the standard was not revised to require the auditor to communicate management's consultation with non-accountants.

Going Concern (Paragraph 17 of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee certain matters related to the auditor's evaluation of the company's ability to continue as a going concern. The communication requirements in Auditing Standard No. 16 are based on the auditor's performance requirements under AU sec. 341, *The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern,* which requires the auditor to evaluate whether there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time.[107] The auditor's communication to the audit committee regarding the auditor's evaluation of the company's ability to continue as a going concern can serve to further inform the audit committee, in certain circumstances, regarding difficult conditions and events that the company is encountering.

Auditing Standard No. 16 requires the auditor to communicate the conditions and events the auditor identified that, when considered in the aggregate, lead the auditor to believe that there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time. Information about such conditions and events is obtained from the application of auditing procedures planned and performed to achieve audit objectives that are related to management's assertions in the financial statements.[108] Examples of such conditions and events include, but are not limited to, negative trends, other indications of possible financial difficulties, internal matters, or external matters that have occurred.[109]

Under AU sec. 341, if after considering the identified conditions and events, in the aggregate, the auditor believes that there is substantial doubt about the entity's ability to continue as a going concern for a reasonable period of time, the auditor should consider management's plans for dealing with the adverse effects of the conditions and events.[110] Additionally, the auditor should obtain information about the plans and consider whether it is likely that the adverse effects will be mitigated for a reasonable period of time, and that such plans can be effectively implemented.[111] Auditing Standard No. 16 requires that if the auditor concludes, after consideration of management's plans, that substantial doubt about the company's ability to continue as a going concern is alleviated, the auditor should communicate to the audit committee the basis for the auditor's conclusion, including elements the auditor identified within management's plans that are significant to overcoming the adverse effects of the conditions and events.[112]

Under AU sec. 341, if the auditor concludes that substantial doubt about the company's ability to continue as a going concern for a reasonable period of time remains, the audit report should include an explanatory paragraph to reflect the auditor's conclusion that there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time.[113] Additionally, Auditing Standard No. 16 requires that if the auditor concludes that substantial doubt about the company's ability to continue as a going concern for a reasonable period of time remains,[114] the auditor should communicate to the audit committee: (1) The effects, if any, on the financial statements and the adequacy of the related disclosure; [115] and (2) the effects on the auditor's report.[116]

The reproposed standard required the auditor to communicate the conditions and events the auditor identified that, when considered in the aggregate, indicate that there ''could be'' substantial doubt about the company's ability to continue as a going concern for a reasonable period of time. Some commenters suggested that the threshold for communication to the audit committee should be when the auditor believes there ''is'' substantial doubt about the company's ability to continue as a going concern, rather than when there ''could be'' substantial doubt. Those commenters suggested that threshold because, under AU sec. 341, the auditor is required to consider management's plans for addressing the adverse effects of the events and conditions when the auditor believes there ''is'' substantial doubt.

Auditing Standard No. 16 was revised to require the threshold for the auditor's

[107] *See* AU sec. 341.06, which provides examples of such conditions and events and AU sec. 341.07, which discusses the auditor's procedures if the auditor believes there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time.

[108] *See* AU sec. 341.02.

[109] *See* AU sec. 341.06, which provides examples of such conditions and events.

[110] *See* AU sec. 341.07, which discusses the auditor's procedures if the auditor believes there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time.

[111] *See* AU sec. 341.03b.

[112] *See* AU sec. 341.08, which discusses the auditor's responsibilities related to the auditor's evaluation of management's plans.

[113] *See* AU sec. 341.12.

[114] *See* AU sec. 341.03c, which discusses the auditor's evaluation of factors that indicate there is substantial doubt about the company's ability to continue as a going concern.

[115] *See* AU sec. 341.10, which discusses the possible effects on the financial statements and the adequacy of the related disclosure.

[116] *See* AU secs. 341.12–.16, which discuss the auditor's consideration of the effects on the auditor's report when the auditor concludes that substantial doubt exists about the company's ability to continue as a going concern for a reasonable period of time.

initial communication to the audit committee to be when the auditor ''believes there is'' substantial doubt about the company's ability to continue as a going concern. This aligns more closely the communication requirement about the conditions and events with the other communication requirements in paragraph 17 of Auditing Standard No. 16. Under paragraph 17 of Auditing Standard No. 16 the auditor is required to communicate conditions and events, along with the auditor's conclusion regarding whether either management's plans alleviate the adverse effects of the conditions and events (item b) or substantial doubt remains (item c).

Uncorrected and Corrected Misstatements (Paragraphs 18–19 of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to provide the audit committee with the schedule of uncorrected misstatements[117] relating to accounts and disclosures that was presented to management. Several commenters indicated that audit committees would not find value in information presented at the same level of detail as presented to management, and that the auditor, therefore, should provide a summary of misstatements to the audit committee.

The Board decided to retain the requirement because presenting a schedule that shows only a summary of the uncorrected misstatements rather than the individual misstatements might not be informative for the audit committee. In addition, the requirement in Auditing Standard No. 16 is not a significant change from AU sec. 380.10, which required the presentation to the audit committee of a schedule of uncorrected misstatements.

The schedule of uncorrected misstatements required by Auditing Standard No. 16 is similar to the summary of uncorrected misstatements included in or attached to the management representation letter.[118] Additionally, the Exchange Act and SEC Rule 2–07 require the auditor to provide to the audit committee other material written communications between the auditor and management, which would include the schedule of unadjusted audit differences and a listing of adjustments and reclassifications not recorded, if any.[119]

Auditing Standard No. 14 requires the auditor to accumulate misstatements identified during the audit, other than those that are clearly trivial, and to communicate those to management on a timely basis.[120] According to Auditing Standard No. 14, a misstatement may relate to a difference between the amount, classification, presentation, or disclosure of a reported financial statement item and the amount, classification, presentation, or disclosure that should be reported in conformity with the applicable financial reporting framework.[121] The requirement in Auditing Standard No. 16 to communicate misstatements related to accounts and disclosures relates only to those misstatements that the auditor has accumulated throughout the audit that are not clearly trivial and have been reported to management.

Auditing Standard No. 16 also requires the auditor to discuss with the audit committee, or determine that management has adequately discussed with the audit committee, the basis for the determination that the uncorrected misstatements were immaterial, including the qualitative factors[122] considered. In addition, the auditor also should communicate to the audit committee that uncorrected misstatements or matters underlying those uncorrected misstatements could potentially cause future-period financial statements to be materially misstated, even if the auditor has concluded that the uncorrected misstatements are immaterial to the financial statements under audit.

Auditing Standard No. 16 also requires the auditor to communicate those corrected misstatements, other than those that are clearly trivial, related to accounts and disclosures that might not have been detected except through the auditing procedures performed and discuss with the audit committee the implications that such corrected misstatements might have on the financial reporting process.

One commenter suggested that the standard should require the auditor to communicate management's adjusting entries recorded at the end of the period or other entries to reconcile accounts. The release accompanying the original proposed standard included a question that asked whether all corrected misstatements, including those detected by management, should be communicated to the audit committee. Many commenters responding to the question were not supportive of the auditor communicating misstatements detected by management or management's period-end adjusting entries, because the auditor may not have knowledge of all such adjustments due to the nature of a company's financial statement close process and the timing of the auditor's procedures. Commenters suggested that such a requirement would likely result in the auditor expending significant effort to identify misstatements or adjusting entries that the company's internal controls previously identified in the financial close process. Accordingly, the standard does not include a requirement for the auditor to communicate misstatements detected by management.

Some commenters suggested that the standard should be revised to require the auditor to communicate only corrected misstatements that individually or in the aggregate could be significant to the company's financial statements. As noted previously, Auditing Standard No. 14 requires the auditor to accumulate misstatements identified during the audit, other than those that are clearly trivial. The misstatements the auditor accumulated and management corrected are those that are other than clearly trivial and could be significant to the company's financial statements, either quantitatively or qualitatively. Auditing Standard No. 16 also requires the auditor to communicate those corrected misstatements that might not have been detected except through the auditing procedures performed. The intent of this requirement is to inform the audit committee of misstatements, which might have certain implications on the company's financial reporting process, that were detected only through audit procedures. Therefore, Auditing Standard No. 16 was not revised.

Another commenter suggested that the standard should specifically require the auditor to request management to correct the uncorrected misstatements. The Board did not make this change because management has its own legal responsibilities in relation to the preparation and maintenance of the company's books, records, and financial statements. Section 13(i) of the Exchange Act requires the financial statements filed with the SEC to reflect all material correcting adjustments identified by the auditor.[123]

[117] Footnote 13 to paragraph 20 of Auditing Standard No. 14 indicates that misstatements include both omissions and the presentation of inaccurate or incomplete disclosures.

[118] *See* paragraph .06g of AU sec. 333, *Management Representation.*

[119] *See* Section 10A(k)(3) of the Exchange Act, 15 U.S.C. 78j–1(k)(3), SEC Rule 2–07(a)(3) and Securities Act Release No. 8183.

[120] *See* paragraphs 10 and 15 of Auditing Standard No. 14.

[121] *See* paragraph A2 of Auditing Standard No. 14.

[122] *See* Appendix B of Auditing Standard No. 14, which discusses the qualitative factors related to the evaluation of the materiality of uncorrected misstatements.

[123] Section 13(i) of the Exchange Act, 15 U.S.C. 78j–1(m)(i).

Material Written Communication (Paragraph 20 of Auditing Standard No. 16)

Auditing Standard No. 16 incorporates the Exchange Act's requirement for the auditor to communicate other material written communications between the auditor and management to the audit committee.[124] This requirement is intended to capture other possible material written communications that might occur but are not addressed by requirements in the standard or by other PCAOB standards, such as the management representation letter.[125]

Departure From the Auditor's Standard Report (Paragraph 21 of Auditing Standard No. 16)

Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee when the auditor expects to modify the opinion in the auditor's report or include explanatory language or an explanatory paragraph in the auditor's report.[126] The auditor is required to communicate the reasons for and the wording of the modification, explanatory language, or explanatory paragraph. The requirement is intended to provide the basis for a discussion between the auditor and the audit committee in those circumstances in which the auditor expects to add explanatory language or modify the opinion in the auditor's standard report.

As part of overseeing the audit and the financial reporting process, it might be important for the audit committee to understand the reasons an auditor adds explanatory language or modifies the opinion in the auditor's standard report. Such communication enables the audit committee to be aware of the nature of any specific matters that the auditor expects to highlight in the auditor's report. In addition, these communications provide the audit committee with an opportunity to obtain further clarification from the auditor about the modification. This communication also provides the audit committee with an opportunity to provide the auditor with further information and explanations regarding the matters that are expected to be included in the auditor's report.

Disagreements With Management (Paragraph 22 of Auditing Standard No. 16)

Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee any disagreements with management about matters, whether or not satisfactorily resolved, that individually or in the aggregate could be significant to the company's financial statements or the auditor's report. This requirement is retained from AU sec. 380.13.

Examples of disagreements might include disagreements with management about the application of accounting principles to the company's specific transactions and events and the basis for management's judgments about accounting estimates. Disagreements might also arise regarding the scope of the audit, disclosures to be made in the company's financial statements, or the wording of the auditor's report. For purposes of Auditing Standard No. 16, disagreements do not include differences of opinion based on incomplete facts or preliminary information that are later resolved by the auditor obtaining additional, relevant facts or information prior to the issuance of the auditor's report.

One commenter suggested that disagreements that are satisfactorily resolved should not be communicated to the audit committee unless the auditor determines that these matters warrant the audit committee's attention. As noted previously, this communication requirement is not new. As part of conducting the oversight of the audit and the financial reporting process, it might be important for the audit committee to know the areas of tension between the auditor and management regarding matters that could be significant to the company's financial statements, such as accounting principles and practices, financial statement disclosures, auditing scope or procedures, or similar matters. Accordingly, no change was made in response to this comment. Additionally, SEC Form 8–K requires that a registrant report certain disagreements between management and the auditor, whether or not such disagreements are satisfactorily resolved, when there is a change in the auditor.[127] The requirement in Auditing Standard No. 16 provides the audit committee with information regarding important matters that might need to be reported subsequently in an SEC filing.

Difficulties Encountered in Performing the Audit (Paragraph 23 of Auditing Standard No. 16)

Auditing Standard No. 16 includes the requirement from AU sec. 380.16 for the auditor to communicate to the audit committee any significant difficulties encountered during the audit. Significant difficulties encountered during the audit include, but are not limited to:

d. Significant delays by management, the unavailability of company personnel, or an unwillingness by management to provide information needed for the auditor to perform his or her audit procedures;

e. An unreasonably brief time within which to complete the audit;

f. Unexpected extensive effort required by the auditor to obtain sufficient appropriate audit evidence;

g. Unreasonable management restrictions encountered by the auditor on the conduct of the audit; and

h. Management's unwillingness to make or extend its assessment of the company's ability to continue as a going concern when requested by the auditor.

Other Matters (Paragraph 24 of Auditing Standard No. 16)

Auditing Standard No. 16 requires the auditor to communicate to the audit committee other matters arising from the audit that are significant to the oversight of the company's financial reporting process. This communication includes, among other matters, complaints or concerns regarding accounting or auditing matters that have come to the auditor's attention during the audit and the results of the auditor's procedures regarding such matters. Communication of the other matters is based on the results of audit procedures or the conduct of the audit and does not require the auditor to perform new or additional procedures beyond the communication itself.

The Sarbanes-Oxley Act requires that audit committees of listed companies establish procedures for the receipt, retention, and treatment of complaints received by the company regarding accounting, internal accounting control, or auditing matters, and for the confidential, anonymous submission by employees of the company of concerns

[124] Section 10A(k)(3) of the Exchange Act, 15 U.S.C. 78j–1(k)(3), requires the auditor to report this information to the audit committee; *see also* SEC Rule 2–07.

[125] *See* Securities Act Release No. 8183 for a discussion of the substance of other material written communications.

[126] *See* paragraphs .11–.74 and .76 of AU sec. 508, *Reports on Audited Financial Statements.*

[127] *See e.g.,* Exchange Act Form 8–K, Item 4.01. *See also* Item 304(a)(1)(iv) of Regulation S–K, 17 CFR § 229.304(a)(1)(iv), and Instructions 4 and 5 to that item, which require disclosure of disagreements, or differences of opinion, at the ''decision-making level,'' that, if not resolved to the auditor's satisfaction, would have caused the auditor to make reference to the subject matter of the disagreement in connection with his or her report.

regarding questionable accounting or auditing matters.[128]

Auditing Standard No. 12 requires the auditor to inquire of the audit committee regarding tips or complaints received by the audit committee regarding financial reporting matters. The auditor might become aware of complaints or concerns regarding financial reporting matters that were not received through the audit committee's process, and, therefore, are unknown to the audit committee. The audit committee might be better able to exercise its oversight activities if the auditor informed the audit committee of these matters. Paragraph 24 of Auditing Standard No. 16 requires the auditor to communicate these matters to the audit committee.

AU sec. 380 required the auditor to ensure that the audit committee receives additional information regarding the scope and results of the audit that may assist the audit committee in overseeing the financial reporting and disclosure process. Auditing Standard No. 16 enhances the requirement in AU sec. 380 for the auditor to communicate to the audit committee the results of the audit procedures regarding the accounting or auditing matters that have been the subject of complaints or concerns.

The standard acknowledges that there might be other matters known to the auditor that may be beneficial to the audit committee's oversight of the financial reporting process. This communication could provide the audit committee with an opportunity to better understand management's intentions regarding such matters.

Several commenters suggested that Auditing Standard No. 16 should require the auditor to communicate to the audit committee the results of PCAOB inspection findings and any necessary remediation by the audit firm. With respect to inspections, the Sarbanes-Oxley Act restricts what the Board may publicly disclose,[129] and the Sarbanes-Oxley Act makes no exception for disclosure to an audit committee even if a Board inspection has reviewed an audit of the financial statements overseen by that audit committee. The Board cannot compel a firm to disclose nonpublic inspection information to an audit committee. This need not prevent an audit committee from discussing inspection results with its auditor. The Board encourages firms to communicate effectively with audit committees about inspection matters. The Sarbanes-Oxley Act does not restrict a firm from disclosing to an audit committee nonpublic information regarding PCAOB inspections (including quality control deficiencies and the firm's remediation of those deficiencies) or PCAOB disciplinary matters.[130]

Form and Documentation of Communications (Paragraph 25 of Auditing Standard No. 16)

Auditing Standard No. 16 retains from AU sec. 380 the ability for auditors to communicate to the audit committee either orally or in writing, unless otherwise specified in the standard. Some commenters suggested that the standard should require all communications to be in writing, while other commenters indicated that the standard should continue to provide flexibility in the manner of communication.

Auditing Standard No. 16 was not revised to require all communications to be in writing. The Board's intention is to promote effective two-way communication between the auditor and the audit committee, whether through presentations, written reports, or interactive discussions. Written communications might provide the auditor with a basis to lead an active two-way discussion with the audit committee.

In addition, the form of communication may depend on the nature of the matter to be communicated. For example, written information often makes it easier for the audit committee to understand highly complex information (for example, information about critical accounting estimates). However, having a dialogue on key matters often is an important factor in effective communications between the auditor and the audit committee.

Auditing Standard No. 16 also requires the auditor to document the communications in the work papers, whether such communication took place orally or in writing. The standard further requires the auditor to include a copy of or a summary of management's communications provided to the audit committee in the audit documentation if, as part of its communications to the audit committee, management communicated some or all of the matters identified in paragraphs 12 or 18 and, as a result, the auditor did not communicate these matters at the same level of detail as management.

Timing (Paragraph 26 of Auditing Standard No. 16)

The Board considers communications with audit committees to be an integral part of the audit process. AU sec. 380 stated that audit committee communications are incidental to the audit and are not required to occur before the issuance of the auditor's report on the entity's financial statements so long as the communications occur on a timely basis.[131] Auditing Standard No. 16 requires the auditor to communicate the matters required by the standard in a timely manner and prior to the issuance of the auditor's report. This requirement aligns the timing of communications with SEC Rule 2–07, which requires the auditor to communicate matters to the audit committee prior to the filing of the auditor's report with the SEC.[132] The appropriate timing of a particular communication to the audit committee depends on factors such as the significance of the matters to be communicated and corrective or follow-up actions needed, unless other timing requirements are specified by PCAOB rules or standards or the securities laws.

The reproposed standard specified that all communications be made in a timely manner and prior to the issuance of the auditor's report, unless other timing requirements are specified by PCAOB rules or standards or the rules or regulations of the SEC. One commenter suggested that the ''rules and regulations of the SEC'' should be modified to the ''federal securities laws,'' since timing of certain communications to the audit committee also is specified in securities laws. The standard was updated to reference ''securities laws.''[133]

Commenters generally agreed that audit committee communications should occur in a timely manner and prior to the issuance of the auditor's report. Some commenters suggested that the standard should specify the timing of the communication about certain matters, such as during planning or prior to the earnings release.

Auditing Standard No. 16 does not emphasize the specific timing of certain

[128] *See* Section 301 of the Sarbanes-Oxley Act, and Section 10A(m)(4) of the Exchange Act, 15 U.S.C. 78j-1(m)(4).

[129] *See* Section 104(g)(2) of the Sarbanes-Oxley Act (providing that the Board shall make inspection reports available to the public in appropriate detail ''subject to,'' among other things, the broad disclosure restrictions of Section 105(b)(5)(A)).

[130] *See Information for Audit Committees About the PCAOB Inspection Process,* PCAOB Release No. 2012–003 (Aug. 1, 2012).

[131] AU sec. 380.04.

[132] *See* SEC Rule 2–07.

[133] The term ''securities laws'' is defined in section 2(a)(15) of the Sarbanes-Oxley Act, 15 U.S.C. 7201, to mean the provisions of law referred to section 3(a)(47) of the Exchange Act, 15 U.S.C. 78c(a)(47), as amended by the Sarbanes-Oxley Act, and includes the rules, regulations, and orders issued by the SEC thereunder.

communications because the appropriate timing might vary depending on the circumstances. As noted in the standard, the appropriate timing of a particular communication to the audit committee depends on factors such as the significance of the matters to be communicated and any corrective or follow-up action needed, unless other timing requirements are specified by PCAOB rules or standards or the securities laws. However, in all events, the timing of the communication should be prior to the issuance of the auditor's report.

Providing communications required by Auditing Standard No. 16 to the audit committee in a timely manner and prior to the issuance of the auditor's report will allow the audit committee and the auditor the opportunity to take any action they may deem appropriate to address the matters communicated prior to the issuance of the auditor's report.

The reproposed standard noted that an auditor may communicate to only the audit committee chair if done in order to communicate matters in a timely manner during the audit; however, the auditor should communicate such matters to the full audit committee prior to the issuance of the auditor's report. Several commenters suggested that the auditor's responsibility to subsequently communicate to the ''full'' audit committee was an unnecessary burden and that the word ''full'' should be deleted to allow the auditor to communicate to the audit committee when a quorum is present. The standard was revised accordingly to eliminate the word ''full.''

Adequacy of the Two-Way Communication Process

The original proposed standard included a requirement for the auditor to evaluate whether the two-way communication between the auditor and the audit committee was adequate to support the objectives of the audit. The requirement was included to emphasize that effective two-way communication is beneficial to achieving the objectives of the audit.

Many commenters on the original proposed standard noted that an evaluation of the adequacy of the two-way communications can only be effective if both parties are involved in the evaluation. These commenters also suggested that if only the auditor evaluates the effectiveness based on his or her understanding of what was communicated, that evaluation would not provide information about the audit committee's understanding of that communication. In response to commenters, the Board removed this requirement in the reproposed standard.

Some commenters on the reproposed standard indicated that the Board should reinstate the requirement for the auditor to evaluate the adequacy of the two-way communication between the auditor and the audit committee to encourage the auditor to determine whether there is effective two-way communication. Additionally, some commenters suggested that the standard should be revised to change certain requirements for the auditor to communicate ''with'' the audit committee instead of ''to'' the audit committee in situations in which two-way discussion would be appropriate for the auditor to obtain information on particular matters relevant to the audit.

The note in paragraph 3 of Auditing Standard No. 16 states that the requirement for the auditor to ''communicate to'' the audit committee is meant to encourage effective two-way communication between the auditor and the audit committee throughout the audit to assist in understanding matters relevant to the audit. The importance of effective two-way communications remains in the standard; therefore, no change was considered necessary.

In addition, as part of understanding the company's control environment in Auditing Standard No. 12, the auditor assesses whether the board or audit committee understands and exercises oversight responsibility over financial reporting and internal control.[134] Other PCAOB standards require that, in an audit of financial statements, if the auditor becomes aware, or in an integrated audit, if the auditor concludes that the oversight of the company's external financial reporting and internal control over financial reporting by the company's audit committee is ineffective, the auditor must communicate that information in writing to the board of directors.[135] Not including a requirement for the auditor to evaluate the adequacy of a two-way communication in this standard does not change the auditor's responsibility for assessing the audit committee's effectiveness under existing PCAOB standards.

Amendments to PCAOB Standards

With the adoption of Auditing Standard No. 16, the Board adopted related communication requirements to other PCAOB standards. These amendments were made to the following standards, among others:

- Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements;*
- AU sec. 316, *Consideration of Fraud in a Financial Statement Audit;*
- AU sec. 317, *Illegal Acts by Clients;*
- AU sec. 550, *Other Information in Documents Containing Audited Financial Statements;* and
- AU sec. 722, *Interim Financial Information.*

The Board is amending AU sec. 722 to be consistent with Auditing Standard No. 16. Some commenters suggested that the amendments to AU sec. 722 should clarify that the accountant (''accountant'' is the term used in AU sec. 722) is not required to repeat communications that were made as part of the annual audit. Other commenters suggested that the amendments to AU sec. 722 should become effective for interim periods following the first annual period in which Auditing Standard No. 16 becomes effective and that, otherwise, implementing the amendments prior to the first annual communication under Auditing Standard No. 16 would likely result in unnecessarily expanding the communication requirements related to the auditor's review of interim information.

The objective of a review of interim financial information pursuant to AU sec. 722 is to provide the accountant with a basis for communicating whether the accountant is aware of any material modifications that should be made to the interim financial information for it to conform with generally accepted accounting principles.[136] Procedures for conducting a review of interim financial information generally are limited to analytical procedures, inquiries, and other procedures that address significant accounting and disclosure matters relating to the interim financial information to be reported.[137] A review may bring to the accountant's attention significant matters affecting the interim financial information, but it does not provide assurance that the accountant will become aware of all significant matters that would be identified in an audit.[138]

AU sec. 722.18 requires the accountant to make inquiries of members of management who have responsibility for financial and accounting matters, including but not limited to, matters concerning unusual

[134] *See* paragraphs 23–24 of Auditing Standard No. 12.

[135] *See* paragraph 79 of Auditing Standard No. 5 and paragraph 5 of AU sec. 325.

[136] AU sec. 722.07.

[137] AU sec. 722.15.

[138] AU sec. 722.07.

or complex situations that may have an effect on the interim financial information. Examples of situations about which the accountant would ordinarily inquire of management include, among other things, significant, unusual, or infrequently occurring transactions; application of new accounting principles; changes in accounting principles or the methods of applying them; and trends and developments affecting accounting estimates.[139]

An amendment to AU sec. 722 states that when conducting a review of interim financial information, the accountant also should determine whether any of the matters described in Auditing Standard No. 16, as they relate to interim financial information, have been identified.[140] This requirement is similar to the current requirement for the accountant to refer to AU sec. 380 for matters to communicate to the audit committee when conducting an interim review.[141]

Additionally, the amendments to AU sec. 722 recognize that management might communicate some or all of the matters related to the company's accounting policies, practices, estimates, and significant unusual transactions described in paragraph 12 of Auditing Standard No. 16. If management communicates any of these matters, the accountant does not need to communicate them at the same level of detail as management, as long as certain criteria are met. However, any omitted or inadequately described matters should be communicated to the audit committee.

The amendment to AU sec. 722.35 also indicates that any communication the accountant may make about the entity's accounting policies, practices, estimates, and significant unusual transactions as applied to its interim financial reporting generally would be limited to the effect of significant events, transactions, and changes in accounting estimates that the accountant considered when conducting the review of interim financial information. The amendments to AU sec. 722 do not require that the communications to the audit committee repeat the annual communications but, rather, that the communication be related to the accountant's findings while performing the interim review procedures.

The Board determined not to defer the effective date for quarterly reviews as suggested by some commenters. Deferral of the effective date would result in AU sec. 380 continuing to apply to communications relevant to quarterly reviews, while Auditing Standard No. 16 simultaneously would require communications relating to the annual audit. Auditing Standard No. 16 requires timely communications of matters in connection with the annual audit to be made throughout the year under audit. These communications would, therefore, be made at or near the time that related communications are required in connection with quarterly reviews. Applying Auditing Standard No. 16 for the annual audit and AU sec. 380 for quarterly reviews could cause some degree of complexity because auditors would be required to apply two different standards when communicating important information to the audit committee. Therefore, the Board is making Auditing Standard No. 16 effective for quarterly reviews of fiscal years beginning on or after December 15, 2012.

In addition to avoiding having two co-existing and differing standards, implementing Auditing Standard No. 16 in the first quarter of 2013 should benefit audit committees by providing for the communication of significant information during the most current period. Also, and as discussed above, the objective of a review of interim financial information differs significantly from that of an audit, and any communication the accountant would make pertaining to interim financial reporting would be limited, as discussed in AU sec. 722, to matters the accountant considered when conducting the review of interim financial information.

The proposed amendments to other PCAOB standards accompanying the reproposed standard included an amendment to AU sec. 551, *Reporting on Information Accompanying the Basic Financial Statements in Auditor-Submitted Documents.* This amendment would have required the auditor to communicate to the audit committee material misstatements if the client did not agree to revise the accompanying information. This amendment was removed from the amendments accompanying Auditing Standard No. 16 because the Board has proposed to supersede AU sec. 551 as part of its standard-setting project related to auditing supplemental information.[142]

QC sec. 20, *System of Quality Control for a CPA Firm's Accounting and Auditing Practice,* states that to minimize the risk of misunderstandings regarding the nature, scope, and limitations of services to be performed, policies and procedures should provide for obtaining an understanding with the client regarding those services.[143] To align with Auditing Standard No. 16, the reproposed standard proposed an amendment to QC sec. 20 to change ''client'' to ''audit committee.'' One commenter indicated that QC sec. 20 applies to attest engagements as well as to audit engagements. This commenter suggested that instead of replacing ''client'' with ''audit committee,'' a clarifying footnote be added to the word ''client'' to indicate that with respect to a financial statement audit or an audit of internal control over financial reporting, the auditor is required to establish an understanding of the terms of the audit engagement with the audit committee. The Board considered this comment and decided not to amend QC sec. 20 at this time. Changes to the Board's quality control standards will be considered as part of the Board's quality control standard-setting project.

Audits of Brokers and Dealers

Section 982 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') [144] gave the Board oversight of the audits of brokers and dealers registered with the SEC. In September 2010, the Commission issued interpretive guidance clarifying that the references in Commission rules and staff guidance and in the federal securities laws to generally accepted auditing standards (''GAAS'') or to specific standards under GAAS, as they relate to nonissuer brokers or dealers, should continue to be understood to mean the auditing and attestation standards established by the American Institute of Certified Public Accountants (''AICPA''), but noted that it intended to revisit this interpretation in connection with a SEC rulemaking project to update the audit and attestation requirements for brokers and dealers in light of the Dodd-Frank Act.[145] On June 15, 2011, the SEC proposed to amend its rules, including SEC Rule 17a–5 under the Exchange Act, to require, among other things, that audits of brokers' and dealers' financial statements and examinations of reports regarding compliance with SEC requirements be

[139] AU sec. 722.55.

[140] Amendment to AU sec. 722.34.

[141] *Id.*

[142] *See Proposed Auditing Standard, Auditing Supplemental Information Accompanying Audited Financial Statements and Related Amendments to PCAOB Standards.* PCAOB Release No. 2011–005 (July 12, 2011).

[143] QC sec. 20.16.

[144] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[145] SEC, *Commission Guidance Regarding Auditing, Attestation, and Related Professional Practice Standards Related to Brokers and Dealers,* Exchange Act Release No. 62991 (Sept. 24, 2010).

performed in accordance with the standards of the PCAOB.[146]

If the SEC adopts its proposed amendments to SEC Rule 17a–5 or provides other direction that auditors of brokers and dealers are to comply with PCAOB professional standards, the Board's auditing, attestation, quality control, and, where applicable, independence standards would then apply to audits of brokers and dealers as required by Section 17 of the Exchange Act and SEC Rule 17a–5.[147]

Further, if the SEC adopts its proposed amendments to SEC Rule 17a–5 or provides other direction that auditors of brokers and dealers are to comply with PCAOB standards, prior to the effective date of Auditing Standard No. 16,[148] the Board's interim standard, AU sec. 380, would be in effect for audits of brokers and dealers conducted for periods prior to the effective date of Auditing Standard No. 16. The Board's interim standard, AU sec. 380, which was last amended in 1999, indicates that it is not applicable to the audit of a broker or dealer if the broker or dealer does not have an audit committee [149] or is registered with the SEC only because of Section 15(a) of the Exchange Act.[150] Conversely, the auditor communication requirements under GAAS, which are contained in Statement on Auditing Standards (''SAS'') 114, *The Auditor's Communication With Those Charged With Governance,* which was issued by the Auditing Standards Board (''ASB'') of the AICPA in 2006, are applicable to audits of all brokers and dealers.[151]

Because of this difference in the applicability of the auditor communication standards to the audits of brokers and dealers, there could be a gap in required audit committee communications if the SEC amendments to SEC Rule 17a–5 are adopted and become effective prior to the effective date of Auditing Standard No. 16. To eliminate this gap, the Board is amending AU sec. 380 to delete the current exception for audits of brokers and dealers that do not have an audit committee or are registered with the SEC only because of Section 15(a) of the Exchange Act. The transitional amendment would eliminate the above-referenced gap in audit committee communications by making the communication requirements in AU sec. 380 applicable to audits of issuers and brokers and dealers, as those terms are defined in the Sarbanes-Oxley Act, prior to the effective date of Auditing Standard No. 16.

If PCAOB standards are applicable to audits of brokers and dealers prior to the effective date of Auditing Standard No. 16, the communication requirements under Auditing Standard No. 16 would be applicable to the audits of brokers and dealers upon the effective date of the standard.

The release accompanying the reproposed standard posed a question about whether the standard should apply to the audits of all brokers and dealers. Many commenters supported the requirement for the standard to apply to the audits of all brokers and dealers. However, some commenters suggested that it may not be practicable to communicate the matters in the standard because they may not be applicable to all brokers and dealers due to the varying size and nature of the brokers and dealers as well as the difference in their governance structures. Some commenters suggested that these brokers and dealers may not have an audit committee, board of directors, or equivalent body, or that the individual designated to oversee the financial reporting process and audits of the company might be the same person preparing the financial statements. They suggested, therefore, that the standard should apply only to certain types of brokers and dealers, such as carrying brokers or dealers. Other commenters suggested that the standard should not be applicable to the audits of brokers and dealers.

The Board acknowledges that there are smaller, less complex brokers and dealers that do not have an audit committee, board of directors, or equivalent body, but that communicating matters about the audit and the financial statements to those overseeing the financial reporting process is important. The governance structure of brokers and dealers does not change the value of the information regarding the audit or the company's financial statements.

Therefore, as discussed in this release, the definition of audit committee was revised for audits of nonissuers to recognize that if no such committee or board of directors (or equivalent body) exists with respect to the company, the communication should be made to the person(s) who oversee the accounting and financial reporting processes of the company and audits of the financial statements of the company.

The release accompanying the reproposed standard posed a question about whether there are any communication requirements specific to the audits of all brokers and dealers that should be added to the standard. Some commenters suggested that the standard should require additional communication to the audit committee related to the additional attestation reporting to be required for brokers and dealers as proposed in pending SEC amendments to its Rule 17a–5.[152] Once the amendments to Rule 17a–5 are adopted in final form, the Board may consider adding requirements for communication to the audit committee pertaining to such matters.

Emerging Growth Companies

Pursuant to Section 104 of the Jumpstart Our Business Startups Act (''JOBS Act''), any rules adopted by the Board subsequent to April 5, 2012, do not apply to the audits of EGCs (as defined in Section 3(a)(80) of the Exchange Act) unless the SEC ''determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors, and whether the action will promote efficiency, competition, and capital formation.'' [153] Auditing Standard No. 16 is the first auditing standard adopted by the Board subsequent to enactment of the JOBS Act and accordingly is subject to a separate determination by the SEC

[146] SEC, *Broker-Dealer Reports,* Exchange Act Release No. 64676 (June 15, 2011).

[147] 17 CFR 240.17a–5.

[148] As noted in this release, the Board anticipates that Auditing Standard No. 16 will be effective, subject to SEC approval, for audits of fiscal years beginning on or after December 15, 2012.

[149] AU sec. 380.01 states that the communications required by AU sec. 380 are applicable to entities that either have an audit committee or that have otherwise formally designated oversight of the financial reporting process to a group equivalent to an audit committee (such as a finance committee or budget committee).

[150] *See* AU sec. 380.01, which states that the communications required by the standard ''are applicable to * * * all Securities and Exchange Commission (SEC) engagements.'' As noted in footnote 2 to AU sec. 380.01, the audits of brokers and dealers do not fall within an SEC engagement as defined in AU sec. 380 if the broker or dealer is registered only because of Section 15(a) of the Exchange Act.

[151] *See* paragraph 1 of SAS 114 which states ''[t]his statement * * * establishes standards and provides guidance on the auditor's communication with those charged with governance in relation to an audit of financial statements,'' and section 5.129 of the *AICPA Audit & Accounting Guide: Brokers and Dealers in Securities* (July 2010), which states, in part: ''AU section 380, *The Auditor's Communication with Those Charged with Governance* * * * has been updated for the issuance of SAS No. 114* * *. AU 380 is applicable to all broker-dealers being audited under GAAS, regardless of their governance structure or size.''

[152] SEC, *Commission Guidance Regarding Auditing, Attestation, and Related Professional Practice Standards Related to Brokers and Dealers,* Exchange Act Release No. 62991 (Sept. 24, 2010).

[153] Public Law 112–106, 126 STAT. 306 (April 5, 2012). *See* Section 103(a)(3)(C) of the Sarbanes-Oxley Act, 15 U.S.C. 7213(a)(3)(C), as added by Section 104 of the JOBS Act.

regarding its applicability to audits of EGCs.

The Board is also requesting that the Commission approve the proposed rules, pursuant to Section 103(a)(3)(C) of the Sarbanes-Oxley Act, for application to audits of EGCs, as that term is defined in Section 3(a)(80) of the Exchange Act. The Board's request is set forth in section D.

Effective Date

The Board anticipates that the transitional amendments to AU sec. 380 will be effective, subject to SEC approval, for the periods that PCAOB standards become applicable to audits of brokers and dealers, as designated by the SEC upon adoption of its amendments to SEC Rule 17a–5, if such periods precede the effective date of Auditing Standard No. 16.

The Board anticipates that Auditing Standard No. 16 and related amendments, included will be effective, subject to SEC approval, for audits of fiscal years beginning on or after December 15, 2012.

Comparison of the Objectives and Requirements of Auditing Standard No. 16, Communications With Audit Committees, to the Analogous Standards of the International Auditing and Assurance Standards Board and the Auditing Standards Board of the American Institute of Certified Public Accountants

In developing its original proposed standard, the Board took into account, among other things, the analogous standards of the International Auditing and Assurance Standards Board (''IAASB'') and the ASB of the AICPA. The release accompanying the initial proposed standard and reproposed standard included a comparison of the objectives and requirements of the initial proposed standard and reproposed standards to the analogous standards of the IAASB and ASB.

The following discussion compares certain significant differences between the objectives and requirements of Auditing Standard No. 16 and the analogous standards of the IAASB and ASB of the American Institute of Certified Public Accountants.

The analogous IAASB standards are:

3. International Standard on Auditing (''ISA'') 210, *Agreeing the Terms of Audit Engagements,* and

4. ISA 260, *Communication with Those Charged with Governance.*

The analogous ASB standards [154] are:

5. AU–C Section 210, *Terms of Engagement,* and

6. AU–C Section 260, *The Auditor's Communication With Those Charged with Governance.*

Other standards of the IAASB and the ASB, respectively, were considered in this comparison to the extent that they include comparable requirements, including:

e. ISA 240, *The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements,*

f. ISA 450, *Evaluation of Misstatements Identified during the Audit,*

g. ISA 570, *Going Concern,*

h. ISA 600, *Special Considerations—Audits of Group Financial Statements (Including the Work of Component Auditors),*

i. ISA 720, *The Auditor's Responsibilities Relating to Other Information in Documents Containing Audited Financial Statements,*

j. AU–C Section 240, *Consideration of Fraud in a Financial Statement Audit,*

k. AU–C Section 450, *Evaluation of Misstatements Identified During the Audit,*

l. AU–C Section 600, *Using the Work of Others—Special Considerations—Audits of Group Financial Statements (Including the Work of Component Auditors),*

m. SAS 118, *Other Information in Documents Containing Audited Financial Statements,* and

n. SAS 126, *The Auditor's Consideration of An Entity's Ability to Continue as a Going Concern* (Redrafted).

The information presented does not cover the application and explanatory material in the IAASB standards or ASB standards.[155]

This discussion is provided for informational purposes only. It is not a summary of or a substitute for Auditing Standard No. 16 itself. This comparison may not represent the views of the IAASB or ASB regarding the interpretation of their standards.

Objectives

PCAOB

Auditing Standard No. 16 supersedes AU sec. 310 and AU sec. 380. Given the responsibility of many audit committees for the appointment and retention of the auditor, Auditing Standard No. 16 combines the requirements from the Board's standards, AU secs. 310 and 380, into one auditing standard.

Auditing Standard No. 16 includes four objectives for the auditor, which reflect both the appointment and retention of the auditor as well as the overall communication responsibilities. The objectives of the auditor are to:

a. Communicate to the audit committee the responsibilities of the auditor in relation to the audit and establish an understanding of the terms of the audit engagement with the audit committee;

b. Obtain information from the audit committee relevant to the audit;

c. Communicate to the audit committee an overview of the overall audit strategy and timing of the audit; and

d. Provide the audit committee with timely observations arising from the audit that are significant to the financial reporting process.

IAASB and ASB

ISA 210 and AU–C Section 210 both include an objective to establish whether the preconditions for an audit are present. Auditing Standard No. 16 does not include this objective, because some of the related requirements in the ISA and SAS are not applicable to audits performed under PCAOB standards, such as determining whether the financial reporting framework is acceptable. For audits performed under PCAOB standards, the auditor should look to the requirements of the Securities and Exchange Commission for the company under audit with respect to the accounting principles applicable to that company.

Both ISA 260 and AU–C Section 260 include an objective for the auditor to promote effective two-way communication between the auditor and those charged with governance. Although Auditing Standard No. 16 does not include a similar objective, the standard encourages effective two-way communication between the auditor and the audit committee. As stated in Auditing Standard No. 16,

[154] In October 2011, the ASB issued Statement on Auditing Standards (''SAS'') No. 122, *Statements on Auditing Standards: Clarification and Recodification,* which contains the Preface to Codification of Statements on Auditing Standards, *Principles Underlying an Audit Conducted in Accordance with Generally Accepted Auditing Standards,* and 39 clarified SASs. SAS 122 identifies the section within the AICPA codification with ''AU–C'' section numbers. *See http://www.aicpa.org/RESEARCH/STANDARDS/AUDITATTEST/Pages/audit%20and%20attest%20standards.aspx.*

[155] Paragraph A59 of ISA 200, *Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with International Standards on Auditing,* indicates that the application and other explanatory material section of the ISAs ''does not in itself impose a requirement,'' but ''is relevant to the proper application of the requirements of an ISA.'' Paragraph A63 of AU–C Section 200, *Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Generally Accepted Auditing Standards,* states that although application and other explanatory material ''does not in itself impose a requirement, it is relevant to the proper application of the requirements of an AU–C section.''

''communicate to,'' is meant to encourage effective two-way communication between the auditor and the audit committee throughout the audit to assist in understanding matters relevant to the audit.

Appointment and Retention

Significant Issues Discussed with Management In Connection with the Auditor's Appointment or Retention

PCAOB

Auditing Standard No. 16 requires the auditor to discuss with the audit committee any significant issues that the auditor discussed with management in connection with the appointment or retention of the auditor, including significant discussions regarding the application of accounting principles and auditing standards.

IAASB and ASB

ISA 210 and AU–C Section 210 do not include a similar requirement.

Establish an Understanding of the Terms of the Audit

PCAOB

Auditing Standard No. 16 requires the auditor to establish an understanding of the terms of the audit engagement with the audit committee. This understanding includes communicating to the audit committee the objective of the audit, the responsibilities of the auditor, and the responsibilities of management. Paragraph 6 of Auditing Standard No. 16 requires the auditor to record the understanding of the terms in an engagement letter and provide the engagement letter to the audit committee annually. In addition, paragraph 6 of Auditing Standard No. 16 includes a requirement for the auditor to have the engagement letter executed by the appropriate party or parties on behalf of the company. If the appropriate party or parties are other than the audit committee, or its chair on behalf of the audit committee, the auditor should determine that the audit committee has acknowledged and agreed to the terms of the engagement.

Additionally, Auditing Standard No. 16 requires the auditor to decline to accept, continue, or perform the engagement if the auditor cannot establish an understanding of the terms of the audit engagement with the audit committee.

IAASB and ASB

ISA 210 and AU–C Section 210 require the auditor to agree on the terms of the audit engagement with management and, where appropriate, those charged with governance.

ISA 210 and AU–C Section 210 require the engagement letter to be in writing, although there is no requirement that the engagement letter be given to the audit committee or that it be signed by the audit committee, or its chair on behalf of the audit committee, or that it otherwise be acknowledged by the audit committee. Additionally, ISA 210 states that for recurring audits, the auditor shall assess whether circumstances require the terms of the audit engagement to be revised and whether there is a need to remind the entity of the existing terms of the audit engagement. Accordingly, ISA 210 permits the auditor to not send a new audit engagement letter or other written agreement each period.

AU–C Section 210 requires the auditor to assess whether circumstances require the terms of the audit engagement to be revised. If the auditor concludes that the terms of the preceding engagement need not be revised for the current engagement, the auditor should remind management of the terms of the engagement, and the reminder should be documented.

Both ISA 210 and AU–C Section 210 also establish requirements for the auditor to determine whether the preconditions for an audit exist. Auditing Standard No. 16 does not include similar requirements, as these requirements were either not applicable to audits performed under PCAOB standards or were addressed through the requirements in Auditing Standard No. 16 for establishing an understanding of the terms of the audit engagement with the audit committee.

ISA 210 requires the auditor to determine whether there are any conflicts between the financial reporting standards and additional requirements supplemented by law or regulation. AU–C Section 210 does not include similar requirements. Auditing Standard No. 16 also does not include similar requirements as they are not relevant to the audits performed under PCAOB standards.

ISA 210 and AU–C Section 210 also include requirements regarding limitation of scope prior to audit engagement acceptance, other factors affecting audit engagement acceptance, and acceptance of a change in the terms of the audit engagement. Auditing Standard No. 16 does not include such requirements as they are not applicable to audits performed under PCAOB standards.

AU–C Section 210 also includes requirements regarding initial audits and re-audits. Auditing Standard No. 16 does not include similar requirements, although similar requirements are included in the Board's standard, AU sec. 315, *Communications Between Predecessor and Successor Auditors.*

Additionally, ISA 260 and AU–C Section 260 include a requirement for the auditor to communicate with those charged with governance the form, timing, and expected general content of communications. Auditing Standard No. 16 does not include this requirement; however, Auditing Standard No. 16 does not preclude the auditor from communicating these matters to the audit committee.

Obtaining Information and Communicating the Audit Strategy

Obtaining Information Relevant to the Audit

PCAOB

Auditing Standard No. 16 requires the auditor to inquire of the audit committee about whether it is aware of matters relevant to the audit, including, but not limited to, violations or possible violations of laws or regulations. This requirement complements the requirement in Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* for the auditor to make inquiries of the audit committee, or equivalent (or its chair) about risks of material misstatement, including inquiries related to fraud risks.[156]

IAASB and ASB

ISA 260 and the AU–C Section 260 do not contain a similar requirement for the auditor to inquire of matters that might be relevant to the audit, including, but not limited to, knowledge of violations or possible violations of laws or regulations. However, ISA 240 and AU–C Section 240 require the auditor to make inquiries of those charged with governance to determine whether they have knowledge of any actual, suspected, or alleged fraud affecting the entity.

Overall Audit Strategy, Significant Risks, and Timing of the Audit

PCAOB

Auditing Standard No. 16 requires the auditor to communicate to the audit committee an overview of the overall audit strategy, including the timing of the audit, and discuss with the audit committee the significant risks identified during the auditor's risk assessment procedures. As part of communicating the overall audit strategy, paragraph 10 of Auditing Standard No. 16 requires the auditor to communicate the following matters to the audit committee, if applicable:

[156] Paragraphs 5.f. and 54–57 of Auditing Standard No. 12.

a. The nature and extent of specialized skill or knowledge needed to perform the planned audit procedures or evaluate the audit results related to significant risks;

b. The extent to which the auditor plans to use the work of the company's internal auditors in an audit of financial statements;

c. The extent to which the auditor plans to use the work of internal auditors, company personnel (in addition to internal auditors), and third parties working under the direction of management or the audit committee when performing an audit of internal control over financial reporting;

d. The names, locations, and planned responsibilities of other independent public accounting firms or other persons, who are not employed by the auditor, that perform audit procedures in the current period audit; and

e. The basis for the auditor's determination that the auditor can serve as principal auditor, if significant parts of the audit are to be performed by other auditors.

In addition, Auditing Standard No. 16 requires the auditor to communicate to the audit committee significant changes to the planned audit strategy or the significant risks initially identified and the reasons for such changes.

IAASB and ASB

ISA 260 and AU–C Section 260 require the auditor to communicate an overview of the planned scope and timing of the audit. However, ISA 260 and AU–C Section 260 do not require the auditor to communicate significant changes to the planned scope and timing of the audit. Further, ISA 260 and AU–C Section 260 do not include requirements for the auditor to communicate information about specialized skill or knowledge needed to perform the planned audit procedures or evaluate the audit results related to significant risks, the auditor's use of the work of internal auditors, or the auditor's use of the work of other company personnel and third parties working under the direction of management or the audit committee.

ISA 260 and AU–C Section 260 do not include requirements for the auditor to communicate information about the names, locations, and planned responsibilities of other independent public accounting firms or other persons, who are not employed by the auditor, that perform audit procedures in the current period audit.

However, ISA 600 and AU–C Section 600, include requirements for the auditor to communicate certain matters to those charged with governance including: an overview of the type of work to be performed on the financial information of the components; an overview of the nature of the group engagement team's planned involvement in the work to be performed by the component auditors on the financial information of significant components; instances where the group engagement team's evaluation of the work of a component auditor gave rise to a concern about the quality of that auditor's work; any limitation on the group audit; and fraud or suspected fraud involving group management, component management, employees who have significant roles in group-wide controls or other where the fraud resulted in a material misstatement of the group financial statements. In addition, AU–C Section 600 also includes a requirement for the auditor to communicate the basis for the decision to make reference to the audit of a component auditor in the auditor's report on the group financial statements.

Results of the Audit

Accounting Policies and Practices, Estimates, and Significant Unusual Transactions

PCAOB

Auditing Standard No. 16 requires the auditor to communicate certain matters relating to accounting policies and practices, estimates, and significant unusual transactions. However, Auditing Standard No. 16 acknowledges that if management communicates matters related to accounting policies and practices, estimates, and significant unusual transactions to the audit committee, the auditor does not need to communicate these matters at the same level of detail as management as long as the auditor (1) participated in management's discussion with the audit committee, (2) affirmatively confirmed to the audit committee that management has adequately communicated these matters, and (3) with respect to critical accounting policies and practices, identified for the audit committee those accounting policies and practices that the auditor considers critical. In addition, the auditor is required to communicate any omitted or inadequately described matters to the audit committee.

Matters to be communicated include:

a. Significant accounting policies and practices—(1) management's initial selection of, or changes in, significant accounting policies or the application of such policies in the current period; and (2) the effect on financial statements or disclosures of significant accounting policies in (i) controversial areas or (ii) areas for which there is a lack of authoritative guidance or consensus, or diversity in practice.

b. All critical accounting policies and practices to be used, including: (1) the reasons certain policies and practices are considered critical; and (2) how current and anticipated future events might affect the determination of whether certain policies and practices are considered critical.

c. Critical accounting estimates—(1) a description of the process management used to develop critical accounting estimates; (2) management's significant assumptions used in critical accounting estimates that have a high degree of subjectivity; and (3) any significant changes management made to the processes used to develop critical accounting estimates or significant assumptions, a description of management's reasons for the changes, and the effects of the changes on the financial statements.

d. Significant unusual transactions—(1) significant transactions that are outside the normal course of business for the company or that otherwise appear to be unusual due to their timing, size, or nature; and (2) the policies and practices management used to account for significant unusual transactions.

IAASB

ISA 260 requires the auditor to communicate the auditor's views about significant qualitative aspects of the entity's accounting practices, including accounting policies, accounting estimates and financial statement disclosures.

ASB

AU–C Section 260 requires the auditor to communicate the auditor's views about qualitative aspects of the entity's significant accounting practices, including accounting policies, accounting estimates, and financial statement disclosures. AU–C Section 260 also provides that, when applicable, the auditor should determine that those charged with governance are informed about the process used by management in formulating particularly sensitive accounting estimates, including fair value estimates, and about the basis for the auditor's conclusions regarding the reasonableness of those estimates.

The ISAs and the AU–Cs do not include a similar requirement for communicating significant unusual transactions.

Auditor's Evaluation of the Quality of the Company's Financial Reporting

PCAOB

Auditing Standard No. 16 requires the auditor to communicate the following matters to the audit committee:

a. Qualitative aspects of significant accounting policies and practices.

(1) The results of the auditor's evaluation of, and conclusions about, the qualitative aspects of the company's significant accounting policies and practices, including situations in which the auditor identified bias in management's judgments about the amounts and disclosures in the financial statements; and

(2) The results of the auditor's evaluation of the differences between (i) estimates best supported by the audit evidence and (ii) estimates included in the financial statements, which are individually reasonable, that indicate a possible bias on the part of the company's management.

b. Assessment of critical accounting policies and practices. The auditor's assessment of management's disclosures related to the critical accounting policies and practices, along with any significant modifications to the disclosure of those policies and practices proposed by the auditor that management did not make.

c. Conclusions regarding critical accounting estimates. The basis for the auditor's conclusions regarding the reasonableness of the critical accounting estimates.

d. Significant unusual transactions. The auditor's understanding of the business rationale for significant unusual transactions.

e. Financial statement presentation. The results of the auditor's evaluation of whether the presentation of the financial statements and related disclosures are in conformity with the applicable financial reporting framework, including the auditor's consideration of the form, arrangement, and content of the financial statements (including the accompanying notes), encompassing matters such as the terminology used, the amount of detail given, the classification of items, and the bases of amounts set forth.

f. New accounting pronouncements. Situations in which, as a result of the auditor's procedures, the auditor identified a concern regarding management's anticipated application of accounting pronouncements that have been issued but are not yet effective and might have a significant effect on future financial reporting.

g. Alternative accounting treatments. All alternative treatments permissible under the applicable financial reporting framework for policies and practices related to material items that have been discussed with management, including the ramifications of the use of such alternative disclosures and treatments and the treatment preferred by the auditor.

IAASB

ISA 260 requires the auditor to communicate the auditor's views about significant qualitative aspects of the entity's accounting practices, including accounting policies, accounting estimates, and financial statement disclosures. The ISA provides that, when applicable, the auditor shall explain to those charged with governance why the auditor considers a significant accounting practice, that is acceptable under the applicable financial reporting framework, not to be most appropriate to the particular circumstances of the entity.

The ISAs do not include a similar requirement for communicating the auditor's understanding of the business rationale for significant unusual transactions.

ASB

AU–C Section 260 requires the auditor to communicate the auditor's views about qualitative aspects of the entity's significant accounting practices, including accounting policies, accounting estimates, and financial statement disclosures. When applicable the auditor should:

a. Explain to those charged with governance why the auditor considers a significant accounting practice that is acceptable under the applicable financial reporting framework not to be most appropriate to the particular circumstances of the entity, and

b. Determine that those charged with governance are informed about the process used by management in formulating particularly sensitive accounting estimates, including fair value estimates, and about the basis for the auditor's conclusions regarding the reasonableness of those estimates.

The AU–Cs do not include a similar requirement for communicating the auditor's understanding of the business rationale for significant unusual transactions.

Other Information in Documents Containing Audited Financial Statements

PCAOB

When other information is presented in documents containing audited financial statements, Auditing Standard No. 16 requires the auditor to communicate to the audit committee the auditor's responsibility under PCAOB rules and standards for such information, any related procedures performed, and the results of such procedures.

AU sec. 550, *Other Information in Documents Containing Audited Financial Statements,* requires that if the auditor identifies a material inconsistency in the other information presented in documents containing audited financial statements, and the other information is not revised by management to eliminate the material inconsistency, the auditor should communicate the material inconsistency to the audit committee. The auditor should also consider other actions, such as revising the audit report to include an explanatory paragraph describing the material inconsistency, as described in paragraph .11 of AU sec. 508, *Reports on Audited Financial Statements,* withholding the use of the report in the document, and withdrawing from the engagement. The auditor should also communicate a material misstatement of fact to the client and the audit committee, if the material misstatement of fact is not corrected.

IAASB

ISA 720 requires that if the auditor identifies a material inconsistency in the other information in documents containing audited financial statements and revision of the other information is necessary and management refuses to make the revision, then the auditor shall communicate this matter to those charged with governance and (a) include in the auditor's report an Other Matter(s) paragraph describing the material inconsistency in accordance with ISA 706, *Emphasis of Matter Paragraphs and Other Matter Paragraphs in the Independent Auditor's Report;* or (b) withhold the auditor's report; or (c) withdraw from the engagement, where withdrawal is possible under applicable law or regulation. ISA 720 also requires the auditor to notify those charged with governance of the auditor's concern regarding the other information and take any further appropriate action if there is a material misstatement of fact in the other information which management refuses to correct.

ASB

SAS 118 contains similar requirements to those in Auditing Standard No. 16.

Difficult or Contentious Matters for Which the Auditor Consulted

PCAOB

Auditing Standard No. 16 requires the auditor to communicate to the audit committee matters that are difficult or contentious for which the auditor consulted outside the engagement team and that the auditor reasonably determined are relevant to the audit committee's oversight of the financial reporting process.

IAASB and ASB

ISA 260 and AU–C Section 260 do not include a similar requirement.

Management Consultation With Other Accountants

PCAOB

When the auditor is aware that management consulted with other accountants about significant auditing or accounting matters and the auditor has identified a concern regarding such matters, Auditing Standard No. 16 requires the auditor to communicate to the audit committee his or her views about such matters that were the subject of such consultation.

IAASB

ISA 260 does not include a similar requirement.

ASB

AU–C Section 260 requires the auditor to communicate to those charged with governance the auditor's views about matters that were the subject of management's consultations with other accountants on accounting or auditing matters when the auditor is aware that such consultations occurred.

Going Concern

PCAOB

Paragraph 17 of Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee, when applicable, certain matters relating to the auditor's evaluation of the company's ability to continue as a going concern. These matters include (a) If the auditor believes there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time, the conditions and events that the auditor identified that, when considered in the aggregate, indicate that there is substantial doubt; (b) If the auditor concludes, after consideration of management's plans, that substantial doubt about the company's ability to continue as a going concern is alleviated, the basis for the auditor's conclusion, including elements the auditor identified within management's plans that are significant to overcoming the adverse effects of the conditions and events; (c) if the auditor concludes, after consideration of management's plans, that substantial doubt about the company's ability to continue as a going concern for a reasonable period of time remains, the effects, if any, on the financial statements and the adequacy of the related disclosure and the effects on the auditor's report.

IAASB

ISA 570 requires the auditor to communicate events or conditions identified that may cast significant doubt on the entity's ability to continue as a going concern. This communication includes whether the events or conditions constitute a material uncertainty; whether the use of the going concern assumption is appropriate in the preparation and presentation of the financial statements; and the adequacy of related disclosures in the financial statements.

ASB

SAS 126 requires the auditor to communicate with those charged with governance the nature of the conditions or events identified, the possible effects on the financial statements and the adequacy of related disclosures in the financial statements, and the effects on the auditor's report if, after considering identified conditions or events in the aggregate and after considering management's plans, the auditor concludes that substantial doubt about the entity's ability to continue as a going concern for a reasonable period of time remains.

Uncorrected and Corrected Misstatements

PCAOB

Auditing Standard No. 16 requires the auditor to provide the audit committee with the schedule of uncorrected misstatements related to accounts and disclosures that the auditor presented to management. Auditing Standard No. 16 also requires the auditor to discuss with the audit committee, or determine that management has adequately discussed with the audit committee, the basis for the determination that the uncorrected misstatements were immaterial, including the qualitative factors considered. Additionally, Auditing Standard No. 16 requires the auditor to communicate that uncorrected misstatements or matters underlying those uncorrected misstatements could potentially cause future-period financial statements to be materially misstated. Auditing Standard No. 16 also requires the auditor to communicate to the audit committee those corrected misstatements, other than those that are clearly trivial, related to accounts and disclosures that might not have been detected except through the auditing procedures performed, and discuss with the audit committee the implications that such corrected misstatements might have on the company's financial reporting process.

IAASB and ASB

ISA 450 and AU–C Section 260 include requirements for the auditor to communicate uncorrected misstatements and the effect that they, individually or in aggregate, may have on the opinion in the auditor's report. The auditor's communication shall identify the material uncorrected misstatements individually. Additionally, under ISA 450 and the AU–C Section 260, the auditor is required to communicate the effect of uncorrected misstatements related to prior periods on the relevant classes of transactions, account balances or disclosures, and the financial statements as a whole.

ISA 450 and AU–C Section 450 require the auditor to request that uncorrected misstatements be corrected. Auditing Standard No. 16 does not require the auditor to make this request, because under SEC rules the financial statements are required to reflect all material correcting adjustments identified by the auditor.

ISA 450 does not include a requirement for the auditor to communicate corrected misstatements to those charged with governance. AU–C Section 260 requires the auditor to communicate material, corrected misstatements that were brought to the attention of management as a result of audit procedures.

Material Written Communication

PCAOB

Auditing Standard No. 16 requires the auditor to communicate to the audit committee other material written communications between the auditor and management.

IAASB and ASB

ISA 260 and AU–C Section 260 require the auditor to communicate to those charged with governance written representations the auditor is requesting.

Disagreements with Management

PCAOB

Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee any disagreements with management about matters, whether or not satisfactorily resolved, that individually or in the aggregate could be significant to the company's financial statements or the auditor's report. Auditing Standard No. 16 also states that disagreements with management do not include differences of opinion based on incomplete facts or preliminary information that are later resolved by the auditor obtaining additional relevant facts or information prior to the issuance of the auditor's report.

IAASB

The ISAs do not include a similar requirement.

ASB

AU–C Section 260 requires the auditor to communicate disagreements with management, if any.

Other Matters

PCAOB

Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee other matters arising from the audit that are significant to the oversight of the financial reporting process. This communication includes, among other matters, complaints or concerns regarding accounting or auditing matters that have come to the auditor's attention during the audit and the results of the auditor's procedures regarding such matters.

IAASB and ASB

ISA 260 and AU–C Section 260 include a similar requirement for the auditor to communicate other matters to those charged with governance that, in the auditor's professional judgment, are significant and relevant to the oversight of the financial reporting process.

Form and Documentation of Communications

PCAOB

Auditing Standard No. 16 requires the auditor to communicate the matters in the standard to the audit committee, either orally or in writing, unless otherwise specified in Auditing Standard No. 16. In addition, the standard also requires the auditor to document the communications in the work papers whether such communications took place orally or in writing. Auditing Standard No. 16 also requires the auditor to include a copy of or a summary of management's communication provided to the audit committee in the audit documentation, if as part of its communications to the audit committee, management communicated some or all of the matters related to accounting policies and practices, estimates, significant unusual transactions, or uncorrected misstatements to the audit committee, and, as a result, the auditor did not communicate these matters at the same level of detail as management.

IAASB

ISA 260 requires the auditor to communicate in writing with those charged with governance regarding significant findings from the audit if, in the auditor's professional judgment, oral communication would not be adequate. Written communication need not include all matters that arose during the course of the audit.

ASB

AU–C Section 260 requires the auditor to communicate in writing with those charged with governance significant findings or issues from the audit if, in the auditor's professional judgment, oral communication would not be adequate. This communication need not include matters that arose during the course of the audit that were communicated with those charged with governance and satisfactorily resolved.

Timing

PCAOB

Auditing Standard No. 16 requires the communications to the audit committee to be made in a timely manner and prior to the issuance of the auditor's report.[157]

IAASB and ASB

ISA 260 and AU–C Section 260 require that the auditor should communicate with those charged with governance on a timely basis.

D. Request To Apply Auditing Standard No. 16 to Audits of Emerging Growth Companies

Introduction and Statutory Background

On August 15, 2012, the Board adopted Auditing Standard No. 16 (Auditing Standard No. 16 may also be referred to as ''the new standard'' in this section)[158] pursuant to the Board's authority under the Sarbanes-Oxley Act.[159]

Auditing Standard No. 16 requires auditors to communicate certain significant audit and financial statement matters to the audit committee of the company[160] under audit. Among other things, the required communications include such matters as: (i)The company's critical accounting practices; (ii) significant risks identified by the auditor's risk assessment procedures; (iii) the company's significant unusual transactions; and (iv) when applicable, the auditor's evaluation of the company's ability to continue as a going concern. Communications may be made orally or in writing, but should be made in a timely manner and prior to the issuance of the auditor's report.

In the Board's view, the adoption of Auditing Standard No. 16 is in the public interest and contributes to investor protection because it establishes requirements that enhance the relevance, timeliness, and quality of communications between auditors and audit committees. The enhanced relevance, timeliness, and quality of communications should improve the audit and facilitate audit committees' financial reporting oversight, fostering improved financial reporting. The Board's adopting release dated August 15, 2012, discusses the record developed by the Board in adopting Auditing Standard No. 16 in greater detail.

In addition, the Sarbanes-Oxley Act was recently amended by Section 104 of the JOBS Act[161] to provide that any additional rules adopted by the Board subsequent to April 5, 2012, do not apply to the audits of EGCs[162] unless the SEC ''determines that the application of such additional requirements is necessary or appropriate

[157] Auditing Standard No. 16 includes the following exception for registered investment companies—Consistent with SEC Rule 2–07 of Regulation S–X, 17 CFR § 210.2–07, in the case of a registered investment company, audit committee communication should occur annually, and if the annual communication is not within 90 days prior to the filing of the auditor's report, the auditor should provide an update, in the 90-day period prior to the filing of the auditor's report, of any changes to the previously reported information.

[158] *Communications with Audit Committees,* PCAOB Release No. 2012–004 (Aug. 15, 2012).

[159] Public Law 107–204. Pursuant to Section 101 of the Sarbanes-Oxley Act, the mission of the Board is to oversee the audit of companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports. Section 103 of the Sarbanes-Oxley Act authorizes the Board to adopt auditing standards for use in public company audits ''as required by this Act or the rules of the [Securities and Exchange] Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.'' In addition, Section 982 of the Dodd-Frank Act of 2010 expanded the authority of the PCAOB to oversee the audits of registered brokers and dealers, as defined in the Exchange Act. *See* Public Law 111–203.

[160] The term ''company'' as used in this section is intended to refer to companies whose audits are required to be performed in accordance with PCAOB standards.

[161] Public Law 112–106.

[162] Section 3(a)(80) of the Exchange Act defines the term ''emerging growth company.''

in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation.'' [163] As a result, Auditing Standard No. 16, which was adopted by the Board after April 5, 2012, is subject to a separate determination by the SEC regarding its applicability to audits of EGCs.

The Board is thus requesting that the Commission also take action to apply Auditing Standard No. 16 to audits of EGCs, pursuant to Section 104 of the JOBS Act. In this submission, the Board is providing information to assist the SEC in its consideration of whether it is ''necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation,'' to apply Auditing Standard No. 16 to audits of EGCs.

The information provided in this submission summarizes the Board's record in adopting Auditing Standard No. 16 and includes a discussion of the following areas to assist the SEC in its consideration pursuant to Section 104 of the JOBS Act: (i) The background of and reasons for the new standard; (ii) the Board's approach to developing the new standard, including consideration of alternatives; (iii) key changes and improvements from existing audit committee communication requirements; and (iv) characteristics of EGCs and economic considerations.

Background and Reasons for the New Standard

The following discussion provides summary information regarding the background and reasons for Auditing Standard No. 16. These matters are also discussed in greater detail in the Board's adopting release.

Auditing Standard No. 16 would replace PCAOB interim standards AU sec. 380 and AU sec. 310.[164] The existing PCAOB requirements regarding auditor communications with audit committees are primarily in AU sec. 380, while AU sec. 310 discusses establishing an understanding between the auditor and the client regarding the audit engagement.

AU sec. 380 became effective in January 1989, at a time when management typically hired and retained the auditor and had oversight of the work of the auditor. AU sec. 380 indicates that audit committee communications are ''incidental to the audit'' and are not required to occur prior to the issuance of the auditor's report. AU sec. 380 includes a variety of specified communication requirements.

Subsequently, changes to the federal securities laws and related SEC rules imposed additional communication requirements that are not currently reflected in AU sec. 380. Most significantly, in 2002, the Sarbanes-Oxley Act changed the role of the audit committee and the interaction between the audit committee and the auditor, requiring the auditor of a listed company to report directly to the audit committee. Section 301 of the Sarbanes-Oxley Act made changes to the federal securities laws to require the audit committee of a listed company to be directly responsible for the appointment, compensation, and oversight of the work of the external auditors, including the resolution of disagreements between management and the auditor regarding financial reporting. In addition, Section 204 of the Sarbanes-Oxley Act made other changes to the federal securities laws to require the auditor to report the following matters to the audit committee on a timely basis:

- All critical accounting policies and practices to be used;
- All alternative treatments of financial information within generally accepted accounting principles that have been discussed with management, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and
- Other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences.

Since the adoption of AU sec. 380, certain PCAOB auditing standards also have changed as a result of the Board's ongoing efforts to revise its interim standards. For example, in 2010 the Board adopted eight standards on assessing and responding to risk in an audit (the ''risk assessment'' standards), which cover the entire audit process, from initial planning activities to evaluating audit evidence to forming the opinion to be expressed in the auditor's report.[165] The risk assessment standards address, among other things, requirements for the auditor in the areas of audit planning, audit strategy, and risk assessment, including requirements for the auditor to identify significant risks of material misstatement. As one of the PCAOB's interim auditing standards, AU sec. 380's communication requirements are not aligned with the procedures performed pursuant to the PCAOB's risk assessment standards, which became effective for audits for fiscal years beginning after December 15, 2010.

Additionally, observations from the Board's oversight activities raised matters for consideration. For example, some inspection observations indicate that auditors have not made all required audit committee communications, possibly because they are not aware of the varying sources of communication requirements contained throughout the Board's standards and rules. Currently, thirteen auditing standards and rules require the auditor to communicate with the audit committee, and other additional communication requirements are located in the federal securities laws and SEC rules.

In light of these changes and considerations, the Board adopted Auditing Standard No. 16 with the goal of improving the audit by enhancing communications between auditors and audit committees. With the passage of the Sarbanes-Oxley Act and the establishment of the PCAOB, Congress acknowledged that auditors play an important role in protecting the interests of investors by preparing and issuing informative, accurate, and independent audit reports.[166] The audit committee also plays an important role in protecting the interests of investors by assisting the board of directors in fulfilling its responsibility to a company's shareholders and others to oversee the integrity of a company's accounting and financial reporting processes and audits.

In the Board's view, both the auditor and the audit committee benefit from a meaningful and timely exchange of information regarding significant risks of material misstatement in the financial statements and other matters that may affect the integrity of the company's financial reports. Communications with the audit committee improve the audit by providing auditors with the audit committee's insights about the company as well as providing auditors with a forum separate from management to

[163] *See* Section 103(a)(3)(C) of the Sarbanes-Oxley Act, as added by Section 104 of the JOBS Act.

[164] Shortly after its inception, the Board adopted the existing standards of the AICPA, as in existence on April 16, 2003, on an initial, transitional basis. *See* PCAOB Release No. 2003–006 (Apr. 18, 2003). References to AU sections (''AU secs.'') throughout this document are to these PCAOB interim auditing standards, which consist of generally accepted auditing standards, as described in the AICPA Auditing Standards Board's Statement on Auditing Standards No. 95, as in existence on April 16, 2003, to the extent not superseded or amended by the Board.

[165] *See* PCAOB Release 2010–004 (Aug. 5, 2010).

[166] *See* Section 101(a) of the Sarbanes-Oxley Act; Senate Report No. 107–206, at 5–6 (July 3, 2002).

discuss complex and significant matters about the audit and the company's financial reporting process. Communications between the auditor and the audit committee allow the audit committee to be well-informed about accounting, auditing, and disclosure matters, including the auditor's evaluation of matters that are significant to the financial statements, and to be better able to carry out its oversight role.

Auditing Standard No. 16 also updates the auditing standards to reflect the communication requirements mandated by the federal securities laws and aligns the audit committee communication requirements with auditor performance requirements, including those in the risk assessment standards. Bringing these requirements together in one place should promote the auditor's compliance with relevant statutory and regulatory requirements (as well as facilitating audit planning and informing audit scope). Updating auditing standards to incorporate new statutory and regulatory requirements can help ensure that audit firms update their audit methodologies to include all required and relevant procedures. Such updating is particularly critical with respect to AU sec. 380 because, as noted earlier, AU sec. 380 treats audit committee communications as ''incidental,'' and does not focus on the important role of the audit committee in the current regulatory environment.

The Board's Approach to Development of Auditing Standard No. 16, Including Consideration of Alternatives

Auditing Standard No. 16 was adopted by the Board after several years of consideration and public outreach. For example, the issue of auditor communications with the audit committee was discussed with the Board's Standing Advisory Group (''SAG'') on several occasions prior to the Board's decision to propose a new standard.[167]

The Board proposed a new standard on March 29, 2010, which was open for comment until May 28, 2010. The comment period reopened on September 7, 2010 and was extended until October 21, 2010, to accommodate comments received in connection with a public roundtable held by the Board on September 21, 2010.

The standard was then reproposed on December 20, 2011, and open for comment until February 29, 2012. The Board adopted the new standard on August 15, 2012.

The Board received and considered 44 comment letters on the original proposal, which included the reopened comment period, and 39 comment letters on the reproposed standard. Most commenters were supportive of the Board's efforts to enhance communications between the auditor and the audit committee. Those commenters agreed that fuller and more relevant communications between the auditor and audit committee would allow the auditor to perform a more informed, and thus more effective, audit and also would enable the audit committee to more effectively fulfill its oversight responsibilities regarding the financial reporting process.

The Board's adopting release explains in greater detail the Board's consideration of significant comments received and the reasons for making the changes reflected in the new standard. In general, as discussed below, the Board made a number of decisions as it developed Auditing Standard No. 16 that make the new standard more efficient and effective to apply, and avoid unnecessary costs. The following summary describes the Board's overall approach and highlights some of the choices made, and alternatives considered.

- *Auditing Standard No. 16 is scalable, based on a company's size and complexity.* In developing the new standard, the Board sought to promote high-quality audits, while considering the standard's overall effect on current audit practice and on audit committees and companies. In doing so, the Board sought to achieve the standard's intended benefits, without imposing unnecessary costs, and to create a standard that is scalable based on the company's size and complexity. A company's size and complexity can affect the risks of material misstatement, create auditing challenges, and involve other significant matters that warrant bringing to the attention of the audit committee. Thus, an auditor of a smaller, less complex company with fewer difficult auditing or financial reporting issues may have fewer matters to communicate than for an audit of a larger, more complex company. Accordingly, under Auditing Standard No. 16, in an audit of a small, less complex company, an auditor may make less extensive audit committee communications than in an audit of a larger, more complex company. The original proposal asked for comment on whether any of the requirements of the proposed standard were inappropriate based on the size or industry of the company. Commenters considered the proposed requirements to be applicable and appropriate to companies of different sizes and industries.
- *Auditing Standard No. 16 has been carefully designed to: (i) Retain the pre-existing communication requirements in auditing standards; (ii) incorporate the communication requirements already imposed by the Sarbanes-Oxley Act and related SEC rules; and (iii) link new communications to related performance requirements arising out of the Board's existing auditing standards.* As a result of this approach, the auditor's communications under the new standard are limited to *communicating* the results of the audit or specific audit procedures already required under the existing standards. Auditing Standard No. 16 does not impose new performance obligations on the auditor, other than the standard's required communications.
- *Auditing Standard No. 16 organizes and compiles information regarding other PCAOB auditor communication requirements.* Auditing Standard No. 16 contains an appendix that lists in one place other PCAOB standards and rules that require the auditor to communicate specific matters to the audit committee. This aspect of the new standard responds to observations from the Board's oversight activities that suggest that auditors may not make all required audit committee communications because they might not be aware of the varying sources of such requirements. This convenient list facilitates auditors' identification of other PCAOB standards and rules that contain communication requirements.
- *Auditing Standard No. 16 focuses on the communication of significant matters relating to the audit.* In developing the new standard, the Board sought to focus on communication of significant matters relating to the audit. In response to comments, the requirements in Auditing Standard No. 16 were changed from the original proposal to focus the auditor on communicating matters that are significant to the audit committee's oversight of the financial reporting process. For example, changes were made to limit communications regarding the need for specialized skill or knowledge in the audit to only those relevant to significant audit risks. Similarly, the standard was narrowed to require communications relating to matters on which the auditor consulted to only those 'difficult or contentious' matters that are relevant to the audit committee's oversight of the financial reporting process.

[167] The SAG discussed the audit committee communications standard at a number of its meetings, including meetings prior to proposing a new standard on: June 21–22, 2004, June 8, 2005, Oct. 5–6, 2005, and Oct. 14–15, 2009.

• *Auditing Standard No. 16 provides the auditor with flexibility to communicate orally or in writing.* AU sec. 380 provides the auditor with the flexibility to communicate orally or in writing. Several commenters to both the original proposal and the reproposal suggested that the communications to the audit committee should be required to be in writing. The Board considered this approach, but determined that requiring all communications to be in writing could reduce the effectiveness of the communication process. The Board's goal is to promote effective two-way communication between the auditor and the audit committee, whether through presentations, written reports, or interactive discussions. Allowing different forms of communication also makes the communication requirement more flexible for companies of all sizes and natures.

• *Auditing Standard No. 16 recognizes that management, as well as the auditor, may discuss issues relating to the company's financial statements with the audit committee, and that it would not be cost-effective or practical for the audit committee to receive the same communication twice.* With respect to certain auditor communications, the new standard provides that the auditor need not duplicate communications made by management at the same level of detail, so long as certain conditions specified in Auditing Standard No. 16 are met.[168] These changes allow for better use of auditor, management, and audit committee time and resources while, at the same time, help to ensure that the audit committee is informed of important accounting issues.

• *Auditing Standard No. 16 reflects practical considerations.* The scope of the new standard was narrowed in response to practical concerns raised during the comment process. For example, the original proposed standard included a requirement for the auditor to evaluate whether the two-way communications between the auditor and the audit committee were adequate to support the objectives of the audit. Commenters were concerned that the evaluation might not be effective, as it would reflect only the auditor's evaluation of the communications, and would not provide information about the audit committee's understanding of the nature of the communications. The Board agreed and did not adopt the requirement.

Key Changes and Improvements From Existing Standards

The following discussion provides a summary of the existing standards relating to auditor communications. The summary also includes a discussion of improvements that have been made in the new standard that should benefit audit quality. These matters also are discussed in greater detail in the Board's adopting release.

Existing Requirements. As previously noted, the existing requirements for communications with the audit committee are primarily in AU sec. 380. In addition, AU sec. 310 requires the auditor to establish an understanding with the client regarding the audit engagement.

Requirements Retained from Existing Standard. The new standard retains from AU sec. 380 the following audit committee communication requirements:

• Major issues discussed with management prior to the retention of the auditor;

• The company's significant accounting policies and practices;

• The auditor's responsibility related to other information in documents containing audited financial statements;

• Difficulties encountered in performing the audit; and

• Disagreements with management.

Incorporation of Statutory Communication Requirements. Auditing Standard No. 16 also incorporates the following specific auditor communication requirements contained in Exchange Act Section 10A(k) and SEC Rule 2–07 of Regulation S–X (''SEC Rule 2–07''):

• All critical accounting policies and practices to be used;

• All alternative treatments of financial information within generally accepted accounting principles that have been discussed with management, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and

• Other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences.[169]

Improvements Made to Existing Communication Requirements. While Auditing Standard No. 16 retains many of the communication requirements in AU sec. 380, it also revises certain requirements to be consistent with existing audit performance requirements or to respond to other requirements in the Sarbanes-Oxley Act as well as SEC Rule 2–07. The new standard improves current communication requirements in the following areas:

• *Timing/Shift in Approach to Audit Committee Communications.* AU sec. 380 provides that audit committee communications are ''incidental to the audit.'' While AU sec. 380 requires auditors to ''discuss'' or determine that the audit committee is ''informed'' regarding a range of matters on a timely basis, AU sec. 380 also provides that communications are not required to occur prior to the issuance of the auditor's report. The new standard indicates that communications between the auditor and the audit committee are integral to the audit and that communications should occur in a timely manner and prior to the issuance of the auditor's report. By requiring communications prior to the issuance of the auditor's report, Auditing Standard No. 16 makes a significant difference in the standard regarding the timing of communications by giving auditors and audit committees the ability to take appropriate action to address the matters communicated, including any effect on the company's financial statements. This timing requirement aligns with the timing of communications required by Exchange Act Section 10A(k) and SEC Rule 2–07.

• *Understanding the Terms of the Audit and the Engagement Letter.* AU sec. 310 requires the auditor to establish an understanding with the ''client'' regarding the terms of the audit and services to be performed. Auditing Standard No. 16 retains the requirement for the auditor to establish an understanding of the terms of the audit engagement and the services to be performed, but requires the understanding to be with the audit committee. The new standard also requires that the understanding be recorded in an engagement letter. These changes align the new standard with the audit committee's oversight of the work of the external auditor.[170] These new requirements also build on the requirement in AU sec. 310 for the auditor to document the understanding in the working papers, preferably through a written communication with the client. Having a mutually clear understanding of the terms of the engagement, including the objectives of the audit, the responsibilities of the

[168] *See* note to Paragraph 12 of Auditing Standard No. 16 and discussion in PCAOB Release No. 2012–004 (Aug. 15, 2012) at pages A4–24 to A4–25.

[169] *See* Section 10A(k) of the Exchange Act, 15 U.S.C. § 78j–1(k), and implementing changes in Rule 2–07(a)(1)–(3) of Regulation S–X, 17 CFR § 210.2–07(a)(1)–(3).

[170] *See* Section 301 of the Sarbanes-Oxley Act, and Section 10A(m)(2) of the Exchange Act, 15 U.S.C. 78j–1(m)(2).

auditor, and the responsibilities of management in connection with the audit, should benefit both the auditor and the audit committee.

• *Definition of ''Audit Committee.''* AU sec. 380 does not have a formal definition of audit committee, but describes the audit committee as ''those that have responsibility for oversight of the financial reporting process.'' Auditing Standard No. 16 incorporates the definition of audit committee used in the Sarbanes-Oxley Act and modifies the Sarbanes-Oxley Act's definition for companies that are nonissuers, such as brokers and dealers.

• *Qualitative Aspects of the Company's Financial Reporting.* AU sec. 380 requires the auditor to discuss with the audit committee the auditor's judgments about the quality, not just the acceptability, of the entity's accounting principles, including the consistency of the entity's accounting policies and their application, and the clarity and completeness of the entity's financial statements and related disclosures. Many commenters indicated that it was unclear what was meant by the quality, clarity, and completeness of the company's financial statements and related disclosures. Auditing Standard No. 16 aligns the communication requirement with an underlying performance requirement in Auditing Standard No. 14, *Evaluating Audit Results.* Under this approach, the auditor communicates, among other things: (i) the results of the auditor's evaluation of and conclusions about the qualitative aspects of the company's significant accounting policies and practices, including situations in which the auditor identified bias in management's judgments and (ii) the results of the auditor's evaluation of whether the presentation of the financial statements and the related disclosures are in conformity with the applicable financial reporting framework, including such matters as consideration of the form, arrangement, and content of the financial statements. This approach aligns with existing performance requirements and was favored by most commenters.

• *Critical Accounting Estimates.* AU sec. 380 requires the auditor to determine that the audit committee is informed about the process used by management in formulating ''particularly sensitive'' accounting estimates. Auditing Standard No. 16 largely retains the auditor communication requirement from AU sec. 380, but uses the term ''critical accounting estimates,'' which conforms to the term used by the SEC.[171] Auditing Standard No. 16 adds related requirements to communicate matters pertaining to management's significant assumptions and changes to the process or assumptions used to develop critical accounting estimates. These additional requirements address communication of the results of the auditor's procedures performed under AU sec. 342, *Auditing Accounting Estimates.* The purpose of this communication is to focus the audit committee's attention on the estimates that might be subject to higher risk of material misstatement.

• *Uncorrected and Corrected Misstatements.* Auditing Standard No. 16 incorporates the communication requirements from AU sec. 380 related to uncorrected and corrected misstatements. In addition, Auditing Standard No. 16 incorporates the requirement from the Sarbanes-Oxley Act and SEC Rule 2–07 for the auditor to report to the audit committee other material written communications between the auditor and management, such as a schedule of unadjusted differences.

• *Significant Unusual Transactions.* AU sec. 380 requires the auditor to determine that the audit committee is informed about the methods used to account for significant unusual transactions. Auditing Standard No. 16 revises the requirement by adding requirements based on the auditor's procedures under AU sec. 316, *Consideration of Fraud in a Financial Statement Audit,* for the auditor to communicate: (i) Significant transactions that are outside the normal course of business for the company or otherwise appear to be unusual due to their timing, size, or nature and (ii) the auditor's understanding of the business rationale for significant unusual transactions. Communications of significant unusual transactions by the auditor will improve audit quality by promoting discussion of such transactions. It will also allow the audit committee to gain insight into such transactions and take appropriate actions, if necessary, to address the financial statement or disclosure impact of such transactions.

• *Management Consultations with Other Accountants.* When the auditor is aware that management consulted with other accountants about auditing and accounting matters, AU sec. 380 requires the auditor to discuss with the audit committee the auditor's views about significant matters that were the subject of such consultation. Auditing Standard No. 16 modified this requirement. The new standard requires the auditor to communicate to the audit committee only when the auditor has identified a concern regarding such consultations. Commenters viewed this change as an improvement as they noted that it may be good practice for management to consult with other accountants as experts to assist them regarding complex accounting matters, but that the audit committee need not be informed of all such consultations, rather just those matters for which the auditor identified a concern.

• *Obtaining Information Relevant to the Audit.* Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement,* requires the auditor to inquire of the audit committee regarding the matters important to the identification and assessment of risks of material misstatement, including fraud risks. Pursuant to Auditing Standard No. 16, the auditor also inquires about whether the audit committee is aware of additional matters relevant to the audit. As a result, the auditor has an opportunity to focus on any additional matters relevant to the audit, such as possible violations of laws or regulations. This inquiry requirement might enable the auditor to learn from the audit committee about a possible previously unidentified risk.

New Communication Requirements. Auditing Standard No. 16 also contains new communication requirements that improve the audit by promoting discussion about significant aspects of the audit, while also providing valuable information to the audit committee. These new communications relate to audit procedures that already will be performed under existing PCAOB standards, with the auditor communicating the results of such procedures to the audit committee. The new communication requirements include:

• *Overall Audit Strategy and Significant Risks.* Auditing Standard No. 16 includes a requirement for the auditor to communicate to the audit committee an overview of the overall audit strategy, including the timing of the audit, and to discuss with the audit committee significant risks the auditor identified, and significant changes to the planned audit strategy or identified risks. These changes are aligned with the results of the audit procedures performed under the PCAOB's risk assessment standards, in particular, Auditing Standard No. 9, *Audit Planning,* and Auditing Standard No.

[171] *See* SEC, *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations,* Securities Act Release No. 8350 (Dec. 19, 2003).

12, *Identifying and Assessing Risks of Material Misstatement.*

• *Other Participants in the Audit.* Auditing Standard No. 16 requires the auditor to communicate, as applicable, information about specialized skill or knowledge needed for the audit. In addition, the auditor is required to communicate: (i) Information regarding other participants in the audit, such as the extent of the use of internal auditors, company personnel, other third parties (including other independent public accounting firms), or other persons not employed by the auditor that are involved in the audit and (ii) the basis for the auditor's determination that the auditor can serve as the audit engagement's principal auditor, if significant parts of the audit are performed by other auditors. The communications related to others involved in the audit, including the nature and extent of their involvement, could be important for an audit committee to understand in its oversight of the audit. These communications should reflect the results of other audit procedures that the auditor is currently required to perform in accordance with PCAOB standards.

• *Difficult or Contentious Matters for which the Auditor Consulted.* Auditing Standard No. 16 requires the auditor to communicate to the audit committee matters that are difficult or contentious for which the auditor consulted outside the engagement team and that the auditor reasonably determined are relevant to the audit committee's oversight of the financial reporting process. Audit committees might better appreciate the importance of difficult or contentious matters, benefiting their governance responsibility, if they are aware that such consultations took place. Communications are based on the results of the procedures the auditor performed regarding difficult or contentious matters.

• *Going Concern.* Auditing Standard No. 16 requires the auditor to communicate to the audit committee certain matters related to the auditor's evaluation of the company's ability to continue as a going concern. The communication requirements in Auditing Standard No. 16 are based on the auditor's performance requirements under AU sec. 341, *The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern.* This communication enables the auditor to improve the audit by facilitating discussion between the auditor and the audit committee about the company's ability to continue as a going concern. This communication also can serve to further inform the audit committee, by focusing attention on financial difficulties the company is encountering. Through this communication, the auditor can benefit from the audit committee's views of the concerns identified by the auditor. Such communications also could be significant in terms of the audit committee's role in overseeing the company's financial reporting process to ensure that the company's financial statements contain the necessary disclosures.

• *Other Matters.* Auditing Standard No. 16 requires the auditor to communicate to the audit committee other matters arising from the audit that are significant to the oversight of the company's financial reporting process, such as complaints or concerns regarding accounting or auditing matters that have come to the auditor's attention during the audit. The auditor benefits from a robust discussion of such complaints or concerns with the audit committee. Also, the audit committee should be better able to exercise its oversight activities if the auditor informs the audit committee of these matters. Communication to the audit committee is based on the results of the auditor's procedures relating to such other matters.

• *New Accounting Pronouncements.* Auditing Standard No. 16 requires the auditor to communicate to the audit committee situations in which, as a result of the auditor's procedures, the auditor identified a concern regarding management's anticipated application of accounting pronouncements that have been issued but are not yet effective and might have a significant effect on future financial reporting. This communication informs the audit committee of situations relevant to the audit committee's oversight of the company's financial reporting process. Auditing Standard No. 16 requires only that the auditor communicate concerns identified as a result of existing audit performance requirements and does not require the auditor to perform additional procedures to identify such concerns.

• *Departure from the Auditor's Standard Report.* Auditing Standard No. 16 requires the auditor to communicate to the audit committee when the auditor expects to: (i) Modify the opinion in the auditor's report or (ii) include explanatory language or an explanatory paragraph in the auditor's report. The requirement is intended to provide the basis for a discussion between the auditor and the audit committee in those circumstances in which the auditor expects to change the auditor's standard report. This requirement is limited to the communication of changes to the audit report determined by the auditor during the course of the audit and does not require the performance of new audit procedures.

Other Considerations Relating to Changes to the Standard. As part of the Board's regular standard-setting process, the Board takes into account costs related to its proposed changes based on, among other things, the Board's general knowledge of audit firm practice based on the Board's oversight activities. The Board did not specifically seek or receive comment that attempted to quantify costs related to the new standard.[172]

The Board has sought to devise an overall framework for auditor communications that is sensitive to the new standard's overall effect. The Board has sought to avoid unnecessary costs in developing the new standard. To the extent that the new standard changes existing or imposes new communication requirements, however, the Board recognizes that those requirements will impose some incremental costs.

To avoid unnecessary costs:

• Auditing Standard No. 16 incorporates significant existing and new communication requirements into one standard. Bringing these requirements together in one place should promote the auditor's compliance with relevant statutory and regulatory requirements, as well as potentially reducing auditor time searching for requirements. Similarly, an appendix to the new standard lists and identifies the location of other auditor communication requirements contained in other PCAOB rules and standards; and

• The new standard does not impose new auditor performance requirements, other than the required communications themselves. In other words, the new audit committee communication requirements in Auditing Standard No. 16 are based on the results of audit procedures performed under existing standards.

In considering costs, as a threshold matter, the Board notes that auditors and audit committees already engage in audit committee communications under the federal securities laws and existing auditing standards and thus registered firms and companies already incur some costs in complying with existing requirements.

[172] The discussion in this section reflects the Board's qualitative assessment of the new standard's impact based on the overall design of the new standard, and the changes made by the Board in response to comments, both of which are discussed throughout this submission and in the record for Auditing Standard No. 16.

Registered firms will need to incur the one-time cost to update their audit methodologies to reflect the new requirements and conduct initial training of their personnel on the new requirements.[173] In addition, registered firms will incur the recurring costs of the additional time required to prepare and make the communications in each audit in which they are required and to document that those communications were made. The Board also recognizes that audit committees will need to receive or read, and potentially discuss and act upon, the new required communications, which might result in the ongoing cost of increased time required for audit committee meetings. The Board sought to ensure that the recurring communication requirements are scalable—that is, they vary based on the size and complexity of the company—in part to avoid unnecessary costs.

For all the reasons discussed above and in the Board's adopting release, the Board does not anticipate the incremental costs imposed by the new standard would be significant.

Characteristics of EGCs and Economic Considerations

The PCAOB has begun to monitor implementation of the JOBS Act in order to understand the characteristics of EGCs and inform the Board's request to apply Auditing Standard No. 16 to audits of EGCs.[174]

To obtain data regarding EGCs, the PCAOB's Office of Research and Analysis has reviewed registration statements and Exchange Act reports filed with the SEC with filing dates between April 5, 2012, and June 4, 2012, for disclosures by entities related to their EGC status. Only those entities that have voluntarily disclosed their EGC status have been identified.[175]

Characteristics of Self-Identified EGCs. As of June 4, 2012, based on the PCAOB's research, 196 entities have voluntarily identified themselves as EGCs in SEC filings. These 196 entities operate in diverse industries. The five most common Standard Industrial Classification (SIC) codes applicable to these entities are for: blank checks; pharmaceutical preparations; prepackaged software services; computer processing/data preparations services; and crude petroleum/natural gas.

Of the 196 entities, approximately 78% are companies that were identified in a registration statement filed to conduct an initial public offering. The other 22% were identified through Exchange Act filings. Forty-one entities have securities listed on a national securities exchange.

The reported assets for the 196 entities ranged from zero to approximately $13 billion, based on filings for the period reported. The average and median reported assets of the 196 entities were approximately $260.6 million and approximately $24.9 million, respectively.[176] The reported revenue for the 196 entities, based on filings for the period reported, ranged from zero to approximately $958.1 million. The average and median reported revenue of the 196 entities was approximately $106.9 million and approximately $6.7 million, respectively. Seventy-eight of the 196 entities identified themselves as ''development stage entities'' in their financial statements.[177] Of the 196 entities, 103 were audited by firms that are annually inspected by the PCAOB (i.e., firms that have issued audit reports for more than 100 public company audit clients). The remaining 93 were audited by triennially inspected firms (i.e., firms that have issued audit reports for 100 or fewer public company audit clients).

Based on the Board's initial analysis of EGCs, these entities appear to represent diverse industries and are audited by a diverse group of firms. Although these entities range in size, approximately 61% or 119 have reported revenue of less than $50 million. Given the December 8, 2011, initial starting point for EGC eligibility, one key difference between EGCs and other entities appears to be the length of time an EGC has been subject to the reporting requirements under the Exchange Act.[178]

Economic Considerations and Application of Auditing Standard No. 16 to Audits of EGCs. The Board adopted Auditing Standard No. 16 to ''further the public interest in informative, accurate, and independent audit reports.'' Auditing Standard No. 16 is intended to improve the relevance, timeliness, and quality of communications between auditors and audit committees. The Board's determination to adopt Auditing Standard No. 16 is based on a record developed over several years that includes extensive public outreach and comment.

As discussed above and in the Board's release, improved communications should result in both auditors and audit committees becoming better informed and, therefore, better equipped to fulfill their respective roles in the company's financial reporting. Through this communication, the auditor may obtain more complete information about the company, enabling the auditor to be more effective in identifying and assessing risks of material misstatement in the company's financial statements

[173] Those firms that in the past did not use an engagement letter for audits subject to the standard will now have to develop one. In the Board's experience, most firms currently use an engagement letter for such audits.

[174] Pursuant to the JOBS Act, an ''emerging growth company'' is defined in Section 3(a)(80) of the Exchange Act. In general terms, an issuer qualifies as an EGC if it has total annual gross revenue of less than $1 billion during its most recently competed fiscal year (and its first sale of common equity securities pursuant to an effective Securities Act registration statement did not occur on or before December 8, 2011). *See* JOBS Act Section 101(a), (b), and (d). Once an issuer is an EGC, the entity retains its EGC status until the earliest of: (i) The first year after it has total annual gross revenue of $1 billion or more (as indexed for inflation every five years by the SEC); (ii) the end of the fiscal year after the fifth anniversary of its first sale of common equity securities under an effective Securities Act registration statement; (iii) the date on which the company issues more than $1 billion in non-convertible debt during the prior three year period; or (iv) the date on which it is deemed to be a ''large accelerated filer'' under the Exchange Act (generally, an entity that has been public for at least one year and has an equity float of at least $700 million).

[175] The PCAOB has not validated these entities' self-identification as EGCs. The information presented in this submission also does not include data for entities that have confidentially submitted draft registration statements to the SEC for confidential non-public review in accordance with the JOBS Act. Thus, the data and analysis are not based on the complete population of EGCs. The Board recognizes that its initial analysis of self-identified EGCs does not include all entities that may be EGCs and that, after the JOBS Act has been in effect for a longer period of time, additional analysis of the characteristics of EGCs may be possible.

[176] For purposes of comparison, the PCAOB compared the data compiled with respect to the 196 entities with companies listed in the Russell 3000 Index in order to compare the EGC population with the broader issuer population. The Russell 3000 was chosen for comparative purposes because it is intended to measure the performance of the largest 3000 U.S. companies representing approximately 98% of the investable U.S. equity market (as marketed on the Russell Web site). The average and median reported assets of issuers in the Russell 3000 was approximately $11.5 billion and approximately $1.4 billion, respectively. The average and median reported revenue of issuers in the Russell 3000 was approximately $4.6 billion and $742.8 million, respectively.

[177] According to Financial Accounting Standards Board (''FASB'') guidance, development stage entities are entities devoting substantially all of their efforts to establishing a new business and for which *either* of the following conditions exists: (a) Planned principal operations have not commenced or (b) planned principal operations have commenced, but there has been no significant revenue from operations.) *See* FASB Accounting Standards Codification, Subtopic 915–10, *Development Stage Entities—Overall.*

[178] The Board notes that its initial analysis is generally consistent with the legislative history of the JOBS Act, which anticipated that EGCs will be somewhat smaller entities that may have less experience in complying with some aspects of the federal securities laws. *See* House Report No. 112–406, at 5–7.

and designing and performing audit procedures to address those risks. Similarly, a better informed audit committee should contribute to management oversight, which may also improve the company's financial reporting as well as its oversight of management more generally.

The Board believes the standard will enhance the quality of the audit and the quality of the financial reporting process. In attempting to obtain these benefits through the new standard, the Board sought to avoid imposing unnecessary costs. The approach used by the Board was to consider the new standard's overall effect on current audit practice and on audit committees and companies. This approach was used to develop a standard that is scalable based on a company's size and complexity, thereby avoiding unnecessary costs for audits of smaller or less complex companies, including smaller or less complex companies that are EGCs.

The benefits of the standard, which are summarized throughout this submission and described more fully in the Board's adopting release, should also be applicable to companies of various types and natures. For example, auditors and audit committees of all types of companies should benefit from a meaningful exchange of information regarding significant matters that may affect the integrity of a company's financial reports. Communications with the audit committee should improve the audit by providing auditors with the audit committee's insights about the company, as well as providing auditors with a forum that is separate from management to discuss complex and significant matters about the audit and the company's financial reporting process. Communications between the auditor and the audit committee should allow the audit committee to be well-informed about accounting, auditing, and disclosure matters that are significant to the company's financial statements, and to be better able to carry out its oversight role. These general benefits of the new standard should accrue to audits of all companies, including EGCs.

Moreover, enhanced audit committee communications may be of particular benefit to EGCs. Based on the Board's preliminary analysis of EGC data, EGCs generally appear to be companies that are relatively new to the SEC reporting process. Such companies may have new audit committee members and may be relatively less familiar with SEC reporting requirements, and have relatively more questions regarding how to present their financial statements for SEC reporting purposes. Similarly, some EGCs may be considering for the first time initial choices in their accounting policies and practices that could have implications for their financial reporting.

Another benefit of the new standard is that it provides for communications regarding significant matters on a timely basis. Timely communications with the audit committee help improve the audit by, among other things: (i) Informing the audit committee, which has responsibility for the oversight of financial reporting, about significant matters related to the audit and the financial statements; (ii) enabling the auditor to obtain the audit committee's insights and information about transactions and events; (iii) enabling the auditor to learn from the audit committee about additional matters relevant to the audit, including possible violations of laws or regulations; and (iv) assisting the auditor in gaining a better understanding of the company and its environment. Timely communications also permit both the auditor and the audit committee to take appropriate action to address the matters communicated, including any effect on the company's financial statements. Again, these benefits were designed to benefit audits of all companies, including audits of EGCs.

The new standard also promotes communications that are tailored to the circumstances of the company and informative, rather than ''boiler-plate'' or standardized. Under Auditing Standard No. 16, required communications would vary by the nature and complexity of the company being audited. Effective communication between the auditor and the audit committee also need not be in writing, but may involve many forms of communication, such as presentations, charts, and robust discussions, as well as written reports. Such flexibility in the form of communications is an important element of the new standard and part of what allows the standard to work for audits of companies of varying sizes and complexity, including EGCs.

The Board has also considered other potential economic effects on efficiency and capital formation. The Board's overall approach is designed to: (i) Scale the required communications to the size and complexity of the company being audited; (ii) maintain flexibility (for example, with respect to communicating orally or in writing); (iii) minimize duplicative or redundant communications to the audit committee from the auditor and management; (iv) focus the communications on the accounting matters that are significant to the auditor and the audit committee; and (v) reduce auditors' search costs (i.e., the costs associated with researching the federal securities laws' and auditing standards' various communication requirements) by providing a list of other PCAOB standards and rules that contain audit committee communication requirements in one place. Moreover, as previously discussed, the auditor's requirements under the new standard are focused on communicating the results of audit procedures that the auditor is already required to perform.

The Board also considered alternatives to the communication requirements in the final standard. Before commencing this project, the Board considered whether a new standard was necessary, particularly since a number of the standard's requirements were already required by existing auditing standards or provisions of the federal securities laws. The Board also discussed whether to develop a new standard on audit committee communications with its SAG, and had subsequent discussions with the SAG on the nature and extent of communications in a new standard. The Board proposed the standard, extended the proposal's comment period, held a roundtable, and reproposed the standard to obtain additional public input. As a result of the public comment and outreach, through which many commenters were supportive, the Board decided to proceed with a new standard. The Board did so because it believes that establishing the new communication requirements, as well as clarifying, updating and consolidating the other communication requirements, would improve audits and audit committee oversight with respect to all types of companies, including EGCs, without imposing unnecessary costs.

Many now agree that the interaction between the auditor and the audit committee—as mandated by the Sarbanes-Oxley Act—improves audit quality and the quality of financial reporting.[179] Research has indicated that improved auditor communications with audit committees can enhance the

[179] For example, research conducted by the Center for Audit Quality and published in its March 2008, *Report on the Survey of Audit Committee Members,* found that increased audit committee oversight was believed to have had a positive impact on the overall quality of audits by 92% of its audit committee member respondents. As recently as June 12, 2012, the United Kingdom's Financial Reporting Council issued its annual report, *Audit Quality Inspections,* which indicate, among other things, that: ''Audit committees play an essential role in ensuring the quality of financial reporting. In particular, their work with auditors in planning the audit and reviewing its results contributes greatly to the quality of the audit.''

quality of the audit and the quality of the financial reporting process.[180] Also, most commenters on the new standard generally agreed that fuller and more relevant communications between the auditor and audit committee would allow the auditor to perform a more informed, and thus more effective audit, and would enable the audit committee to more effectively fulfill its oversight responsibilities regarding the financial reporting process.[181]

Higher quality financial reporting (as a result of better informed auditors, better informed audit committees, or both) improves the quality of information available to the markets and reduces the information asymmetry that exists about the company among investors as well as between investors and the company's management.[182] Academic research indicates that improving the quality of financial reporting can reduce investors' uncertainty about the information being provided in companies' financial reports and thus increase efficiency in capital allocation and foster capital formation.[183] Higher quality financial reporting (and improved corporate governance) can mitigate principal-agent problems and reduce agency costs.[184]

There will be some costs associated with audit committee communications under the new standard, including additional costs incurred by companies. As previously discussed, the costs for a company to operate and maintain an audit committee may increase because of the need for additional meetings and increased audit committee member time demands. However, for the reasons explained above, the Board does not believe these additional costs will significantly expand the time or resources companies spend on audit committees.

With respect to competition, as noted above, the standard is designed to be scalable based on a company's size and complexity. The required communications can be tailored or adjusted to fit the size and nature of the company under audit. By doing so, the Board sought to avoid imposing unnecessary costs that could have a disproportionate effect on, and thereby potentially have an adverse competitive impact on, smaller and less complex public companies. In response to the Board's solicitation of comment on the appropriateness of the standard's requirements for audits of companies of different sizes and in different industries, commenters generally considered the requirements of the standard to be applicable and appropriate to companies of varying sizes and industries. Commenters did not raise concerns regarding the standard's impact on competition and the Board has not identified any economic effects on competition.

Conclusion

As discussed throughout this submission, and in the Board's adopting release, the Board believes that Auditing Standard No. 16 will contribute to audit effectiveness. In addition, the new standard should assist the audit committee in its oversight over financial reporting. Moreover, more effective and informed communications between the auditor and the audit committee also should help enhance the quality of a company's financial reporting.

In both its proposing and reproposing releases, the Board sought comment on all aspects of the standard and as part of the process specifically asked questions regarding the appropriateness of the standard for companies of all sizes or industries, which include EGCs. Commenters considered the requirements of the standard to be applicable and appropriate to companies of different sizes and industries. Notably, the Board received comments from a wide spectrum of commenters, including from auditors that represented the interests of both small and large accounting firms and that audit companies of various sizes.

After the enactment of the JOBS Act, the Board compiled data available from entities voluntarily identifying themselves as EGCs in SEC filings. Based on data available to the Board, it appears that a wide range of entities, of differing sizes and industries, identify themselves as EGCs. One key difference between EGCs and other issuers appears to be the length of time that they have been subject to Exchange Act reporting requirements.

The Board believes that Auditing Standard No. 16 is in the public interest, and, for the reasons explained above, after considering the protection of investors and the promotion of efficiency, competition, and capital formation, recommends that the standard should apply to audits of EGCs. Accordingly, the Board requests that the Commission determine that it is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation, to apply Auditing Standard No. 16 to audits of emerging growth companies. The Board stands ready to assist the Commission in considering any comments the Commission receives on these matters during the public comment process.

III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Pursuant to Section 19(b)(2)(A)(ii) of the Exchange Act, and based on its determination that an extension of the period set forth in Section 19(b)(2)(A)(i) of the Exchange Act is appropriate in

[180] *See, e.g.,* Jeff Cohen, Ganesh Krishnamoorthy, and Arnie Wright, *Views to Strengthen Auditor Independence and Skepticism,* PCAOB meeting (March 22, 2012). Among other things, the statement provides: ''Our research has validated the very important role the audit committee plays in enhancing audit and financial reporting quality.'' *See also* Jeffrey Cohen, Lisa Milici Gaynor, Ganesh Krishnamoorthy, and Arnold M. Wright, *Auditor Communications with the Audit Committee and the Board of Directors: Policy Recommendations and Opportunities for Future Research,* Accounting Horizons, at 183 (June 2007) (''Frequent communications with a well-informed, financially sophisticated audit committee and communications among the audit committee, the auditor and the full board improve financial reporting quality.'').

[181] For a discussion of comments received on the new standards, *see* PCAOB Release No. 2012–004 (Aug. 15, 2012) and PCAOB Release No. 2011–008 (Dec. 20, 2011).

[182] Shareholders and other financial statement users possess less information about the company than the company's management. This information asymmetry can provide an opportunity for management to act in ways that are not aligned with the interests of the company's investors. *See, e.g.,* Greenwald, B. C., and J. E. Stiglitz, *Asymmetric Information and the New Theory of the Firm: Financial Constraints and Risk Behavior,* 80 American Economic Review 2, at 160–165 (1990). Also, information asymmetry between informed and uninformed investors makes the latter less willing to trade and require higher risk premiums when they do invest. *See, e.g.,* Easley, D., and M. O'Hara, *Information and the Cost of Capital,* 59 The Journal of Finance 4, at 1553–1583 (2004).

[183] *See, e.g.,* Lambert R. A., C. Leuz, and R. E. Verrecchia, *Accounting Information, Disclosure, and the Cost of Capital,* 45 *Journal of Accounting Research, at* 385–420 (2007). The authors show that accounting information influences a company's cost of capital directly and indirectly. Improved financial reporting quality can reduce a company's cost of capital by increasing precision of investors' assessments of a company's future cash flows. The lower cost of capital can subsequently affect real investment choices of the company, improving future cash flows and increasing the value of the company. *See also* Easley, D., and M. O'Hara, *Information and the Cost of Capital,* 59 The Journal of Finance 4, at 1553–1583 (2004). Their model suggests that increasing reliable public information about a company reduces the risk premium investors require. Also, Lambert et al. (2012) show that cost of capital decreases with higher average precision of information. *See* Lambert R. A., C. Leuz, and R. E. Verrecchia, *Information Asymmetry, Information Precision, and the Cost of Capital,* 16 Review of Finance, at 1–29 (2012).

[184] In a principal-agent situation, the goals of principals and agents generally differ and it is expensive for the principals to directly verify the agents' actions. In a corporation, management acts as agent for the shareholders (principals), with the audit committee and the auditor serving as intermediary agents. Well informed intermediary agents can more effectively exercise their oversight responsibilities to mitigate undesired behaviors of the management and reduce the goal incongruence between management and shareholders.

light of the PCAOB's request that the Commission, pursuant to Section 103(a)(3)(C) of the Sarbanes-Oxley Act, determine that the proposed rule changes apply to audits of emerging growth companies, as defined in Section 3(a)(80) of the Exchange Act, the Commission has determined to extend to December 17, 2012 as the date by which the Commission should take action on the proposed rule changes.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of the Sarbanes-Oxley Act.

In addition, the Board requested that the Commission, pursuant to Section 103(a)(3)(C) of the Sarbanes-Oxley Act, determine that the proposed rule changes apply to audits of emerging growth companies, as defined in Section 3(a)(80) of the Exchange Act. In order for the proposed rule changes to apply to audits of emerging growth companies, the Commission must determine that the application is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation. Please provide any views you believe will help the Commission in making that determination.

Comments may be submitted by any of the following methods:

Electronic Comments

1. Use the Commission's Internet comment form (*http://www.sec.gov/rules/pcaob.shtml*); or
2. Send an email to *rule-comments@sec.gov*. Please include File Number PCAOB–2012–01 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 PCAOB–2012–01. 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/pcaob/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do 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. PCAOB–2012–01 and should be submitted on or before October 9, 2012.

For the Commission, by the Office of the Chief Accountant, by delegated authority.[185]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22632 Filed 9–14–12; 8:45 am]

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[185] 17 CFR 200.30–11(b)(2).

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Part V

Department of Treasury

Internal Revenue Service

26 CFR Part 1

Regulations Regarding the Application of Section 172(h) Including Consolidated Groups; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–140668–07]

RIN 1545–BH16

Regulations Regarding the Application of Section 172(h) Including Consolidated Groups

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 172(h) and section 1502 of the Internal Revenue Code. These proposed regulations provide guidance regarding the treatment of corporate equity reduction transactions (CERTs), including the treatment of multiple step plans for the acquisition of stock and CERTs involving members of a consolidated group. These proposed regulations also provide guidance regarding certain elections relating to the carryback of consolidated net operating losses (CNOLs) to separate return years. These proposed regulations will affect C corporations and corporations filing consolidated returns.

DATES: Written or electronic comments and requests for a public hearing must be received by December 17, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–140668–07), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–140668–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–140668–07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Amie Colwell Breslow or Marie C. Milnes-Vasquez at (202) 622–7530; concerning submissions of comments and request for public hearing, Oluwafunmilayo Taylor at *Oluwafunmilayo.P.Taylor@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2171. Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by November 16, 2012. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in these proposed regulations is in §§ 1.1502–21(b)(3)(ii)(B) and 1.1502–72(e).

The proposed regulations provide guidance regarding application of section 172(b)(1)(E) and (h) and section 1502.

The collection of information is required in order to obtain a benefit. The likely respondents are corporations that are members of consolidated groups.

Estimated total annual reporting burden: 120,000 hours.

Estimated average annual burden hours per respondent: 15 hours.

Estimated number of respondents: 8,000.

Estimated frequency of responses: Once.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 172 provides rules relating to net operating loss (NOL) carrybacks and carryovers. Section 172(b)(1)(A) states that the NOL for any taxable year generally is carried back to each of the 2 years preceding the taxable year of the loss and carried over to each of the 20 years following the taxable year of the loss.

The corporate equity reduction transaction rules of section 172(b)(1)(E) and (h) were enacted in 1989 in response to the use of NOL carrybacks to finance leveraged buyout transactions. Congress enacted these rules to limit a corporation's ability to obtain tax refunds as the result of the carryback of NOLs that were attributable to interest deductions allocable to such transactions. See Explanation of Corporate Tax Refund Restriction Bill, 135 Cong. Rec. S9936–01, at S9944 (1989); 1989 WL 193512.

Section 172(h)(3)(A) defines a *corporate equity reduction transaction* (CERT) as a ''major stock acquisition'' (MSA) or an ''excess distribution'' (ED). Section 172(h)(3)(B) defines *major stock acquisition* as the acquisition by a corporation, pursuant to a plan of such corporation (or any group of persons acting in concert with such corporation), of stock in another corporation representing 50 percent or more (by vote or value) of the stock in such other corporation. Section 172(h)(3)(C) defines *excess distribution* as the excess (if any) of the aggregate distributions (including redemptions) made during a taxable year by a corporation with respect to its stock over the greater of: 150 percent of the average of such distributions during the 3 taxable years immediately preceding such taxable year, or 10 percent of the fair market value of the stock of the corporation at the beginning of such taxable year. Thus, the total of distributions that may be treated as an ED is limited to the amount that exceeds the greater of two baselines: One tied to a historical, three-year average and the other based on the fair market value of the distributor.

If an MSA or ED occurs, section 172(b)(1)(E) and (h) limit the carryback of the portion of an NOL that constitutes a ''corporate equity reduction interest loss'' (CERIL) of an ''applicable corporation'' in any ''loss limitation year.'' See section 172(b)(1)(E)(i).

Section 172(b)(1)(E)(iii) defines an *applicable corporation* as a C corporation that acquires stock, or the stock of which is acquired, in an MSA; a C corporation making distributions with respect to, or redeeming, its stock in connection with an ED; or a C corporation that is a successor to one of the other types of applicable corporations. Section 172(b)(1)(E)(ii) defines *loss limitation year* as the taxable year in which a CERT occurs and each of the two succeeding taxable years. Section 172(h)(1) defines *corporate equity reduction interest loss* as the excess of (1) the total NOL for a loss limitation year, over (2) the NOL for the loss limitation year computed without regard to the allocable interest deductions that are otherwise taken into account in computing the NOL. Section 172(h)(2)(A) defines *allocable interest deductions* as deductions allowed on the portion of any indebtedness allocable to a CERT.

Under section 172(h)(2)(B), except as provided in regulations or section 172(h)(2)(E), indebtedness is allocable to a CERT in the manner prescribed under section 263A(f)(2)(A) without regard to paragraph (i) thereof (relating to traced debt). Thus, a portion of the taxpayer's total interest expense is allocable to the CERT. See H.R. Rep. No. 101–247, at 1251 (Conf. Rep.). However, section 172(h)(2)(C) limits the amount of allocable interest deductions for any loss limitation year to (1) the amount allowable as a deduction for interest paid or accrued by the taxpayer during the loss limitation year, less (2) the average of deductions allowed for interest paid or accrued by the taxpayer for the three taxable years preceding the taxable year in which the CERT occurred. Therefore, the allocable interest deductions are limited to the increase in interest deductions over a historical, three-year baseline.

Section 172(h)(3)(C) and (E) sets forth specific rules for determining whether an ED has occurred. For purposes of determining a corporation's aggregate distributions for a taxable year under section 172(h)(3)(C)(i) and the average of such distributions during the three taxable years preceding the relevant taxable year under section 172(h)(3)(C)(ii)(I), section 172(h)(3)(E)(ii) provides that the distributions taken into account are reduced by the aggregate amount of stock issued by the corporation during the applicable period in exchange for money or property other than stock in the corporation. However, section 172(h)(3)(E)(i) provides that stock described in section 1504(a)(4) (certain preferred stock) and distributions (including redemptions) with respect to such stock are disregarded.

For purposes of applying section 172(b)(1)(E) and (h), an applicable corporation and all members of its consolidated group are treated as a single taxpayer. See section 172(h)(4)(C).

Currently, there are no regulations under section 172(b)(1)(E) and (h). Section 172(h)(5) grants the Secretary the authority to prescribe such regulations as may be necessary to carry out the purposes of section 172(h), including regulations: (A) For applying section 172(h) to successor corporations and to cases in which a taxpayer becomes (or ceases to be) a member of a consolidated group; (B) to prevent the avoidance of section 172(h) through the use of related parties, pass-through entities, and intermediaries; and (C) for applying section 172(h) when more than one corporation is involved in a CERT. In addition, section 172(h)(2)(B) grants the Secretary authority to issue regulations prescribing a method for allocating indebtedness to a CERT other than the method contained in section 263A(f)(2)(A). Section 1502 provides the Secretary with broad authority to prescribe rules applicable to corporations that file consolidated returns that are different from the income tax provisions that would apply if those corporations filed separate returns.

These proposed regulations provide general rules addressing whether a CERT has occurred, the computation of a CERIL, and the treatment of successors. The proposed regulations also address issues specific to the application of section 172(b)(1)(E) and (h) to consolidated groups, including: (1) Treatment of the consolidated group as a single taxpayer; (2) determination of the group's three-year average that is relevant to a particular consolidated return loss limitation year; (3) application of these rules if the corporation participating in a CERT becomes a member of a consolidated return group; (4) application of these rules if a group member deconsolidates after the group has participated in (or is treated as having participated in) a CERT; (5) apportionment of a CERIL (and other special status CNOLs) to members of a consolidated group for carryback or carryover to separate return years; and (6) application of section 172(b)(1)(E) and (h) to a life-nonlife group. The proposed regulations also provide rules that would amend the loss carryback waivers available to deconsolidating group members.

At this time, the Department of Treasury and the IRS are not providing rules addressing the application of section 172(h) to related parties, pass-through entities, or intermediaries. However, the Department of Treasury and the IRS continue to study the circumstances under which these persons should be subject to section 172(b)(1)(E) and (h). For example, the purposes of the statute may be furthered if section 172(b)(1)(E) and (h) apply to the acquisition of 100 percent of the stock of a target by a partnership in which a corporation (or consolidated group) holds a controlling interest. On the other hand, the purposes of the statute may not be advanced if 100 percent of the stock of a target is acquired in a single transaction, but the percentage of target stock indirectly attributable to corporate acquirers is relatively small. The Department of Treasury and the IRS request comments regarding the parameters for applying section 172(b)(1)(E) and (h) to indirect corporate acquirers, and what special computational rules, if any, would be needed to implement its application.

The Department of Treasury and the IRS considered inclusion of an anti-avoidance rule to prevent taxpayers from engaging in section 381 transactions to shorten loss limitation years. However, the Department of Treasury and the IRS believe that the detrimental effects of shortening tax years make it unlikely that taxpayers will attempt to undertake such transactions as a planning technique. For example, shortening a loss limitation year will reduce the income in that year, and, accordingly, will limit the ability to carry back any losses to that year. The Department of Treasury and the IRS continue to study whether an anti-abuse rule is needed and request comments on this issue.

In addition, the Department of Treasury and the IRS are not providing rules addressing the application of section 172(b)(1)(E) and (h) to transactions occurring before these rules are adopted as final regulations (transitional issues). However, the Department of Treasury and the IRS continue to study, and request comments on, transitional issues. For example, the Department of Treasury and the IRS request comments regarding the application of section 172(b)(1)(E) and (h) if a taxable year constitutes a loss limitation year with regard to more than one CERT, one occurring before and the other occurring after the adoption of these proposed regulations as final regulations.

Explanation of Provisions

1. General CERT Rules

A. Determination of Existence of a CERT

As discussed, a CERT is either an MSA or an ED. The statute does not exclude tax-free transactions from treatment as an MSA or an ED. In addition, the concerns targeted by Congress in enacting section 172(b)(1)(E) and (h) can exist in the context of both taxable and tax-free transactions. Accordingly, the proposed regulations provide that a tax-free transaction that meets the statutory definition of an MSA or an ED must be tested as a CERT under section 172(b)(1)(E) and (h) and these proposed regulations (collectively, the ''CERT rules''). For example, a section 355 transaction, a corporate organization under section 351, or a stock acquisition that qualifies for reorganization treatment under section 368(a)(1)(A) and (a)(2)(E) must be tested under the CERT rules.

These proposed regulations also provide that an integrated plan of stock acquisition including multiple steps will be tested as a single potential MSA for purposes of determining the consequences of the transaction under the CERT rules. This treatment applies even if a step in the plan might separately constitute an ED, or might so qualify in conjunction with other distributions in the same taxable year.

Section 172(h)(3)(C)(ii) limits the amount of distributions in a taxable year that may be treated as an ED. Under one prong of this limitation, the taxpayer's distributions are treated as an ED only to the extent that they exceed 150 percent of the taxpayer's average of distributions (three-year distribution average) made in the three taxable years preceding the taxable year in which a potential ED occurs (the distribution lookback period). These proposed regulations provide that, to the extent that a distribution is part of an integrated plan that is treated as an MSA, the distribution is excluded from the computation of the taxpayer's three-year distribution average that is relevant to any other potential ED. These proposed regulations provide additional rules for calculating the taxpayer's three-year distribution average under section 172(h)(3)(C)(ii)(I) relevant to potential EDs that occur in taxable years that are not full 12-month years.

B. Loss Limitation Years

The proposed regulations generally provide that the taxable year in which a CERT occurs and each of the two succeeding taxable years constitute loss limitation years with regard to the CERT. The proposed regulations also provide special rules addressing loss limitation years of successors, consolidated groups, and former members of consolidated groups.

C. Computation of a CERIL

Under section 172(h)(1), the term *CERIL* means, with respect to any loss limitation year, the excess (if any) of (1) the NOL for such taxable year, over (2) the NOL for such taxable year determined without regard to any allocable interest deductions otherwise taken into account in computing such loss. Section 172(h)(2)(A) defines *allocable interest deductions* as deductions allowed for interest on any indebtedness allocable to a CERT. Section 172(h)(2)(B) states that, except as provided in regulations and section 172(h)(2)(E), the indebtedness allocable to a CERT is determined under the avoided cost methodology of section 263A(f)(2)(A), with certain adjustments.

Under section 263A(f)(2)(A) and the regulations thereunder, allocable interest deductions are computed by multiplying the ''weighted average interest rate'' by ''average excess expenditures'' as those terms are defined in § 1.263A–9(c)(5)(ii) and (iii). Because section 263A contemplates transactions that are very different in nature from CERTs, it is often difficult to identify the costs associated with a CERT that are analogous to average excess expenditures. To ameliorate this difficulty, these proposed regulations provide MSA- and ED-specific rules for computing costs associated with a CERT (CERT costs). Further, these proposed regulations identify additional CERT costs by looking to the capitalization rules under section 263(a). Specifically, the proposed regulations treat as CERT costs amounts paid or incurred to facilitate an MSA or ED to the extent that those amounts are required to be capitalized under section 263(a) (with certain modifications), and any amounts disallowed under section 162(k). Because most CERTs occur under circumstances that already require application of section 263(a), invoking those rules should result in greater administrability. Once the CERT costs are identified, the interest allocable to those costs is computed under the principles of section 263A(f)(2)(A) and the regulations thereunder (with adjustments). The avoided cost methodology of section 263A(f)(2)(A) effectively allocates interest to a CERT to the extent that the taxpayer's interest costs could have been reduced if the taxpayer had not engaged in the CERT. For purposes of applying the avoided cost rules of section 263A(f)(2)(A), all CERT costs are treated as if they were cash expenditures.

Under the proposed regulations, *CERT costs* with regard to an MSA include the fair market value of the stock acquired, whether that stock is acquired in exchange for cash, stock of the acquirer, or other property. The inclusion of the fair market value of stock acquired in stock-for-stock exchanges ensures that such transactions are treated similarly to an issuance of acquirer's stock for cash followed by an MSA funded with the cash proceeds. Further, inclusion of the fair market value of stock acquired is consistent with the avoided cost methodology applied under section 172(h)(2) because the CERT statute rejects tracing and assumes that debt is used to fund all CERT costs.

In addition, CERT costs of an MSA include the fair market value of any distribution that is part of an integrated transaction constituting the MSA. CERT costs also include amounts paid or incurred to facilitate any step of the MSA to the extent that those amounts are required to be capitalized under section 263(a), and any amounts disallowed under section 162(k).

Under the proposed regulations, CERT costs associated with an ED include the fair market value of distributions to shareholders that are determined to be EDs during the year in which the CERT occurs. CERT costs also include a portion of amounts paid or incurred to facilitate the distributions to the extent that those amounts are required to be capitalized under section 263(a), and any amounts disallowed under section 162(k). However, if neither section 263(a) nor section 162(k) applies or if only section 162(k) applies to a distribution included in an ED, additional CERT costs associated with the distribution are determined under the principles of § 1.263(a)–4(e) (relating to the capitalization of costs that facilitate the acquisition or creation of intangibles), applied as if the ED were a transaction within the scope of § 1.263(a)–4.

As discussed, the rules of section 263(a) are applied in the CERT context with certain modifications. For the purpose of identifying CERT costs under these proposed regulations, modifications to the operation of § 1.263(a)–4 and –5 include treating certain borrowing costs as facilitative of an MSA or ED. Therefore, CERT costs will include these borrowing costs. Congress objected to the carryback of NOLs resulting from leveraging that directly or indirectly enables CERTs; therefore, the Department of Treasury and the IRS believe that it is appropriate to include borrowing costs in total CERT costs. However, the Department of Treasury and the IRS request comments regarding the extent to which borrowing costs should be included in CERT costs.

The computation of interest allocable to CERTs under the rules of section 263A(f)(2)(A) involves the time-weighted average of costs incurred as of various dates in the taxable year. Therefore, these proposed regulations set forth rules for determining when CERT costs should be taken into account. Under these proposed regulations, accumulated CERT costs as of a particular date are the total CERT costs that have been taken into account as of that date under the applicable corporation's method of accounting. A special proration rule is provided to determine accumulated CERT costs related to an ED. Finally, CERT costs incurred in any year prior to the year in which the CERT occurs are included in accumulated CERT costs beginning on the first day of the year in which the CERT occurs.

Section 172(h)(2)(E) requires that the allocation of interest to a CERT be reduced if an unforeseeable extraordinary adverse event occurs during a loss limitation year but after the CERT. The proposed regulations do not provide guidance with regard to unforeseeable extraordinary adverse events. However, the Department of Treasury and the IRS request comments regarding whether rules are necessary and, if so, what type of events should constitute unforeseeable extraordinary adverse events.

D. Limitation on Interest Deductions

The CERT rules generally provide that the portion of an NOL for any loss limitation year that is attributable to the interest deductions allocable to a CERT (that is, a CERIL) may not be carried back to any year prior to the year in which the CERT occurred. As discussed, section 172(h)(2)(C) limits the amount of interest treated as an allocable interest deduction to the excess of the amount allowable as a deduction for interest paid or accrued by the taxpayer during the loss limitation year, over the average of amounts allowable as a deduction for interest paid or accrued (the three-year average) during the three taxable years preceding the taxable year in which the CERT occurred (the lookback period). These proposed regulations provide special rules for computing the three-year average in special situations, such as if an applicable corporation is not in existence for the entire lookback period. Further, the proposed regulations adjust the three-year average if the relevant loss limitation year is not a full 12-month taxable period. These proposed regulations also set forth special rules for any taxable year that constitutes a loss limitation year with regard to multiple CERTs.

The legislative history indicates that Congress expected the Department of Treasury and the IRS to write rules that provide that increases attributable solely to fluctuations in interest rates would not be taken into account for purposes of applying the three-year average. Out of concern that the additional complexities of such rules would outweigh the benefit, these proposed regulations do not include rules that factor out increases in interest deductions attributable solely to fluctuations in interest rates. However, the Department of Treasury and the IRS are studying a rule that, for purposes of applying the three-year average, would factor out interest deductions that are attributable to increases in a taxpayer's interest rate that occur after the date of a CERT. Under the rule being considered, the measurement of a baseline interest rate after the CERT occurs would take into account the fact that CERT activity will often decrease a taxpayer's creditworthiness and increase its average cost of borrowing, and accordingly that the existence of the CERT, in and of itself, will increase a taxpayer's borrowing expenses. The Department of Treasury and the IRS request comments on whether such a baseline would effectively account for fluctuations in interest rates or whether an alternative measure would be more appropriate.

E. Predecessor and Successor

As discussed, the CERT rules apply only to applicable corporations. Under section 172(b)(1)(E)(iii)(III), an applicable corporation includes any corporation that is a successor of: a corporation that acquires stock in an MSA; a corporation the stock of which is acquired in an MSA; or a corporation making a distribution with respect to, or redeeming, its stock in connection with an ED. For purposes of applying the CERT rules, these proposed regulations define *successor* as a transferee or distributee in a transaction to which section 381(a) applies. Further, if a successor to a previous applicable corporation with regard to a CERT itself transfers assets to a further successor, the further successor corporation is treated as an applicable corporation with regard to that CERT. In addition, these proposed regulations set forth special rules for computing a successor's CERIL.

F. Operating Rules

The proposed regulations include special rules regarding the prohibition on carryback of a CERIL. These rules provide that no CERIL may be carried back to any taxable year that includes solely dates that precede the date on which the CERT at issue occurred. In applying this rule to multi-step MSAs and to EDs that include multiple distributions, the date on which the CERT occurs is the earliest date on which the requirements for CERT status have been satisfied. These proposed regulations also provide that, for purposes of determining whether an ED has occurred, the computation of any three-year distribution average under section 172(h)(3)(C)(ii)(I) will be reduced by the average of the stock issuances made by the applicable corporation during the three years of the distribution lookback period.

The principles of the proposed regulations apply to the computation of the alternative minimum tax net operating loss under section 56(d).

2. Special CERT Rules Applicable to Consolidated Groups

A. Single Entity Treatment

Section 172(h)(4)(C) states that, except as provided by regulation, all members of a consolidated group are treated as a single taxpayer for purposes of section 172(b)(1)(E) and (h). These proposed regulations provide further guidance regarding the application of single entity principles. These proposed regulations affirm that transactions and expenditures undertaken by a particular member are not separately tracked; rather, the entire group is treated as a single applicable corporation. For example, if multiple members of a group acquire in total 50 percent or more (by vote or value) of the stock of another corporation, the group has engaged in an MSA. Likewise, the computation of a group's CERIL under section 172(h)(1) for any loss limitation year that is a consolidated return year includes the debt of all members and all interest deductions that are allowed on the group's consolidated return.

Intercompany transactions (including interest accruals and payments on intercompany obligations) are generally disregarded under the proposed regulations. However, these proposed regulations provide that a transaction will not be disregarded if a party to the transaction becomes a non-member as a part of the same plan or arrangement.

The most difficult issues in the CERT area arise from the application of single entity concepts if different corporations join and deconsolidate from a group within the same three-year period. The fungibility of money and the ease of moving cash and debt within a consolidated group may provide a consolidated group with an unwarranted ability to manipulate the application of the CERT rules, further complicating the analysis. After considering different approaches, the Department of Treasury and the IRS have determined that application of single entity principles, under which corporations cease to be separately tracked for CERT purposes after their inclusion in a group, will limit complexity and promote administrability. Furthermore, single entity treatment is consistent with the statutory default of treating the consolidated group as a single taxpayer.

Consistent with single entity treatment, these proposed regulations provide that, if an applicable corporation with regard to a CERT occurring in a separate return year (pre-existing CERT member) joins a consolidated group, the group is treated as a single applicable corporation with regard to that CERT in the consolidated return year of the acquisition and any relevant succeeding year. The pre-existing CERT member will no longer have separate status as an applicable corporation. Beginning on the day the pre-existing CERT member is first included in the group, the only CERIL computation will be that of the group.

These proposed regulations also provide that, in the consolidated return context, both the debt of a new member acquired in a CERT and the corresponding interest expenses are included in the group's CERIL computation, even if the group would not have been in a position to pay off the debt of the acquired corporation if the CERT had not occurred. For example, if a target corporation acquired by a consolidated group has debt outstanding prior to the acquisition, the group takes into account interest incurred by the group that is attributable to the target's pre-existing debt, despite the fact that the group would have had no reason to satisfy the target's debt if the acquisition had not occurred. If the acquisition had not occurred, the debt of the target would not have become a liability of the applicable corporation (the group), and the associated interest expense would not have been deducted by the group. As will be discussed, the historical interest expense of the target is also included in the group's computation of the three-year average applied to limit the interest allocated to the CERT.

B. Applicable Corporation Status and Allocation of CERT Costs Following Deconsolidation From a Group

These proposed regulations provide that, if a member deconsolidates from a group on or after (1) the date on which the group engages in a CERT, or (2) the date on which the group acquires a pre-existing CERT member, then, following the deconsolidation, both the deconsolidating member and the group generally will be treated as applicable corporations with regard to the CERT. The deconsolidating member will be apportioned a pro rata share of the group's CERT costs incurred through the date of the deconsolidation. The proration is based on the relative fair market values of the deconsolidating corporation (immediately after its deconsolidation) and the entire group (immediately before the deconsolidation). This rule applies regardless of whether any particular corporation would have constituted an applicable corporation with regard to the CERT without the application of the single entity treatment. The Department of Treasury and the IRS request comments regarding alternatives for allocating CERT costs following deconsolidation from a group.

The CERT costs that are allocated and apportioned to the deconsolidating member are subtracted from the group's CERT costs and will not attract allocable interest in any loss limitation year of the group (or any separate return loss limitation year of another group member) after the year of deconsolidation. Therefore, the group may have less CERIL in the years following the deconsolidation. Apportionment of CERT costs to the deconsolidating member may result in that corporation having a CERIL in the period following its deconsolidation.

Under these proposed regulations, the deconsolidating member (or the common parent of any group that the deconsolidating member joins immediately after deconsolidation) may elect out of the general rule of apportionment. In making this election, the member or common parent permanently waives all carrybacks of losses allocable to the deconsolidating member to years of the former group and any preceding taxable years. If this election is made, the deconsolidating member will not be treated as an applicable corporation with regard to the CERT, and it will not be allocated any CERT costs. Applicable corporation status and CERT costs will remain with the former group. This is true even if the deconsolidating member directly engaged in the CERT. Further, none of the interest history of the group will be allocated to the deconsolidating member for CERT purposes, including determining the CERIL related to any future CERT. The resulting lack of interest history may increase the amount of a CERIL in future taxable years associated with other CERTs of the deconsolidating corporation. This election is available to any deconsolidating member, even if the former group is not an applicable corporation with regard to any CERT at the time of the deconsolidation.

C. Loss Limitation Years

Because all members of a consolidated group are treated as a single taxpayer under section 172(h)(4)(C), a consolidated group is treated as the ''applicable corporation'' with regard to a CERT. These proposed regulations provide special rules for determining loss limitation years of consolidated groups and former members of consolidated groups. Under these proposed regulations, the taxable year in which a CERT actually occurs is a loss limitation year. Any other taxable year (potential loss limitation year) of any applicable corporation (including a consolidated group) will constitute a loss limitation year with regard to the CERT only if, under the carryover rules of sections 172(b)(1)(A)(ii) and 381(c)(1), the potential loss limitation year would constitute the first or second taxable year following the taxable year of the corporation or consolidated group that actually engaged in the CERT, which includes the date of the CERT. For purposes of tracking taxable years, section 172 and 381 are applied as if the inclusion of any corporation in a consolidated group or the deconsolidation of any member from a group were a transaction described in section 381(a).

The proposed regulations provide that the separate return years of a corporation that deconsolidates from a consolidated group may be loss limitation years with regard to a CERT of the former group. This may occur only if the consolidated return year of the deconsolidation is a first or second loss limitation year with regard to that CERT. The taxable years of more than one applicable corporation (including a consolidated group) may be loss limitation years with regard to the same CERT, even if those taxable years include the same dates.

The special rules for determining loss limitation years can be illustrated as follows: T corporation maintains a calendar taxable year and does not join in the filing of a consolidated return. The X group holds 60 percent of the only class of T stock. On July 1, Year 5, T engages in a CERT. The X group, which includes member S, maintains a calendar taxable year. On December 31, Year 5, the X group acquires all of the remaining T stock. T is first included in the X group on January 1, Year 6. On June 30, Year 6, S deconsolidates from the X group, and thereafter S maintains a calendar taxable year. The first loss limitation year with respect to the T CERT is T's calendar Year 5. Pursuant to these proposed regulations, as a result of acquiring T, the X group is treated as an applicable corporation with respect to the T CERT. The X group's loss limitation years with respect to the T CERT are its calendar Years 6 and 7. Because no election is made with respect to the deconsolidation of S, following the deconsolidation, S is also treated as an applicable corporation with regard to the T CERT. Because consolidated return Year 6 (the year of the deconsolidation) is a second loss limitation year with regard to the CERT, S's short year ending December 31, Year 6 will be S's only loss limitation year with regard to the T CERT.

D. Determining the Three-Year Average of a Group

As discussed in section 1.D. of this preamble, under section 172(h)(2)(C), the interest deductions treated as allocable to a CERT are limited to the difference between the interest paid or accrued in the loss limitation year at issue and the average of the interest paid or accrued in the three years preceding the year of the CERT (three-year average). These proposed regulations adopt single entity concepts intended, in part, to decrease the complexity of the computation of the three-year average resulting from the entry of corporations into, and the deconsolidation of corporations from, a consolidated group. Under these proposed regulations, with regard to a corporation joining a group, the interest history of that corporation is combined with that of the acquiring group. For purposes of the CERT rules, this interest is thereafter generally treated as having been paid or accrued by the group and is no longer separately traced to the acquired corporation. Similarly, with regard to the deconsolidation of a member from a group, a portion of the group's entire interest history is generally apportioned to the deconsolidating member for purposes of the CERT rules. The apportionment is based on the relative fair market values of the deconsolidating corporation (immediately after its deconsolidation) and the entire group (immediately before the deconsolidation). Under these proposed regulations, the allocated and apportioned history is subtracted from the group's interest history solely for purposes of the CERT rules and is unavailable to the group with regard to any loss limitation year of the group (or any separate return loss limitation year of another group member) after the year of deconsolidation. Consistent with single entity treatment and rejection of a tracing regime, the interest allocated to a particular deconsolidating member is not tied to that member's actual interest history.

These proposed regulations also provide special rules relevant to any loss limitation year during which a corporation (partial-year member) becomes a member of, or ceases to be a member of, a group (transitional year). For purposes of computing any three-year average of a group that is relevant to a transitional year, these rules require proration of the interest history that is attributable to the partial-year member so that a group that includes a particular member for only a portion of a loss limitation year includes only a pro rata portion of that member's three-year interest history. These proposed regulations also provide special rules for computing the three-year average if a group is not in existence for three taxable years prior to the consolidated return year in which the CERT occurs (the lookback period) and for determining the lookback period if a group acquires a corporation that previously engaged in a CERT.

E. Excess Distributions in Groups

These proposed regulations contain rules pertaining to the computation of EDs of consolidated groups and of corporations that have been consolidated group members. Consistent with single entity treatment under section 172(h)(4)(C), the proposed regulations provide that the distributions relevant for purposes of computing an ED of a consolidated group generally include only non-intercompany distributions. However, this general rule does not apply if a party to the transaction deconsolidates as part of the same plan or arrangement. Under those circumstances, the distribution will be tested on a separate entity basis as a potential CERT.

As discussed in section 1.A. of this preamble, section 172(h)(3)(C)(ii) places a limitation on the amount of distributions in a taxable year that may be treated as ED, and the limitation is based in part on 150 percent of the taxpayer's average of distributions (three-year distribution average) made in the three taxable years preceding the taxable year of the potential ED. These proposed regulations provide that single entity principles generally apply to the computation of the three-year distribution average of a consolidated group or a corporation that has been a consolidated group member. That is, the only distributions taken into account are those made to non-member shareholders. However, in computing the three-year distribution average of a consolidated group that includes a member for less than the entire consolidated return year of a potential ED, the group takes into account only a pro rata portion of the actual distribution history of that member. Further, a corporation that deconsolidates from a group takes into account its actual history of non-intercompany distributions for purposes of applying the CERT rules in future separate return years. The corporation is not apportioned a pro rata share of the total distribution history of the group.

Additional rules apply with regard to computation of stock issuances and valuation of the group, which are intended to ensure that the rules in those areas are applied on a single entity basis. Specifically, the proposed regulations provide that, in applying section 172(h)(3)(E)(ii) to determine the offset of stock issuances against distributions, only stock that is issued to non-members is taken into account. Further, the proposed regulations provide that the value of the group, computed pursuant to section 172(h)(3)(C)(ii)(II), equals the value of the stock of all members other than stock that is owned directly or indirectly by another member.

F. Reverse Acquisitions

These proposed regulations address the application of the MSA rules to reverse acquisitions, as defined in § 1.1502–75(d)(3). The proposed regulations provide that, if a reverse acquisition occurs, the CERT rules will be applied by treating the acquirer in form as the target corporation, and treating the target in form as the acquiring corporation. They also provide special rules regarding the computation of the CERT costs in a reverse acquisition.

G. Life-Nonlife Groups

These proposed regulations provide rules for applying the CERT rules to a group that elects under section 1504(c)(2) to file a consolidated return (life-nonlife group). As with consolidated groups generally, the fungibility of money and the ease of moving cash and debt within a life-nonlife group may provide an unwarranted ability to manipulate the application of the CERT rules. Accordingly, these proposed regulations generally apply the CERT rules and the consolidated return CERT rules to a life-nonlife group on a single entity basis, and not on a subgroup basis. Under the proposed regulations, a single CERIL is computed with regard to any loss limitation year of a life-nonlife group, which includes all life-nonlife group members' CERT costs, debt, and interest paid or accrued for that year. However, for purposes of determining the CERIL of a life-nonlife group under section 172(h)(1) for any loss limitation year, the sum of the nonlife consolidated net operating loss (nonlife CNOL) (if any) and the life consolidated loss from operations (LO) (if any) for that year is treated as a notional ''NOL'' of the group. For this purpose, nonlife consolidated taxable income does not offset any LO, and consolidated partial life insurance company taxable income (as used in § 1.1502–47(g)) does not offset any nonlife CNOL.

If a CERIL exists for a loss limitation year of a life-nonlife group, that CERIL is allocated on a pro rata basis between the nonlife CNOL and the LO of the group, based on the relative sizes of the two attributes.

3. Specialized CNOL Carryback Rules

These proposed regulations provide rules regarding the apportionment of CNOLs that contain a component portion of special status loss, such as a CERIL or a specified liability loss. See section 172(h)(1) and (f)(1). Under these rules, a special status loss is apportioned to each group member, separately from the remainder of the CNOL, under the method provided in § 1.1502–21(b)(2)(iv). This apportionment occurs without separate entity inquiry into whether a particular member incurred the specific expenses or engaged in the particular activities required by the provisions governing the special status loss.

The proposed regulations also amend and expand the current election under § 1.1502–21(b)(3)(ii)(B), informally referred to as the ''split-waiver'' election. That election is currently available to any group that acquires one or more members from another group. By making the election, the acquiring group relinquishes, with respect to all CNOLs attributable to the newly-acquired corporation, the portion of the carryback period during which that corporation was a member of another group. The current rule does not allow a group to waive the portion of the carryback period for which a newly-acquired corporation was not a member of a consolidated group. The current election is a one-time election and must be made with the acquiring group's timely-filed original return for the year of the acquisition.

The proposed regulations amend the split waiver election to make the election available to any group that acquires a corporation, regardless of whether such corporation was acquired from another group. An election results in the waiver of the entire carryback period with regard to CNOLs allocable to the acquired corporation, not only the period during which the corporation was a member of another group. Further, any election that is made with regard to a newly-acquired member that had been a member of another group at the time of its acquisition must include all members acquired from the same group during the taxable year of the acquiring group.

In addition, the proposed regulations give the electing group a choice of making the one-time election or making the split-waiver election on an annual basis with regard to the CNOL of a particular consolidated return year. Any annual split-waiver election must be filed with the group's timely filed original return for the year of the CNOL. The one-time election and the annual split-waiver election that are available under proposed § 1.1502–21(b)(3)(ii)(B) apply generally with respect to losses attributable to the acquired corporation. These split-waiver elections are in addition to the one-time election available under the CERT rules to elect out of the general rule of apportionment for CERT costs and interest history to a deconsolidating member, which also results in the waiver of all carrybacks of losses allocable to the deconsolidating member to any prior taxable years. As a result, under these proposed regulations, corporations may have three, mutually exclusive, irrevocable elections to waive carryback of CNOLs to separate return years: An annual election, a one-time election, and a special CERT election.

Proposed Effective Date

Sections 1.172(h)–1 through 1.172(h)–5 and § 1.1502–72 (except § 1.1502–72(e)) are effective for CERTs occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**, except that they do not apply to any CERTs occurring pursuant to a written agreement that is binding prior to the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. The amendments to § 1.1502–21(b)(2) are effective for taxable years for which the due date of the original return (without extensions) is on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Section 1.1502–72(e) and the amendments to § 1.1502–21(b)(3) are effective for acquisitions or deconsolidations, as appropriate, occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**, except that they do not apply to any acquisition or deconsolidations, as appropriate, occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these proposed regulations will primarily affect C corporations and members of consolidated groups, which tend to be large corporations. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Department of Treasury and the IRS request comments on all aspects of the proposed regulations. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are Rebecca J. Holtje and Marie C. Milnes-Vasquez of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Department of Treasury and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Sections 1.172(h)–1 through –5 are also issued under 26 U.S.C. 172. * * *
Section 1.1502–21(b)(2)(iv)(C) is also issued under 26 U.S.C. 1502. * * *
Section 1.1502–72 is also issued under 26 U.S.C. 1502. * * *

Par. 2. Sections 1.172(h)–0 through 1.172(h)–5 are added to read as follows:

§ 1.172(h)–0 Table of Contents.

This section lists the paragraphs contained in §§ 1.172(h)–1 through 1.172(h)–5.

§ 1.172(h)–1 Existence of CERT and loss limitation years.

(a) *In general.* If there is a corporate equity reduction transaction (CERT) and an applicable corporation has a corporate equity reduction interest loss (CERIL) for any loss limitation year, section 172(b)(1)(E) and (h), this section, §§ 1.172(h)–2 through 1.172(h)–5, and § 1.1502–72 (collectively, the *CERT rules*) limit the amount of net operating loss that can be carried back to any taxable year preceding the taxable year in which the CERT occurs. This section provides rules regarding the determination of whether a CERT has occurred and whether a taxable year constitutes a loss limitation year. See § 1.172(h)–2 for rules regarding the computation of a CERIL.

(b) *Applicable corporation*—(1) *In general.* The CERT rules apply only to applicable corporations. The term *applicable corporation* means a C corporation that acquires stock, or the stock of which is acquired, in a major stock acquisition (MSA), a C corporation making distributions with respect to, or redeeming, its stock in connection with an excess distribution (ED), or a C corporation that is a successor of any corporation described in this paragraph (b)(1). For special rules regarding the definition of an applicable corporation with regard to members that join and leave a consolidated group, see § 1.1502–72(a) and (b).

(2) *Predecessor and successor.* For purposes of the CERT rules, the term *predecessor* means a transferor or distributor of assets to a transferee or distributee (the successor) in a transaction to which section 381(a) applies. A corporation is a successor to its predecessor, and to all predecessors of that predecessor. If an applicable corporation transfers or distributes its assets to a successor, the successor is treated as an applicable corporation in the successor's taxable year during which the transfer or distribution occurs and any subsequent years.

(c) *CERT defined*—(1) *In general.* A CERT can be an MSA or an ED.

(2) *MSA defined.* An *MSA* is the acquisition by a corporation pursuant to a plan of such corporation (or any group of persons acting in concert with such corporation) of stock in another corporation representing 50 percent or more (by vote or value) of the stock in such other corporation.

(3) *ED defined.* An *ED* is any excess of the aggregate distributions made during a taxable year by a corporation with respect to its stock, over the greater of—

(i) 150 percent of the average of such distributions (the three-year distribution average) during the three taxable years immediately preceding such taxable year (the distribution lookback period); or

(ii) 10 percent of the fair market value of the stock of such corporation as of the beginning of such taxable year. For purposes of testing a potential ED, distributions include redemptions.

(d) *Transactions tested as CERTs*—(1) *Tax-free transactions.* A transaction may constitute a CERT and must be tested under the CERT rules regardless of whether gain or loss is recognized by any party. For example, a distribution that qualifies for tax-free treatment under section 355 is tested as a potential ED (or part of a potential ED). Likewise, the acquisition by a corporation of 50 percent or more of the stock of another corporation in a transaction meeting the requirements of section 351, section 368(a)(1)(A) and (a)(2)(E), or section 368(a)(1)(B) constitutes an MSA.

(2) *Multiple step plan of acquisition.* Solely for purposes of determining whether an MSA has occurred and determining the consequences of an MSA, all steps of an integrated plan (including redemptions and other distributions) are tested as a single potential MSA. If an integrated plan qualifies as an MSA and includes one or more distributions, then, for purposes of applying the CERT rules, the distributions are treated solely as a part of the MSA, regardless of whether such distributions would otherwise constitute an ED (or would so qualify in conjunction with other distributions). Any distributions during the year that are not part of the integrated plan qualifying as an MSA are tested as a potential ED.

(3) *Examples.* The following examples illustrate the rules of this paragraph (d). For purposes of these examples, unless otherwise stated, assume that all entities are domestic C corporations that do not join in the filing of a consolidated return and that the entities have no history of paying dividends or otherwise making distributions:

Example 1. Spin-off. Distributing corporation (D) distributes stock of controlled corporation (C) to its shareholders in a transaction that satisfies the requirements of section 355. There is no taxable ''boot'' associated with the distribution. Pursuant to paragraph (d)(1) of this section, D's distribution of C stock is tested as a potential ED (in conjunction with any other distributions by D during the same taxable year). The same result would obtain if D distributes boot to its shareholders in addition to C stock.

Example 2. Bootstrap acquisition. (i) *Facts.* T is a publicly-traded, widely-held corporation with a single class of stock outstanding with a fair market value of $100. The following steps occur as part of an integrated plan. Corporation A acquires 10 percent of the outstanding stock of T for $10. A forms a new corporation, S, with a contribution of $25. S obtains a loan of $65 from an unrelated lender, and then merges with and into T, with T surviving. In the merger, all shareholders of T except A receive cash in exchange for their shares, and as a consequence, A owns all of the outstanding stock of T. As a result of the merger, T becomes liable for S's $65 loan. Assume that the $90 cash payment from T to the T shareholders should be treated as a redemption to the extent of the $65 loan assumed by T, and as a stock acquisition by A to the extent of the remaining $25.

(ii) *Analysis.* A's direct acquisition of 10 percent of T's outstanding stock and the steps culminating with the merger are part of an integrated plan. Therefore, the multiple steps are tested together as a potential MSA. Because the steps of the integrated plan resulted in A's acquisition of 100 percent of T, the transaction is treated as a single MSA. Furthermore, because the $65 redemption is part of an MSA, it is treated solely as part of the MSA and is not tested as a potential ED. See paragraph (d)(2) of this section.

(e) *Loss limitation years.* The taxable year in which a CERT occurs and each of the two succeeding taxable years constitute loss limitation years with regard to the CERT. See § 1.172(h)–4(b) (addressing loss limitation years of successors) and § 1.1502–72(a)(3) (addressing loss limitation years of consolidated groups and former members of consolidated groups).

(f) *Computation of three-year distribution average relevant to a potential ED*—(1) *Integrated plan.* Section 172(h)(3)(C)(ii)(I) and paragraph (c)(3) of this section treat as an ED the excess of distributions in a taxable year over the taxpayer's average distributions (three-year distribution average) made in the three taxable years preceding the taxable year in which a potential ED occurs (distribution lookback period). The computation of a taxpayer's three-year distribution average under this paragraph (f) excludes any distribution during the distribution lookback period that is treated as part of an integrated plan qualifying as an MSA pursuant to paragraph (d)(2) of this section. See § 1.1502–72(f)(2) and (3) for rules relating to distributions (including intercompany distributions) made during a consolidated return year.

(2) *Short taxable year.* For purposes of computing the three-year distribution average under this paragraph (f), if the year of the potential ED is less than a full 12-month year, the distribution history with regard to any year of the taxpayer during a distribution lookback period (distribution lookback period year) equals the amount of distributions made during the distribution lookback period year multiplied by a fraction, the numerator of which equals the number of days in the short taxable year of the potential ED, and the denominator of which equals the number of days in the distribution lookback period year. The value of the fraction may not exceed 100 percent. No distributions are deemed made (in excess of amounts actually distributed) in a distribution lookback period year that is shorter than the year of the potential ED.

(g) *Effective/applicability date.* This section is applicable to CERTs occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. This section is also applicable to the deconsolidation of a member from, or the acquisition of a corporation by, a consolidated group that occurs on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. However, in each case, this section does not apply to any CERT, deconsolidation, or acquisition occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

§ 1.172(h)–2 Computation of a CERIL.

(a) *In general*—(1) *Scope.* The portion of a net operating loss (NOL) that is treated as a corporate equity reduction interest loss (CERIL) (as defined in paragraph (a)(2) of this section) cannot be carried back to a taxable year preceding the taxable year in which the corporate equity reduction transaction (CERT) occurs. This section provides rules for computing allocable interest deductions necessary to compute a CERIL for purposes of applying section 172(b)(1)(E) and (h), §§ 1.172(h)–1 through 1.172(h)–5, and § 1.1502–72 (the CERT rules).

(2) *CERIL defined.* A *CERIL* means, with respect to any loss limitation year, the excess (if any) of the NOL for such taxable year over the NOL for such taxable year determined without regard

to any allocable interest deductions otherwise taken into account in computing such loss.

(b) *Computation of allocable interest deductions*—(1) *In general. Allocable interest deductions* are deductions allowed for interest on the portion of indebtedness allocable to a CERT. Except as provided in section 172(h)(2)(E) (relating to adjustments for certain unforeseeable events), indebtedness is allocated to a CERT in the manner prescribed in section 263A(f)(2)(A), without regard to clause (i) thereof (relating to traced debt). Generally, interest deductions are allocable to a CERT if the interest expense could have been avoided if the CERT had not been undertaken (for example, if the amount of CERT costs (as defined in paragraph (b)(3)) had instead been used to pay down debt). See section 263A(f)(2)(A)(ii) and § 1.263A–9(a)(1). For purposes of applying the avoided cost rules of section 263A(f)(2)(A)(ii), all CERT costs are treated as if they were cash expenditures.

(2) *Operating rules.* This section provides a method for identifying the pool of costs to be treated as arising from a CERT (CERT costs). The interest allocable to those CERT costs is then computed under the principles of the avoided cost rules under section 263A(f)(2)(A) (without regard to paragraph (i) thereof) and the regulations thereunder, but substituting ''CERT costs'' or ''accumulated CERT costs'' (as defined in paragraph (b)(4)) for ''production expenditures'' or ''accumulated production expenditures,'' where those terms appear. In addition, for purposes of applying the avoided cost rules to compute interest allocable to a CERT, the ''production period'' is treated as beginning on the first date of the taxable year in which the CERT occurs (year of the CERT) on which there are accumulated CERT costs. Because the principles of section 263A(f)(2)(A)(i) are inapplicable to CERT computations, the principles of § 1.263A–9(b) (relating to traced debt) are also inapplicable. Instead, accumulated CERT costs are treated in their entirety as expenditures allocable to non-traced debt as that term is defined under § 1.263A–9(c)(5), and interest allocable to a CERT is calculated without tracing debt under the provisions of § 1.263A–9(d)(1). Limitations apply to the amount of interest allocable to a CERT. See, for example, section 172(h)(2)(C)(ii) and § 1.172(h)–3 (generally relating to three-year average interest history).

(3) *CERT costs defined*—(i) *Major stock acquisition.* CERT costs with regard to a major stock acquisition (MSA) include the fair market value of the stock acquired, whether that stock is acquired in exchange for cash, for stock of the acquirer, or for other property. In addition, CERT costs include the fair market value of any distributions to shareholders that are treated as part of the MSA under § 1.172(h)–1(d)(2). CERT costs also include the sum of amounts paid or incurred to facilitate any step of the MSA to the extent that those amounts are required to be capitalized under section 263(a), and any amounts disallowed under section 162(k). See also § 1.1502–72(a)(4) for additional rules regarding CERT costs in the case of a reverse acquisition.

(ii) *Excess distribution.* CERT costs with regard to an excess distribution (ED) include the fair market value of any distributions to shareholders during the year of the CERT. CERT costs also include the sum of amounts paid or incurred to facilitate the distributions to the extent that those amounts are required to be capitalized under section 263(a), and any amounts disallowed under section 162(k). To the extent that neither section 263(a) nor section 162(k) applies or if only section 162(k) applies to a distribution included in an ED, additional CERT costs associated with the distribution are determined under the principles of § 1.263(a)–4(e) (relating to the capitalization of certain costs incurred to acquire or create intangibles), applied as if the distribution were a transaction within the scope of § 1.263(a)–4.

(iii) *Borrowing costs included in CERT costs.* For purposes of identifying CERT costs with regard to an MSA or ED under this paragraph (b)(3), the determination of whether costs facilitate an MSA or ED is made without regard to §§ 1.263(a)–5(c)(1) and 1.263(a)–4(e)(1)(iv) (excluding borrowing costs). Therefore, certain costs of debt financing are included in CERT costs.

(4) *Accumulated CERT costs*—(i) *Major stock acquisition.* Except as otherwise provided in this paragraph (b)(4), accumulated CERT costs with regard to an MSA as of a particular date are the total CERT costs described in paragraph (b)(3) of this section that have been taken into account as of that date under the applicable corporation's method of accounting. For example, CERT costs incurred in the taxable year after the year of the CERT are not included in accumulated CERT costs in the year of the CERT, but are included in accumulated CERT costs during the taxable year in which they are incurred and in any succeeding loss limitation year. Similarly, CERT costs include costs incurred after the date on which a CERT occurs if the CERT consists of multiple steps. See § 1.172(h)–5(a).

(ii) *Excess distribution.* Except as provided otherwise in this paragraph (b)(4), accumulated CERT costs as of a particular date with regard to an ED are the total CERT costs described in paragraph (b)(3) of this section that have been taken into account as of that date under the applicable corporation's method of accounting, multiplied by a fraction, the numerator of which equals the amount of distributions constituting an ED during the year of the CERT pursuant to § 1.172(h)–1(c)(3), and the denominator of which equals the total amount of distributions made during the year of the CERT. CERT costs include costs incurred after date on which a CERT occurs if the CERT consists of multiple steps. See § 1.172(h)–5(a).

(iii) *CERT costs incurred in a year prior to a CERT year.* CERT costs incurred in a year prior to the year of the CERT are treated as incurred on the first day of the year of the CERT.

(iv) *Year constitutes loss limitation year with regard to multiple CERTs.* If a single taxable year constitutes a loss limitation year with regard to more than one CERT, the accumulated CERT costs on any particular date during that year include accumulated CERT costs under this paragraph (b)(4) with regard to all such CERTs. See § 1.172(h)–3(d) for rules regarding computation of a CERIL if a year constitutes a loss limitation year with regard to multiple CERTs.

(5) *No netting of interest income and deductions.* Allocable interest deductions under paragraph (b)(1) of this section are the deductions allowed for interest on any indebtedness allocable to a CERT. Allocable interest deductions are not netted against a taxpayer's interest income.

(6) *Certain unforeseeable events.* [Reserved].

(7) *Examples.* The following examples illustrate the rules of this paragraph (b). Unless otherwise provided, assume that all entities are domestic C corporations that do not join in the filing of consolidated returns and are accrual method taxpayers. Assume that all applicable corporations have substantial NOLs in their loss limitation years:

Example 1. CERT costs in MSA. (i) *Facts.* On February 1, Year 5, Corporation A begins investigating the possible acquisition of Corporation T. On March 1, Year 5, A enters into an exclusivity agreement with T. On July 1, Year 5, A engages in an MSA when it acquires all of the stock of T in exchange for cash. A incurs costs for services rendered by its outside counsel and an investment banker. A's outside counsel and the investment banker conduct due diligence on T, determine the value of T, negotiate and structure the transaction with T, draft the purchase agreement, secure shareholder approval, and prepare SEC filings. In addition, the investment banker arranges borrowings to fund both the stock acquisition and A's operations. A also pays a bonus to one of its corporate officers, who negotiated the acquisition of T. Before and after the acquisition is consummated, A incurs costs to relocate personnel and equipment, and to integrate records and information systems.

(ii) *Analysis.* The CERT costs taken into account by A in computing interest allocable to the CERT include the fair market value of the T stock. See paragraph (b)(3)(i) of this section. The costs incurred on or after the date of the exclusivity agreement, March 1, Year 5, (but not before) to conduct due diligence are also included in A's CERT costs. See paragraph (b)(3)(i) of this section and § 1.263(a)–5(e)(1). A's CERT costs also include all amounts incurred to determine the value of T, negotiate and structure the transaction with T, draft the purchase agreement, secure shareholder approval, and prepare SEC filings. See § 1.263(a)–5(e)(2). In addition, A's CERT costs include borrowing costs that facilitate the CERT. See paragraph (b)(3)(iii) of this section. A's CERT costs do not include any portion of the bonus paid to the corporate officer or the costs incurred to relocate personnel and equipment, and to integrate records and information systems. See § 1.263(a)–5(c)(6) and (d).

Example 2. CERT costs in ED. (i) *Facts.* X corporation is a calendar-year taxpayer. On July 1, Year 5, X makes a distribution of $80,000 to its shareholders, $60,000 of which constitutes an ED. X makes no other distributions during Year 5. At previous regular quarterly board of directors meetings, the directors discussed the July 1, Year 5 distribution. On March 30, Year 5, X incurs $2,500 in borrowing costs that constitute CERT costs under paragraph (b)(3)(iii) of this section. In addition, on March 30 and April 15, Year 5, X incurs $500 and $3,000, respectively, for work performed by its outside counsel which facilitates the ED under the principles of § 1.263(a)–4(e). During Year 5, X pays its directors for attendance at the regular quarterly board of directors meetings. No additional CERT costs are incurred in Years 6 and 7.

(ii) *CERT costs.* X's CERT costs include the fair market value of all distributions made during the year of the CERT ($80,000), as well as the $2,500 of borrowing costs. See paragraph (b)(3)(ii) and (iii) of this section. In addition, under the principles of section § 1.263(a)–4(e), X's CERT costs include the costs incurred for work performed by A's outside counsel related to the ED. See paragraph (b)(3)(ii) of this section and § 1.263(a)–4(e)(1)(i). X's CERT costs do not include amounts paid to X's board of directors to attend the regular board of directors meetings. See § 1.263(a)–4(e)(4)(ii)(B).

(iii) *Accumulated CERT costs.* Under paragraph (b)(4)(ii) of this section, X's accumulated CERT costs as of a particular date with regard to its ED are the total CERT costs that have been taken into account as of that date multiplied by a fraction the numerator of which equals the amount of distributions constituting ED during the year of the CERT, and the denominator of which equals the total amount of distributions made during the year of the CERT. Here $60,000 is divided by $80,000, which equals ¾. The CERT occurs during X's Year 5, and that year is a loss limitation year with regard to the CERT. X's accumulated CERT costs on March 30, Year 5 are $2,250 (3,000 x ¾). X's accumulated CERT costs are $4,500 (6,000 × ¾) on April 15, Year 5 and $64,500 (86,000 × ¾) on July 1, Year 5. X's Years 6 and 7 are also loss limitation years. Because no additional CERT costs are incurred in Years 6 and 7, throughout those years, X's accumulated CERT costs are $64,500.

Example 3. Accumulated CERT costs in an MSA. (i) *All CERT costs incurred in year of CERT.* X corporation is a calendar-year taxpayer. On March 1, Year 5, X acquires all of the stock of unrelated corporation T in an MSA. X's loss limitation years are calendar Years 5, 6, and 7. During Year 5, X incurs the following CERT costs: $4,000 on January 30; $50,000 on March 1; and $9,000 on March 15. During Year 5, X's accumulated CERT costs are: $4,000 as of January 30; $54,000 as of March 1; and $63,000 as of March 15. See paragraph (b)(4)(i) of this section. No additional CERT costs are incurred in Years 6 and 7. As a result, throughout Years 6 and 7, X's accumulated CERT costs are $63,000.

(ii) *Portion of CERT costs incurred prior to year of CERT.* The facts are the same as in paragraph (i) of this *Example 3,* except during Year 4, X incurs $2,000 of CERT costs. During Year 5, X's accumulated CERT costs are: $2,000 as of January 1 (reflecting costs incurred during Year 4); $6,000 as of January 30; $56,000 as of March 1; and $65,000 as of March 15. See paragraph (b)(4)(i) and (iii) of this section. X is treated as having no accumulated CERT costs during Year 4.

(c) *Effective/applicability date.* This section is applicable to CERTs occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. This section is also applicable to the deconsolidation of a member from, or the acquisition of a corporation by, a consolidated group that occurs on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. However, in each case, this section does not apply to any CERT, deconsolidation, or acquisition occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

§ 1.172(h)–3 Limitation on allocable interest deductions.

(a) *General rule.* The amount of allocable interest deductions (determined under § 1.172(h)–2(b)) for any loss limitation year is limited to the excess (if any) of the amount allowable as a deduction for interest paid or accrued by the taxpayer during the loss limitation year, over the average of interest paid or accrued by the taxpayer (the three-year average) for the three taxable years preceding the taxable year in which the corporate equity reduction transaction (CERT) occurred (the lookback period). This section provides additional rules for computing the three-year average relevant to any loss limitation year for purposes of applying section 172(b)(1)(E) and (h), §§ 1.172(h)–1 through 1.172(h)–5, and § 1.1502–72 (the CERT rules*).*

(b) *Three-year average for a short loss limitation year*—(1) *General rule.* For purposes of computing the three-year average if the relevant loss limitation year is less than a full 12-month year, the interest paid or accrued with regard to any year of the taxpayer during a lookback period (lookback period year) equals the amount of interest treated as paid or accrued multiplied by a fraction, the numerator of which equals the number of days in the short loss limitation year, and the denominator of which equals the number of days in the lookback period year. The value of the fraction may not exceed 100 percent. Zero interest is deemed paid or accrued (in excess of amounts actually paid or accrued) in a lookback period year that is shorter than the loss limitation year.

(2) *Example.* The following example illustrates the short loss limitation year rule of this paragraph (b):

Example. (i) *Facts.* T, a domestic C corporation, was organized on July 1, Year 1. T's first taxable year is a short taxable year, which includes July 1 through December 31, Year 1 (184 days). T's next two taxable years are full calendar years: Calendar Year 2 and Calendar Year 3. T's Year 4 ends on September 30 as a result of a change in accounting period. T engages in a CERT during its taxable Year 4, which includes January 1, Year 4, through September 30, Year 4 (273 days). T's next two taxable periods are full 12-month fiscal years ending on September 30, Year 5, and September 30, Year 6.

(ii) *Year 4 analysis.* T's taxable Year 4 is a short loss limitation year. Therefore, in computing its three-year average applicable to loss limitation Year 4, T multiplies its interest treated as paid or accrued during each of the three years of the lookback period by the fraction specified in paragraph (b)(1) of this section. The pertinent fraction with regard to Year 1 of the lookback period is 273/184 (number of days in short loss limitation year divided by the number of days in the lookback period year). However, under paragraph (b)(1) of this section, the value of the fraction cannot exceed 100 percent. As a result, T includes in the computation of its three-year average its actual interest paid or accrued in Year 1. As to Years 2 and 3, T includes in the computation of its three-year average its actual interest paid or accrued in each of those years, multiplied by a fraction equal to 273/365.

(iii) *Year 5 and 6 analysis.* Because T's taxable Years 5 and 6 are full 12-month loss limitation years, T includes in the computation of its three-year average applicable to those loss limitation years its actual interest paid or accrued in each year of the lookback period, without adjustment.

(c) *Computation of interest paid or accrued by corporation with incomplete lookback period*—(1) *Lookback period for corporation not in existence.* If an applicable corporation was not in existence for three taxable years preceding the taxable year in which the CERT occurred (the lookback period), for purposes of determining the limitation on allocable interest deductions under section 172(h)(2)(C) and paragraph (a) of this section, the applicable corporation's lookback period is deemed to have additional 12-month periods that end on the calendar date that is one day prior to the date of the corporation's organization. See § 1.172(h)–4(c)(2)(i)(B) (regarding determination of lookback period for successor applicable corporations not in existence on date of CERT) and § 1.1502–72(d)(4)(ii) (regarding consolidated groups not in existence during the entire lookback period).

(2) *Interest history of corporation not in existence.* If an applicable corporation was not in existence for the entire lookback period, it is treated as having paid or accrued zero interest during periods deemed to exist under paragraph (c)(1) of this section in computing any three-year average. However, if the applicable corporation is a successor corporation pursuant to § 1.172(h)–1(b)(2), the computation of any three-year average for the successor includes interest paid or accrued by any predecessor during the lookback period. See § 1.172(h)–4(c)(2)(ii)(A).

(3) *Example.* The following example illustrates the rules of this paragraph (c):

Example. Corporation not in existence for entire lookback period. C is a domestic C corporation that does not join in the filing of a consolidated return and maintains a calendar taxable year. C is formed on October 1, Year 3, and engages in a CERT during Year 5. For purposes of computing any CERIL related to the CERT, paragraph (a) of this section requires that C must measure its interest deductions for the lookback period. However, C was not in existence for three taxable years preceding the year in which the CERT occurred. Rather, C was in existence for one full calendar taxable year (Year 4) and one short taxable year (October 1 through December 31, Year 3). Pursuant to paragraph (c)(1) of this section, C's lookback period is deemed to include an additional taxable period (October 1, Year 2, through September 30, Year 3). Further, in computing any three-year average, C is treated as having paid or accrued zero interest during the deemed additional period. See paragraph (c)(2) of this section.

(d) *Computation of a CERIL if single year constitutes loss limitation year with regard to multiple CERTs*—(1) *Single CERIL computation.* This paragraph (d) applies if a taxable year constitutes a loss limitation year of the taxpayer with regard to more than one CERT. In that case, a single corporate equity reduction interest loss (CERIL) is computed under section 172(h)(1) and § 1.172(h)–2(a)(2) for that year. This computation takes into account accumulated CERT costs for every CERT, determined under § 1.172(h)–2(b)(4)(iv) for the loss limitation year.

(2) *Limitation on allocable interest deductions.* In computing the single CERIL under this paragraph (d), section 172(h)(2)(C) and paragraph (a) of this section are applied a single time to limit the cumulative amount of interest allocable to all of the CERTs to the excess (if any) of the amount allowable as a deduction for interest paid or accrued by the taxpayer during the loss limitation year over the three-year average for the lookback period. The limitation is not applied separately with respect to interest allocable to a particular CERT.

(3) *Computation of three-year average if CERTs have different lookback periods*—(i) *In general.* If the lookback periods (as defined in paragraph (a) of this section or in § 1.1502–72(d)(4)) relevant to all of the CERTs pertinent to a loss limitation year are not identical, a cumulative three-year average is computed by applying the rules of paragraph (d)(3)(ii) of this section. The cumulative three-year average is treated as the three-year average relevant to the loss limitation year, and is applied to determine the limitation on the amount of interest allocable to all of the CERTs under section 172(h)(2)(C) and paragraph (a) of this section.

(ii) *Cumulative three-year average.* The cumulative three-year average applicable to any loss limitation year is computed under this paragraph (d)(3)(ii). With regard to each lookback period relevant to a loss limitation year, a modified three-year average is computed. The modified three-year average is the three-year average relevant to a particular lookback period (determined under section 172(h)(2)(C) and this section) multiplied by a fraction, the numerator of which equals the accumulated CERT costs as of the close of the loss limitation year that are attributable to the particular CERT or CERTs to which the three-year average corresponds, and the denominator of which equals the total accumulated CERT costs as of the close of the loss limitation year that are attributable to all CERTs relevant to the loss limitation year. See § 1.172(h)–2(b)(4) defining accumulated CERT costs. The sum of all modified three-year averages is the cumulative three-year average for that year.

(4) *Allocation of a CERIL among CERTS.* After the computation of the single CERIL for a loss limitation year that is attributable to all CERTs, the total CERIL is allocated to particular CERTs, if CERILs attributable to different CERTs are subject to different limitations on carryback. See section 172(b)(1)(E)(i) and § 1.172(h)–5(b) (regarding prohibition on carrybacks). For purposes of this allocation, the CERT costs attributable to each particular CERT are identified. The total CERIL is then attributed to each CERT by multiplying the total CERIL by a fraction, the numerator of which equals the accumulated CERT costs as of the close of the loss limitation year that are attributable to a particular CERT, and the denominator of which equals the total accumulated CERT costs as of the close of the loss limitation year that are attributable to all CERTs relevant to the loss limitation year. See § 1.172(h)–2(b)(4) defining accumulated CERT costs.

(5) *Examples.* The following examples illustrate the rules of this paragraph (d). Unless otherwise provided, assume that all entities are domestic C corporations that do not join in the filing of consolidated returns and that maintain calendar taxable years. Assume that all applicable corporations have substantial net operating losses in their loss limitation years:

Example 1. Multiple CERTs with identical lookback period. (i) *Facts.* Corporation A maintains a calendar taxable year. A engages in two separate CERTs during its taxable Year 4. The lookback period for both CERTs is January 1, Year 1, through December 31, Year 3. The total amount of interest deductions allocable to CERT 1 and CERT 2 (before application of section 172(h)(2)(C) and paragraph (a) of this section) is $50. A's total interest expense during Year 4 was $150, and its three-year average interest for the lookback period was $120.

(ii) *Analysis.* Year 4 constitutes a loss limitation year with regard to both CERT 1 and CERT 2. A single CERIL is computed with regard to Year 4, and the limitation on allocable interest under section 172(h)(2)(C) and paragraph (a) of this section is applied a single time. See paragraphs (d)(1) and (2) of this section. The limitation under section 172(h)(2)(C) and paragraph (a) of this section is applied to the cumulative amount of interest allocable to the two CERTs ($50). See paragraph (d)(2) of this section. The limitation under section 172(h)(2)(C) and paragraph (a) of this section equals the excess of the amount of interest allowable in Year 4 ($150) over the three-year average ($120), or $30. Therefore, the CERIL is limited to $30.

Example 2. Multiple CERTs with different lookback periods. (i) *Facts.* Corporation A maintains a calendar taxable year. A engages in CERT 1 during its taxable Year 4. The lookback period relevant to CERT 1 is January 1, Year 1, through December 31, Year 3. A also engages in CERT 2 during its taxable Year 5. The lookback period relevant to CERT 2 is January 1, Year 2, through December 31, Year 4. The total amount of interest deductions allocable to CERT 1 and CERT 2 (before application of section 172(h)(2)(C) and paragraph (a) of this section) during taxable Year 5 is $50. A's total interest expense during Year 5 is $126. A's three-year average interest that is relevant to loss limitation Year 5 for the CERT 1 lookback period is $100, and its three-year average interest that is relevant to loss limitation Year 5 for the CERT 2 lookback period is $110. A's accumulated CERT costs attributable to CERT 1 are $400. A's accumulated CERT costs attributable to CERT 2 are $600.

(ii) *Cumulative three-year average.* Year 5 is a loss limitation year with regard to both CERT 1 and CERT 2. A single CERIL is computed with regard to Year 5, and the limitation on allocable interest under section 172(h)(2)(C) and paragraph (a) of this section is applied a single time. See paragraph (d)(1) and (2) of this section. The limitation under section 172(h)(2)(C) and paragraph (a) of this section is applied to the cumulative amount of interest allocable to the two CERTs ($50). See paragraph (d)(2) of this section. Because Year 5 constitutes a loss limitation year with regard to CERTs with different lookback periods, the relevant three-year average applied under section 172(h)(2)(C) and paragraph (a) of this section is the cumulative three-year average, which is the sum of all modified three-year averages. See paragraph (d)(3)(ii) of this section. The modified three-year average with regard to CERT 1 is the three-year average for CERT 1 multiplied by $400/$1,000 (accumulated CERT costs attributable to CERT 1 divided by the total accumulated CERT costs attributable to CERTs 1 and 2), or ⅖. Therefore, the modified three-year average with regard to CERT 1 is $40 ($100 \times ⅖$). The modified three-year average with regard to CERT 2 is the three-year average for CERT 2 multiplied by $600/$1,000 (accumulated CERT costs attributable to CERT 2 divided by the total accumulated CERT costs attributable to CERTs 1 and 2), or ⅗. Therefore, the modified three-year average with regard to CERT 2 is $66 ($110 \times ⅗$). Thus, the cumulative three-year average interest for Year 5 is $106 ($40 + $66). See paragraph (d)(3) of this section. The limitation under section 172(h)(2)(C) and paragraph (a) of this section equals the excess of the amount of interest allowable in Year 5 ($126) over the cumulative three-year average interest ($106), or $20. Therefore, the CERIL for Year 5 is limited to $20.

(iii) *Allocation of a CERIL to different CERTs.* Because Year 5 constitutes a loss limitation year with regard to more than one CERT, and a CERIL associated with each CERT is subject to different limitations on carryback, the total CERIL must be allocated between CERT 1 and CERT 2. See paragraph (d)(4) of this section. The portion of the total CERIL allocated to CERT 1 is the total CERIL multiplied by $400/$1,000 (accumulated CERT costs attributable to CERT 1 divided by the total accumulated CERT costs attributable to CERTs 1 and 2), or ⅖. Therefore, the portion of the total CERIL allocated to CERT 1 is $8 ($20 \times ⅖$). The portion of the total CERIL allocated to CERT 2 is the total CERIL multiplied by $600/$1,000 (accumulated CERT costs attributable to CERT 2 divided by the total accumulated CERT costs attributable to CERTs 1 and 2), or ⅗. Therefore, the portion of the total CERIL allocated to CERT 2 is $12 ($20 \times ⅗$). See paragraph (d)(4) of this section. See also section 172(b)(1)(E)(i) and § 1.172(h)–5(b)(1) for rules regarding the prohibition on carryback of a CERIL.

Example 3. CERTs of multiple corporations with identical lookback period. (i) *Facts.* Corporation T maintains a taxable year ending on June 30. On August 31, Year 5, T engages in CERT 1. Unrelated P is the parent of a group that maintains a calendar taxable year. On October 31, Year 5, P acquires all the stock of T in an MSA (CERT 2). T is first included in the P group on November 1, Year 5. For its calendar Year 5, the P group is treated as an applicable corporation with respect to CERT 1 and CERT 2. See § 1.1502–72(a)(2)(iv)(A). The P group's lookback period for both CERTs is January 1, Year 2, through December 31, Year 4. The total CERIL of the group in Year 5 is $80. The P group's accumulated CERT costs attributable to CERT 1 are $500. The P group's accumulated CERT costs attributable to CERT 2 are $1,500. The P group has a consolidated net operating loss (CNOL) in Year 5, a portion of which is allocable to T under § 1.1502–21(b)(2)(iv)(B).

(ii) *Allocation of a CERIL to different CERTs.* Year 5 constitutes a loss limitation year with regard to two CERTs that share a common lookback period. However, the CERIL associated with the different CERTs is subject to different limitations on carryback under § 1.172(h)–5(b)(1) (some CNOL will be carried back to the group's consolidated return years and some will be carried back to T's separate return years). Therefore, the total CERIL must be allocated between CERT 1 and CERT 2. The portion of the total CERIL allocated to CERT 1 is the total CERIL multiplied by $500/$2,000 (accumulated CERT costs attributable to CERT 1 divided by the total accumulated CERT costs attributable to CERTs 1 and 2), or ¼. See paragraph (d)(4) of this section. Therefore, the portion of the total CERIL allocated to CERT 1 is $20 ($80 \times ¼$). The portion of the total CERIL allocated to CERT 2 is the total CERIL multiplied by $1,500/$2,000 (accumulated CERT costs attributable to CERT 2 divided by the total accumulated CERT costs attributable to CERTs 1 and 2), or ¾. Therefore, the portion of the total CERIL allocated to CERT 2 is $60 ($80 \times ¾$).

(e) *Effective/applicability date.* This section is applicable to CERTs occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. This section is also applicable to the deconsolidation of a member from, or the acquisition of a corporation by, a consolidated group that occurs on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. However, in each case, this section does not apply to any CERT, deconsolidation, or acquisition occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

§ 1.172(h)–4 Special rules for predecessors and successors.

(a) *Scope.* This section provides guidance with regard to the application of section 172(b)(1)(E) and (h), §§ 1.172(h)–1 through 1.172(h)–5, and § 1.1502–72 (the CERT rules) to predecessors and successors (as defined in § 1.172(h)–1(b)(2)).

(b) *Loss limitation years*—(1) *In general.* This paragraph (b)(1) applies to identify loss limitation years of a successor. The taxable year in which a corporate equity reduction transaction (CERT) actually occurs is a loss limitation year. See § 1.172(h)–1(e). Any taxable year of a successor (potential loss limitation year) of any applicable corporation is a loss limitation year with regard to the CERT if, under the carryover rules of sections 172(b)(1)(A)(ii) and 381(c)(1), the potential loss limitation year constitutes the first or second taxable year following the taxable year of the corporation that actually engaged in the CERT which includes the date on which the CERT occurred. See § 1.172(h)–5(a) (defining date on which CERT occurs in multiple-step transaction); but see § 1.1502–72(a)(3) (defining loss limitation years of consolidated groups and corporations that were previously members of a consolidated group).

(2) *Example.* The following example illustrates the rules of this paragraph (b):

Example. Loss limitation years of successor. T is a domestic C corporation that maintains a calendar taxable year and does not join in the filing of a consolidated return. On March 31, Year 6, T engages in a CERT. On June 30, Year 6, T merges into Corporation A, a calendar-year taxpayer, in a transaction to which section 381(a) applies. T's taxable Year 6 ends on the date of the merger, and A succeeds to T's tax attributes. See section 381(a) and (b)(1). T's only loss limitation year with respect to the Year 6 CERT is its short taxable year ending June 30, Year 6. See section 172(b)(1)(E)(ii) and § 1.172(h)–1(e). Following the merger, A is the successor to T, and A is treated as an applicable corporation with regard to the

Year 6 CERT. See § 1.172(h)–1(b)(2). A's calendar Years 6 and 7 are the second and third loss limitation years with regard to the Year 6 CERT. See section 172(b)(1)(E)(ii) and paragraph (b)(1) of this section.

(c) *Computation of a CERIL*—(1) *CERT costs.* For purposes of computing any corporate equity reduction interest loss (CERIL) under section 172(h)(1) and § 1.172(h)–2(a)(2), any CERT costs incurred (or treated as incurred under this paragraph (c)) by a predecessor are attributed to the successor. However, such costs are treated as having been incurred by the successor only for purposes of applying the avoided cost rules of section 263A(f)(2)(A) to any measurement date (as defined in § 1.263A–9(f)(2)) after the date of the section 381(a) transaction.

(2) *Limitation on allocable interest deductions*—(i) *Lookback period*—(A) *In general.* The *lookback period* with regard to a CERT is the three taxable years preceding the taxable year in which the CERT occurs. See § 1.172(h)–3(a). The lookback period that is relevant to the calculation of any CERIL of a successor (successor's lookback period) is the three years preceding the taxable year of the successor that includes the date on which the CERT occurred. See §§ 1.172(h)–5(a) (defining the date on which a CERT occurs if the CERT consists of multiple steps) and § 1.172(h)–3(c) (regarding corporations with insufficient lookback periods).

(B) *Successor not in existence on date of CERT.* If a successor was not in existence on the date on which the CERT occurred, for purposes of determining the lookback period, the successor is deemed to have additional 12-month periods that end on the calendar date that is one day prior to the date of the corporation's organization. The successor is deemed to have a sufficient number of such additional periods such that the successor is treated as having a year that includes the date on which the CERT occurred and as having three years (the lookback period) immediately preceding the deemed year that includes the date of the CERT. See § 1.172(h)–3(c)(1) regarding lookback period for corporation lacking three-year history.

(ii) *Computation of three-year average*—(A) *In general.* Except as otherwise provided in this paragraph (c)(2)(ii), for purposes of determining any three-year average of a successor under section 172(h)(2)(C)(ii) and § 1.172(h)–3, the interest paid or accrued by a successor includes interest paid or accrued by all corporations that are its predecessors as of the end of the successor's taxable year. If the dates of any taxable year of a predecessor do not precisely correspond to the dates of a taxable year of the successor, the interest paid or accrued by the predecessor is apportioned equally to each date of the predecessor's taxable year. The successor is treated as having paid or accrued in any year during the lookback period all predecessor interest that is apportioned to a date within that lookback period year.

(B) *Year of successor transaction.* In computing the three-year average that is relevant to the taxable year of a successor that includes the date of the section 381(a) transaction that resulted in successor status, the successor includes only a pro rata portion of the predecessor's amount of interest paid or accrued during the successor's lookback period. The pro rata amount equals the predecessor's interest treated as paid or accrued for the dates of the successor's lookback period, multiplied by a fraction, the numerator of which equals the number of days in the loss limitation year of the successor that follow the date of the transaction that resulted in successor status, and the denominator of which equals the number of days in the successor's loss limitation year. The predecessor's amount of interest treated as paid or accrued that is subject to proration under this paragraph (c)(2)(ii)(B) is the interest history of the predecessor that would otherwise be fully combined with the interest history of the successor under paragraph (c)(2)(ii)(A) of this section.

(3) *Examples.* The following examples illustrate the rules of this paragraph (c). Unless otherwise provided, assume that all entities are domestic C corporations that do not join in the filing of consolidated returns and that maintain calendar taxable years. Assume that all applicable corporations have substantial net operating losses in their loss limitation years:

Example 1. Predecessor corporation engages in CERT. (i) *Facts.* Corporation X is a calendar-year taxpayer. On February 1, Year 5, X engages in a CERT. On August 1, Year 5, X merges into unrelated corporation Y in a transaction to which section 381(a) applies. Y is a calendar-year taxpayer and all of its taxable years are full calendar years. All of X's taxable years prior to the year of the merger are full calendar years.

(ii) *Analysis.* X's only loss limitation year is its short year ending August 1, Year 5. X's lookback period relevant to the Year 5 CERT includes X's calendar Years 2, 3, and 4. See paragraph (c)(2)(i)(A) of this section; see also § 1.172(h)–3(b)(1) (computation of three-year average for a short loss limitation year). Following the merger, Y is the successor to X, and Y is treated as an applicable corporation with regard to the Year 5 CERT. See § 1.172(h)–1(b)(2). Because Y's calendar Year 5 follows a single loss limitation year of X with regard to the same CERT, Y's calendar Years 5 and 6 are loss limitation years with regard to the Year 5 CERT. See paragraph (b)(1) of this section and § 1.381(c)(1)–1(e)(3). Y's lookback period for the Year 5 CERT is its calendar Years 2, 3, and 4. See paragraph (c)(2)(i)(A) of this section. The computations of Y's three-year averages relevant to its loss limitation Years 5 and 6 include interest paid or accrued by Y and by all of Y's predecessors, including X, during the lookback period. See paragraph (c)(2)(ii)(A) of this section. However, because Year 5 is Y's taxable year that includes the date of the section 381(a) transaction that resulted in Y's successor status, for purposes of computing Y's three-year average for Y's loss limitation Year 5, Y includes only a pro rata portion of X's amount of interest paid or accrued. In the proration, X's amount of interest paid or accrued during the 3 year lookback period is multiplied by 151/365 (the number of days in Y's loss limitation Year 5 that follow the date of the section 381(a) transaction that resulted in Y's successor status, divided by the number of days in Y's loss limitation Year 5). See paragraph (c)(2)(ii)(B) of this section.

(iii) *Predecessor and successor have different taxable years.* The facts are the same as in paragraph (i) of this *Example 1,* except that X maintained a taxable year ending June 30 before its merger into Y. X's full taxable year ending June 30, Year 5, and its short year ending August 1, Year 5, are its loss limitation years with regard to its February 1, Year 5 CERT. See section 172(b)(1)(E)(ii) and § 1.172(h)–1(e). Following the merger of X into Y, Y is a successor to X and is treated as an applicable corporation with regard to the Year 5 CERT. Y's calendar Year 5 is the third loss limitation year with regard to the CERT. See paragraph (b)(1) of this section. Y's lookback period is Y's three taxable years preceding Y's taxable year that includes the date of the CERT, which are Years 2, 3, and 4. Further, because the dates of X's taxable years do not precisely correspond to the dates of Y's taxable years, X's interest paid or accrued is apportioned equally to each date within each of X's taxable years. Y is treated as having paid or accrued in any year during the lookback period all of X's interest that is so apportioned. See paragraph (c)(2)(ii)(A) of this section. However, because Y's taxable Year 5 includes the date of the section 381(a) transaction that resulted in Y's successor status, for purposes of computing Y's three-year average for loss limitation Year 5, Y includes only a pro rata portion of X's interest history. See paragraphs (c)(2)(ii)(B) of this section.

Example 2. Successor corporation not in existence for entire lookback period. (i) *Facts.* Corporation A is formed on October 1, Year 3, and thereafter maintains a calendar taxable year. Immediately after A is formed in Year 3, a second corporation, T, merges into A in a transaction that meets the requirements of section 368(a)(1)(A). During Year 5, A engages in a CERT.

(ii) *Analysis.* A's loss limitation years are its calendar Years 5, 6, and 7. See section 172(b)(1)(E)(ii). For purposes of computing any CERIL related to the Year 5 CERT, section 172(h)(2)(C)(ii) and § 1.172(h)–3 require that A measure its interest deductions for the three years preceding the taxable year of the CERT (three-year average). However, A is in existence for only two taxable years before the year in which the CERT occurs. Therefore, pursuant to § 1.172(h)–3(c)(1), A is deemed to have an additional taxable period (October 1, Year 2, through September 30, Year 3). Further, in computing the three-year average, A is treated as having paid or accrued zero interest during the deemed year. See § 1.172(h)–3(c)(2). However, because T is the predecessor of A, the computation of A's three-year average relevant to its loss limitation Year 5 includes interest paid or accrued by T during the lookback period (October 1,Year 2, through December 31, Year 4). See paragraph (c)(2)(ii)(A) of this section and § 1.172(h)–3(c)(2). Because T merges into A in a year prior to any loss limitation year, there is no proration of T's interest history under paragraph (c)(2)(ii)(B) of this section.

(d) *Three-year distribution average.* For purposes of determining any three-year distribution average of a successor under section 172(h)(3)(C)(ii)(I) and § 1.172(h)–1(c)(3), the distributions made by a successor include distributions made by all corporations that are its predecessors as of the end of the successor's taxable year. If the dates of any taxable year of a predecessor do not correspond to the dates of a taxable year of the successor, the distributions made by the predecessor are apportioned equally to each date of the predecessor's taxable year. The successor is treated as having made in its taxable years all predecessor distributions that are apportioned to a date within those taxable years.

(e) *Effective/applicability date.* This section is applicable to CERTs occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. This section is also applicable to the deconsolidation of a member from, or the acquisition of a corporation by, a consolidated group that occurs on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. However, in each case, this section does not apply to any CERT, deconsolidation, or acquisition occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

§ 1.172(h)–5 Operating rules.

(a) *Date on which CERT occurs in a multi-step transaction.* For purposes of applying section 172(b)(1)(E) and (h), §§ 1.172(h)–1 through 1.172(h)–4, and this section, and § 1.1502–72 (the CERT rules), if a corporate equity reduction transaction (CERT) consists of multiple steps, the date on which the CERT occurs is the earliest date on which the requirements for CERT status are satisfied. For example, if multiple distributions are made in a single year, an excess distribution (ED) is treated as occurring on the earliest date on which the amount of distributions satisfies the greater of the two thresholds contained in section 172(h)(3)(C)(ii) and § 1.172(h)–1(c)(3). A major stock acquisition (MSA) is treated as occurring on the earliest date on which at least 50 percent of the stock of a corporation is acquired, subject to the provisions of section 172(h)(3)(B) and § 1.172(h)–1(c)(2).

(b) *Prohibition on carryback*—(1) *In general.* No corporate equity reduction interest loss (CERIL) attributable to a CERT may be carried back under section 172 or § 1.1502–21(b) to any taxable year (including a consolidated return year) that includes solely dates that precede the date on which the CERT occurred. In addition, if a corporation becomes a member of a consolidated group as a result of a CERT, no CERIL allocable to that CERT may be carried back under section 172 or § 1.1502–21(b) to the taxable year of the acquired corporation that includes the date on which the CERT occurred, or to any preceding taxable year. See § 1.172(h)–3(d)(4) regarding allocation of a CERIL among CERTs, and § 1.1502–21(b)(2)(iv)(C)(1) for the apportionment of a CERIL among consolidated group members.

(2) *Example.* The following example illustrates the rules of this paragraph (b):

Example. Prohibition on carryback. (i) *Facts.* T corporation maintains a taxable year ending June 30. X corporation is the parent of a group that maintains a calendar taxable year. On March 31, Year 5, the X group acquires all of the T stock in a CERT, and T is first included in the X group on April 1, Year 5. During its consolidated return Year 5, the X group has a consolidated net operating loss (CNOL), a portion of which constitutes a CERIL, pursuant to section 172(h)(1) and § 1.172(h)–2(a)(2). Part of the CERIL is apportioned to T, pursuant to § 1.1502–21(b)(2)(iv)(C)(1).

(ii) *Analysis.* On the date of the acquisition, both the X group and T constitute applicable corporations with regard to the Year 5 CERT. See section 172(b)(1)(E)(iii)(I) and § 1.172(h)–1(b). T's short taxable year ending on March 31, Year 5, was T's taxable year in which the CERT occurred. The X group's year in which the CERT occurred was its consolidated return Year 5. Section 172(b)(1)(E)(i) and paragraph (b) of this section prohibit the carryback of a CERIL to years preceding the taxable year in which the CERT occurs. Pursuant to paragraph (b)(1) of this section, no portion of a CERIL relating to the X group CNOL can be carried back to any taxable year that includes solely dates that precede the date on which the CERT occurred. As a result, no portion of the CERIL can be carried back to the X group's Year 4, or any preceding year. Moreover, because T becomes a member of the X group as a result of the CERT, no portion of the CERIL can be carried back to T's short taxable year ending March 31, Year 5, or any preceding taxable year. See paragraph (b)(1) of this section.

(c) *Stock issuances and computation of three-year distribution average*—(1) *In general.* In determining whether an ED has occurred, aggregate distributions made during a taxable year are reduced by the aggregate amount of stock issued by the applicable corporation during the year in which the potential ED occurred in exchange for money or property other than stock of the applicable corporation. Similarly, the computation of any three-year distribution average under section 172(h)(3)(C)(ii)(I) and § 1.172(h)–1(f) is reduced by the average of the stock issuances described in section 172(h)(3)(E)(ii) and this paragraph (c)(1) during the three years of the distribution lookback period (three-year stock issuance average).

(2) *Example.* The following example illustrates the rules of this paragraph (c):

Example. (i) *Facts.* C is a corporation that maintains a calendar taxable year. During Year 5, C makes a large distribution to its shareholders. During taxable Years 2, 3, and 4, C distributes an average of $100,000 per year. In addition, during taxable Year 2, C issued stock in exchange for $90,000 cash. During taxable Year 3, C issued stock in exchange for $15,000 cash. C issued no stock during taxable Year 4.

(ii) *Analysis.* C must test its Year 5 distribution as a potential ED. C's three-year distribution average without respect to any stock issued during the distribution lookback period is $100,000. C's three-year distribution average is reduced by the average of the stock issued by the corporation in exchange for money or property other than stock in C during the years of the distribution lookback period (three-year stock issuance average). See paragraph (c)(1) of this section. C's three-year stock issuance average is $35,000 [($90,000 + $15,000 + 0)/3]. Therefore, T's three-year distribution average is $65,000 ($100,000 − $35,000).

(d) *Computation of the alternative minimum tax net operating loss deduction.* The CERT rules governing the carryback of net operating losses following a CERT also apply to the carryback of an alternative minimum tax net operating loss.

(e) *Effective/applicability date.* This section is applicable to CERTs occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. This section is also applicable to the deconsolidation of a member from, or the acquisition of a corporation by, a consolidated group that occurs on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. However, in each case, this section does not apply to any CERT, deconsolidation, or acquisition occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 3. Section 1.1502–21 is amended by adding paragraphs (b)(2)(iv)(C) and (h)(1)(iv) and revising paragraphs (b)(3)(ii)(B) and (h)(5) to read as follows:

§ 1.1502–21 Net operating losses.

* * * * *

(b) * * *

(2) * * *

(iv) * * *

(C) *Apportionment of special status losses—(1) In general.* The amount of the group's CNOL that is determined to constitute a corporate equity reduction interest loss (CERIL) (as defined in section 172(h)(1) and § 1.172(h)–2(a)(2)), specified liability loss (as defined in section 172(f)(1)), or any other net operating loss (NOL) that is subject to special carryback or carryover rules (special status loss), is apportioned to each member separately from the remainder of the CNOL, based on the percentage of CNOL attributable to the member as determined under paragraph (b)(2)(iv)(B) of this section. This apportionment is made without regard to whether a particular member actually incurred specific expenses or engaged in specific activities required by the special status loss provisions. If a consolidated group must apply § 1.172(h)–3(d)(4) to allocate its CERIL for a loss limitation year between multiple corporate equity reduction transactions (CERTs), then the portion of the CERIL allocable to each CERT is treated as a separate CERIL for purposes of applying this paragraph (b)(2)(iv)(C) to apportion special status losses among members of the group.

(*2*) *Example.* The following example illustrates the rules of this paragraph (b)(2)(iv)(C):

Example. (i) *Facts.* P is the parent of a group that includes S and that maintains a calendar taxable year. S has been a member of the group for all relevant years. In Year 3, the P group engages in a CERT. T is included in the P group beginning on January 1, Year 4, as a result of a transaction that does not constitute a CERT. In Year 4, the P group has a CNOL of $1,200. Under the CERT rules (in section 172(b)(1)(E) and (h), §§ 1.172(h)–1 through 1.172(h)–5, and § 1.1502–72), $300 of the CNOL (25%) constitutes a CERIL. Assume that, absent application of this paragraph (b)(2)(iv)(C), under paragraph (b)(2)(iv)(B) of this section, ⅔ of the CNOL ($800) is attributable to T and the remaining ⅓ of the CNOL ($400) is attributable to S.

(ii) *Analysis.* Under this paragraph (b)(2)(iv)(C), the CNOL is divided into its special status (CERIL) component, and its non-special status component. Because T has separate return year carryback years, each component of the CNOL (the non-special status CNOL and the CERIL) is apportioned under paragraph (b)(2)(iv)(B) of this section. Under that apportionment rule, ⅔ of each amount is apportioned to T, and the remainder of the CNOL is attributable to S and can be carried back to prior P group years, subject to any applicable limitations. Therefore, $200 of the $300 CERIL is apportioned to T, and $600 of the $900 non-special status CNOL is also apportioned to T. The $200 CERIL cannot be carried back to certain taxable years of T under the CERT rules. Likewise, $100 of the $300 CERIL is apportioned to S, and $300 of the $900 non-special status CNOL is also apportioned to S. Under the CERT rules, the $100 CERIL cannot be carried back to certain taxable years.

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(3) * * *

(ii) * * *

(B) *Election on acquisition to waive carryback to separate return years*—(*1*) *In general.* A corporation may make one of three mutually exclusive, irrevocable elections to waive carryback of CNOLs to separate return years of acquired members. Any election that is made with regard to an acquired corporation that was a member of a consolidated group (the former group) immediately before becoming a member of an acquiring group must include all other corporations that were members of the former group and that joined the acquiring group during the same consolidated return year of the acquiring group.

(*2*) *Annual election.* If a corporation becomes a member of an acquiring group, the acquiring group may make an irrevocable election to relinquish, with respect to the part of any CNOL attributable to the member, the portion of the carryback period for which the member filed a separate return. This is an annual election, applicable to the CNOL of a single year. The election is made in a separate statement entitled, ''THIS IS AN ELECTION UNDER § 1.1502–21(b)(3)(ii)(B)(*2*) TO WAIVE THE PRE- [insert the first taxable year in which the member(s) joined the group] CARRYBACK PERIOD FOR THE PORTION OF THE [insert taxable year] CNOL ATTRIBUTABLE TO [insert the name(s) and EIN(s) of the corporation(s)].'' The statement must be filed with the acquiring group's timely filed original return for the consolidated return year of the particular CNOL.

(*3*) *Single election.* If a corporation becomes a member of an acquiring group, the acquiring group may make an irrevocable election to relinquish, with respect to all CNOLs attributable to the member, the portion of the carryback period for which the member filed a separate return. The election is not an annual election and applies to all losses that would otherwise be subject to a carryback to separate return years under section 172 or paragraph (b) of this section. The election is made in a separate statement entitled, ''THIS IS AN ELECTION UNDER § 1.1502–21(b)(3)(ii)(B)*(3)* TO WAIVE THE PRE- [insert the first taxable year in which the member(s) joined the group] CARRYBACK PERIOD FOR THE PORTION FOR ALL NOLs (and ALL CNOLs) ATTRIBUTABLE TO [insert the name(s) and EIN of the corporation(s)].'' The statement must be filed with the acquiring group's timely filed original income tax return for the consolidated return year the corporation (or corporations) became a member.

(*4*) *Special one-time election for deconsolidating member.* Section 1.1502–72(e)(1) makes available an election by a deconsolidating member (or its new common parent immediately following deconsolidation) to relinquish in whole the carryback of all NOLs to taxable years of the former group and any preceding taxable year. An election under § 1.1502–72(e)(1) will control whether the deconsolidating corporation is treated as an applicable corporation under section 172(b)(1)(E)(iii) and § 1.172(h)–1(b)(1) following the deconsolidation with regard to a CERT of the former group. See § 1.1502–72(b). Further, an election under § 1.1502–72(e)(1) may affect the computation of the CERIL under section 172(h)(1) and § 1.172(h)–2(a)(2) with regard to any CERT for which the deconsolidating corporation (or any group of which the deconsolidating corporation is a member) is an applicable corporation under section 172(b)(1)(E)(iii) and § 1.172(h)–1(b)(1) following the deconsolidation. See § 1.1502–72(c)(4) and (d)(3)(ii).

* * * * *

(h) * * *

(1) * * *

(iv) Paragraph (b)(2)(iv)(C) of this section applies to taxable years for which the due date of the original return (without extensions) is on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

* * * * *

(5) *Waiver of carrybacks.* Paragraph (b)(3)(ii)(B) of this section (relating to the waiver of carrybacks to separate return years) applies to acquisitions

occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**, except that it does not apply to any acquisition occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. For original consolidated Federal income tax returns due (without extensions) before the date of the publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**, see paragraph (b)(3)(ii)(B) of this section as contained in 26 CFR part 1 in effect on April 1, 1999.

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Par. 4. Section 1.1502–72 is added to read as follows:

§ 1.1502–72 Corporate equity reduction transactions.

(a) *In general*—(1) *Scope.* Section 172(b)(1)(E) and (h), §§ 1.172(h)–1 through 1.172(h)–5, and the rules of this section (the CERT rules) apply to determine whether a corporate equity reduction transaction (CERT) has occurred and to determine the consequences of the CERT, including rules governing the carryback of losses following a CERT, with respect to corporations that become, are, or cease to be members of a consolidated group.

(2) *Single entity treatment*—(i) *In general.* All members of a group are treated as a single taxpayer for purposes of the CERT rules. For example, if multiple members of a group acquire in total 50 percent or more (by vote or value) of the stock of another corporation, the group has engaged in a major stock acquisition (MSA) as defined in section 172(h)(3)(B) and § 1.172(h)–1(c)(2). The transactions and expenditures undertaken by a particular group member are generally not separately tracked; instead, the entire group is treated as a single applicable corporation.

(ii) *Debt and interest of group members*—(A) *In general.* The computation of a group's corporate equity reduction interest loss (CERIL) under section 172(h)(1) and § 1.172(h)–2(a)(2) for any loss limitation year (as defined in paragraph (a)(3) of this section) that is a consolidated return year includes the debt of all members and all interest deductions that are allowed on the group's consolidated return for that year. This rule applies regardless of whether any particular debt or interest expense is directly related to the CERT, whether any particular member was included in the group on the date of the CERT, or whether any particular debt would not exist in the group if the group had not engaged in the CERT. But see paragraph (a)(2)(iii) of this section (providing that intercompany transactions are generally disregarded).

(B) *Debt of acquired corporation.* With respect to a corporation that joins a consolidated group (acquired corporation), in applying the CERT rules to consolidated return years that are loss limitation years, any debt of the acquired corporation is treated as debt of the acquiring group for purposes of applying the avoided cost rules of section 263A(f)(2)(A) on any measurement date after the inclusion of the corporation in the group. See section 172(h)(2) and § 1.172(h)–2(b) (applying the principles of section 263A(f)(2)(A)(ii)); see also § 1.263A–9(f)(2) (defining measurement dates).

(iii) *Intercompany transactions.* In applying the CERT rules, intercompany transactions as defined in § 1.1502–13 are generally disregarded. For example, interest expense attributable to an intercompany obligation is not taken into account in computing the CERIL or three-year average of a group. However, a transaction between group members is not disregarded if a party to the transaction becomes a non-member pursuant to the same plan or arrangement. In such case, any transaction between group members, including a potential excess distribution (ED) as defined in section 172(h)(3)(C), § 1.172(h)–1(c)(3), and paragraph (f)(1) of this section, is tested on a separate entity basis under the CERT rules. It may also be tested as part of a larger, multi-step MSA. See § 1.172(h)–1(d)(2).

(iv) *Applicable corporation status following inclusion of member with pre-existing CERT*—(A) *Acquiring group treated as applicable corporation.* If a corporation that is an applicable corporation (including by application of paragraph (b) of this section) with regard to a CERT occurring in a separate return year (pre-existing CERT member) joins a consolidated group, the group is treated as a single applicable corporation with regard to that CERT in the consolidated return year of the acquisition and any succeeding year. A corporation is a pre-existing CERT member regardless of whether the transaction at issue is an MSA that constitutes a CERT with respect to both a consolidated return year of the acquiring group and a separate return year of the acquired corporation.

(B) *End of separate tracking of target.* Beginning on the first day on which a pre-existing CERT member is included in a consolidated group, the member ceases to be separately tracked as an applicable corporation. See paragraph (a)(2)(i) of this section. The CERT rules thereafter apply to the group, rather than to the member, with regard to any CERT for which the member had been an applicable corporation, including an MSA in which the member was acquired by the group. Therefore, beginning on the day on which the pre-existing CERT member is included in the group, no CERIL is computed with regard to the member, independent of the CERIL computed for the group. But see § 1.1502–21(b)(2)(iv)(C) (providing for allocation and apportionment of a group's CERIL to specific group members) and § 1.172(h)–5(b)(1) (relating to prohibition on carryback of a CERIL).

(3) *Loss limitation years*—(i) *In general.* This paragraph applies to identify loss limitation years of a consolidated group and corporations that have been members of a consolidated group. The taxable year in which a CERT actually occurs is a loss limitation year. Any other taxable year (potential loss limitation year) of any applicable corporation (including a consolidated group) constitutes a loss limitation year with regard to the CERT only if, under the carryforward rules of sections 172(b)(1)(A)(ii) and 381(c)(1), the potential loss limitation year would constitute the first or second taxable year following the taxable year of the corporation or consolidated group that actually engaged in the CERT that includes the date on which the CERT occurred. Except as otherwise provided in paragraph (a)(3)(ii) of this section, for purposes of this paragraph (a)(3), sections 172 and 381 are applied as if the inclusion of any corporation in a consolidated group or the deconsolidation of any member from a group were a transaction listed in section 381(a).

(ii) *Corporation joins group in an MSA.* If a corporation joins a group in an MSA, no separate return year of the acquired corporation ending on or before it joined the acquiring group is treated as a loss limitation year for the purpose of determining the loss limitation years of the acquiring group or any corporation that deconsolidates from that group that relate to the MSA.

(iii) *Deconsolidating members.* Under this paragraph (a)(3)(iii), a corporation that deconsolidates (deconsolidating member) from a group (former group) that is an applicable corporation may have loss limitation years with regard to a CERT of its former group. See paragraphs (b) (relating to post-deconsolidation status as applicable corporation) and (e)(1) of this section (providing for an irrevocable waiver of carrybacks such that a deconsolidating member is not treated as an applicable corporation). If the consolidated return year during which the deconsolidation occurs (year of deconsolidation) is a first or second loss limitation year with regard to the CERT, then certain separate return years of a deconsolidating member that is treated as an applicable corporation will constitute loss limitation years. If the year of deconsolidation is a first loss limitation year with regard to the CERT, the following two separate return years will constitute loss limitation years. If the year of deconsolidation is a second loss limitation year with regard to the CERT, the separate return year that immediately follows the year of deconsolidation will constitute a loss limitation year. If the deconsolidating member joins another consolidated group, the consolidated return years of that group may also constitute loss limitation years with regard to the CERT of the former group. See paragraph (a)(2)(iv) of this section (relating to inclusion of member with pre-existing CERT).

(4) *Application of rules to reverse acquisitions.* In the case of any acquisition to which § 1.1502–75(d)(3) applies (a reverse acquisition), for purposes of applying the CERT rules, the first corporation (as defined in § 1.1502–75(d)(3)(i)) is treated as the corporation the stock of which is acquired, and the second corporation (as defined in § 1.1502–75(d)(3)(i)) is treated as the corporation that acquires stock. In addition, for purposes of § 1.172(h)–2(b)(3)(i) (identifying CERT costs of an MSA) in the case of a reverse acquisition, the fair market value of the stock acquired equals the fair market value of the stock of the first corporation that the stockholders (immediately before the acquisition) of the first corporation own immediately after the acquisition, rather than the fair market value of the stock of the second corporation.

(b) *Applicable corporation status following deconsolidation*—(1) *In general.* If a corporation deconsolidates in a loss limitation year from a group that is treated as an applicable corporation with regard to a CERT, the deconsolidating corporation and the former group are both treated as applicable corporations following the deconsolidation. If the corporation joins another consolidated group (acquiring group) following the deconsolidation, the rules of this section apply to the acquiring group, and this paragraph (b) applies with regard to the deconsolidation of any member from the acquiring group during a loss limitation year associated with the CERT. See paragraph (a)(2)(iv) of this section regarding treatment of a group as a single applicable corporation following an acquisition; see also paragraph (a)(3)(ii) of this section for identification of loss limitation years following a deconsolidation. This paragraph (b) applies without regard to whether any particular corporation would on a separate entity basis have constituted an applicable corporation with regard to the CERT under section 172(b)(1)(E)(iii) and § 1.172(h)–1(b), with or without the application of section 172(h)(4)(C) and paragraph (a)(2) of this section, or whether the CERT occurred in a consolidated return year. However, under this paragraph (b), the deconsolidating corporation may be treated as an applicable corporation with regard to a CERT of a former group only if the group engages in the CERT on or before the date of the deconsolidation, or if a pre-existing CERT member, as described in paragraph (a)(2)(iv)(A) of this section, joins the group on or before the date of the deconsolidation.

(2) *Exception if waiver filed.* In general, a corporation that deconsolidates from a group (or the parent of a group acquiring the deconsolidating member), may, pursuant to paragraph (e)(1) of this section, make an irrevocable election to relinquish the carryback of all net operating losses (NOLs) (and attributable portions of consolidated net operating losses (CNOLs)) to taxable years of the former group and any preceding years. If such an election is made, the deconsolidating member is not treated as an applicable corporation with regard to any CERT of the former group after the deconsolidation. Any group that acquires the deconsolidating member is not treated as an applicable corporation with regard to any CERT of the former group solely as a result of the acquisition of that member. The former group will continue to be treated as an applicable corporation with regard to the CERT.

(3) *Examples.* The following examples illustrate the rules of paragraph (a) of this section and this paragraph (b). For purposes of these examples, assume that all entities are domestic C corporations unless otherwise stated. Assume that all applicable corporations have substantial NOLs in their loss limitation years:

Example 1. Single entity treatment of acquisition indebtedness. (i) *Facts.* Corporation T is a calendar-year taxpayer that has significant debt outstanding, which was incurred to fund operations. Unrelated P is the common parent of a calendar-year consolidated group. The following steps occur pursuant to an integrated plan. On May 1, Year 5, P acquires 10 percent of the T stock for $100. On June 30, Year 5, T borrows $700 and immediately thereafter uses the money to redeem some of its shares from its shareholders. On the same day, the P group acquires all of the remaining T stock in exchange for $200. Assume that the $700 cash payment from T to the T shareholders is treated as a redemption. T is first included in the P group on July 1, Year 5. Under § 1.172(h)–1(d)(2), the steps of the integrated plan (including the redemption of the former T shareholders) constitute a single MSA.

(ii) *Analysis.* T's short taxable year ending June 30, Year 5 is T's year of the CERT. The P group's consolidated return Year 5 is the taxable year of the CERT for the group. For purposes of allocating to the single MSA interest paid or accrued during the P group's loss limitation years (Years 5, 6, and 7) under § 1.172(h)–2(b), the P group takes into account the debt of all members, including the $700 loan and all of T's other debt. See paragraph (a)(2)(ii)(B) of this section. The allocation of interest also takes into account all deductions for interest paid or accrued that are included in the consolidated return for the relevant loss limitation year. See paragraph (a)(2)(ii)(A) of this section.

Example 2. Loss limitation years if a corporation joins group in an MSA. Corporation T maintains a taxable year ending June 30. Unrelated X is the common parent of a calendar-year consolidated group. On March 31, Year 5, the X group acquires all of the T stock in a CERT, and T is first included in the X group on April 1, Year 5. On the date of the acquisition, both the X group and T constitute applicable corporations with regard to the Year 5 CERT. See § 1.172(h)–1(b) and paragraph (a)(2) of this section. T's short taxable year ending on March 31, Year 5, was T's taxable year in which the CERT occurred. T's only loss limitation year with respect to the Year 5 CERT is its short taxable year ending on March 31, Year 5. See § 1.172(h)–1(e) and paragraph (a)(3) of this section. Beginning on April 1, Year 5, T ceases to be separately tracked as an applicable corporation. See paragraph (a)(2)(i) and (iv)(B) of this section. The X group's year in which the CERT occurred is its consolidated return Year 5. The X group's loss limitation years with respect to the Year 5 CERT are its full taxable calendar Years 5, 6, and 7. See paragraph (a)(3)(i) and (ii) of this section.

Example 3. Loss limitation years of a group and deconsolidating member. (i) *Facts.* P is the common parent of a calendar-year consolidated group that includes S. On June 30, Year 6, a member of the P group engages in an acquisition that constitutes a CERT. S is not a party to the acquisition. On September 30, Year 6, S deconsolidates from the P group. No election under paragraph (e)(1) of this section is made with respect to the deconsolidation of S. Following its deconsolidation, S does not join in the filing of a consolidated return with another group, and it maintains a calendar taxable year.

(ii) *Analysis.* Because no election is made under paragraph (e)(1) of this section, following the deconsolidation, both the P group and S are treated as applicable corporations with regard to the Year 6 CERT. See paragraph (b)(1) of this section. The P group's loss limitation years with regard to the CERT are its consolidated return Years 6, 7, and 8. See section 172(b)(1)(E)(ii) and paragraph (a)(3)(i) of this section. S deconsolidates from the P group during consolidated return Year 6, which is the first loss limitation year with regard to the CERT. See paragraph (a)(3)(i) of this section. For purposes of applying paragraph (a)(3) of this section to identify loss limitation years, S is treated as deconsolidating from the P group in a transaction to which section 381(a) applies. Therefore, S's two taxable years that follow the deconsolidation, the short year ending December 31, Year 6, and the full taxable calendar Year 7, are its additional loss limitation years with regard to the Year 6 CERT. See paragraph (a)(3)(iii) of this section. See section 172(b)(1)(E)(i) and § 1.172(h)–5(b)(1) for rules regarding the prohibition on carryback of a CERIL.

Example 4. Loss limitation years if a pre-existing CERT member joins the group. (i) *Acquiring group has loss limitation years.* Corporation T maintains a calendar taxable year and does not join in the filing of a consolidated return. On July 1, Year 5, T engages in a CERT (Year 5 CERT). Unrelated X is the common parent of a calendar-year consolidated group that includes S. On December 31, Year 5, the X group acquires all of the outstanding T stock. T is first included in the X group on January 1, Year 6. The first loss limitation year with respect to the Year 5 CERT is T's calendar Year 5. See § 1.172(h)–1(e). As a result of the X group's acquisition of T, the X group is treated as a single applicable corporation with respect to the Year 5 CERT. See paragraph (a)(2)(iv) of this section. For purposes of applying paragraph (a)(3) of this section to identify loss limitation years, T is treated as joining the X group in a transaction to which section 381(a) applies. Because T has one loss limitation year with regard to the CERT before it joins the X group, the X group has two loss limitation years with respect to the Year 5 CERT: Its calendar Years 6 and 7. See paragraph (a)(3)(i) of this section. However, the X group must test its acquisition of T under the CERT rules.

(ii) *Acquiring group has no loss limitation years.* The facts are the same as in paragraph (i) of this *Example 4,* except that the X group acquires T on January 31, Year 7. Because T has three loss limitation years before it is included in the X group (calendar Years 5 and 6, and a short taxable year ending on January 31, Year 7), none of the X group's consolidated return years are loss limitation years with regard to the Year 5 CERT. See section 172(b)(1)(E)(ii) and paragraph (a)(3)(i) of this section.

(iii) *Member deconsolidates from acquiring group.* The facts are the same as in paragraph (i) of this *Example 4,* except that S deconsolidates from the X group on June 30, Year 6. No election under paragraph (e)(1) of this section is made on the deconsolidation of S. Following its deconsolidation from the X group, S does not join in the filing of a consolidated return. T and the X group's loss limitation years remain the same as in paragraph (i) of this *Example 4.* Because no election is made under paragraph (e)(1) of this section with respect to S's deconsolidation, following the deconsolidation, S and the X group are both treated as applicable corporations with regard to T's Year 5 CERT. See paragraph (b)(1) of this section. S deconsolidates from the P group during consolidated return Year 6, which is the second loss limitation year with regard to the CERT. See paragraph (a)(3)(i) of this section. Therefore, following its deconsolidation, S's only loss limitation year with respect to the Year 5 CERT is its short taxable year July 1, Year 6 through December 31, Year 6. See paragraph (a)(3)(iii) of this section.

Example 5. Deconsolidation before group engages in CERT. Corporation T is a member of the P group, which maintains a calendar taxable year. On February 28, Year 4, T deconsolidates from the P group due to T's acquisition by the X group, which also maintains a calendar taxable year. T is included in the X group as of March 1, Year 4. No election under paragraph (e)(1) of this section is made on the deconsolidation of T from the P group. On March 31, Year 4, the P group engages in a CERT. Because the P group engages in the CERT after the date of the deconsolidation, T is not treated as an applicable corporation following the deconsolidation. See paragraph (b)(1) of this section. However, the X group must apply the CERT rules to the X group's acquisition of T.

Example 6. Member that engages in CERT deconsolidates with a waiver election. (i) *Facts.* P is the common parent of a calendar-year consolidated group. On March 31, Year 4, the P group engages in an MSA, when member T acquires all of the stock of T1. On June 30, Year 4, T and its subsidiaries (including T1) deconsolidate from the P group due to the acquisition of T by the X group. T and its subsidiaries are first included in the X group as of July 1, Year 4. The X group makes an election under paragraph (e)(1) of this section on the deconsolidation.

(ii) *Analysis.* Because an election under paragraph (e)(1) of this section is made on the deconsolidation of T and its subsidiaries from the P group, following the deconsolidation, only the P group is treated as an applicable corporation with regard to the March 31, Year 4 CERT. Neither T, T1, nor the X group is treated as an applicable corporation with regard to the March 31, Year 4 CERT, even though T directly engaged in the MSA, and T1 was the acquired corporation in that MSA. See paragraph (b)(2) of this section. However, the X group must apply the CERT rules to the X group's acquisition of T.

(c) *Identification and allocation of CERT costs*—(1) *In general.* The portion of an NOL that is treated as a CERIL is subject to limitation on carryback. See section 172(b)(1)(E)(i) and § 1.172(h)–5(b)(1). A CERIL is computed in part by identifying the deductions allowed for interest allocable to the CERT. The computation of interest allocable to a CERT under section 172(h)(2) and § 1.172(h)–2(b) takes into account all CERT costs as defined in § 1.172(h)–2(b)(3). This paragraph (c) contains rules applicable to the identification and allocation of CERT costs of a consolidated group.

(2) *Single entity treatment of CERT costs.* The computation of interest allocable to a CERT in any particular loss limitation year of a consolidated group includes CERT costs incurred (including costs deemed incurred under this paragraph (c)) with regard to the CERT by all corporations that are members of a group during the loss limitation year.

(3) *CERT costs of acquired corporation.* With respect to a corporation that joins a consolidated group (acquired corporation), for purposes of applying the CERT rules, any CERT costs incurred (or treated as incurred under this paragraph (c)) by the acquired corporation during separate return years prior to the acquired corporation's inclusion in the group are attributed to the acquiring group. Such costs are treated as having been incurred by the acquiring group for purposes of applying the avoided cost rules of section 263A(f)(2)(A) to any measurement date after the acquisition of the corporation. Those CERT costs are no longer separately identified as CERT costs incurred by the acquired corporation.

(4) *Allocation of CERT costs on deconsolidation*—(i) *In general.* This paragraph (c)(4) applies to determine the CERT costs allocable to a corporation that deconsolidates in a loss limitation year from a group that is treated as an applicable corporation with regard to a CERT. Under this paragraph (c)(4), CERT costs may be allocated to a deconsolidating corporation only if the group engages in the relevant CERT on or before the date of the deconsolidation, or if a pre-existing CERT member, as described in paragraph (a)(2)(iv)(A) of this section, joins the group on or before the date of the deconsolidation. This paragraph (c)(4) applies regardless of whether any particular corporation would have constituted an applicable corporation under section 172(b)(1)(E)(iii) and § 1.172(h)–1(b) without the application of section 172(h)(4)(C) and paragraph (a)(2) of this section, whether the CERT occurred in a consolidated return year, or whether any particular corporation actually incurred CERT costs.

(ii) *No waiver election made.* If no election under paragraph (e)(1) of this section is made with regard to the deconsolidation, CERT costs incurred by the group (including costs treated as incurred by the group under this paragraph (c)) are allocated between the deconsolidating corporation and the former group, solely for purposes of computing allocable interest deductions of the deconsolidating corporation and the continuing group with regard to the CERT under section 172(h)(2) and § 1.172(h)–2(b). For purposes of computing interest allocable to the CERT under section 172(h)(2) and § 1.172(h)–2(b) during the loss limitation year of the former group that is the year of the deconsolidation, the CERT costs allocated to the deconsolidating member are included in the group's accumulated CERT costs on those measurement dates on which the deconsolidating corporation was included in the group. The portion of the group's total CERT costs that is allocated to a deconsolidating member equals the group's total CERT costs multiplied by a fraction, the numerator of which equals the value of the deconsolidating corporation immediately after its deconsolidation, and the denominator of which equals the value of the entire group immediately prior to the deconsolidation.

(iii) *Waiver election made.* If an election under paragraph (e)(1) of this section is made with regard to a deconsolidation, no CERT costs are allocated to the deconsolidating corporation. All CERT costs remain with the former group for purposes of identifying its allocable interest deductions under section 172(h)(2) and § 1.172(h)–2(b) with regard to the CERT.

(5) *Examples.* The following examples illustrate the rules of this paragraph (c). For purposes of the examples in this paragraph (c)(5), assume that all entities are domestic C corporations unless otherwise stated. Assume that all applicable corporations have substantial NOLs in their loss limitation years:

Example 1. Aggregation of CERT costs of consolidated group and target. (i) *Facts.* P is the common parent of a calendar-year consolidated group that includes S1 and S2. On June 30, Year 5, S1 acquires all of the stock of T for $10 million. P incurs CERT costs of $100,000 and $250,000 for work performed by its outside counsel and an investment banker, respectively, that facilitates the acquisition. In addition, T incurs CERT costs of $175,000 for work performed by its outside counsel that facilitates the acquisition. All of these costs are incurred on or before the date of the acquisition. In all relevant years preceding its acquisition, T does not join in the filing of a consolidated return.

(ii) *Analysis.* For purposes of computing the P group's allocable interest deductions under section 172(h)(2) and § 1.172(h)–2(b), the P group's CERT costs include CERT costs incurred by all members of the P group. See paragraph (c)(2) of this section. In addition, when T joins the P group, the CERT costs incurred by T prior to its inclusion in the P group are attributed to the P group and are treated as having been incurred by the P group for purposes of applying the avoided cost rules of section 263A(f)(2)(A) to any measurement date after the acquisition of T. See paragraph (c)(3) of this section. As a result, the P group's accumulated CERT costs on July 1, Year 5, are $10,525,000 [$10,000,000 + $100,000 + 250,000 + 175,000]. See § 1.172(h)–2(b)(3) for rules defining CERT costs.

Example 2. Acquiring group treated as incurring CERT costs associated with unrelated CERT of target. T is a calendar-year taxpayer that does not join in the filing of a consolidated return. P is the common parent of a calendar-year consolidated group. P also owns 70 percent of the only class of T stock. During Year 4, T engages in a CERT. On June 30, Year 5, P acquires the remainder of the stock of T, and T is first included in the P group on July 1, Year 5. Following the acquisition, the P group is treated as an applicable corporation with regard to T's Year 4 CERT. See paragraph (a)(2)(iv) of this section. The P group's consolidated return Year 5 is the third and final loss limitation year with regard to the Year 4 CERT. See paragraph (a)(3)(i) of this section. The P group is treated as having incurred all of T's expenses allocable to the CERT for purposes of computing any CERIL for consolidated return Year 5. Because T was a member of the P group for less than the entire calendar taxable Year 5, T's CERT costs are included in the P group's accumulated CERT costs only on those measurement dates on which T is included in the group (that is, measurement dates on or after July 1, Year 5). See paragraph (c)(3) of this section and § 1.172(h)–2(b)(4). See also paragraph (d)(3)(iii) for rules relating to the interest history of a partial-year member.

Example 3. Allocation of CERT costs to deconsolidating member. (i) *Facts.* P is the common parent of a calendar-year consolidated group. P owns 60 percent of the sole class of stock of T, a calendar-year taxpayer. On January 31, Year 5, the P group engages in a CERT. On March 31, Year 5, P acquires the remainder of the stock of T, and T is first included in the P group on April 1, Year 5. On June 30, Year 6, T deconsolidates from the P group, with no election made under paragraph (e)(1) of this section.

(ii) *Analysis.* T is not a member of the P group at the time of the CERT. However, following its deconsolidation, T is treated as an applicable corporation with regard to the Year 5 CERT because the P group engages in the CERT before T deconsolidates, and no election is made under paragraph (e)(1) of this section on the deconsolidation. See paragraph (b)(1) of this section. Further, a portion of the P group's CERT costs is allocated to T for purposes of computing any CERIL of T (or of any group of which T becomes a member following its deconsolidation from the P group) with regard to the Year 5 CERT. See paragraphs (b)(1) and (c)(4)(ii) of this section. However, the CERT costs of the group otherwise allocated to T are included in the P group's accumulated CERT costs on those measurement dates during which T is included in the group (that is, measurement dates before July 1, Year 6). See paragraph (c)(4)(ii) of this section and § 1.172(h)–2(b)(4).

(d) *Determining the three-year average of a group*—(1) *In general.* Section 172(h)(2)(C) and § 1.172(h)–3(a) limit the amount of allocable interest deductions to the excess (if any) of the amount allowable as a deduction for interest paid or accrued by the taxpayer during the loss limitation year, over the average of interest paid or accrued by the taxpayer (the three-year average) for the three taxable years preceding the taxable year in which the CERT occurred (the lookback period). The computation under section 172(h)(2)(C)(ii) and § 1.172(h)–3(b) of a group's three-year average for the lookback period that is relevant to any loss limitation year includes interest paid or accrued (or treated as paid or accrued under this paragraph (d)) during the lookback period by all corporations that are members of the consolidated group during the loss limitation year.

(2) *Varying group membership.* If group membership varies from one loss limitation year to another, a different three-year average is computed with regard to each loss limitation year of the group.

(3) *Interest history*—(i) *Combination of interest history of acquired member with group history.* With respect to a corporation that joins a consolidated group (acquired corporation), for purposes of applying the CERT rules, the interest paid or accrued (or treated as paid or accrued under this paragraph (d)) by the acquired corporation during each separate return year prior to its inclusion in the group is apportioned equally to each day within each of its separate return years. The interest apportioned to dates within the lookback period is then combined with the interest paid or accrued by the acquiring group and is treated as interest paid or accrued by the acquiring group during the lookback period for purposes of computing the three-year average that is relevant to any loss limitation year beginning with the consolidated return year during which the acquired corporation is first included in the group. For purposes of the CERT rules, the interest from the separate return years is no longer separately traced as interest paid or accrued by the acquired corporation. But see paragraph (d)(3)(iii) of this section for rules requiring proration of interest history attributable to corporations that are members of a group for less than an entire loss

limitation year. The interest paid or accrued by a predecessor (as defined in § 1.172(h)–(1)(b)(2)) of a member of the group is similarly combined with the interest paid or accrued by the group. See § 1.172(h)–4(c)(2)(ii)(A).

(ii) *Interest treated as paid or accrued by a corporation that deconsolidates*—(A) *In general.* This paragraph (d)(3)(ii) provides rules that apply for purposes of determining any three-year average of a corporation that deconsolidates from a group (or a three-year average of any other group of which it becomes a member) and any three-year average of the group from which the corporation deconsolidates (former group). These rules apply to the computation of any three-year average with regard to a CERT of the former group or any other CERT.

(B) *Waiver election made.* If an election under paragraph (e)(1) of this section is made with respect to the deconsolidation of a corporation from a group, then, following the deconsolidation, the deconsolidating member is treated as having paid or accrued zero interest during the period of its inclusion in the former group and preceding years. The group retains the interest history that would otherwise be allocated and apportioned to the deconsolidating member under this paragraph (d)(3)(ii).

(C) *No waiver election made.* If no election under paragraph (e)(1) of this section is made with respect to the deconsolidation of a corporation, a portion of the group's amount of interest treated as paid or accrued during the period of the corporation's consolidation and any preceding years is allocated and apportioned to the deconsolidating corporation. The allocated and apportioned interest is subtracted from the group's interest history and is unavailable to the group (or any other group member) for purposes of computing a three-year average with regard to any loss limitation year of the group (or any other group member) after the year of deconsolidation. But see paragraph (d)(3)(iii) of this section for rules requiring proration of interest history attributable to corporations that are members of a group for less than an entire loss limitation year.

(D) *Method of allocation.* If no election under paragraph (e)(1) of this section is made when a corporation deconsolidates, solely for purposes of the CERT rules, the corporation is treated as having paid or accrued interest equal to the amount of interest paid or accrued by the group in each consolidated return year through the date of the deconsolidation (including any combination of interest history pursuant to paragraph (d)(3)(i) of this section), multiplied by a fraction, the numerator of which equals the value of the deconsolidating corporation immediately after its deconsolidation, and the denominator of which equals the value of the entire group immediately prior to the deconsolidation.

(iii) *Proration of lookback period interest for members that are part of a group for less than the entire loss limitation year.* If any member is included in the group for less than an entire consolidated return year that is a loss limitation year (partial-year member), then the group takes into account a pro rata portion of the partial-year member's amount of interest paid or accrued during the lookback period for purposes of determining a group's three-year average relevant to that loss limitation year. The amount of interest treated as paid or accrued that is subject to proration under this paragraph (d)(3)(iii) is the interest of the partial-year member that would otherwise be fully combined with the interest history of the acquiring group under paragraph (d)(3)(i) of this section (with regard to corporations acquired during the loss limitation year) or the interest that is otherwise allocated to a deconsolidating member under paragraph (d)(3)(ii) of this section. The pro rata amount equals the partial-year member's interest treated as paid or accrued for the dates of the lookback period, multiplied by a fraction, the numerator of which equals the number of days of the loss limitation year during which the partial-year member was a member of the group, and the denominator of which equals the number of days in the loss limitation year. This proration applies to interest paid or accrued during the entire lookback period, including portions of the lookback period during which the partial-year member was a member of the group.

(4) *Lookback period*—(i) *In general.* The lookback period with regard to a CERT is the three taxable years preceding the taxable year in which the CERT occurs. See section 172(h)(2)(C)(ii) and § 1.172(h)–3(a). The lookback period that is relevant to any CERIL of a consolidated group is the three taxable years preceding the taxable year of the group that includes the date on which the CERT occurred. See § 1.172(h)–5(a) (defining the date on which a CERT occurs if the CERT consists of multiple steps). This rule applies whether the group actually engaged in the CERT or is treated as an applicable corporation with regard to a CERT solely by application of paragraph (a)(2)(iv) of this section.

(ii) *Group not in existence for entire lookback period.* If a group was not in existence for three taxable years prior to the consolidated return year that includes the date of the CERT, the lookback period includes the group's taxable years preceding the year of the CERT plus the preceding taxable years of the corporation that was the common parent of the group on the first day of the group's first consolidated return year (original common parent). If the group and the original common parent together have fewer than three taxable years that precede the consolidated return year that includes the date of the CERT, the lookback period will be deemed to include full 12-month periods that end on the calendar date that is one day prior to the date of organization of the original common parent.

(iii) *Group not in existence on date of CERT.* If a group was not in existence on the date on which the CERT occurred, for purposes of determining the lookback period, the group's taxable years will be deemed to include the taxable years of the group's original common parent. If the original common parent was not in existence on the date of the CERT, or it does not have three taxable years that precede its taxable year that includes the date of the CERT, the group will be deemed to have additional 12-month taxable periods that end on the calendar date that is one day prior to the date of the original common parent's organization. From these deemed taxable periods, the group will identify the deemed period that includes the date on which the CERT occurred and the three immediately preceding deemed periods that constitute the lookback period. See § 1.172(h)–5(a) regarding date on which CERT occurred in multi-step transaction.

(iv) *Interest history of corporations not in existence.* If any member of a group is not in existence for the entire lookback period, for purposes of the CERT rules, that member is treated as having paid or accrued zero interest before its organization. But see § 1.172(h)–4(c)(2)(ii) (regarding interest history of successors).

(5) *Examples.* The following examples illustrate the rules of this paragraph (d). Unless otherwise stated, assume that all entities are domestic C corporations that have full, 12-month taxable years. Assume that all applicable corporations have substantial NOLs in their loss limitation years:

Example 1. Acquired member's interest history combined with interest history of group. (i) *Facts.* P is the common parent of a calendar-year consolidated group that includes S on all relevant dates. On December 31, Year 5, S acquires the stock of T in a CERT, and T is first included in the P group on January 1, Year 6. Membership in the P group is otherwise stable for all relevant years. Prior to joining the P group, T does not join in the filing of a consolidated return and maintains a calendar taxable year. T's amounts of interest paid or accrued in Years 2, 3, and 4, respectively, are $600, $200, and $400. The P group's amounts of interest paid or accrued in Years 2, 3, and 4, respectively, are $1,400, $1,000, and $1,200.

(ii) *Analysis.* The P group's loss limitation years are calendar Years 5, 6, and 7. See paragraph (a)(3)(i) of this section. Year 5 is also a loss limitation year for T. The P group's lookback period with regard to the CERT is calendar Years 2, 3, and 4. See paragraph (d)(4)(i) of this section. For purposes of computing any three-year average of the P group for its lookback period, on the acquisition of T, the interest history of T is generally combined with the interest history of the P group. See paragraph (d)(3)(i) of this section. However, because T is not a member of the P group on any date during consolidated return Year 5, the computation of the P group's three-year average relevant to Year 5 will not include any of T's interest paid or accrued during the lookback period. See paragraph (d)(3)(iii) of this section. Thus, the P group's three-year average for loss limitation Year 5 is $1,200 ([$1,400 + $1,000 + 1,200]/3). Because T is a member of the P group during each day of loss limitation Years 6 and 7, T's history of interest paid or accrued during the lookback period is fully included in the P group's computation of its three-year average relevant to loss limitation Years 6 and 7. See paragraph (d)(3)(i) and (iii) of this section. Thus, the P group's three-year average for loss limitation Years 6 and 7 is $1,600 ([$1,400 + $1,000 + 1,200 + $600 + $200 + $400]/3).

(iii) *Interest combination if acquired member included in group for part of loss limitation year.* The facts are the same as in paragraph (i) of this *Example 1,* except that S acquires the stock of T on March 31, Year 5, and T is included in the P group for 275 days. Because T is a partial-year member of the P group during loss limitation Year 5, the computation of the three-year average relevant to loss limitation Year 5 includes the interest of T for the lookback period, prorated as required under paragraph (d)(3)(iii) of this section. Because T is in the P group for 275 days during Year 5, the computation of the P group's three-year average relevant to Year 5 takes into account an amount of T's interest history equal to T's actual amount of interest paid or accrued for each year of the lookback period, multiplied by a fraction equal to 275/365 (number of days of the loss limitation year during which T is a member of the P group divided by the number of days in the loss limitation year), or $452 ($600 × [275/365]), $151 ($200 × [275/365]), and $301 ($400 × [275/365]) for Years 2, 3, and 4, respectively.

Example 2. Lookback period if corporation with CERT history joins group. (i) *Facts.* P is the common parent of a calendar-year consolidated group. P also owns 55 percent of the sole class of stock of Corporation T, which maintains a taxable year ending June 30. On September 30, Year 4, T engages in a CERT. On December 31, Year 5, P acquires the remainder of the stock of T, and T is first included in the P group on January 1, Year 6.

(ii) *Analysis.* T's full taxable year ending June 30, Year 5, and its short year ending December 31, Year 5 are loss limitation years with regard to the September Year 4 CERT. The lookback period for the CERT relevant to these two loss limitation years is T's three taxable years ending on June 30, Years 2, 3, and 4. See section 172(h)(2)(C)(ii) and § 1.172(h)–3(a). The P group's calendar Year 6 is its sole loss limitation year with regard to T's September Year 4 CERT. See paragraph (a)(3)(i) of this section. In determining any CERIL with regard to the P group's calendar Year 6, the lookback period is the three taxable years prior to the taxable year of the group that includes the date on which the CERT occurred. See paragraph (d)(4)(i) of this section. Therefore, the lookback period with regard to the P group's loss limitation Year 6 is calendar consolidated return Years 1, 2, and 3.

Example 3. Interest history if no waiver election made on member deconsolidation. (i) *Facts.* P is the common parent of a calendar-year consolidated group that includes S. The P group engaged in a CERT on December 27, Year 5. S deconsolidates from the P group on December 31, Year 5. No election under paragraph (e)(1) of this section is made on the deconsolidation of S. S's value immediately after its deconsolidation is $4,000. The P group's value immediately before S's deconsolidation is $10,000. The P group and its members engaged in no prior CERTs.

(ii) *Analysis.* Because the CERT occurs during the P group's calendar consolidated return Year 5, Years 5, 6, and 7 are the P group's loss limitation years. Because no election is made under paragraph (e)(1) of this section with regard to the deconsolidation of S, S is treated as an applicable corporation with regard to the Year 5 CERT under paragraph (b)(1) of this section and the interest history of the P group during the period of S's consolidation and any preceding years is allocated to S and the remaining members of the P group. See paragraph (d)(3)(ii)(C) of this section. The amount of the P group's interest for each year that is allocated to S is the amount of interest paid or accrued by the P group in the relevant consolidated return year multiplied by a fraction equal to 4,000 divided by 10,000 (the value of the deconsolidating corporation immediately after its deconsolidation divided by the value of the entire group immediately prior to the deconsolidation), or ⅖. See paragraph (d)(3)(ii)(D) of this section. The interest allocated to S is subtracted from the interest history of the group and is unavailable to the P group for purposes of computing a three-year average with regard to any loss limitation year of the P group after the year of the deconsolidation, including Years 6 and 7. The interest history allocated to S will be maintained by S to be used in the computation of any CERIL of S, or any CERIL of any group of which S is later a member. See paragraph (d)(3)(ii)(C) of this section.

(iii) *Waiver election filed.* The facts are the same as in paragraph (i) of this *Example 3,* except that an election under paragraph (e)(1) of this section is filed on the deconsolidation of S. As a result of that election, S is not treated as an applicable corporation with regard to the Year 5 CERT under paragraph (b)(2) of this section and none of the interest history of the P group is allocated to S under paragraph (d)(3)(ii)(B) of this section. Therefore, in any post-deconsolidation year, for purposes of computing a CERIL in connection with any CERT with regard to which S (or of any group of which S is later a member) is an applicable corporation, S is treated as having paid or accrued zero interest for the period of its inclusion in the P group and preceding years. The P group will retain the interest history that would otherwise be allocated to S. See paragraph (d)(3)(ii)(B) of this section.

Example 4. Interest history if no waiver election made for member that deconsolidates prior to CERT. (i) *Facts.* P is the parent of a calendar-year consolidated group that includes S. On December 31, Year 4, S deconsolidates from the P group. No election is made under paragraph (e)(1) of this section with regard to the deconsolidation. On July 1, Year 5, the P group engages in a CERT. The P group and its members engaged in no prior CERTs.

(ii) *Analysis.* Because no election is made under paragraph (e)(1) of this section with regard to the deconsolidation of S, the interest history of the P group is allocated between S and the remaining members of the P group. See paragraph (d)(3)(ii)(C) of this section. This allocation occurs despite the fact that, at the time of the deconsolidation, the P group has not engaged in a CERT. Therefore, for purposes of computing any three-year average for the P group relevant to the Year 5 CERT, the portion of the interest history allocated to S is unavailable to the P group for purposes of computing a three-year average with regard to any loss limitation year of the P group after the year of the deconsolidation. See paragraph (d)(3)(ii)(C) of this section.

Example 5. Interest history if waiver election made for member that deconsolidates and then engages in a CERT. (i) *Facts.* P is the parent of a calendar-year consolidated group that includes X. On December 31, Year 5, X deconsolidates from the P group and makes an election under paragraph (e)(1) of this section. After its deconsolidation, X maintains a calendar taxable year. During Year 7, X engages in a CERT.

(ii) *Analysis.* X's loss limitation years with regard to the Year 7 CERT are Years 7, 8, and 9. X's lookback period with regard to the CERT is comprised of its Years 4 and 5 in the P consolidated group, and X's separate return Year 6. See section 172(h)(2)(C)(ii) and paragraph (d)(4)(i) of this section. As a result of the filing of the election under paragraph (e)(1) of this section, none of the interest history of the P group is allocated to X. Therefore, for purposes of computing X's three-year average for loss limitation Years 7, 8, and 9, X is treated as having paid or accrued zero interest during Years 4 and 5 of the lookback period. See paragraph (d)(3)(ii)(B) of this section.

Example 6. Interest history if member deconsolidates mid-year. (i) *Facts.* P is the common parent of a calendar-year consolidated group that includes S. S deconsolidates from the P group on June 30, Year 5. No election under paragraph (e)(1) of this section is made on the deconsolidation of S. During Year 5, but prior to the deconsolidation, the P group engages in a CERT. S is not a party to the CERT, and, throughout its history in the group, S paid or accrued only nominal interest.

(ii) *Analysis.* The P group's lookback period is calendar Years 2, 3, and 4. Consolidated return Years 5, 6, and 7 are the P group's loss limitation years. Because no election is made under paragraph (e)(1) of this section with regard to the deconsolidation of S, the interest history of the P group is allocated between S and the remaining members of the P group. See paragraph (d)(3)(ii)(C) of this section. This is true although S played no part in the CERT, and it actually paid or accrued only nominal interest. In the consolidated return year of the deconsolidation (here, the P group's Year 5), S was a member for 181 days. Therefore, the P group includes in the computation of its three-year average relevant to Year 5 a pro rata portion of the interest history allocated to S. See paragraph (d)(3)(ii)(C) and (iii) of this section. The pro rata portion equals the group's interest history allocated to S under paragraph (d)(3)(ii)(C) and (D) of this section, multiplied by a fraction equal to 181/365 (number of days of the loss limitation year during which S is a member divided by the number of days in the loss limitation year). See paragraph (d)(3)(iii) of this section. The portion of the interest history allocated to S is excluded in its entirety from the computation of the group's three-year average relevant to Years 6 and 7. The interest history allocated to S will be used in the computation of any CERIL of S, and any CERIL of any group of which S is later a member. See paragraph (d)(3)(ii)(C) of this section.

Example 7. Group not in existence for the entire lookback period. (i) *Facts.* Corporation P is formed on October 1, Year 3, and maintains a calendar taxable year. On January 1, Year 4, P forms S in a transaction meeting the requirements of section 351. Beginning in Year 4, P files consolidated returns with S, its only subsidiary. The P group maintains a calendar taxable year. During Year 5, the P group engages in an ED.

(ii) *Analysis.* For purposes of limiting any CERIL related to the Year 5 CERT, the P group must measure its interest deductions for the three years preceding the taxable year in which the CERT occurs (three-year average). See section 172(h)(2)(C)(ii) and § 1.172(h)–3(a). However, the P group was not in existence for three taxable years before the year that includes the date of the CERT (calendar Year 5). Rather, the P group was in existence for one full calendar taxable year (Year 4). Because the group does not have a three-year history, the lookback period includes the common parent's (P's) short taxable year (October 1 through December 31, Year 3), and is also deemed to include an additional taxable period (October 1, Year 2 through September 30, Year 3). See paragraph (d)(4)(ii) of this section. Further, in computing the three-year average, the P group members are treated as having paid or accrued zero interest for dates on which they did not exist. However, the P group is treated as having paid any interest paid by P during its short taxable year (October 1 through December 31, Year 3). See paragraph (d)(4)(iv) of this section.

Example 8. Group not in existence prior to year of the CERT but target in existence. (i) *Facts.* Corporation P is formed on January 1, Year 4. On the same day, P organizes wholly-owned, special-purpose corporation S. T is an unrelated, calendar-year corporation with a significant tax history. On February 1, Year 4, S merges into T, with T surviving. In the merger, all of T's historic shareholders receive cash in exchange for their shares. Following the merger, P owns all of the outstanding stock of T, and P is treated as acquiring all the stock of T in an MSA. The P group files consolidated returns beginning in Year 4 and maintains a calendar taxable year. T is first included in the P group on February 2, Year 4.

(ii) *Analysis.* Neither P (the original common parent) nor the P group is in existence before the year that includes the date of the CERT (calendar Year 4). Therefore, for purposes of applying the interest allocation limitation of section 172(h)(2)(C) and § 1.172(h)–3(a), the P group's lookback period is deemed to include three additional taxable periods (January 1 through December 31 for Years 1, 2, and 3). See paragraph (d)(4)(ii) of this section. Further in computing the three-year average, P is treated as having paid or accrued zero interest during the deemed years (January 1, Year 1 through December 30, Year 3). See paragraph (d)(4)(iv) of this section. However, with respect to the group's acquisition of T, the interest history of T is combined with the interest history of the P group. Because T is not a member of the P group for each day of loss limitation Year 4, the computation of the three-year average applicable to loss limitation Year 4 will include only a pro rata portion of the interest of T for the lookback period. See paragraph (d)(3)(i), (d)(3)(iii), and paragraph (iii) of Example 1 of paragraph (d)(5) of this section.

(e) *Election to waive carryback from all separate return years*—(1) *In general.* In addition to any other elections available under section 172(b)(3) and § 1.1502–21(b)(3), if a member becomes a non-member of a group (former group), the former member may make an irrevocable election to relinquish the carryback of all NOLs (and attributable portions of CNOLs) to taxable years of the former group and any preceding years. If the former member becomes a member of another group (acquiring group) immediately after its deconsolidation from the former group, the election described in this paragraph (e)(1) is available only to the common parent of the acquiring group. The election is not an annual election and applies to all losses that would otherwise be subject to carryback to years of the former group (or preceding years) under section 172 or § 1.1502–21(b). The election is binding on the deconsolidating corporation and any group of which it may become a member. Further, the election is available without regard to whether the former group is treated as an applicable corporation with regard to any CERT at the time of the deconsolidation. Any election under this paragraph (e)(1) by the common parent of an acquiring group must include all deconsolidating corporations that were members of the former group and that joined the acquiring group during the same consolidated return year of the acquiring group. The election is made in a separate statement entitled, ''THIS IS AN ELECTION UNDER § 1.1502–72(e)(1) TO WAIVE THE PRE- [insert the first taxable year following the deconsolidation of the former member(s) from the former group] CARRYBACK PERIOD FOR ALL NOLs AND ALL CNOLs ATTRIBUTABLE TO [insert the name(s) and EIN(s) of the corporation(s)].'' The statement must be filed with the timely filed original return of the former member or the acquiring group for the first taxable year following the deconsolidation of the former member from the former group. See paragraphs (b)(2), (c)(4)(iii), and (d)(3)(ii)(B) of this section relating to treatment of a deconsolidating member making an election under this paragraph (e)(1).

(2) *Example.* The following example illustrates the rules of this paragraph (e):

Example. P, a publicly-held corporation, is the common parent of a calendar-year consolidated group that includes T. On July 30, Year 5, the P group engages in a CERT. On December 31, Year 5, T deconsolidates from the P group, and it continues to maintain a calendar taxable year. With respect to its deconsolidation, T makes an election under paragraph (e)(1) of this section. As a result of such election, T is not treated as an applicable corporation with regard to the P group's Year 5 CERT and none of the CERT costs or interest history of the P group are allocated to T. See paragraphs (b)(2), (c)(4)(iii), and (d)(3)(ii)(B) of this section. On March 30, Year 6, the X group acquires all of the stock of T. The X group maintains a calendar taxable year. A portion of the X group's Year 6 CNOL is attributable to T under § 1.1502–21(b)(2)(iv)(B). Because T filed an election under paragraph (e)(1) of this section with respect to its deconsolidation from the P group, no portion of the X group's Year 6 CNOL attributable to

T can be carried back to any taxable years of T, of the P group, or any preceding years.

(f) *Excess distribution*—(1) *Defined.* Section 172(h)(3)(C) and § 1.172(h)–1(c)(3) provide that an ED means the excess (if any) of the aggregate distributions (including redemptions) made during a taxable year by a corporation with respect to its stock, over the greater of 150 percent of the average of such distributions (three-year distribution average) for the three taxable years immediately preceding such taxable year (distribution lookback period), or 10 percent of the fair market value of the stock of such corporation as of the beginning of such taxable year.

(2) *Determination of an ED by a group*—(i) *Aggregation of distributions to non-members.* For purposes of determining whether a group has made an ED during any consolidated return year (potential ED year), distributions by all members of the group to non-members during the potential ED year are aggregated and tested under section 172(h)(3)(C), § 1.172(h)–1(c)(3), and paragraph (f)(1) of this section.

(ii) *Distributions between members of the same group.* Distributions between members of the same group are generally disregarded for purposes of applying the CERT rules. However, the preceding sentence does not apply if a party to the transaction is deconsolidated pursuant to the same plan or arrangement. See paragraph (a)(2)(iii) of this section.

(3) *Computation of three-year distribution average*—(i) *In general.* The computation under section 172(h)(3)(C)(ii)(I) and § 1.172(h)–1(f) of the group's three-year distribution average includes distributions made during the distribution lookback period to non-members by each corporation that is a member of the consolidated group during the potential ED year. Distributions made during the distribution lookback period by predecessors of those members are also included. See § 1.172(h)–4(d). The computation includes distributions made by corporations during separate return years, subject to additional rules of this paragraph (f) and paragraph (a)(2)(iii) of this section. If a corporation was a member of a prior group during a portion of a distribution lookback period, the distribution history of that corporation during taxable years of the prior group includes only distributions made by that corporation to non-members of the prior group.

(ii) *Corporation deconsolidated from a group.* If a corporation deconsolidates from a group (former group), the corporation's actual distribution history is subtracted from the group's distribution history and is available to the deconsolidating corporation (or any group of which it becomes a member) for purposes of computing any three-year distribution average following the deconsolidation. The deconsolidating member's distribution history will be unavailable to the former group for purposes of computing its three-year distribution average with regard to any potential ED year of the former group after the year of deconsolidation. See § 1.172(h)–1(f)(1) (excluding from three-year distribution average those distributions treated as part of an MSA).

(iii) *Members included in group for less than entire loss limitation year.* If any member is included in the group for less than an entire potential ED year (partial-year member), then a pro rata portion of the partial-year member's distribution history is computed under the principles of paragraph (d)(3)(iii) of this section and is included for purposes of determining the group's three-year distribution average relevant to that potential ED year.

(4) *Stock value and stock issuances of a group*—(i) *Stock issuances taken into account in computing distributions.* Stock issued by a member of a group is taken into account in applying section 172(h)(3)(E)(ii) and § 1.172(h)–5(c)(1) only if the stock is issued to a non-member. Intercompany stock issuances are disregarded. This rule is applicable whether the stock issuance occurred in the current group or a previous group.

(ii) *Value of stock of group.* For purposes of applying section 172(h)(3)(C)(ii)(II), § 1.172(h)–1(c)(3), and paragraph (f)(1) of this section (relating to the fair market value of the stock of a distributing corporation), the value of the stock of the group is the value of the stock of all members, other than stock that is owned directly or indirectly by another member. But see section 172(h)(3)(E)(i) for rules regarding the exclusion of certain preferred stock for purposes of applying sections 172(h)(3)(C), § 1.172(h)–1(c)(3) and (f), and this paragraph (f). See also paragraphs (a)(2)(iii) and (f)(2)(ii) of this section, requiring separate entity analysis of certain transactions between members of a consolidated group.

(5) *Examples.* The following examples illustrate the rules of this paragraph (f). For purposes of these examples, assume that all entities are domestic C corporations:

Example 1. Corporation deconsolidates from group. (i) *Facts.* P is the common parent of a calendar-year consolidated group that includes T. P owns 90 percent of the outstanding stock of T, and A (an unrelated party) owns the remaining 10 percent of the outstanding stock of T. T regularly makes distributions to its shareholders, P and A. On December 31, Year 4, X, the common parent of another calendar-year consolidated group, acquires all of the outstanding stock of T, and T deconsolidates from the P group. T is first included in the X group on January 1, Year 5. On March 31, Year 5, X makes a large distribution to its non-member shareholders. X makes no further distributions during its taxable year.

(ii) *Analysis.* The X group's distribution to its non-member shareholders on March 31, Year 5, is tested as a potential ED under section 172(h)(3)(C), § 1.172(h)–1(c)(3) and (f), and paragraph (f) of this section. The X group's distribution lookback period with regard to the potential ED is January 1 through December 31, for each of Years 2, 3, and 4. For purposes of computing the X group's three-year distribution average, the computation includes any distributions made by T to A, its former non-member shareholder, during the distribution lookback period, because T is a member of the X group during the year of the potential ED. See paragraph (f)(3) of this section. Distributions between members of the X group and between members of the P group are disregarded. See paragraph (f)(2)(ii) of this section.

Example 2. Integrated plan to deconsolidate. T is a wholly-owned subsidiary of P, and is a member of the P group. As part of a plan that includes the deconsolidation of T from the P group, T makes a distribution to P. Because T's distribution to P is part of an integrated plan that results in the deconsolidation of T, T's distribution to P is tested on a separate entity basis as a potential ED under section 172(h)(3)(C) § 1.172(h)–1(c)(3) and (f), and paragraph (f) of this section. See paragraphs (a)(2)(iii) and (f)(2)(ii) of this section. Therefore, the rules of section 172(h)(3)(C), § 1.172(h)–1(c)(3) and (f), and paragraph (f) of this section are applied based on the separate entity value and distribution history of T. See § 1.172(h)–1(d)(2) regarding testing of the distribution as part of a plan of major stock acquisition.

(g) *Life-nonlife groups*—(1) *Scope.* This paragraph (g) provides rules for applying the CERT rules to a group that elects under section 1504(c)(2) to file a consolidated return (life-nonlife group). See § 1.1502–47 (rules regarding life-nonlife groups).

(2) *Single entity treatment*—(i) *In general.* All members of a life-nonlife group are generally treated as a single taxpayer for purposes of the CERT rules. Accordingly, the rules of paragraphs (a) through (f) and (h) of this section and the rules of §§ 1.172(h)–1 through 1.172(h)–5 are applied by treating the life-nonlife group as a single taxpayer, and are not applied on a subgroup basis. For example, all members of a life-nonlife group are treated as a single entity for purposes of determining whether a CERT has occurred under sections 172(h)(3)(B) and (C) and

§ 1.172(h)–1. See paragraph (a)(2)(i) of this section. Furthermore, all intercompany transactions between and within subgroups are generally disregarded. In addition, if a pre-existing CERT member becomes a member of a life-nonlife group, the life-nonlife group is treated as a single applicable corporation with regard to that CERT in the consolidated return year of the acquisition and any succeeding year. See paragraph (a)(2)(iv) of this section. If it is determined that a CERT exists, the amount of the CERIL is determined for the entire life-nonlife consolidated group as described in paragraph (g)(2)(ii)(A) of this section, and the CERIL is allocated to each subgroup as described in paragraph (g)(3) of this section.

(ii) *CERIL*—(A) *Single CERIL computation.* For any loss limitation year, a single CERIL is computed under section 172(h)(1) and § 1.172(h)–2(a)(2) for the life-nonlife group. The computation of the life-nonlife group's CERIL for any loss limitation year includes all life-nonlife group members' CERT costs, debt, and interest paid or accrued for that year.

(B) *Net operating loss.* For purposes of determining the CERIL of a life-nonlife group under section 172(h)(1) and § 1.172(h)–2(a)(2), the *net operating loss* of the group in any loss limitation year is the sum of the nonlife consolidated net operating loss (nonlife CNOL) (if any) and the consolidated loss from operations (consolidated LO) (if any) for that year. For this purpose, nonlife consolidated taxable income does not offset any LO, and consolidated partial life insurance company taxable income (as used in § 1.1502–47(g)) does not offset any nonlife CNOL.

(iii) *Carryover to separate return years.* If any nonlife CNOL or consolidated LO that is attributable to a member of a subgroup may be carried to a separate return year (as defined in § 1.1502–47(d)(10)), the CERIL that is associated with the nonlife CNOL or consolidated LO is apportioned to each member, as relevant, under the method provided by § 1.1502–21(b)(2)(iv)(C)(1).

(iv) *Deconsolidation.* If a member deconsolidates from a life-nonlife group without an election under paragraph (e)(1) of this section, then paragraphs (b)(1), (c)(4)(i) and (ii), and (d)(3)(ii)(A) and (C) of this section (relating to treatment of a deconsolidating member) apply to allocate CERT status, CERT costs, and interest history from the entire life-nonlife group to the deconsolidating member, and not from a specific subgroup.

(3) *Allocation of a CERIL.* If a CERIL exists under paragraph (g)(2)(ii)(A) of this section, that CERIL is allocated to each subgroup that has a nonlife CNOL or consolidated LO. The amount of the nonlife CNOL and consolidated LO in a loss limitation year that constitutes a CERIL is equal to the total amount of the CERIL for the loss limitation year multiplied by a fraction, the numerator of which equals the nonlife CNOL or consolidated LO (as relevant), and the denominator of which equals the nonlife CNOL plus the consolidated LO.

(h) *Effective/applicability date*—(1) *In general.* Other than paragraph (e) of this section, the rules of this section apply to CERTs occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. The rules of this section also apply to the deconsolidation of a member from, or the acquisition of a corporation by, a consolidated group that occurs on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. However, in each case, this section does not apply to any CERT, deconsolidation, or acquisition occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

(2) *Waiver election.* Paragraph (e) of this section applies to the deconsolidation of a member from a consolidated group that occurs on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**, except that it does not apply to any deconsolidation occurring pursuant to a written agreement that is binding before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

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FEDERAL REGISTER

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Part VI

The President

Memorandum of August 29, 2012—Delegation of Certain Functions and Authority Under Section 5(a) of the Tom Lantos Block Burmese Junta's Anti-Democratic Efforts Act of 2008

Federal Register
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Presidential Documents

Title 3—

The President

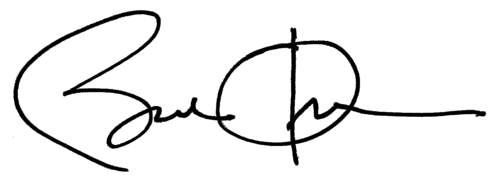
Memorandum of August 29, 2012

Delegation of Certain Functions and Authority Under Section 5(a) of the Tom Lantos Block Burmese Junta's Anti-Democratic Efforts Act of 2008

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby delegate to you the functions and authority conferred upon the President by section 5(a)(2) of the Tom Lantos Block Burmese Junta's Anti-Democratic Efforts Act of 2008 (Public Law 110–286) (the ''Act''), to waive the visa ban under section 5(a)(1) of the Act, and to make the specified certification to the Congress.

You are authorized and directed to publish this memorandum in the *Federal Register.*



THE WHITE HOUSE,
Washington, August 29, 2012

[FR Doc. 2012–23042
Filed 9–14–12; 11:15 am]
Billing code 4710–10–P

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FEDERAL REGISTER PAGES AND DATE, SEPTEMBER

CFR PARTS AFFECTED DURING SEPTEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

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H.R. 1402/P.L. 112–170
To authorize the Architect of the Capitol to establish battery recharging stations for privately owned vehicles in parking areas under the jurisdiction of the House of Representatives at no net cost to the Federal Government. (Aug. 16, 2012; 126 Stat. 1303)

H.R. 3670/P.L. 112–171
To require the Transportation Security Administration to comply with the Uniformed Services Employment and Reemployment Rights Act. (Aug. 16, 2012; 126 Stat. 1306)

H.R. 4240/P.L. 112–172

Ambassador James R. Lilley and Congressman Stephen J. Solarz North Korea Human Rights Reauthorization Act of 2012 (Aug. 16, 2012; 126 Stat. 1307)

S. 3510/P.L. 112–173

To prevent harm to the national security or endangering the military officers and civilian employees to whom internet publication of certain information applies, and for other purposes. (Aug. 16, 2012; 126 Stat. 1310)

Last List August 16, 2012

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